MEDIATION PERSPECTIVES FROM THE BENCH, BAR AND MEDIATION TABLE IN A MAGISTRATES COURT — FINDING COMMON GROUND AND BRIDGING GAPS

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ABSTRACT

Debates, dichotomies, and distinctions exist within the literature and amongst ADR practitioners, regarding mediation's varying purposes, diversity in practices and variety of procedures. This research explores these three themes, using the Magistrates Court of South Australia ('the Court') as a case study. There are four principal actors who are involved, either directly or indirectly, in mediation within the Court: magistrates, lawyers, mediators and disputants. I refer to three of the four principal actors – magistrates, lawyers and mediators – collectively as 'Stakeholders'. I examine data from semi-structured interviews with five magistrates, seven lawyers and 16 mediators regarding their understandings, expectations, and experiences of mediation's *purpose*, *practice* and *procedure*. The research identifies the main areas of convergence and divergence between Stakeholders and shows that expectation gaps exist between them regarding the three themes. I examine prominent expectation gaps and make recommendations to address them.

DEDICATION

To my beloved grandparents who were unable to attend university because they left their birthplace in search of a better future and to 'better our children'.

I dedicate this to you:

Mr Georgios Kassapidis
Mrs Stella Kassapidis
Mrs Dimitra Divitkos
Mr Pantelis ('the Craftsman') Divitkos

Without your encouragement and ongoing support, and indeed the encouragement and support of my beloved parents, I would not have been able to complete my tertiary studies.

After many long years of study and regularly answering your question 'have you almost finished?' each time you came over for a coffee, I am happy to announce '*τέλος*' ('the End').

This work is as much mine as it is yours.

DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

I give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library Search and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

Signature: Peter G Kassapidis

24 May 2023

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I am grateful to Ms Sylvia Huie, former manager of the Adelaide Magistrates Court Mediation Unit, who permitted me to observe her mediate in the Court and encouraged me to apply for membership to the Court's Panel of Private Qualified Mediators. I am also grateful to all of the administrative staff at the mediation unit. It has been a delight to work with you over the years.

I thank Her Honour Judge Mary-Louise Hribal, Chief Magistrate, for granting me access to the magistracy to participate in the interviews.

I would like to acknowledge all the research participants who provided such rich data.

I am also grateful for the opportunity to transition from conducting purely facilitative mediation in the Magistrates Court to conducting 'bolshier' conciliation conferences in the South Australian Employment Tribunal.

Most importantly, this thesis would not have been possible without the assistance of my parents, Paul and Chryss Kassapidis. They have been and will remain my *pro bono* counsel and life coach extraordinaires. They have offered their unconditional support and sustained encouragement throughout all of my years of study. To that end, I am grateful that they have witnessed that their years of positive, practical, pragmatic and persistent perseverance has paid off.

Finally, a much deserved thank you to Aisha. I am happy that I will no longer have to say 'I'm almost there, I'll probably be finished in just a few more weeks' and we can finally have a weekend back for the first time in many years.

LIST OF FIGURES

List of Acronyms and Abbreviations

AAT	Administrative Appeals Tribunal
ADR	Alternative Dispute Resolution
ADRAC	Australian Dispute Resolution Advisory Council
CAA	Courts Administration Authority
LEADR	Lawyers Engaged in Alternative Dispute Resolution
IAMA	Institute of Arbitrators and Mediators Australia
NADRAC	National Alternative Dispute Resolution Advisory Council
NMAS	National Mediator Accreditation System
NVC	Non-Violent Communication Process
PDR	Primary Dispute Resolution
Practice Directions	Magistrates Court of South Australia, *Practice Direction: Consolidated Civil Practice Directions*, 1 October 2015
Practice Standards	National Mediator Accreditation System *Practice Standards* (2015)
RI	Resolution Institute
Rules	*Magistrates Court (Civil) Rules 2013* (SA)
The Act	*Magistrates Court Act 1991* (SA)
The Court	The Magistrates Court of South Australia
UCRs	*Uniform Civil Court Rules 2020* (SA)

CHAPTER I: INTRODUCTION

I first encountered the term 'mediation' in my final year of law school in 2009 in a Civil and Criminal Procedure course at the University of Adelaide. I found the description of a process whereby a 'neutral third party facilitates discussions to assist parties reach agreement'[1] fascinating. It provided a stark contrast to the primary focus of my undergraduate degree; namely, the zero-sum game of litigation where the judge reduces a complex part of human experience to a one-line answer: 'A wins; B loses.'[2]

In legal practice I was introduced to 'legal negotiations', which involved a system of interaction between individuals in key relationships, including lawyer/client, lawyer/lawyer and client/client, each with its own dynamic.[3] However, I realised that legal negotiations do not always involve a third-party facilitator nor operate within a court's rules-based framework.

Unfulfilled by my cursory introduction to mediation during law school, I completed mediation training with LEADR, the predecessor to the Resolution Institute ('RI'), an Australasian not-for-profit membership organisation that provides education, professional accreditation and ancillary services relating to dispute resolution processes.[4] Mediation's *purpose*, according to that training, centred upon the promotion of disputant 'self-determination'.[5] LEADR described mediation *practice* in terms of a 'facilitative model',[6] with the mediator's role being to assist disputants identify their 'needs and interests'.[7] LEADR's eight-stage *procedure* was captured pictorially as the 'two triangles' diagram.[8] My interest in mediation, a process that some literature suggests enables disputants to 'expand the pie'[9] through interest-based negotiation,[10] was further piqued. I commenced exploring mediation theory in greater depth and observed the ongoing debates, dichotomies, and distinctions in the literature regarding mediation's varying *purposes*, diversity in *practices* and variety of *procedures*.[11]

After becoming an accredited mediator under the National Mediator Accreditation System,[12] I became a member of the Panel of Private Qualified Mediators in the Magistrates Court of South Australia ('the Court')[13] in 2015. I observed that court-connected mediation involves a system of

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1 'Civil and Criminal Procedure' (Lecture No 3, Adelaide University, 2 April 2009).

2 Justice Kenneth Hayne, 'Australian Law in the Twentieth Century' (Speech, Judicial Conference of Australia, 13 November 1999) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej_judicial.htm>.

3 See, eg, Robert H Mnookin, Scott R Peppet and Andrew S Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000) 5.

4 Gerald Raftesath, 'LEADR: Principles and Practicalities' (2013) 24(3) *Australasian Dispute Resolution Journal* 139, 142. The Resolution Institute was created by the merger of LEADR and the Institute of Arbitrators & Mediators Australia (IAMA) on 1 January 2015. See 'History', *Resolution Institute* (Web Page, 2022) <https://www.resolution.institute/about-us/our-governance>. See also Australian Charities and Not-For-Profits Commission, 'Resolution Institute', *Australian Government* (Web Page, 2021) <https://www.acnc.gov.au/charity/charities/13b8bce4-2daf-e811-a963-000d3ad244fd/profile>.

5 See below Chapter II at 34.

6 See below Chapter II at 65.

7 See below Chapter II at 51.

8 I explore debates pertaining to the 'standard' mediation *procedure* and compare eight procedures that guide the stages in mediation in Chapter II. See also Appendix H.1: Stages of Eight Mediation *Procedures* and Appendix H.2. Three Mediation Procedural Diagrams.

9 Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement without Giving in* (Random House, 3rd rev ed, 2012) 58.

10 Ibid xxvi. See also Chapter II at 51 and 64.

11 See below Chapter II.

12 See below Chapter II at 29.

13 See below Chapter III.

interaction between four key groups — courts, mediators, lawyers and disputants — with differing interests.[14]

I started to question, what do we really know about mediation in this particular court-connected context? I queried mediation's *purpose* and what its *practice* and *procedure* entails. Moreover, what are the understandings, expectations, and experiences of those involved, either directly or indirectly, in mediation and are they largely convergent or divergent? This thesis addresses these questions, as detailed below.

I also became a member of the Law Society of South Australia's Alternative Dispute Resolution ('ADR') Committee and during meetings, the debates, dichotomies, and distinctions prominent in the literature came to life. A polarising debate, that continues, is how does 'mediation' differ from 'conciliation'?[15] This increased my fascination regarding *purpose*, *practice*, and *procedure*, which I refer to as 'the three themes' that I explore throughout this thesis. I wondered whether mediation in the Court was reflective of mediation theory or whether there were prominent 'gaps' between theory and practice,[16] as suggested in the literature and during debates with peers.

Captivated by the debates, dichotomies, and distinctions in the literature and amongst ADR practitioners, I embarked upon a PhD to explore the three themes, focusing on the Magistrates Court, by undertaking semi-structured interviews with magistrates, lawyers and mediators.

A *Aim of Research and Research Questions*

I contend there are four principal actors who are involved, either directly or indirectly, in mediation within the Court: magistrates, lawyers, mediators and disputants.[17] I use the term 'disputants' to distinguish the main characters in the legal dispute – the plaintiff/applicant and defendant/respondent – from the three other principal actors, and from other constituents of each disputant's 'tribe'.[18] Conversely, I use the term 'participants' to describe all individuals present at mediation, regardless of their role, to include lawyers, support persons and other members of the tribe. I chose not to include disputants in this research and explain why shortly.

I refer to three of the four principal actors – magistrates, lawyers and mediators – collectively as 'Stakeholders'. This research examines Stakeholder understandings, expectations, and experiences of mediation in the Court by reference to three research questions:

1. What do Stakeholders report regarding mediation's *purpose*?
2. What do Stakeholders report regarding mediation *practice*?
3. What do Stakeholders report regarding mediation *procedure*?

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14 See, eg, John Lande, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2002) 50(1) *UCLA Law Review* 69, 118–26.

15 See below Chapter II at 36.

16 See below Chapter II at 37, 47, 58, 71 and 82–3.

17 I use the term 'disputants' to describe those persons or bodies who are 'in dispute' — often described as 'clients', 'parties', 'users' or 'consumers': see generally Lola Akin Ojelabi and Alysoun Boyle, '*Playing Devil's Advocate': Reality Testing in the Context of Mediation in Australia* (Report, December 2022) 18; Laurence Boulle and Nadja Alexander, *Mediation: Skills and Techniques* (LexisNexis Butterworths, 3rd ed, 2020) 17 ('*Skills and Techniques*'); National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (September 2003) 5, 9–10 ('*Dispute Resolution Terms*'); National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice through People* (Report, February 2011) 10 <https://apo.org.au/sites/default/files/resource-files/2011-02/apo-nid66677.pdf>.

18 For example, insurers, business partners or significant others: see John Wade, 'Bargaining in the Shadow of the Tribe and Limited Authority to Settle' (2003) 15(2) *Bond Law Review* 123.

The three research questions branch off into several sub-questions/sub-themes. For example, as part of the *purpose* question, I include Stakeholder responses concerning what they deem constitutes 'success' in mediation.[19] As part of the *practice* question, I explore Stakeholder reports of which practice model is predominantly utilised. I also explore Stakeholder reports of the mediator's role, functions, and what constitutes 'appropriate' levels of mediator intervention.[20] As part of the *procedure* question, I explore Stakeholder reports of what occurs before, during, and after mediation.[21]

These three themes are interrelated and overlap. For example, overlap exists between the varying *purposes* of mediation, diversity in *practices* and variety of *procedures*. The three themes also impact upon the types of discourse that occurs within different mediation contexts.[22]

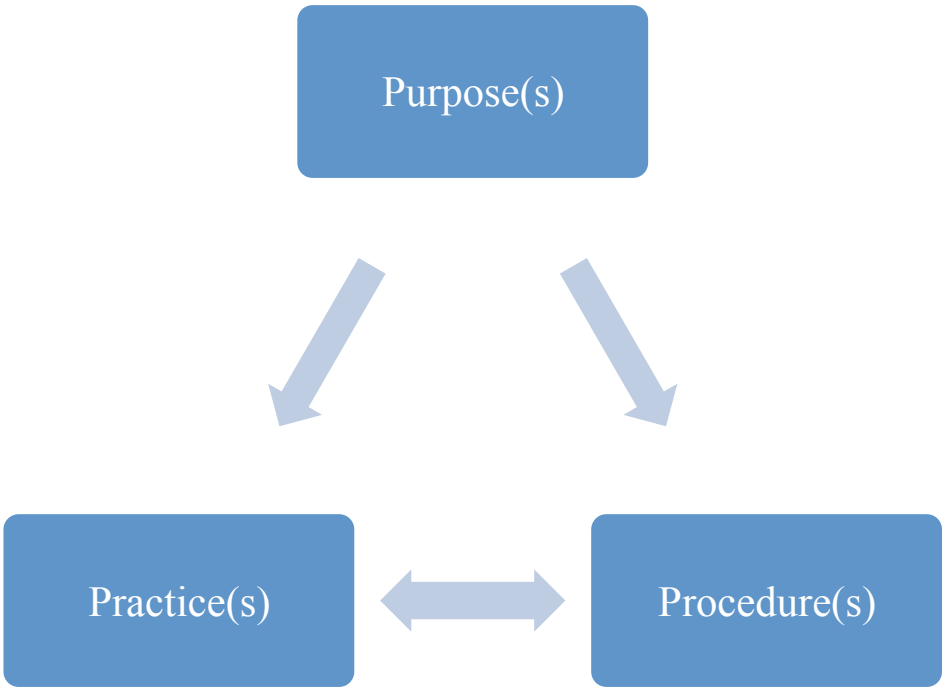

Figure 1: *Purpose* drives *Practice* and *Procedure*

I contend that *purpose* is linked with the other two themes.[23] My core contention is that *purpose* drives *practice* and *procedure*. This is supported by the empirical data.[24]

This research also examines prominent gaps between Stakeholder reports regarding the three themes and I use the term 'expectation gaps' throughout the thesis to describe such gaps.

B *Research Problem: Debates, Dichotomies, and Distinctions*

19 See below Chapter IV.
20 See below Chapter V.
21 See below Chapter VI.
22 See below Chapter II at 36, 42, 61, 64–7.
23 See, eg, Dorothy J Della Noce, James R Antes and Judith A Saul, 'Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model' (2004) 19(3) *Ohio State Journal on Dispute Resolution* 1005, 1042, citing James R Antes and Judith A Saul, 'Evaluating Mediation Practice from a Transformative Perspective' (2001) 18(3) *Mediation Quarterly* 313, 319.
24 See below Chapter IV, V and VI.

The debates, dichotomies, and distinctions within the literature, and amongst ADR practitioners, regarding the three themes of *purpose*, *practice* and *procedure* illustrate the potential for those involved in mediation to experience 'expectation gaps'.

1 *Stakeholders As 'Gatekeepers' to Mediation in the Court*

Mediation in the Court involves a system of interaction between Stakeholders within a rules-based framework.[25] Stakeholders play their own 'gatekeeper'[26] role within the Court and therefore are worthy of study. They are interrelated, overlap exists between their respective gatekeeper roles and their understandings, expectations, and experiences impact upon each other.

Magistrates play a supervisory and managerial role over litigated proceedings through active case management.[27] This includes the opportunity to suggest or encourage mediation.[28] They also have the power to order actions to mediation.[29] As 'referrers',[30] their understandings and expectations regarding the three themes impact upon lawyer and disputant expectations. Considerable literature exists regarding 'Judicial ADR'[31] processes such as 'judicial mediation',[32] but is not central to addressing the three research questions.

Similar to magistrates, lawyers also play a gatekeeper role.[33] Disputants in common law countries typically carry their disputes through lawyers,[34] who are ethically obliged to inform clients about the alternatives to fully contested adjudication.[35] The proper discharge of lawyers' obligations to

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25 See below Chapter III.

26 Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6(1) *Harvard Negotiation Law Review* 1, 81 ('The Inevitable Price of Institutionalization?').

27 Laurence Boulle and Rachael Field, *Mediation in Australia* (LexisNexis Butterworths, 2018) 161, 278.

28 See below Chapter VI at 172.

29 See below Chapter II at 45. See also Chapter III at 96, Chapter VI at 173, and Chapter VII at 206.

30 *Dispute Resolution Terms* (n 17) 10. See also Nicky McWilliam et al, *Court-Reffered Alternative Dispute Resolution: Perceptions of Members of the Judicary: An Overview of the Results of a Study* (Report, Australasian Institute of Judicial Administration, October 2017) ch 1.

31 See below Chapter III at 94.

32 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 302–9; Tania Sourdin and Archie Zariski, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters, 2013) ch 1; Iain Field, 'Judicial Mediation, the Judicial Process and Ch III of the Constitution' (2011) 22(2) *Australasian Dispute Resolution Journal* 72; Marilyn Warren, 'Should Judges be Mediators?' (2010) 21(2) *Australasian Dispute Resolution Journal* 77; Justice PA Bergin, '2010 Alternative Dispute Resolution Workshop' (Speech, NSW Bar Association, 28 August 2010) 3–4 <http://www.austlii.edu.au/au/journals/NSWJSchol/2010/16.pdf>; Laurence Street, *Bar Practice Course: Mediation* (New South Wales Bar Association, 2007) 1, 5 ('*Bar Practice Course*'), citing *Evans v State of Florida*, 603 So 2d 15 (Fla, 1992); David Spencer, 'Judicial Mediators: Is the Time Right?: Part I' (2006) 17(3) *Australasian Dispute Resolution Journal* 130; David Spencer, 'Judicial Mediators: Is the Time Right?: Part II' (2006) 17(4) *Australasian Dispute Resolution Journal* 189; David Spencer, 'Judicial Mediators: Are they Constitutionally Valid?' (2006) 9(4) *ADR Bulletin* 61, 61; Fran L Tetunic, 'Florida Mediation Case Law: Two Decades of Maturation' (2003) 28(1) *Nova Law Review* 87, 137; Michael Moore, 'Judges as Mediators: A Chapter III Prohibition or Accommodation?' (2003) 14(3) *Australasian Dispute Resolution Journal* 188 ('Judges as Mediators'); Hiram E Chodosh, 'Judicial Mediation and Legal Culture' (1999) 4(3) *Issues of Democracy* 6. See also *Merlino v Property Solutions For You Pty Ltd* (District Court of South Australia, Master Blumberg, 27 November 2017) [80], [86] ('*Merlino*').

33 Brad J Reich, 'Attorney v Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation' (2002) 26(2) *Southern Illinois University Law Journal* 183, 188. See also John Woodward, 'Lawyer Approaches to Court-Connected Mediation: A New Case Study' (PhD Thesis, University of Newcastle, 2018) 8, 69 ('Lawyer Approaches').

34 See, eg, John Doyle, 'Dispute Resolution: Is Civil Litigation Part of the Solution or Part of the Problem?' (2007) 26(1) *Arbitrator and Mediator* 5, 9; Ronald J Gilson and Robert H Mnookin, 'Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation' (1994) 94(2) *Columbia Law Review* 509, 509.

35 See, eg, Law Society of South Australia, *Australian Solicitors' Conduct Rules 2015* (at 1 July 2015) r 7.2; *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 36. See also Rachael Field and Alpana

their clients and the court require them to inform clients of ADR options, throughout proceedings.[36] Lawyers influence the decision to refer disputes to various ADR processes. Their advice colours their clients' expectations about the three themes, particularly those disputants who have never participated in or have little understanding of mediation.[37] Although lawyers remain significantly understudied due to the difficulty in engaging them in empirical research,[38] some literature highlights the different roles lawyers perform before, during and after mediation.[39] Their roles encompass preparing their clients, being advisors and spokesperson during mediation and drafting terms of settlement.[40] Lawyers also play a gatekeeper role regarding the degree of direct disputant participation during mediation[41] and can influence the way in which disputants engage and participate, as do mediators.[42]

Like magistrates, mediators also play a supervisory and managerial role by conducting the mediation procedure. Some literature examines the views of relatively small samples of mediators who describe 'what happens' during mediation.[43] However, there is a lack of empirical data indicating what mediators 'do', in contrast to what 'they say they do'.[44] Furthermore, some suggest little empirical evidence exists as to whether mediators' understandings, expectations, and experiences are shared across different fields of practice.[45] Whilst my thesis does not fill these gaps, I contend that the mediator's role, functions, and levels of intervention impacts on mediation dynamics and affects participant behaviours, the range of options considered during mediation, outcomes reached and affect participant experiences.[46]

Roy, 'A Compulsory Dispute Resolution Capstone Subject: An Important Inclusion in a 21st Century Australian Law Curriculum' (2017) 27(1) *Legal Education Review* 1, 11; James Duffy and Rachael Field, 'Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 9, 11. See also Chapter III at 94.

36 See, eg, Gino E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 3rd ed, 2012) 88; Gino E Dal Pont, 'Ethics: A Duty to Encourage Settlement' (2005) 79(1–2) *Law Institute Journal* 80; David Spencer, 'Liability of Lawyers to Advise on Alternative Dispute Resolution Options' (1998) 9(4) *Australasian Dispute Resolution Journal* 292. See also *NSW Couriers Pty Ltd v Newman* [2002] NSWSC 1172, [12] (McLellan J) ('*Newman*').

37 See also Chapter VIII at 244.

38 See, eg, Jill Howieson, 'What Is It About Me? What Is It About Mediation?' (2010) 11(8) *ADR Bulletin* 182, 183 ('What Is It About Me?'); Olivia Rundle, 'How Court-Connection and Lawyers' Perspectives Have Shaped Court-Connected Mediation Practice in the Supreme Court of Tasmania' (PhD Thesis, University of Tasmania, 2010) 1, 147 <http://eprints.utas.edu.au/10680/2/02whole.pdf> ('Court-Connected Mediation Practice'). See also Appendix A: Qualitative Research Methodology at 253.

39 See, eg, Stephen Walker and David Smith, *Advising and Representing Clients at Mediation* (Wildy, Simmonds & Hill Publishing, 2013) 9, 152–5; Samantha Hardy and Olivia Rundle, *Mediation for Lawyers* (CCH Australia, 2010) 143–54; Olivia Rundle, 'A Spectrum of Contributions that Lawyers Can Make to Mediation' (2009) 20(4) *Australasian Dispute Resolution Journal* 220; Harold Abramson, *Mediation Representation: Advocating in a Problem-Solving Process* (Oxford University Press, 2nd ed, 2004) ch 7.

40 See, eg, Law Council of Australia, *Guidelines for Parties in Mediations* (at April 2018) rr 5–8; Law Council of Australia, *Guidelines for Lawyers in Mediations* (at May 2019) rr 3–7; Street, *Bar Practice Course* (n 32) 5, 13; Bridget Sordo, 'The Lawyer's Role in Mediation' (1996) 7(1) *Australasian Dispute Resolution Journal* 20.

41 Boulle and Field, *Mediation in Australia* (n 27) 123. See especially Rundle's scholarship in Chapter II at 43. See also Chapter IV at 117 and 120 and Chapter VI at 183 and 191.

42 See, eg, Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Report, Victorian Department of Justice, 1 April 2009) ix, recommendation 16.

43 See, eg, Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (Jessica Kingsley, 2007) 19.

44 Lesley Allport, 'Exploring the Common Ground in Mediation' (PhD Thesis, University of Birmingham, 2015) 153, 298 <https://etheses.bham.ac.uk/id/eprint/6746/1/Allport16PhD.pdf>.

45 Daniel Bowling and David Hoffman (eds), *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (Jossey-Bass, 2003); Michael D Lang and Alison Taylor, *The Making of a Mediator: Developing Artistry in Practice* (Jossey-Bass, 2000).

46 See below Chapter II at 45 and 59, Chapter IV at 108 and 130, Chapter V at 132 and 167–9, Chapter VI at 170, Chapter VII at 196, 200 and 204, Chapter VII at 205 and 212 and Chapter VIII at 238.

Different mediator practices also impact upon direct disputant participation, whether encouraged or not,[47] which can cause tensions between mediators and lawyers.[48] The way mediators describe their 'mediation' *practice* including their role, functions, and levels of intervention impact upon participant expectations of the three themes, which reinforce my contention that *purpose* drives *practice* and *procedure*.[49] For example, if mediation's *purpose* is for disputants to reach settlement, and they want mediators to intervene in the content of their dispute, this increases the probability of advisory/evaluative practices.[50] Mediator conduct before, during, and after mediation can leave a lasting impact not only on lawyers but also upon clients – whether 'repeat players', such as institutional representatives, or individual disputants as 'one-shotters'[51] – regarding both process and outcomes. This also has a flow-on effect upon participant consideration of what constitutes 'success' in mediation.

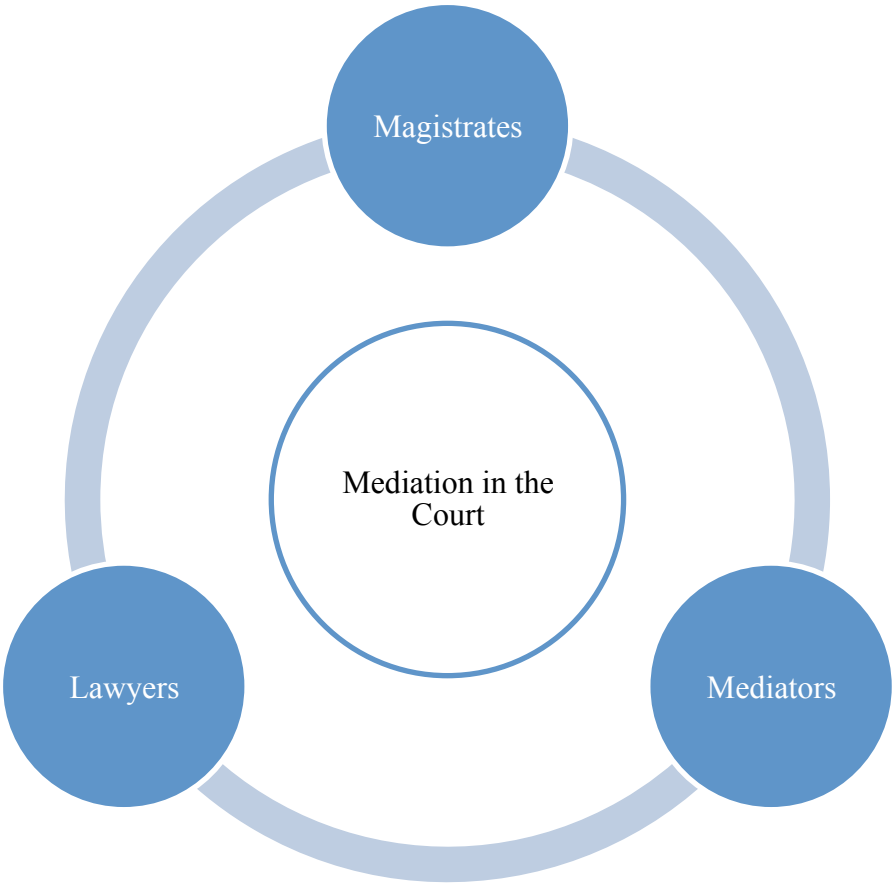

Figure 2: Stakeholders as 'Gatekeepers' of Mediation within the Court

Not only do Stakeholders play their own gatekeeper role, each has their own 'philosophical maps'[52] or 'orientations'[53] about the three themes of *purpose*,[54] *practice*[55] and *procedure*.[56] Stakeholders

47 See below Chapter II at 42 and 64–6.

48 See above Chapter I at 14.

49 See above Chapter I at 13. See below Chapter V.

50 In the literature review I explore the diversity in mediation *practice* and attempts at categorising different 'types' of mediation according to four practice 'models'; namely, advisory/evaluative, settlement, facilitative and transformative: see below Chapter II at 63. See also Chapter V.

51 Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95, 97, cited in Carrie Menkel-Meadow, 'Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR' (1999) 15(1) *Ohio State Journal on Dispute Resolution* 19, 20 ('Repeat Players in ADR') and Leonard L Riskin and Nancy A Welsh, 'Is That All There Is: "The Problem" in Court-Oriented Mediation'(2008) 15(4) *George Mason Law Review* 863, 864–5. See also Chapter IV and VII.

52 Leonard L Riskin, 'Mediation and Lawyers' (1982) 43(1) *Ohio State Law Journal* 29, 43.

may therefore have different understandings, expectations and experiences regarding the three themes, which illustrate the potential for inconsistency and expectation gaps.

2 *Consequences of 'Expectation Gaps'*

Expectation gaps are important because of the mischief they can cause. Expectation gaps regarding the *purpose* of mediation make assessing what constitutes 'success' difficult to define[57] and measure. They illustrate the potential for Stakeholders and other participants to experience inconsistency, *practice* and *procedural* unpredictability and mixed approaches.[58] They can also impact upon practices, behaviours, mediator interventions, mediation dynamics, outcomes reached,[59] and affect participant experiences.

Expectation gaps are also important because of the 'tensions' they create for and between Stakeholder groups. They illustrate the potential for participants to seek varying objectives, some of which highlight tensions with some of mediation's core values.[60] Furthermore, they also reinforce potential tensions between: narrowly defined legal problems versus broader interests;[61] direct disputant participation versus lawyer control;[62] interest-based negotiation versus positional bargaining;[63] facilitative versus evaluative practice;[64] cooperative versus competitive approaches;[65] compliance with industry models versus Private Sessions and Shuttle Negotiation.[66]

The following three examples illustrate the potential for mischief.

(a) Varying Purpose(s) of Mediation

Let us assume that each Stakeholder group has different understandings and expectations regarding mediation's *purpose*. For example, magistrates might understand the purpose is to reduce a perceived backlog of actions. Conversely, lawyers might understand the purpose is to settle actions within the range of anticipated trial outcomes whereas mediators consider the purpose is to promote both disputant self-determination and transformation of societal relations. These expectation gaps could generate Stakeholder disappointment regarding potential outcomes reached, depending on what each Stakeholder groups deems to be a 'successful' mediation.

(b) Diversity in Mediation Practices

Let us also assume that each Stakeholder group has different expectations about mediation *practice*. For example, magistrates might expect mediators to engage in a 'purely facilitative' role and not in an advisory/evaluative manner. Conversely, lawyers might expect mediators to have subject-matter

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53 See below Chapter II at 58.
54 See below Chapter II at Part B.
55 See below Chapter II at Part C.
56 See below Chapter II at Part D.
57 Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97, 105–6 ('Understanding Practice'). See also John Harington Wade, 'Evaluative Mediation: Elephants in the Room?' (10 October 2018) 15 <https://ssrn.com/abstract=3367594> (''Evaluative Mediation').
58 See below Chapter IV at 108, Chapter V at 132 and 168, Chapter VI at 170, 176, 180, 188, 201 and 204, Chapter VII at 205, 208, 212 and 220 and Chapter VIII at 238.
59 See above Chapter I at 15. See below Chapter II at 45, Chapter IV at 108 and 130, Chapter V at 132 and 167–9, Chapter VII at 170, 199, 202 and 204, Chapter VII at 205–6, 212 and Chapter VIII at 238.
60 I explore these in Chapter II at 33–5.
61 See below Chapter II at 41.
62 See below Chapter II at 42.
63 See below Chapter II at 51 and 64.
64 See below Chapter II at 35, 64–6 and 68.
65 See below Chapter II at 35, 44 and 67.
66 See below Chapter II at 76–7.

expertise and engage in advisory and evaluative practices to 'bludgeon' disputants into reaching settlement. Some mediators might remain within their 'purely facilitative' and 'hands-off' role, whereas others may engage in advisory and evaluative 'hands-on' interventions. These expectation gaps illustrate the potential for inconsistency and mixed practices, highlighting the possibility for Stakeholder disappointment regarding 'appropriate' levels of mediator intervention.

(c) Variety of Mediation Procedures

Let us also assume that each Stakeholder group has different expectations about mediation *procedure*. For example, magistrates might expect a semi-structured procedure predominantly in Joint Session where disputants are afforded the opportunity to 'say their piece' before brainstorming settlement options. Lawyers might expect the brief delivery of 'opening statements' regarding liability and quantum that mimic adversarial, competitive approaches, following which the warring camps separate into private rooms to commence positional bargaining centred on a rights-based discourse. As they consider direct disputant participation to be an obstacle to reaching 'quick' settlements, they prefer mediators to shuttle offers and counter-offers until settlement is reached or the mediation is terminated. In contrast, mediators might adhere to a highly structured procedure, with demarcated stages, and keep participants in Joint Session for the majority of time. They actively encourage high levels of direct disputant participation to explore disputant needs and interests and rarely shuttle offers between camps. These expectation gaps illustrate the potential for inconsistency, procedural unpredictability and mixed approaches. They also highlight the potential for Stakeholder disappointment regarding levels of procedural 'control'.[67]

The mischief expectation gaps can cause forms the foundation of my research questions and my contention that exploration of the three themes,[68] viewed through the lens of the Magistrates Court, will be of considerable benefit to Stakeholders, disputants and future theorising.[69]

C *Dearth in Scholarship and Gap in Knowledge*

There has been unequivocal recognition at policy and government levels that 'alternative' dispute resolution processes[70] form a major part of the contemporary Australian legal system.[71] ADR and the courts have a symbiotic relationship.[72] ADR also forms a central element of legal professional practice[73] and is taught within law school curricula in Australia and abroad.[74]

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67 See below Chapter V and Chapter VI.

68 See below Chapter II at Part B, C and D.

69 See below Chapter VIII at 242.

70 See below Chapter II at 19 and 27.

71 See, eg, Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23(3) *Australasian Dispute Resolution Journal* 148 ('Not Teaching ADR in Law Schools?'); Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 5, ch 10; Laurence Boulle, 'Extending the Courts' Shadow over ADR' (2001) 3(10) *ADR Bulletin* 117, 118. See also Hardy and Rundle (n 39) 262–381.

72 Robert McDougall, 'Courts and ADR: A Symbiotic Relationship' (Conference Paper, LEADR & IAMA Conference, 7 September 2015) 10 <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/McDougall_20150907.pdf>. See also 'Address Given by Justice Ronald Sackville at the Launch of LEADR/LBC Australasian Dispute Resolution Service' (1996) 7(2) *Australasian Dispute Resolution Journal* 153, 156 ('Address Given by Justice Ronald Sackville').

73 See, eg, Field and Roy (n 35) 21; Judy Gutman, Tom Fisher and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) 16(1) *Legal Education Review* 125, 128.

74 See, eg, Kathy Douglas, 'The Teaching of ADR in Australian Law Schools: Promoting Non-Adversarial Practice in Law' (2011) 22(1) *Australasian Dispute Resolution Journal* 49; Lela Porter Love, 'Twenty-Five Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training of Mediators' (2002) 17(3) *Ohio State Journal of Dispute Resolution* 597, 598–9; Suzanne J Schmitz, 'What Should We Teach in

Mediation has also become an integrated, and occasionally compulsory, feature of civil litigation procedures in many Australian court and tribunal contexts.[75] Mediation is an integral part of the civil litigation process, which is recognised in case law,[76] 'and the "shadow of the court" promotes resolution'.[77] It has become less an 'alternative' to litigation and more 'an alternative within litigation'.[78] As Macfarlane notes, the extensive introduction of court-connected, private, and judicial mediation is causing 'cultural and institutional changes' within legal practice.[79]

Despite mediation becoming a permanent feature within the formal legal system, many aspects of court-connected ADR remain under-researched[80] and there are few published evaluations of Australian ADR programs.[81]

ADR Courses?: Concepts and Skills for Lawyers Representing Clients in Mediation' (2001) 6(1) *Harvard Negotiation Law Review* 189, 210; Carrie Menkel-Meadow, 'To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum' (1993) 46(5) *Southern Methodist University Law Review* 1995 ('To Solve Problems, Not Make Them'). But see Pauline Collins, 'Resistance to the Teaching of ADR in the Legal Academy' (2015) 26(2) *Australasian Dispute Resolution Journal* 64.

75 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 27, 162, 277; Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2–3) *Common Law World Review* 214, 215; Tina Popa, 'All the Way with ADR: Further Endorsement of ADR in Litigation' (2015) 26(4) *Australasian Dispute Resolution Journal* 218; Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) *University of New South Wales Law Journal* 929; Chief Justice TF Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35(3) *University of New South Wales Law Journal* 870; Tania Sourdin, *Alternative Dispute Resolution* (Lawbook, 6th ed, 2020) chs 8, 13; Boulle, *Mediation: Principles, Process, Practice* (n 71) 395, 560; Tania Sourdin, 'ADR in the Australian Court and Tribunal System' (2003) 6(3) *ADR Bulletin* 55; JJ Spigelman, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 63, 65; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 17 February 2000) ch 6, 424. See also Adele Carr, 'Broadening the Traditional Use of Mediation to Resolve Interlocutory Issues in Matters Before the Courts' (2016) 27(1) *Australasian Dispute Resolution Journal* 10.

76 See, eg, *Dank v Herald and Weekly Times Pty Ltd* [2015] VSC 270, [4] (Dixon J); *Subway Systems Australia v Ireland [No 2]* [2013] VSC 693, [20] (Croft J) ('*Subway Systems Australia*'); *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452, [41] (North J) ('*Victorian Council for Civil Liberties*').

77 Spigelman (n 75) 63. See also *Look Design and Development Pty Ltd v Sweeney* [2015] QDC 36, [15] (Long SC, DCJ) ('*Sweeney*'). See also Chapter III at 90 and 94.

78 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 161, 201, citing Laurence Boulle and Rachael Field, *Australian Dispute Resolution: Law and Practice* (LexisNexis Butterworths, 2017) ch 2, 405–12 ('*Law and Practice*'); Boulle, 'Extending the Courts' Shadow over ADR' (n 71) 118. See also 'Address Given by Justice Ronald Sackville' (n 72) 155; William Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56(3) *Modern Law Review* 380, 382.

79 Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Columbia Press, 2008) 108.

80 Melissa Conley Tyler and Jackie Bornstein, 'Court Referral to ADR: Lessons from an Intervention Order Mediation Pilot' (2006) 16(1) *Journal of Judicial Administration* 48, 49; Kathy Mack, *Court Referral to ADR: Criteria and Research* (National Alternative Dispute Resolution Advisory Council and Australian Institute of Judicial Administration, 2003) 2 ('*Criteria and Research*'); Deborah Hensler, 'A Research Agenda: What We Need to Know about Court Connected ADR' (1999) 6(1) *Dispute Resolution Magazine* 15 ('A Research Agenda').

81 See generally Claire Thurstans, 'ADR in VCAT's Guardianship and Residential Tenancies Lists: Room for Improvement?' (2016) 27(2) *Australasian Dispute Resolution Journal* 125; Popa (n 75); Michael Walton, 'A Critical Evaluation of ADR in the Queensland Planning and Environment Court' (2014) 25(1) *Australasian Dispute Resolution Journal* 20, 26; Rhain Buth, 'Limits to the Quantitative Data on Court-Connected Mediation in Federal Courts of Australia' (2009) 20(4) *Australasian Dispute Resolution Journal* 229; Nadja Alexander, 'Mediation on Trial: Ten Verdicts on Court-Related ADR' (2004) 22(1) *Law in Context* 8, 10 ('Ten Verdicts on Court-Related ADR'); Fleur Kingham, 'Evaluating Quality in Court Annexed Mediation' (Evaluative Paper, Queensland Land and Resources Tribunal, 19 September 2002), archived at <https://perma.cc/FJ5F-76FX>; Tania Sourdin and Tania Matruglio, *Evaluating Mediation: New South Wales Settlement Scheme 2002* (La Trobe University, 2002) ch 1.

Despite this paucity in research, there are three leading contemporary Australian examples of research exploring court-connected mediation.[82]

First, Sourdin assessed the use and effectiveness of mediation in the Supreme and County Courts of Victoria and considered whether mediations: resolved or limited the dispute; were accessible; were considered by disputants to be fair; used resources efficiently and promoted lasting outcomes; and achieved outcomes that were effective and acceptable.[83] She examined 553 case files and parties in those cases were surveyed with 98 usable disputant surveys and 34 mediator surveys returned. Direct interviews and focus groups were also held with stakeholders who included litigants, mediators and representatives.[84]

Secondly, Rundle examined the disparities between the theoretical potential of court-connected mediation with the reality of practice in the Supreme Court of Tasmania.[85] She explored: what opportunities are possible in court-connected mediation; what is 'happening' in the Supreme Court of Tasmania's mediation program; and why 'why is there a difference' between the possibilities and the practice of mediation in that court.[86] Her research focused on how lawyers' perspectives impact upon the practice of court-connected mediation and she interviewed 42 lawyers and four mediators.[87] She examined three sources of court records: the computerised databases; the 'mediation forms' completed by mediators at the conclusion of mediation; and paper 'card' records kept by the registry supervisor for actions that were in the process of being allocated a trial date.[88] She undertook 24 telephone surveys with fourteen lawyers, four defendants and six plaintiffs.[89] She observed ten mediation conferences to supplement her qualitative data[90] and provided a detailed description of the quantitative aspects of the court's mediation program including mediation dates and settlement timing.[91]

Thirdly, Woodward examined how lawyers in New South Wales are engaging with court-connected mediation and whether there is an opportunity to enhance its quality for both lawyers and legal services consumers.[92] His essential question was whether lawyer engagement in court-connected mediation is aligned with the certain core values, norms and beliefs that have come to be identified within mediation practice. He undertook semi-structured interviews with 27 lawyers and eight mediators.

My research is distinguishable from these Australian examples for four reasons. First, they have different research purposes. Secondly, they are different in scope. Thirdly, they use different research methodologies. Fourthly, they use different courts as case studies whereas I focus upon the Magistrates Court of South Australia.

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82 In an older study Zariski surveyed 418 legal practitioners in Western Australia. He found that, despite the appearance of a 'strong business perspective' amongst many respondents related to their thinking about ADR, most law firms had no policy to consider ADR processes or to incorporate provisions for such alternatives in documents they drafted: Archie Zariski, 'Lawyers and Dispute Resolution: What Do They Think and Know (and Think They Know)?:Finding out through Survey Research' (1997) 4(2) *Murdoch University Electronic Journal of Law* <http://classic.austlii.edu.au/au/journals/MurdochUeJlLaw/1997/18.html>.

83 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) i.

84 Ibid ii, 2, 38–41, 51, 162.

85 Rundle, 'Court-Connected Mediation Practice' (n 38) 126.

86 Rundle, 'Court-Connected Mediation Practice' (n 38) 144.

87 Ibid 10, 144, 148, 156.

88 Ibid 133–44.

89 However, little use was made of the survey data given the inadequate participation rates: ibid 132, 480.

90 Ibid 158–9.

91 Ibid 2.

92 Woodward, 'Lawyer Approaches' (n 33) ix, 1, 12, 77, 101.

The Magistrates Court is at the bottom of the hierarchy of courts in South Australia.[93] The Court has promoted the resolution of civil disputes by mediation since the introduction of a pilot-project in the Adelaide Civil Registry in 1996.[94] Although the Court has an established mediation program[95] and weekly review of the Court's case list shows that mediations are conducted regularly, I contend that, at the macro level, not enough is known about mediation in the Court.

Limited research regarding mediation in the Court exists,[96] though it is not contemporary. For example, in a 1999 survey of 77 lawyers, 43% of respondents rated the Court's mediation/conciliation services as 'good'.[97] However, neither magistrates nor mediators were surveyed in this research.

Moreover, at present there is no identifiable research, at the micro level, examining the Stakeholder understandings, expectations and experiences of mediation in the Court. This dearth in scholarship evidences a gap in knowledge, which this thesis aims to redress.

D *Importance of Addressing the Knowledge Gap and Contribution to Knowledge*

It is important to address the knowledge gap identified above for four main reasons.

First, knowing more about mediation within this particular context is important because the Court handles the greatest proportion of civil litigation in South Australia and resolves 'far more' civil actions by mediation than judicial determination.[98] Data in the Courts Administration Authority Annual Reports shows more actions are mediated in the Court than in the higher courts of South Australia.[99]

Secondly, we will benefit from knowing whether Stakeholder understandings, expectations, and experiences are largely convergent or divergent. Specifically, we will benefit from knowing the extent to which Stakeholders share 'common ground' or whether 'gaps' exist between them. If prominent expectation gaps exist, Stakeholders, and other participants, will benefit from addressing them. Addressing significant expectation gaps will promote consistency and predictability in *practice* and *procedure* between the Court's mediators.[100] It will assist satisfying mediation's core values and objectives[101] while promoting rule clarity.[102]

Thirdly, we need to explore the understandings, expectations, and experiences of those who are involved, either directly or indirectly, in mediation. This is particularly relevant given the reported difficulty with interviewing, or observing, those involved in mediations.[103] The individual and collective Stakeholder group insight will enable comparisons to be made between and within each Stakeholder group. It will assist also promoting Stakeholder education regarding the three themes,[104] which will expand the information base on which disputants make decisions.[105]

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93 See below Chapter III at 84–86.

94 See below n 938.

95 See below Chapter III at 86.

96 See, eg, AJ Cannon, 'An Evaluation of the Mediation Trial in the Adelaide Civil Registry' (1997) 7(1) *Journal of Judicial Administration* 50 ('An Evaluation').

97 The four indicia were timeliness, helpfulness to parties, identifies issues and settles or shortens trials: see Courts Administration Authority, *1999 Magistrates Court User Survey Results* (March 1999) 2, 7, 10. (Copy on file with author).

98 See below Chapter III at 90.

99 See below Chapter III at 91.

100 See below Chapter VII at 205.

101 I explore these in Chapter II at 33–5.

102 See below Chapter VII at 206, 216–7, and 234.

103 See Appendix A: Qualitative Research Methodology, 269–70. See also Chapter VII, recommendation 9.

104 See below Chapter VII at 205.

For example, magistrates, armed with the knowledge of what lawyers and mediators expect, will be in a better position to inform lawyers and their clients about the three themes at the first directions hearing,[106] which may assist them in making informed decisions regarding ADR options.[107] Lawyers, familiar with the expectations of magistrates and mediators, can better advise their clients regarding what to expect from the process and how to prepare for mediation.[108] Mediators, cognisant of what magistrates and lawyers expect can tailor their practices and procedures to disputants' needs, while respecting disputant and lawyer choices,[109] and adhering to requirements within the Court's rules-based framework.[110]

Fourthly, we will also benefit from knowing whether practice reflects best practice theory, whether it is time to review if practice has grown beyond the theory,[111] or whether different theories need to be applied within the court context. This will further assist with the development of best practice guidelines for application within the Court.

This research is timely because there have been contemporary rules-based developments to increase the uptake of mediation within the Court's civil jurisdiction since the introduction of the pilot-project.[112] Furthermore, the rules-based framework that was in place during the years that I undertook the research has since been replaced by the *Uniform Civil Court Rules 2020* (SA) ('*UCRs*'), which make contain a stronger policy of encouraging mediation as a primary means of dispute resolution within the courts in South Australia.[113] I explain in Chapter VII that the introduction of the *UCRs* in the latter parts of the research is not prejudicial to the data, for the *UCRs*, like the *Rules*, are at times silent, terse, or insufficiently definitive on many factors relating to the three themes explored in the theory base.[114]

This thesis contributes to the existing knowledge base and evolving mediation scholarship by providing further insight into the debates, dichotomies, and distinctions viewed through the lens of the Magistrates Court.

This thesis addresses the knowledge gap in the literature by being the first and only research to examine rich empirical evidence regarding the three themes from those involved within this local legal context.[115] It complements some of the abovementioned research from interstate courts.[116]

The research is more than a mere contemporary 'snapshot' or record of Stakeholder understandings, expectations, and experiences of the three themes from 2016 to 2018, against which future research exploring stakeholders in other court-connected contexts can be compared.[117] It provides insight into factors that have assisted the development of the Court's mediation culture[118] and insight into contemporary *practice* and *procedure* specific to the Court. This will enable comparisons to be made with mediation programs in other Australian jurisdictions.[119]

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105 See below Chapter II at 32. See also Chapter VII at 209 and 233 and VIII at 247.

106 See below Chapter III at 104.

107 See, eg, Frank EA Sander and Stephen B Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10(1) *Negotiation Journal* 49, 53. See also Chapter II at 30.

108 See below Chapter VII at 205, 212, 221, 225–6, 228 231–3.

109 See below Chapter V at 155, 165 and 167 and Chapter VII at 226, 229–30 and 234.

110 See below Chapter III.

111 See below Chapter II at 70. See also Chapter V at 167 and Chapter VIII at 243.

112 See below n 938.

113 See below Chapter III at Part B. See also Chapter VII at 205.

114 See below Chapter II.

115 Mack, *Criteria and Research* (n 80) 2, 8, 37, 87. See also nn 123, 3081, 3329, 3339 and 3408.

116 See above Chapter I at 20. See also below Chapter II at Part C and D.

117 See below Chapter VII and VIII.

118 See below Chapter III, VII and VIII.

119 Rundle, 'Court-Connected Mediation Practice' (n 38) 164.

The research also provides valuable insight into the prominent expectation gaps between Stakeholders and highlights important gaps between theory and practice.[120] This provides the foundation for future research involving disputants, who may have different understandings, expectations, and experiences from each of the three Stakeholder groups.[121]

E *Scope of Research: Case Study and Introduction to Research Methodology*

I chose to undertake qualitative research using the Court as a case study. I examine data from semi-structured interviews with five magistrates, seven lawyers and 16 mediators.[122] This is, to my knowledge, the largest contemporary qualitative Australian research study to examine the three themes through the collective lens of Stakeholders in one particular court-connected context.

My research does not focus exclusively on the point of view of lawyers or mediators, as I contend they represent two of the three Stakeholder groups within the Court. Instead, my research examines the understanding, expectations, and experiences of magistrates, lawyers, and mediators as a collective, which provides a richer sample for exploration.[123] Obtaining data from those involved in mediation provides an opportunity to consider mediation 'in action' and the research is thus 'real world' rather than 'purely' academic'.[124]

I chose not to include disputants as part of the sample for three reasons. First, unlike Stakeholders who remain understudied, extensive research has focussed upon disputant experiences and levels of satisfaction as to process and outcomes, particularly within the procedural justice framework.[125] Secondly, exploring Stakeholder understandings, expectations, and experiences was better suited to addressing the three research questions.[126] Thirdly, whilst disputants have the potential to be repeat players, in contrast to one-shotters, Stakeholders are regularly involved in mediation and play their own 'gatekeeper' role. However, exploration of disputant understandings, expectations and experiences regarding the three research questions remains worthy of its own research.[127]

I focus on mediation within the Court's civil, rather than criminal, jurisdiction.[128] Furthermore, I focus upon mediations involving lawyers despite some Stakeholders reporting that disputants can be unrepresented.[129] As lawyers are unlikely to be regularly involved in actions within the Civil (Minor Claims) Division and pre-lodgement mediations, I only discuss them briefly when exploring the Court's different divisions.[130]

This research is qualitative rather than quantitative and I chose not to evaluate the take-up rate of mediation or identify obstacles that prevent Stakeholder or disputant engagement with the Court's mediation program,[131] as they are not central to the three research questions. However, I provide an

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120 See below Chapter II, III, IV, V and VI.

121 See below Chapter VIII at 237.

122 To provide contextual background to the sample size, I have summarised quantitative data relating to interviewee characteristics within each Stakeholder group, the number of mediations reported and the types of actions mediated: see Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

123 See Appendix A: Qualitative Research Methodology. See also Appendix B: HREC Documentation.

124 See below Chapter II, Chapter IV, Chapter V and Chapter VII.

125 See below Chapter II at 50 and 56–7.

126 See Appendix: Qualitative Research Methodology. See also Chapter VIII at 237.

127 See below Chapter VII and Chapter VIII at 244.

128 See the discussion in Chapter III.

129 Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 7; Mediator 4; Mediator 6; Mediator 7; Mediator 8; Mediator 9; Mediator 10; Mediator 11; Mediator 12; Mediator 13; Mediator 15; Mediator 16. See below Chapter VI at 198–200, Chapter VII at 222 and Chapter VIII at 245.

130 See below Chapter III at 87 and 91.

131 See below Chapter VIII at 247.

idea of the scale of the Court's mediation program using quantitative data regarding the mediation of civil actions conducted from 1999.[132]

The research examines Stakeholder understandings, expectations and experiences regarding the three research questions and identifies expectation gaps. I chose not to investigate levels of Stakeholder satisfaction with the Court's mediation program[133] nor review the performance of Stakeholders to determine, for example, the extent to which participants are satisfied with mediator practices and procedures or the impact they have upon settlement rates. I also chose not to examine whether Stakeholders consider that the Court's mediation program is achieving its 'program goals',[134] nor investigate whether mediation efficiently and effectively reduces costs to both the Court and disputants.[135] Such investigations were not central to addressing the three research questions.

Like all qualitative research, the data in this thesis and the discussion is limited by time, scope of the case study, methodology, sample and bias.[136] Acknowledging these limitations, the research remains valuable as it addresses the knowledge gap and contributes to mediation scholarship.

At the outset I considered that my personal professional history of being an 'insider-researcher' would assist me in exploring Stakeholder understandings, expectations, and experiences and comparing mediation theory against *practice* and *procedure*. Rather than being a potential limitation of the research, being an insider-researcher was advantageous in developing and testing the research methodology and recruiting Stakeholders.[137]

F *Thesis Structure and Overview of Chapters*

This thesis consists of eight chapters. In this Chapter I have introduced the research aims and research questions and identified the dearth in scholarship. I have also outlined how I will address this knowledge gap and have summarised the scope of the research and research methodology.

I explore general scholarship relating to the theory and practice of mediation in Chapter II before exploring literature that relates specifically to court-connected mediation. I introduce the reader to the varying *purposes* of mediation, diversity in *practices* and variety of *procedures*. The Chapter shows that debates, dichotomies, and distinctions exist pertaining to the three themes, which illustrate the potential for expectation gaps. This Chapter provides the theory base for the thesis, which I draw against when exploring the rules-based framework in Chapter III and when exploring the empirical data in Chapters IV, V, and VI. I also draw against this theory base when examining the prominent expectation gaps in Chapter VII.

I introduce the Court in Chapter III. I provide an overview of its jurisdiction, development of mediation and current program features. As mediation involves interactions between Stakeholders within a rules-based framework, I explore the miscellany of information about mediation within that framework, in place before the commencement of the *UCRs* on 18 May 2020, and on the Court's website. The Chapter illustrates that mediators are afforded considerable flexibility and discretion despite being restricted by the rules-based framework to engaging in a purely facilitative practice. It also shows that the rules-based framework is at times silent, terse, or insufficiently definitive on many factors relating to the three themes that were explored in the theory base.[138] The

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132 See below Chapter III at 89.

133 See below Chapter VIII at 247.

134 See below Chapter II at 53–4. See also Chapter VIII at 247.

135 See below Chapter VIII at 247.

136 I explain the potential for personal biases including the impact of my personal professional history of being an 'insider-researcher' in the research methodology. See Appendix A: Qualitative Research Methodology.

137 See Appendix A: Qualitative Research Methodology at 254.

138 See below Chapter II.

apparent flexibility and discretion afforded to mediators coupled with the gaps in the former, and current, rules-based framework increase the potential for Stakeholders to have divergent understandings, expectations, and experiences regarding the three themes. This discussion provides the foundation against which the empirical data will be presented in the remaining Chapters of this thesis. I draw on this discussion when introducing the *UCRs* in Chapter VII.

I address the three research questions by examining Stakeholder reports regarding the three themes in turn in Chapters IV, V, and VI. Exploration of the empirical data provides contemporary insight into Stakeholder reports regarding the three themes. It demonstrates the main areas of convergence and divergence between Stakeholders and expectation gaps regarding various aspects of the three themes. It also demonstrates gaps between the theory base[139] and the rules-based framework,[140] on the one hand, and what some Stakeholders report occur in practice, on the other.

In Chapter VII I examine the prominent expectation gaps identified in Chapters IV, V, and VI. These gaps are significant for four reasons. First, they can cause tensions between Stakeholders, which can generate participant disappointment regarding the three themes.[141] Secondly, they illustrate the potential for inconsistency, *practice* and procedural *unpredictability* and mixed approaches.[142] Thirdly, they affect mediation's core values[143] and influence behaviours during mediation. Fourthly, they are also indicative of gaps between the theory base[144] and the rules-based framework,[145] on the one hand, and what some Stakeholders report occur in practice, on the other.[146] I conclude with recommendations to address these gaps, which centre on four principles. First, promoting Stakeholder education regarding the three themes. Secondly, promoting rule clarity. Thirdly, promoting satisfaction of mediation's core values and objectives.[147] Fourthly, promoting cultural change in the court context and the legal profession.[148] My recommendations will assist lawyers and their clients make informed decisions regarding mediation within the Court.[149]

I summarise how I satisfied the research aims and addressed the dearth in scholarship in Chapter VIII.

My findings lead to six major conclusions.

First, 'mediation' encompasses a spectrum of *purposes*, *practices* and *procedures* and tensions exist between these three themes. Secondly, Stakeholders are interrelated, overlap exists between their respective gatekeeper roles and their understandings, expectations, and experiences impact upon each other despite a disparity of views existing between and within Stakeholder groups. Thirdly, the three themes are interrelated and overlap[150] and, as indicated throughout this thesis, *purpose* drives *practice* and *procedure*.[151] Fourthly, tensions exist between Stakeholders, particularly between

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139 See below Chapter II.
140 See below Chapter III.
141 See below Chapter VII at 208, 213–4, 220–1 and 233 and Chapter VII at 238 and 249.
142 See below Chapter IV at 108, Chapter V at 132 and 168, Chapter VI at 170, 176, 180, 188, 201 and 204, Chapter VII at 205, 208 and 220 and Chapter VIII at 238.
143 See below Chapter II at 33–5.
144 See below Chapter II.
145 See below Chapter III.
146 See below Chapter IV, V and VI.
147 See below Chapter II at 33–5.
148 See below Chapter VII at 205.
149 See below Chapter VII at 214 and Chapter VIII at 244.
150 See above Chapter I at 13, Chapter IV at 108 and 130, Chapter V at 169, Chapter VII at 205 and Chapter VIII at 237 and 239.
151 See above Chapter I at 13. See below Chapter II at 48, Chapter IV at 108, 113 and 130, Chapter V at 131, 141–2 and 169, Chapter VI at 181, 192, 197 and 202 and Chapter VII at 208, 210 and 234.

mediators and lawyers regarding *practice* and *procedure*.[152] Fifthly, different stakeholder groups are more attuned to different aspects of the three themes.[153] Sixthly, important gaps exist between the theory base[154] and the rules-based framework,[155] in contrast to what some Stakeholders report occur in practice.[156]

My thesis complements existing and evolving court-connected mediation scholarship and provides the foundation for future research within the Court. The findings have implications for court-connected practice and for future theorising about mediation, which can guide policymakers and practitioners about the three themes and thus deliver better outcomes for disputants. To that end, I make recommendations for future research.

I conclude by acknowledging that although we have gained contemporary insight into mediation in the Court, the time is ripe for continued research, particularly with the introduction of the *UCRs*. This will positively impact upon the progression of mediation within the Court and its mediation culture.[157]

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152 See below Chapter V and Chapter VI.
153 See below Chapter IV at 127 and 129, Chapter V at 144 and 168 and Chapter VI at 187, 201 and 204.
154 See below Chapter II.
155 See below Chapter III.
156 See below Chapter IV, V and VI.
157 See below Chapter VIII and VIII.

CHAPTER II: THEORY AND PRACTICE OF MEDIATION AND COURT CONNECTION

In this Chapter I explore general scholarship relating to the theory and practice of mediation before exploring literature that relates to court-connected mediation. I identify debates, dichotomies, and distinctions regarding what mediation 'is' and the varying *purposes*, diversity in *practices* and variety of *procedures* encompassed by the umbrella term 'mediation'. I structure this Chapter according to the three themes of *purpose*, *practice*, and *procedure*. This structure is maintained throughout the thesis.[158]

This Chapter comprises four parts. Part A identifies where 'mediation' fits within the Alternative Dispute Resolution ('ADR') spectrum. I explore the difficulties in defining and describing what mediation 'is' and introduce two definitions/descriptions commonly referred to within the literature and within the Australian mediator accreditation context, before presenting mediation's core 'features' and 'values'. I then outline distinctions between mediation and conciliation before exploring tensions that exist when connecting mediation to the courts. I consider five characteristics that feature in court-connected mediation that do not feature or are less prevalent in non-court-connected contexts. This discussion reveals why it is useful to divide the analysis of mediation into the three themes of *purpose*, *practice* and *procedure*.

Part B explores mediation's varying *purposes*, ranging from the most ideological to the most practical. I discuss the purposes that dominate within the court-connected context.

Part C explores the diversity in mediation *practice* and attempts at categorising different 'types' of mediation according to 'models'. I explore four practice models prominently identified within the literature, which I refer to as 'the four practice models' throughout this thesis. I then discuss the practices that typically operate within the court-connected context.

Part D explores debates pertaining to the 'standard' mediation *procedure* and I compare eight procedures that guide the stages in mediation. I then discuss some procedural characteristics common in court-connected mediation.

The exploration reveals that the varying *purposes*, diversity of mediation *practices*, and variety of *procedures*, create the potential for uncertainty and expectation gaps and for participants to experience inconsistency and both *practice* and *procedural* unpredictability.[159] This reinforces the importance of exploring Stakeholder reports regarding mediation's *purpose*,[160] *practice*,[161] and *procedure*[162] within the Magistrates Court of South Australia ('the Court').

This Chapter provides the theory base for the thesis, which I draw against when exploring the rules-based framework in the next Chapter and when exploring the empirical data.[163]

A *Mediation Within the 'Alternative' Dispute Resolution Spectrum*

'Dispute resolution' refers to all processes used to resolve disputes, whether within or outside the court or tribunal context.[164] 'ADR'[165] is an umbrella term used to describe various processes –

158 See below Chapter IV, V and VI.
159 See below Chapter III at 101 and 106, Chapter IV at 108, Chapter V at 132 and 168, Chapter VI at 170, 176, 180, 188, 201 and 204, Chapter VII at 205, 208, 213 and 220 and Chapter VIII at 238.
160 See below Chapter IV.
161 See below Chapter V.
162 See below Chapter VI.
163 See below Chapters IV, V and VI.
164 *Dispute Resolution Terms* (n 17) 6.
165 Sourdin, *Alternative Dispute Resolution* (n 75) 2–3.

excluding judicial determination – in which a 'dispute resolution practitioner'[166] assists disputants resolve disputes.[167] Some descriptions of ADR include processes that enable disputants to prevent or manage their disputes.[168]

Whilst challenges exist in defining/describing different dispute resolution processes, utilising 'common terminology'[169] promotes consistency, clarity and certainty in ADR processes.[170]

Many descriptors of dispute resolution terms used in this thesis were set out in the National Alternative Dispute Resolution Advisory Council's ('NADRAC') Glossary of Common Terms.[171] NADRAC, the independent non-statutory body tasked with advising the Commonwealth Attorney-General of ADR related matters from 1995 to 2013,[172] categorised dispute resolution processes involving impartial interveners to three main categories.[173] First, facilitative processes including facilitative mediation, facilitation and facilitated negotiation.[174] Secondly, advisory processes including case appraisal, case presentation, conciliation, fact-finding, early neutral evaluation expert appraisal and mini-trial.[175] Thirdly, determinative processes including adjudication, arbitration, dispute review boards, expert determination private judging and litigation.[176]

The two distinguishing features between these categories relate to the process-content dichotomy, occasionally referred to as the 'problem-process dichotomy,'[177] discussed below,[178] and the roles and functions of the impartial intervener.[179] This dichotomy identified within mediation

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166 See, eg, *Dispute Resolution Terms* (n 17) 3; Boulle and Alexander, *Skills and Techniques* (n 17) 2.

167 *Dispute Resolution Terms* (n 17) 4.

168 See, eg, Primary Dispute Resolution ('PDR') used to describe processes that took place before, or instead of, determination by a court such as 'conciliation counselling' within the family law context to assist disputes concerning children: *Dispute Resolution Terms* (n 17) 4–5, 8–9. See also *Family Law Act 1975* (Cth) s 10F.

169 National Alternative Dispute Resolution Advisory Council, 'ADR Terminology' (Discussion Paper, 2002) 6–7 <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/ADR%20Terminology%20A%20Discussion%20Paper.pdf>.

170 See eg, New South Wales Law Reform Commission, *Dispute Resolution: Model Provisions* (Consultation Paper No 18, December 2016) 3 ('*Model Provisions*'); National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Report, September 2009) ('*The Resolve to Resolve*'); National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters* (Report, November 2006) 1, 24; National Alternative Dispute Resolution Advisory Council, *Who Says You're a Mediator?: Towards a National System for Accrediting Mediators* (2004); National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report, April 2001) 4, 24; Maureen Garwood, 'Alternative Dispute Processes for Commercial Disputes: Quality and Style: A Survey' (1999) 10(2) *Australasian Dispute Resolution Journal* 84; Maureen Garwood, 'Managing Quality of ADR for Commercial Disputes' (1999) 10(3) *Australasian Dispute Resolution Journal* 173.

171 *Dispute Resolution Terms* (n 17) 4. See also 'Issues of Fairness and Justice in Alternative Dispute Resolution' (Discussion Paper, National Alternative Dispute Resolution Advisory Council, November 1997) 201–4 ('Issues of Fairness').

172 Attorney-General's Department, 'Alternative Dispute Resolution', *Australian Government* (Web Page, 2017) <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx>.

173 NADRAC's three categories were cited in *Construction, Forestry, Mining and Energy Union v Clermont Coal Mine* (2015) FWC 2023, [19]–[20] (Commissioner Lewin, 30 March 2015) ('*Construction, Forestry, Mining and Energy Union*').

174 *Dispute Resolution Terms* (n 17) 7. Robin Saunders, 'Mediation and Facilitation: Commonalities and Differences' (2009) 20(2) *Australasian Dispute Resolution Journal* 104.

175 *Dispute Resolution Terms* (n 17) 4, 7.

176 Ibid 6; National Alternative Dispute Resolution Advisory Council, *Your Guide to Dispute Resolution* (15 July 2012).

177 Alexander, 'Understanding Practice' (n 57) 103; Nadja Alexander, 'The Mediation Meta-Model: The Realities of Mediation Practice' (2011) 12(6) *ADR Bulletin* 126, 126 ('Realities of Mediation Practice').

178 See below Chapter II at 60.

179 Boulle and Field, *Mediation in Australia* (n 27) 6, 134.

literature,[180] features in the National Mediator Accreditation System ('NMAS') *Practice Standards* (at 1 July 2015) ('*Practice Standards*'), the voluntary industry system under which Recognised Mediator Accreditation Bodies accredit mediators in Australia,[181] in three out of the four practice models[182] and reflected in mediation and conciliation rules from industry bodies.[183]

According to NADRAC, interveners in facilitative processes have no advisory/evaluative or determinative role regarding the content of disputes or their outcome. Conversely, interveners in advisory/evaluative processes investigate and advise on the facts, law and evidence and possible outcomes, but do not have a determinative role. Interveners in determinative processes have evaluative and determinative roles regarding the content of disputes and their outcome including establishing the facts and hearing of evidence, applying the law and making a final determination on the merits.

Despite general consensus within the literature regarding the mediator's powerlessness to render binding outcomes in contrast to determinative 'umpire' models of dispute resolution,[184] an additional category exists – which NADRAC termed 'combined', 'hybrid' or mixed-mode processes – where the intervener plays multiple roles.[185] For example, interveners in conciliation or conferencing combine facilitative and advisory processes[186] and interveners in *med-arb*,[187] mediate first before arbitrating. 'Evaluative mediation', in which interveners facilitate negotiations, evaluate the merits and suggest resolution options, falls within this categorisation. However, NADRAC described evaluative mediation 'as a contradiction in terms' since it is inconsistent with the facilitative description provided in its Glossary of Common Terms.[188] I discuss the facilitative-evaluative dichotomy when discussing the four practice models below.[189]

A fourth category can be added to NADRAC's categorisation:[190] transformative processes such as counselling,[191] conflict coaching[192] and 'transformative' mediation, in which disputants seek to 'resolve intra-personal and inter-personal difficulties in their relationship'.[193]

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180 See, eg, John Michael Haynes, Gretchen L Haynes and Larry Sun Fong, *Mediation: Positive Conflict Management* (State University of New York Press, 2004) 9; Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 4th ed, 2003) ch 2.

181 'National Mediator Accreditation System (NMAS)', *Mediator Standards Board* (Web Page, 2008–23) 3 <https://msb.org.au/resources/documents> ('NMAS'). See below Chapter II at 32.

182 See below Chapter II at 63.

183 Resolution Institute, *Mediation Rules* (at 8 September 2016) r 1; Resolution Institute, *Conciliation Rules* (at 16 November 2006) r 1.

184 See Boulle, *Mediation: Principles, Process, Practice* (n 71) 27, citing Simon Roberts, 'Mediation in Family Disputes' (1983) 46(5) *Modern Law Review* 537, 546. See also *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [27] (McDougall J, 8 May 2018) ('*Ku-ring-gai Council*').

185 Boulle and Field, *Mediation in Australia* (n 27) 164–8.

186 *Dispute Resolution Terms* (n 17) 5–6.

187 See generally Alan Limbury, 'Making Med-Arb Work' (2007) 9(7) *ADR Bulletin* 1; Brian A Pappas, 'Med-Arb and the Legalization of Alternative Dispute Resolution' (2015) 20(1) *Harvard Negotiation Law Review* 157; Bobette Wolski, 'QCAT's Hybrid Hearing: The Best of Both Worlds Or Compromised Mediation?' (2013) 22(3) *Journal of Judicial Administration* 154; Cady Simpson, 'Hearing-Med in Australian Super-Tribunals: Which Cases and What Processes?' (2014) 23(4) *Journal of Judicial Administration* 220. See also Law Council of Australia, *Med-Arb Commentary: A Guide for Legal and ADR Practitioners* (at October 2022) 3 and 13.

188 *Dispute Resolution Terms* (n 17) 7.

189 See below Chapter II at 61.

190 Boulle and Field, *Mediation in Australia* (n 27) 7.

191 *Dispute Resolution Terms* (n 17) 6.

192 See generally Judith Herrmann, 'A Comparison of Conflict Coaching and Mediation as Conflict Resolution Processes in the Workplace' (2012) 23(1) *Australasian Dispute Resolution Journal* 43; Ross Brinkert, 'Conflict Coaching: Advancing the Conflict Resolution Field by Developing an Individual Disputant Process' (2006) 23(4) *Conflict Resolution Quarterly* 517; Samantha Levine-Finley, 'Stretching the Coaching Model' (2014) 31(4) *Conflict Resolution Quarterly* 435.

The four dispute resolution categories[194] are significant to this thesis for they assist in understanding what mediation 'is'. They also provide a lens for the exploration of mediation within the court context. In the next Chapter I introduce the Court's ADR suite, which is consistent with the 'multi-door courthouse' concept, first proposed in the United States in 1976[195] and receiving subsequent academic attention.[196] According to this concept, courts could become a 'one-stop-shop' for disputants by providing multiple dispute resolution services, with judicial adjudication being one, but reserved as an option of 'last resort'.[197] This concept assumes that trained registrars or dedicated dispute resolution advisers would be the 'first points of contact' providing disputants a dedicated front-end diagnosis and assessment to enable referral to appropriate dispute resolution processes. The concept denotes 'fitting the forum to the fuss'[198] to provide individualised services tailored to disputants. Historically, some Australian courts have provided multiple services consistent with the multi-door courthouse.[199] However, the concept has not been applied within all Australian courts, citing concerns about preserving the importance of judicial determination in the Australian constitutional system.[200]

Mediation is one type of process within the Court's ADR suite[201] and I argue is distinguishable from other conflict resolution processes, such as counselling and therapy, which exist outside the civil litigation context.[202] The four dispute resolution categories are relevant to the exploration of the empirical data, particularly when exploring the different mediation *practices* and *procedures*.[203]

1 *Definitional and Descriptional Dilemmas: What 'is' Mediation?*

The mediation field is diverse and pluralistic.[204] It encompasses a wide range of theories and practices and is influenced by various disciplines.[205] 'Mediation' is a contested term and the

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193 'ADR Terminology' (n 169) 20, 35. See below Chapter II at 66–7.

194 See also Laurence Boulle and Rachael Field's Dispute Resolution Matrix in Boulle and Field, *Law and Practice* (n 78) ch 2; Boulle and Field, *Mediation in Australia* (n 27) 135.

195 Frank EA Sander, 'Varieties of Dispute Processing' (Conference Paper, National Conference on the Causes of Popular Dissastisfaction with the Administration of Justice, 8 April 1976).

196 See, eg, Sourdin, *Alternative Dispute Resolution* (n 75) 564–82; Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 123–4; Timothy Heeden, 'Remodelling the Multi-Door Courthouse to Fit the Forum to the Folks: How Screening and Preparation Will Enhance ADR' (2011) 95(3) *Marquette Law Review* 941; Barry Edwards, 'Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs' (2013) 18(1) *Harvard Negotiation Law Review* 281.

197 Boulle and Field, *Mediation in Australia* (n 27) 310.

198 Sander and Goldberg (n 107).

199 For example, the Land and Environment Court of New South Wales. See, eg, Justice Brian J Preston, 'Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales and 12 Benefits of Judicial Specialisation in Environmental Law' (Speech, Renewing Environmental Law: A Conference for Public Interest Environmental Law Practitioners, 3 February 2011) 10 <https://www.lec.nsw.gov.au/lec/publications-and-resources/judicial-speeches-and-papers.html> ('Operating an Environment Court'); Justice Brian J Preston, 'The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse: Part I' (2008) 19(2) *Australasian Dispute Resolution Journal* 72 ('Moving Towards a Multi-Door Courthouse: Part I'); Justice Brian J Preston, 'The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse: Part II' (2008) 19(3) *Australasian Dispute Resolution Journal* 144 ('Moving Towards a Multi-Door Courthouse: Part II').

200 See, eg, Michael Windeyer, 'Settlement in Court-Connected ADR and the Constitutional Function of the Judiciary: An Imbalance between Two Competing Public Interests' (2017) 28(2) *Australasian Dispute Resolution Journal* 135; Ian Field (n 32); Robert French, 'Perspectives on Court Annexed Alternative Dispute Resolution' (Speech, Law Council of Australia: Multi-door Symposium, 27 July 2009) 20; Moore 'Judges as Mediators' (n 32); Phillip Tucker, 'Judges as Mediators: A Chapter III Prohibition' (2000) 11(2) *Australasian Dispute Resolution Journal* 84.

201 See below Chapter III at 93.

202 See below Chapter II at 41 and Chapter III at 93 and 98.

203 See below Chapter IV, Chapter V and Chapter VI.

204 Robert A Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey Bass, rev ed, 2005) 19, 259, 264 ('*The Promise of Mediation*'); James H Stark, 'Preliminary

complexities in defining the 'essential nature or features of a specific process' or describing 'how particular terms are used'[206] within the mediation field are well documented.[207]

There is no single settled definition or description of what mediation 'is' – or 'should be'.[208] Some descriptions are narrow and limit mediation to its purportedly 'pure' form.[209] Others are broad and inclusive of a variety of practices and procedures.[210]

Some complexities in defining 'mediation' can be explained by reference to the ideology-practice continuum; namely, that mediation can be viewed as an *ideology* of 'peace-seeking, transformative conflict-resolving human problem solving' and a *practice* of 'task oriented, communication enhancing dispute settlement.'[211] Further labels include healing-problem-solving[212] or healing-settlement,[213] reflecting either a conflict resolution-focus or a settlement-focus.[214]

'Mediation' is also used to refer to diverse phenomena and, as identified by Boulle, approaches at definition can be categorised as *aspirational, conceptualist*, *descriptive*, *market, procedural*, *occupational* and *operational*.[215] These approaches illustrate the complex relationship between *ideology* and *practice*. They also create the potential for divergence between practitioners, who may be less mindful of this continuum, and academics, who may be more committed to such distinctions.[216]

The difficulties in defining or describing mediation reveal the potential for uncertainty and expectation gaps. I circumvent deeper exploration of this complexity in this Chapter by adopting NADRAC's definition of mediation and how it is described in the NMAS. These definitions/descriptions are commonly referred to within the literature and within the Australian mediator accreditation context, despite the definitional and descriptional dilemmas identified within the literature.

(a) NADRAC

NADRAC's description of mediation merges some of the definitional approaches identified above:

Reflections on the Establishment of a Mediation Clinic' (1996) 2(2) *Clinical Law Review* 457, 473; John Lande, 'How Will Lawyering and Mediation Transform Each Other?' (1996) 24(4) *Florida State University Law Review* 839, 856–7.

205 Boulle, *Mediation: Principles, Process, Practice* (n 71) 14.

206 *Dispute Resolution Terms* (n 17) 2.

207 Boulle, *Mediation: Principles, Process, Practice* (n 71) 6, ch 2; Hazel Genn, *Judging Civil Justice: Hamlyn Lectures 2008* (Cambridge University Press, 2010) 83 ('*Judging Civil Justice*'), citing Carrie Menkel-Meadow (ed), *Mediation: Theory, Policy and Practice* (Ashgate, 2001) xvii ('*Theory, Policy and Practice*').

208 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 2; Genn, *Judging Civil Justice* (n 207) 83, citing Menkel-Meadow, *Theory, Policy and Practice* (n 207) xvii; Kathy Douglas, 'National Mediator Accreditation System: In Search of an Inclusive Definition of Mediation' (2006) 25(1) *Arbitrator and Mediator* 1 ('In Search of an Inclusive Definition of Mediation'); John Wade, 'Mediation: The Terminological Debate' (1994) 5(1) *Australian Dispute Resolution Journal* 204 ('Terminological Debate'); Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(1) *Harvard Negotiation Law Review* 7, 48 ('A Grid for the Perplexed').

209 See also nn 294, 600–2 and 612.

210 See below Chapter II at 38.

211 Carrie Menkel-Meadow, Lela Love and Andrea Kupfer Schneider, *Mediation: Practice, Policy and Ethics* (Aspen, 2006) 101.

212 Allport (n 44) 175.

213 Mark S Umbreit, 'Humanistic Mediation: A Transformative Journey of Peacemaking' (1997) 14(3) *Mediation Quarterly* 201, 209–10.

214 Olivia Rundle, 'Are We Here to Resolve Our Problem or Just to Reach a Financial Settlement?' [2017] (141) *Precedent* 12.

215 Boulle, *Mediation: Principles, Process, Practice* (n 71) 13–16.

216 See, eg, Lande, 'How Will Lawyering and Mediation Transform Each Other?' (n 204) 854, 857. See also nn 265, 704, 1719, 1729, 2813 and 2833.

> ***Mediation*** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour 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 may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.[217]

This description references four mediator functions and limits the mediator's role only to process interventions, with the objective of reaching agreement.

NADRAC described mediation as a 'purely facilitative process' and mediators have no advisory role regarding content,[218] nor do they provide legal, financial or other expert advice or counseling.[219] Conversely, a conciliator may: have an advisory role regarding content or resolution (though not a determinative role); determine the process; suggest and advise on settlement terms; and actively encourage disputant agreement.[220]

(b) NMAS

The NMAS was introduced in 2008 and a revised version came into effect in 2015.[221] It is an opt-in system in which dispute resolution practitioners self-define as 'mediators' regardless of their style of practice.[222]

Like the NADRAC description, the NMAS describes mediation in facilitative terms,[223] though it no longer expressly states that mediation is a 'primarily facilitative' process.[224] It states:

> Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:
> (a) communicate with each other, exchange information and seek understanding
> (b) identify, clarify and explore interests, issues and underlying needs
> (c) consider their alternatives
> (d) generate and evaluate options
> (e) negotiate with each other; and
> (f) reach and make their own decisions.
> A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.[225]

This description promotes mediation's *self-determination* value[226] and references six mediator functions.[227] It limits the mediator's role to process interventions *only* and contains a prescription against mediators evaluating or advising upon the merits or determining outcomes. The NMAS

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217 *Dispute Resolution Terms* (n 17) 9.

218 Ibid 3.

219 *Your Guide to Dispute Resolution* (n 176) 14.

220 *Dispute Resolution Terms* (n 17) 5. See also Resolution Institute, *Conciliation Rules* (at 16 November 2006) rr 1, 5.

221 Sourdin, *Alternative Dispute Resolution* (n 75) ch 14; Bobette Wolski, 'Mediator Standards of Conduct: A Commentary to the Revised National Mediator Accreditation System Practice Standards' (2016) 5(2) *Journal of Civil Litigation and Practice* 109.

222 Boulle and Field, *Mediation in Australia* (n 27) 153. The two express purposes of the NMAS are to promote 'quality, consistency and accountability of NMAS accredited mediators within the diversity of mediation practice in Australia' and to inform participants about what to expect from NMAS accredited mediators: National Mediator Accreditation System, *Practice Standards* (at 1 July 2015) pt 1, Introduction, 2 ('*Practice Standards*').

223 Boulle and Field, *Mediation in Australia* (n 27) 243. See also Council of Australian Tribunals, *Practice Manual for Tribunals* (2020, 5th ed), 85.

224 National Mediator Accreditation System, *Approval Standards* (at September 2007) s 2(3).

225 *Practice Standards* (n 222) s 2.2.

226 See below Chapter II at 34.

227 *Practice Standards* (n 222) s 2.2(a)–(f).

prescribe that mediators must possess 'knowledge and skills' incorporating 'ethical principles' to execute their role.[228]

Whilst determinative practices are excluded from the definition, the NMAS accommodates 'advisory or evaluative mediation or conciliation', described as 'blended' processes. 'Mediators' can utilise a blended process after obtaining express consent, subject to holding appropriate qualifications, professional knowledge and experience, professional registration and professional indemnity insurance or statutory immunity, and ensuring the advice is provided in a manner that respects disputant self-determination.[229]

Some argue the NMAS is 'confusing' for maintaining that mediators do not evaluate or provide advice but acknowledges that mediators *can* evaluate and provide advice.[230] Others criticise the NMAS for not drawing stronger distinctions between mediation and conciliation and that 'conciliation' should be used solely to describe advisory and evaluative processes.[231] Likewise, others criticise it for not readily accommodating or applying to conciliation[232] nor being adequately inclusive of evaluative and transformative practices.[233] Later in this chapter I explore the scholarship on different medication practices. Before doing so, I introduce mediation's core 'features' and 'values'.

(c) Mediation's Core 'Features' and 'Values'

Similar to there not being a single settled definition or description of 'mediation', there is also no singularly accepted description of the 'core' features[234] of 'pure' or 'classical' mediation[235] nor the many 'variable' features.[236] Some authors describe the core features as being a decision-making process whereby an impartial intervener, who has no power to make binding decisions, assists participants reach consensual outcomes.[237] Whilst this description encapsulates the 'major features' of mediation, such as informality, consensuality and voluntary settlement, Bush and Folger argue that this erroneously implies that mediation's primary purpose is settlement.[238]

There is no single settled description of mediation's objectives or core values and both terms are used interchangeably in the literature.[239] Although interrelated, they are not identical.[240] Boulle and Field suggest values are the aspirational, philosophical and motivational ideals intrinsic to mediation's identity, whereas objectives are the extrinsic instrumental, external and pragmatic

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228 Ibid s 10.1.

229 Ibid s 10.2.

230 Troy Peisley, 'Blended Mediation: Using Facilitative and Evaluative Approaches to Commercial Disputes' (2012) 23(1) *Australasian Dispute Resolution Journal* 26, 30.

231 See generally David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 3rd ed, 2014) ch 6, 15.

232 Australian Dispute Resolution Advisory Council, 'Conciliation' (Discussion Paper, October 2019) 48. See also Resolution Resources, *NMAS Review 2020–2022: Findings and Recommendations* (Review Report, 2022) 15, 22 <https://nmasreview.com.au/final-recommendations>.

233 Douglas, 'In Search of an Inclusive Definition of Mediation' (n 208).

234 Boulle, *Mediation: Principles, Process, Practice* (n 71) 26–8.

235 Wade, 'Terminological Debate' (n 208) 204.

236 Boulle, *Mediation: Principles, Process, Practice* (n 71) 29–30.

237 See generally Sourdin, *Alternative Dispute Resolution* (n 75) 78; Boulle, *Mediation: Principles, Process, Practice* (n 71) 13; Street, *Bar Practice Course* (n 32) 1, 2, 7; James A Wall, John B Stark and Rhetta L Standifer, 'Mediation: A Current Review and Theory Development' (2001) 45(3) *Journal of Conflict Resolution* 370, 375.

238 Bush and Folger, *The Promise of Mediation* (n 204) 8, 65.

239 Jacqueline M Nolan-Haley, 'Court Mediation and Search for Justice through Law' (1996) 74(1) *Washington University Law Quarterly* 47, 54; Alexander, 'Understanding Practice' (n 57) 111.

240 Boulle and Field, *Mediation in Australia* (n 27) 38–9.

purposes for which mediation is used and promoted in varying contexts.[241] I explore mediation's objectives during the discussion of mediation's varying *purposes* below.[242]

Four core values exist within the literature delineating philosophical underpinnings to various approaches and practices of mediation.[243] First, disputant *self-determination*, a multifaceted relational value that connotes disputant empowerment and autonomy and encompasses the following elements: direct participatory involvement, procedural involvement, responsibility for outcomes, disputants' own voices and consensuality of outcomes.[244] Self-determination is touted in much literature as mediation's fundamental and defining value,[245] though debates exist about the authenticity of this value, which illustrates incongruence between theory and practice.[246] Direct disputant participation is also reflected in some mediation guidelines[247] and mediation rules.[248]

Secondly, mediator *impartiality* involves three elements: that mediators will conduct a procedurally *fair* process, free from conflicts of interest and perceptions of favouritism/bias, and in a *non-determinative* manner.[249] The meaning and achievability of mediation's 'traditional' *neutrality* value has received significant debate.[250] For example, Wolski argues mediators possess power and influence over both content and outcomes and so cannot be considered 'completely' neutral.[251] Boulle and Field argue that mediator *neutrality* has lost its contemporary relevance[252] and debates

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241 See below Chapter II at 38.

242 See above Chapter II at 49.

243 Boulle and Field, *Mediation in Australia* (n 27) 38–54; Boulle, *Mediation: Principles, Process, Practice* (n 71) 63–91.

244 Boulle and Field, *Mediation in Australia* (n 27) 40–8.

245 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 379–81; Rachael Field, 'Rethinking Mediation Ethics: A Contextual Method to Support Party Self-Determination' (2011) 22(1) *Australasian Dispute Resolution Journal* 8, 10; Rachael Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18(3) *Australasian Dispute Resolution Journal* 1; Nancy A Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice' [2002] (1) *Journal of Dispute Resolution* 179 ('Disputants' Decision Control in Court-Connected Mediation'); Welsh, 'The Inevitable Price of Institutionalization?' (n 26). But see Robert Angyal, 'Is Party Self-Determination a Concept Without Content?' [2020] (15) *Newcastle Law Review* 68, 70, 99; Robert A Baruch Bush and Joseph P Folger, 'Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination' (2015) 16(3) *Cardozo Journal of Conflict Resolution* 741, 742 ('Reclaiming Mediation's Future').

246 Boulle and Field argue self-determination may more accurately be described using the narrower and less aspirational notion of 'informed consent' as to outcomes: Boulle and Field, *Mediation in Australia* (n 27) 380–2, 387.

247 See, eg, *Guidelines for Parties in Mediations* (n 40) r 9; *Guidelines for Lawyers in Mediations* (n 40) r 5.

248 *Mediation Rules* (n 183) r 5.

249 Boulle and Field, *Mediation in Australia* (n 27) 48–51.

250 See, eg, Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social and Legal Studies* 221; Bernard S Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (Jossey-Bass, 2004); Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice: Part I' (2000) 11(2) *Australasian Dispute Resolution Journal* 73; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice: Part II' (2000) 11(3) *Australasian Dispute Resolution Journal* 145; Riskin, 'A Grid for the Perplexed' (n 208) 47; Sara Cobb and Janet Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16(1) *Law and Society Inquiry* 35; John Forester and David Stitzel, 'Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts' (1989) 5(3) *Negotiation Journal* 251; Sydney E Bernard et al, 'The Neutral Mediator: Value Dilemmas in Divorce Mediation' [1984] (4) *Mediation Quarterly* 61.

251 Bobette Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12(4) *Australasian Dispute Resolution Journal* 248, 250–1 ('Mediator Settlement Strategies'). See also Samuel J Imperati and Steven M Maser, 'Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Coss and Manipulation? Three Theories Reveal Paradoxes Resolved by Mediator Standards of Ethical Practice' (2014) 29(2) *Ohio State Journal on Dispute Resolution* 223.

252 Boulle and Field, *Mediation in Australia* (n 27) 54, 58–60, 379.

encompassing neutrality, impartiality and independence have resulted in the contemporary shift to mediator impartiality.[253] Impartiality features in some mediation guidelines.[254]

Thirdly, *non-adversarialism* denotes cooperation and collaboration to reach mutually agreeable 'win-win' outcomes as opposed to adversarial, competitive 'win-lose' approaches.[255]

Fourthly, *responsiveness* denotes responsiveness to individual disputant needs, interests, and priorities in terms of flexibility and informality in process, content and outcomes.[256] Mediation's inherent flexibility is also acclaimed as its 'beauty' in case law.[257]

The distinction between values and objectives are not always clear, for example, self-determination, is often considered as being both a value and an objective.[258] Courts occasionally blur the distinction when trying to construe mediation's 'philosophy' from legislation or rules of court,[259] or when describing the 'value' of mediation's flexibility *and* efficiency and effectiveness 'objectives'.[260] Competing philosophical ideals – interchangeably referred to as values or objectives – also exist in each of the four practice models.[261]

Mediation's core values and objectives are significant to this thesis as they are pertinent to the varying *purposes* of mediation,[262] diversity in *practices*[263] and variety of *procedures*.[264]

Later in this chapter I explore the scholarship on each of the three themes. Before doing so, I explore the distinctions between mediation and conciliation by reference to some of conciliation's common features. I also identify debates between self-described mediation 'purists', 'pragmatists' and those critical of academic constructs.[265] This discussion provides the foundation to debates relating to the four practice models, particularly as overlap exists between conciliation and advisory/evaluative practices.[266]

(d) Conciliation-Mediation and Facilitative-Advisory Distinctions

An important element of the definition of mediation, commonly referred to within the literature,[267] in mediation rules[268] and case law,[269] is the distinction between mediation, as a facilitative process,

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253 Rachael Field and Jonathon Crowe, *Mediation Ethics: From Theory to Practice* (Edward Elgar, 2018) 131; Boulle, *Mediation: Principles, Process, Practice* (n 71) 71.

254 See, eg, *Guidelines for Parties in Mediations* (n 40) 5; Law Council of Australia, *Ethical Guidelines for Mediators* (at April 2018) r 2 <https://www.lawcouncil.asn.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical%20Guidelines%20for%20Mediators_Final%202018.pdf>.

255 Boulle and Field, *Mediation in Australia* (n 27) 51–3; King et al (n 196) 5–6.

256 Boulle and Field, *Mediation in Australia* (n 27) 53–4; Boulle, *Mediation: Principles, Process, Practice* (n 71) 28–9, 81–2.

257 See, eg, *Yoseph v Mammo* [2002] NSWSC 585, [10] ('*Yoseph*'); *Frost v Wake Smith and Tofields Solicitors* [2013] EWCA Civ 1960, [37].

258 Boulle, *Mediation: Principles, Process, Practice* (n 71) 41.

259 Ibid 39, citing *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, [35] (Einstein J) ('*Idoport*').

260 *Yoseph* (n 257) [10] (Barrett J).

261 Boulle, *Mediation: Principles, Process, Practice* (n 71) 39–40. See below Chapter II at 63.

262 See below Chapter II at 49.

263 See below Chapter II at 58.

264 See below Chapter II at 71.

265 See above n 216 and see below n 704.

266 For example, the facilitative-evaluative dichotomy: see below Chapter II at 61.

267 See above Chapter II at 32.

268 *Mediation Rules* (n 183) r 2; The Institute of Arbitrators & Mediator Australia, *Mediation Rules* (at 2007) r 1.

269 See, eg, *Hopeshore Pty Ltd v Melroad Equipment Pty Ltd* [2004] FCA 1445, [30] (Branson J) ('*Hopeshore*'); *Dorrian v Rushlyn Pty Ltd* [2010] FMCA 787, [9]–[10] (Lindsay FM) ('*Dorrian*'); *Winters v Fogarty* [2017] FCA 51, [46] (Bromberg J); *Ku-ring-gai Council* (n 184) [39] (McDougall J). See also *Australian Timeshare and Holiday Ownership Council Ltd v ASIC* [2008] AATA 62, [304] (Deputy President Forgie).

and conciliation, as an advisory process. NADRAC described this as the 'conciliation-mediation distinction'.[270] According to this distinction, mediation and conciliation sit alongside each other within the ADR spectrum.[271] The NMAS description of mediation is like the NADRAC description, as is the distinction between mediation and conciliation, which is referred to as the facilitative-advisory distinction.[272] The discussion that follows provides the foundation for exploring the way 'mediation' and 'qualified mediator' are defined in the Court's rules-based framework.[273]

Similar to the debates regarding mediation,[274] there is no single settled definition or description of 'conciliation' and 'considerable doubt' exists about its ordinary meaning.[275] The primary distinction between mediation and conciliation relate to 'more interventionist' roles and advisory/evaluative functions historically attributed to conciliators.[276] The Australian Dispute Resolution Advisory Council ('ADRAC'), the independent body whose heritage is linked to NADRAC,[277] undertook research into the meaning of conciliation in two discussion papers. It acknowledged that mediation and conciliation share common features but are separate and distinct processes,[278] and though referred to in an array of statutes, remains a poorly understood form of ADR.[279]

Conciliation has a unique history in Australia including a constitutional pedigree[280] and one of its distinctive features is its statutory origin.[281] Historically, conciliation has operated predominantly in statutory contexts.[282] Conciliation functions are entrusted to specialist 'regulatory' public entities.[283]

Conciliators in statutory contexts are customarily public officials, who possess subject-matter expertise and actively encourage agreements which accord with the range of outcomes permitted by the applicable regulatory framework.[284] In some contexts, conciliators provide advice and exercise quasi-determinative functions such as issuing binding directions, making recommendations and report on disputant participation.[285] This is indicative of a more 'robust' level of intervention than mediation.[286] The discourse during conciliation is predominantly rights-based.[287] Conciliation

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270 *Dispute Resolution Terms* (n 17) 3.

271 See above Chapter II at 28.

272 Alexander, 'Realities of Mediation Practice' (n 177) 126.

273 See below Chapter III.

274 See above Chapter II at 30.

275 See generally 'Conciliation' (n 232) 35–6; Boulle and Field, *Law and Practice* (n 78) 65; Spencer and Hardy (n 231) 313; Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 85.

276 See, eg, *Dispute Resolution Terms* (n 17) 3; *Your Guide to Dispute Resolution* (n 176) 15; Sourdin, *Alternative Dispute Resolution* (n 75) 194–7; King et al (n 196) 114.

277 'About Us', *Australian Dispute Resolution Advisory Council* (Web Page) <https://www.adrac.org.au>.

278 Australian Dispute Resolution Advisory Council, *Conciliation: Connecting the Dots* (Final Report, November 2021) iii, iv, ix, x, 3, 9 ('*Connecting the Dots*'); 'Conciliation' (n 232) xii, 13, 30–1. See also Boulle and Field, *Law and Practice* (n 78) 68.

279 *Connecting the Dots* (n 278) ix, 1; 'Conciliation' (n 232) xi, 1.

280 See, eg, *Australian Constitution* s 51(xxxv). See also *Commonwealth Conciliation and Arbitration Act 1904* (Cth), discussed in *R v Gough; Ex Parte Key Meats Pty Ltd* (1982) 148 CLR 582, [14].

281 *Connecting the Dots* (n 278) iii, 1, 4, 5; 'Conciliation' (n 232) xiii, 5, 23, 25, 51–2.

282 See, eg, 'Conciliation' (n 232) 24–5, app 7. See generally Rosalie Poole, 'Facilitating Systemic Outcomes through Anti-Discrimination Conciliation and the Role of the Conciliator in this Quest' (2016) 27(1) *Australasian Dispute Resolution Journal* 49; Chris Provis, 'Mediation and Conciliation in Industrial Relations: Reflections from Australia' (1997) 21(4) *Labor Studies Journal* 81.

283 *Connecting the Dots* (n 278) 5, 18, 20; 'Conciliation' (n 232) 23–31, 37, 42.

284 *Connecting the Dots* (n 278) 4–5, 8, 10, 17–20, 22–4, 26; 'Conciliation' (n 232) xii, 27, 29–31, 51; Boulle and Field, *Mediation in Australia* (n 27) 151. See also n 1240.

285 *Connecting the Dots* (n 278) 19, 29; 'Conciliation' (n 232) xii, 28, 30–1. See, eg, 'Conciliation Process Model', *Administrative Appeals Tribunal* (Web Page) <https://www.aat.gov.au/steps-in-a-review/freedom-of-information-foi/conciliation>. See also Chapter VII at 229.

286 See, eg, *Connecting the Dots* (n 278) 26; 'Conciliation' (n 232) 28, 30; Boulle and Field, *Mediation in Australia* (n 27) 1, 150–51, 373. But see *Construction, Forestry, Mining and Energy Union* (n 173) [16]–[27].

287 *Connecting the Dots* (n 278) 28–9; 'Conciliation' (n 232) 40, 42.

within statutory frameworks usually has investigative and advisory stages not featured in facilitative procedures.[288] Unlike mediators, conciliators have no institutional peak body or national standards to follow.[289]

Though much ink has been spilt over the conciliation-mediation distinction, 'mediation' and 'conciliation' are used interchangeably and inconsistently, with their differences, and the roles and functions of their respective interveners, rarely delineated.[290] Some statutes 'bundle' conciliation with other ADR processes and do not distinguish between them nor do they identify the factors which the entity takes into account in electing to pursue one form of ADR over another.[291] Some legislation and court rules utilise 'mediation' as an all-purpose term [292] encompassing 'conciliation'.[293]

Mediation purists maintain that 'facilitative' mediation is the 'pure' or 'authentic' mediation[294] and posit that 'mediation' and 'conciliation' are binary and mutually exclusive. Conversely, pragmatists argue mediation and conciliation are synonymous.[295] They argue that introducing arbitrary classifications create confusion and inhibit the inherent flexibility of the process, encompassing disputant choice for 'hands on' approaches involving the provision of 'non-binding expressions of opinion or suggestions'.[296] Furthermore, they argue that mediators conducting blended processes also perform interventionist roles and 'context, legislative intent and client expectations' are more important than attempts to distinguish conciliation from mediation.[297] Some judicial commentary denotes uncertainty regarding the extent of the importance and 'meaningful difference' between these two processes.[298] The terms 'mediator', 'mediation', 'conciliator' and 'conciliation' are used interchangeably in some case law.[299]

The debates regarding the conciliation-mediation distinction reveal the potential for uncertainty and expectation gaps while highlighting the potential for gaps between theory and practice.[300]

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288 Boulle and Field, *Law and Practice* (n 78) 68.

289 See also *Connecting the Dots* (n 278) xii, 17, 19, 34; 'Conciliation' (n 232) 48.

290 *Connecting the Dots* (n 278) 17; *Dispute Resolution Terms* (n 17) 3; *The Resolve to Resolve* (n 170) 39; Boulle and Field, *Mediation in Australia* (n 27) 34, 150–51; 'Conciliation' (n 232) 1, 24.

291 *Connecting the Dots* (n 278) 19; 'Conciliation' (n 232) 28.

292 Boulle and Field, *Law and Practice* (n 78) 67.

293 See, eg, *Commercial Arbitration Act 2011* (SA) s 27D(8); *District Court Civil Rules 2006* (SA) r 4 (definition of 'mediation'); *Supreme Court Civil Rules 2006* (SA) r 4 (definition of 'mediation'); *Alternative Dispute Resolution Act 2001* (Tas) s 3(2) (definition of 'mediation'); *Magistrates Court (Civil Division) Rules 1998* (Tas) r 3. See also *NMAS Review 2020–2022: Findings and Recommendations* (n 232) 15, 28. But see below Chapter III at 95. See also Chapter VII at 215–6.

294 See generally, Jane Kidner, 'The Limits of Mediator "Labels": False Debate between "Facilitative" versus "Evaluative" Mediator Styles' [2011] (30) *Windsor Review of Legal and Social Issues* 167, 175; E Patrick McDermottt and Ruth Obartt, '"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9(1) *Harvard Negotiation Law Review* 75, 108; Chris Guthrie, 'The Lawyer's Philosophical Map and the Disputants' Perceptual Map: Impediments to Facilitative Mediation and Lawyering' (2001) 6(1) *Harvard Negotiation Law Review* 145, 187; Kimberlee K Kovach and Lela P Love, 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3(1) *Harvard Negotiation Law Review* 71, 96 ('Mapping Mediation'); Carrie Menkel-Meadow, 'When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals' (1997) 44(6) *University of California Law Review* 1871, 1887. See also above Chapter II at 65.

295 See, eg, Street, *Bar Practice Course* (n 32) 7; *Model Provisions* (n 170) viii, 6.

296 Street, *Bar Practice Course* (n 32) 9.

297 Boulle and Field, *Mediation in Australia* (n 27) 12–13, 381.

298 See eg, *Dorrian* (n 269) [13] (Lindsay FM). See also Chapter VII at 215–6.

299 *AWA Ltd v Daniels* (Supreme Court of New South Wales, Rogers CJ, 24 February 1992) [5] ('*AWA 24/02/1992 Judgment*'); *Morrow v Chinadotcom Corporation* [2001] NSWSC 209, [44] (Barrett J) ('*Morrow*'); *Lee v Loi* [2010] QSC 149, 2 (Fryberger J) ('*Lee*'). See also *Hopcroft v Olsen* (Supreme Court of South Australia, Perry J, 21 December 1998) [33] ('*Hopcroft*').

300 See below Chapter V and Chapter VI. See also *Connecting the Dots* (n 278) 33.

Having provided an introduction to what mediation 'is', its core features and values, and how it is different from conciliation I now introduce the context for this thesis: court-connected mediation. The fact that court-connected mediation occurs in the context of a legal dispute distinguishes it from other mediation in several ways.

There are various mediation contexts comprising Aboriginal, commercial, community, family, human rights, industry bodies, industrial relations, employment and workplace and victim-offender.[301] Context has an impact upon the expectations and understandings of mediation users, which may differ in court-connected mediation, which involves mediating 'within the shadow of the law'.[302]

2 *Court-Connected Mediation and the 'Shadow of the Law'*

'Court-connected' mediation describes a process in which disputants within the ambit of a court or tribunal's jurisdiction are encouraged, voluntarily referred, or ordered to mediation.[303] Mediation programs have existed in private and public spheres in Australia since the 1970s[304] and mediation pilot programs were trialled in numerous Australian courts and tribunals during the 1980s and 1990s.[305] Mediation has become 'connected' to courts and tribunals at the Commonwealth, State and Territory levels.[306] Since the mid 2000s all Australian courts and tribunals have referred matters for dispute resolution processes described generally as 'mediation'.[307]

Mediation within the court-connected context tends to be regulated by legislation, court rules, practice directions, referral orders and case law, which purport to promote certainty, consistency, and accountability in practice.[308] However, there is no standardised or consistent definition of mediation used in the Australian court-connected context, which echoes the earlier discussion. A variety of different approaches exist, some broader or narrower than others.[309] Some legislation and court rules broadly define mediation as a structured *without prejudice* negotiation process, facilitated by an impartial mediator who assists disputants resolve their disputes.[310] Broad

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301 Boulle and Field, *Mediation in Australia* (n 27) 13–29, 35.

302 See, eg, Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950; Melvin Aron Eisenberg, 'Private Ordering through Negotiation: Dispute Settlement and Rulemaking' (1976) 89(4) *Harvard Law Review* 637.

303 See, eg, Boulle, *Mediation: Principles, Process, Practice* (n 71) 560; Boulle and Field, *Law and Practice* (n 78) ch 10; Spencer and Hardy (n 231) chs 4, 12; Sourdin, *Alternative Dispute Resolution* (n 75) chs 3, 8; Buth (n 81); John Woodward, 'Court Connected Dispute Resolution: Whose Interests are Being Served?' (2014) 25(3) *Australasian Dispute Resolution Journal* 159; Tania Sourdin, 'Making an Attempt to Resolve Disputes before Using Courts: We All Have Obligations' (2010) 21(4) *Australasian Dispute Resolution Journal* 225.

304 See generally Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 6th ed, 2019) 122; David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (LawBook, 2005) 3–6.

305 See, eg, Michael Black, 'The Courts, Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia' (1996) *Australian Dispute Resolution Journal* 138; Bridget Sordo, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial' (1994) 5(1) *Australian Dispute Resolution Journal* 62.

306 See, eg, Hardy and Rundle (n 39) 262–381.

307 See, eg, Sourdin, *Alternative Dispute Resolution* (n 75) ch 1; Boulle and Field, *Law and Practice* (n 78) 407–10; National Alternative Dispute Resolution Advisory Council, *Who Can Refer To, Or Conduct, Mediation?: A Compendium of Australian Legislative Provisions Covering Referral to Mediation and Accreditation of Mediators* (August 2004).

308 Boulle and Field, *Mediation in Australia* (n 27) 279, 283. But see below Chapter VII at 205.

309 *The Resolve to Resolve* (n 170) 40–5; Boulle and Field, *Mediation in Australia* (n 27) 4; Boulle, *Mediation: Principles, Process, Practice* (n 71) 17–18.

310 See, eg, *Court Procedures Act 2004* (ACT) s 52A; *Court Procedures Rules 2006* (ACT) r 1176(1); *Civil Procedure Act 2005* (NSW) s 25; *Civil Proceedings Act 2011* (Qld) s 40; *District Court Civil Rules 2006* (SA) r 4 (definition of 'mediation'); *Supreme Court Civil Rules 2006* (SA) r 4 (definition of 'mediation'); *Alternative Dispute Resolution Act 2001* (Tas) s 3(2) (definition of 'mediation'). See also *The Leasing Centre (Aust) Pty Ltd v Rollpress Properties Group Pty Ltd* [2010] NSWSC 877 [31] (Barrett J); *Brown v Rice* [2007] EWHC 625 (Ch), [13] (Mr Stuart Isaacs QC J) ('*Brown*').

definitions encompass a variety of *procedures* and *practices* that promote flexibility and some blur the conciliation-mediation distinction.[311]

Court-connected mediation embodies a partnership between two distinct social institutions – mediation and the judicial system – each of which has its own history, traditions and norms and is built upon different ideologies or moral visions regarding dispute resolution.[312] Mediation and courts arguably serve two masters: private disputants, on the one hand, and public 'justice'[313] – whether substantive, procedural, social or 'access to'[314] – on the other. I discuss some of these purposes below.

Tensions exist when connecting mediation, a consensual and non-adversarial process, to the adversarial court context, referred to as the 'dilemma of court-connection'.[315] For example, tensions between privacy, confidentiality and privilege and public justice.[316] The 'fundamental rule of the common law' is that the administration of justice must occur in open court[317] and 'that court proceedings should be subjected to public and professional scrutiny'.[318] In contrast, the private and confidential nature of mediation prevents them from being open to scrutiny.[319] Provisions regarding mediator immunity from prosecution,[320] common in legislation,[321] further bolster this tension.[322]

Furthermore, certain characteristics feature in court-connected mediation that do not feature or are less prevalent in non-court-connected contexts. These characteristics, and others, have led authors to comment upon the 'institutionalisation' or 'legalisation' of mediation and contend that court-connected mediation has adopted litigation features including adversarialism, rights-focus and lawyer control.[323]

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311 See above Chapter II at 35. See also Chapter VII at 216.

312 Dorothy J Della Noce, Joseph P Folger and James R Antes, 'Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection' (2002) 3(1) *Pepperdine Dispute Resolution Journal* 11, 16, 17, 20 ('Assimilative, Autonomous, or Synergistic Visions').

313 See, eg, Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) ch 2.

314 See below Chapter II at 50.

315 See, eg, Della Noce, Folger and Antes, 'Assimilative, Autonomous, or Synergistic Visions' (n 312) 16; Francis Regan, 'Dilemmas of Dispute Resolution Policy' (1997) 8(1) *Australian Dispute Resolution Journal* 5; James J Alfini, 'Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?' (1991) 19(1) *Florida State University Law Review* 47, 75 (''Is This the End of "Good Mediation"?').

316 See below Chapter III at 103.

317 *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476–7 (McHugh JA, Glass JA agreeing).

318 *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46, 60 [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

319 Mary Walker, 'Guidelines for Lawyers in Mediations' (2007) 9(8) *ADR Bulletin* 150.

320 See, eg, Robyn Carroll, 'Mediator Immunity in Australia' (2001) 23(2) *Sydney Law Review* 185, 187.

321 See, eg, *Civil Procedure Act 2005* (NSW) s 33; *Supreme Court Act 1979* (NT) s 83A(9); *Civil Proceedings Act 2011* (Qld) s 52; *Supreme Court Act 1935* (SA) s 65(2); *District Court Act 1991* (SA) s 32(2); *Supreme Court Act 1935* (WA) s 70.

322 See, eg, *Magistrates Court Act 1991* (SA) s 27(2) ('*the Act*'). See also Boulle and Field, *Mediation in Australia* (n 27) 363–4.

323 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 168, 202; Olivia Rundle, 'Lawyers' Perspectives on "What is Court-Connected Mediation For?"' (2013) 20(1) *International Journal of the Legal Profession* 33; Julie Macfarlane and Michaela Keet, 'Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program' (2005) 42 (3) *Alberta Law Review* 677, 692; Michael Redfern, 'Capturing the Magic: The Analytical Factor' (2000) 11(4) *Australasian Dispute Resolution Journal* 254, 259; Bobette Wolski, 'On Mediation, Legal Representatives and Advocates' (2015) 38(1) *University of New South Wales Law Journal* 5. But see Julie MacFarlane, 'Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation' [2002] (2) *Journal of Dispute Resolution* 244, 297–8 ('Culture Change?'); Craig A McEwen, Nancy H Rogers and Richard J Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79(6) *Minnesota Law Review* 1317, 1385,

Furthermore, court-connected mediation is usually conducted within a court, either in person or by teleconference, implying the court's 'official endorsement',[324] which may impact upon perceptions of the legitimacy, authority and formality of this social institution. Lawyers, disputants and the public generally perceive mediators in court-connected programs as court representatives[325] with 'legal authority'.[326]

I discuss five particular characteristics that feature in court-connected mediation that are less prevalent in non-court-connected contexts that may not involve mediating 'in the shadow of the law' below. This discussion provides the foundation to the debates relating to mediation's *purpose*,[327] particularly as the characteristics generate tensions with some of mediation's core values.[328] The discussion also provides the foundation to the debates relating to the four practice models[329] and the debates relating to the procedural characteristics that are common in court-connected mediation.[330]

(a) Mediating Legally Defined 'Causes of Action' Rather than 'Conflict'

Although the terms 'conflict' and 'disputes' are used interchangeably in the NMAS,[331] and within the literature,[332] I contend that they differ both in scope and application, particularly within the court-connected context. 'Conflict' broadly encompasses differences, difficulties, disputes or causes of disharmony or tensions and includes four types: interpersonal, intrapersonal, intergroup and intragroup.[333] Conversely, 'dispute' is defined in a narrower sense by positions, demands, legal rights and responsibilities.[334]

Courts do not have all-embracing jurisdiction to adjudicate causes of disharmony, tensions, or 'conflicts' in the abstract. They are venues to determine legal disputes against legally defined criteria.

To commence legal action, 'conflict' must develop into a 'legal dispute' and be artificially reduced to a legal cause of action;[335] a legally recognised 'wrong', available at common law, equity or under

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1368; Craig A McEwen, Lynn Mather and Richard J Maiman, 'Lawyers, Mediation, and the Management of Divorce Practice' (1994) 28(1) *Law and Society Review* 149, 161.

324 Elizabeth Ellen Gordon, 'Why Attorneys Support Mandatory Mediation' (1999) 82(5) *Judicature* 224, 226; Della Noce, Folger and Antes, 'Assimilative, Autonomous, or Synergistic Visions' (n 312) 22.

325 Wayne Brazil, 'Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts' [2000] (1) *Journal of Dispute Resolution* 11, 24 ('A View from the Courts').

326 Nancy A Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79(3) *Washington University Law Quarterly* 787, 792, 833 ('Making Deals in Court-Connected Mediation').

327 See below Chapter II at 48.

328 See above Chapter II at 33–5.

329 See below Chapter II at 63.

330 See below Chapter II at 79.

331 See, eg, National Mediator Accreditation System, *Approval Standards* (at September 2007) ss 1(4), 2(2)(d); National Mediator Accreditation System, *Practice Standards* (at September 2007) ss 1(4), 2(5); *Practice Standards* (n 222) s 2.1.

332 Burton argues that 'disputes' involve negotiable interests whereas 'conflicts' are concerned with non-negotiable ontological human needs that cannot be compromised: see generally John W Burton, 'Conflict Resolution as a Political Philosophy' in Dennis JD Sandole and Hugo van der Merwe (eds), *Conflict Resolution Theory and Practice: Integration and Application* (Manchester University Press, 1993) 55, 55. But see John W Burton, *Conflict: Resolution and Provention* (Macmillan, 1990); John W Burton, 'Conflict Provention as a Political System' (2001) 6(1) *International Journal of Peace Studies* 23.

333 See, eg, Roy Lewicki, Bruce Barry and David Saunders, *Essentials of Negotiation* (McGraw Hill Education, 6th ed, 2016) 19; Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (Jossey-Bass Publishers, 1984) 19.

334 See, eg, Alexander, 'Understanding Practice' (n 57) 102. See also *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726; *Ellerine Brothers Pty Ltd v Klinger* [1982] 1 WLR 1375.

335 See, eg, Duffy and Field (n 35) 12–13; See also Boulle and Field, *Mediation in Australia* (n 27) 170–4, 307.

statute that creates a right to sue with a corresponding remedy.[336] Consequently, 'conflict' without a *prima facie* basis in law or in equity does not fall within the scope of a court's jurisdiction.[337]

Many 'conflicts' do not develop into legal disputes because disputants, though feeling aggrieved, do not have a 'legally' recognisable claim.[338] Most civil disputes are addressed outside of the legal system by the 'traditional methods' of negotiation, concession, abandonment or avoidance.[339] Of those matters brought to lawyers, a fraction commence proceedings, fewer reach full adjudicated hearing, and even fewer culminate in final judgment.[340]

Different processes exist outside the court context for counselling and therapy. Whilst mediation, counselling and therapy can share techniques, fundamental differences exist regarding the nature of assistance sought and intervention objectives.[341] Mediation addresses 'the practical dimensions of disputes' and seeks 'agreement', counselling supports people experiencing personal/interpersonal issues and seeks 'adjustment', whereas therapy treats clinically diagnosed 'disorders' seeking a 'cure'.[342] However, there is overlap between counselling and transformative mediation addressing causes and sources of conflict with its focus on personal change or acceptance.[343]

The conflict vis-à-vis legal disputes distinction reflects the distinctive nature of court-connected mediation and its focus upon the resolution of legal disputes rather than interpersonal/intrapersonal 'conflict'. It is relevant to the Court's rules-based framework[344] and to the empirical data regarding *purpose*[345] and the mediator's role and functions.[346]

(b) Narrowly Defined Legal Problems Rather than Broader Interests

The 'problems' in 'matters' or 'proceedings' in common law courts are required to be narrowly defined in pleadings,[347] which restrict disputes to their legal elements.[348] Accordingly, some of the broader and more complex dimensions of 'conflict', deemed legally 'irrelevant', are not considered for legal purposes.[349]

Despite this, legal disputes comprise non-legal elements including commercial, relational and emotional.[350] As legal and non-legal elements cannot always be easily separated, one advantage of mediation over litigation, touted by mediation advocates, is that discussions are not restricted to rights-based matters but can focus on underlying disputant needs and interests.[351] The potential to that mediation affords disputants to discuss and explore broader considerations, including business,

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336 *Ashby v White* (1703) 2 Ld Raym 938, 953; 92 ER 126 (Holt CJ), citing the Latin maxim *ubi jus ibi remedium* (where there is violation of a right, there is a remedy).

337 See below Chapter III at 96.

338 Mnookin, Peppet and Tulumello (n 3) 99–100.

339 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 202; John Wade, 'Current Trends and Models in Dispute Resolution: Part I' (1998) 9(1) *Australian Dispute Resolution Journal* 59, 60.

340 See, eg, Duffy and Field (n 35) 10; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, September 2014) vol 1, 384; Melinda Shirley, 'Breach of an ADR Clause: A Wrong without a Remedy' (1991) 2(1) *Australian Dispute Resolution Journal* 117, 118.

341 Folberg and Taylor (n 333) 28–36.

342 'ADR Terminology' (n 169) 19–20, 31.

343 Boulle and Field, *Mediation in Australia* (n 27) 163.

344 See below Chapter III at 96–7.

345 See below Chapter IV at 117 and 120.

346 See below Chapter V at Part B.

347 See also Chapter III at 96.

348 Leonard L Riskin, 'Mediator Orientations, Strategies and Techniques' (1994) 12(9) *Alternatives to the High Cost of Litigation* 111, 111.

349 Boulle and Field, *Mediation in Australia* (n 27) 170–1.

350 See, eg, Riskin, 'A Grid for the Perplexed' (n 208) 18–23. See also Chapter IV at 117 and 120.

351 See below Chapter II at 51.

personal/professional/relational and/or community interests,[352] despite what is narrowly defined in pleadings, has received judicial recognition.[353] However, like the narrow litigation focus, some literature suggests the 'problems' in court-connected mediation, and available remedies, remain narrowly defined.[354]

Narrow problem definition is relevant to the discussion of practice models. It is more prevalent in settlement and advisory/evaluative mediation undertaken by lawyer-mediators and focused upon rights-based discourse.[355] It is also linked to limited direct disputant participation and lawyer control,[356] explored in the next part of the discussion. It is relevant to the Court's rules-based framework[357] and features in the empirical data.[358]

(c) Limited Direct Disputant Participation and Dominance of Lawyer Control

ADR proponents argue that ADR processes offer disputants more than flexible, efficient, effective informal and private approaches but also provide for active disputant involvement in both process and outcome.[359] Research suggests disputants prefer the opportunity to participate directly during mediation, [360] in contrast to rights-based, advisory, exclusionary approaches, or Shuttle Negotiation,[361] which may increase satisfaction and enhance perceptions of fairness, regardless of outcome.[362]

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352 See, eg, Riskin, 'A Grid for the Perplexed' (n 208) 18–23; *Guidelines for Lawyers in Mediations* (n 40) r 5.

353 See, eg, *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd* [2014] EWHC 3148 (TCC), [69] (Ramsey J) ('*Northrop Grumman Mission Systems Europe*'); *Subway Systems Australia* (n 76) [5] (Croft J); *Sweeney* (n 77) [26] (Long DCJ); *AWA Ltd v Daniels* (Supreme Court of New South Wales, Rolfe J, 18 March 1992) [6] ('*AWA 18/03/1992*').

354 See, eg, Riskin and Welsh (n 51) 864; Leonard L Riskin, 'Who Decides What? Rethinking the Grid of Mediator Orientations' (2003) 9(2) *Dispute Resolution Magazine* 22, 22 ('Rethinking the Grid of Mediator Orientations'); Riskin, 'Mediator Orientations, Strategies and Techniques' (n 348) 114; Rundle, 'Court-Connected Mediation Practice' (n 38) 251–4.

355 See below Chapter II at 64–5.

356 See, eg, Rundle, 'Court-Connected Mediation Practice' (n 38) 288–9, 432.

357 See below Chapter III at 96.

358 See below Chapter IV at 118, 120–1 and 129 and Chapter V at 144 and 150.

359 Sander and Goldberg (n 107) 53; Jean R Sternlight, 'Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting' (1999) 14(2) *Ohio State Journal on Dispute Resolution* 269, 343.

360 See, eg, Tamara Relis, *Perceptions of Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge University Press, 2009) 142; Judith Resnik, 'Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement' [2002] (1) *Journal of Dispute Resolution* 155 ('Mediating Preferences'); Marie Delaney and Ted Wright, *Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (Report, Law Foundation of New South Wales, January 1997); Reich (n 33) 186–96; Nancy A Welsh, 'Stepping Back through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value' (2004) 19(2) *Ohio State Journal on Dispute Resolution* 573, 619 ('Stepping Back through the Looking Glass'); Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 106; Louise Senft and Cynthia Savage, 'Alternative Dispute Resolution in the Courts: Progress, Problems, and Possibilities' (2003) 108(1) *Penn State Law Review* 327.

361 Tania Sourdin and Nikola Balvin, 'Mediation Styles and Their Impact: Lessons from the Supreme Court and County Courts of Victoria Research Project' (2009) 20(3) *Australasian Dispute Resolution Journal* 142, 142, 151–2; Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iv. See below Chapter II at 77. See also Chapter VII at 232 and Chapter VIII at 245.

362 See, eg, Kathy Douglas and Jennifer Hurley, 'The Potential of Procedural Justice in Mediation: A Study into Mediators' Understandings' (2017) 29(1) *Bond Law Review* 5; Rebecca Hollander-Blumoff and Tom Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] (1) *Journal of Dispute Resolution* 1; Welsh, 'Making Deals in Court-Connected Mediation' (n 326); Tom Tyler, 'Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform' (1997) 45(4) *American Journal of Comparative Law* 871, 888; E Allan Lind et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (Rand, 1989); E

Despite the importance of disputant participation,[363] diversity exists regarding the degree to which disputants directly participate in court-connected mediation.[364] Some case law indicates discussions are carried out by or in the presence of disputants, rather than by their lawyers, with disputants 'encouraged to confer'.[365] Some studies suggest lawyers value active disputant participation, under their supervision,[366] in contrast to others who actively discourage it.[367] Some also contend disputants do not want to actively participate, preferring to abdicate responsibility to their lawyers.[368]

Some authors argue that court-connected mediation increasingly resembles a 'traditional' lawyer negotiation albeit with the presence of an intervener.[369] Studies from the United States suggest lawyers dominate mediation whilst disputants play minimal roles[370] and this is also reflected within Australian studies.[371] For example, Rundle found that mediators in the Supreme Court of Tasmania usually limit direct disputant participation and defer to lawyers regarding the extent of their participation.[372] Rundle's scholarship suggests lawyers are cautious of the 'dangers' of direct disputant participation such as 'losing control' over their clients, the need to maintain control over mediation content, and prefer client participation only when requested by them.[373]

Limiting disputant participation and lawyer control[374] is illustrative of a further tension between some of mediation's core values[375] and *purposes*.[376] It also highlights a tension between those

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Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum, 1988). See below Chapter II at 50 and 56.

363 Delaney and Wright (n 360); Susan E Raitt et al, 'The Use of Mediation in Small Claims Courts' (1993) 9(1) *Ohio State Journal on Dispute Resolution* 55; Roselle L Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641 ('Court-Connected Mediation in General Civil Cases'); John Lande, 'Toward More Sophisticated Mediation Theory' [2000] (2) *Journal of Dispute Resolution* 321, 323; Sourdin and Matruglio (n 81) 25, 66.

364 See below Chapter II at 58, 70, 72, 76, 79 and 82.

365 See, eg, *AWA 18/03/1992* (n 353) [6].

366 See, eg, Bobbi McAdoo and Nancy A Welsh, 'Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation' (2004–2005) 5(2) *Nevada Law Journal* 399, 420; McEwen, Rogers and Maiman (n 323) 1371; McEwen, Mather and Maiman (n 323) 167.

367 See, eg, MacFarlane, 'Culture Change?' (n 323) 275–6; James R Coben, 'Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map' (1998) 50(4) *Florida Law Review* 735, 740.

368 Coben (n 367) 741.

369 See, eg, Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 788; Coben (n 367) 740; Thomas B Metzloff, Ralph A Peeples and Catherine T Harris, 'Empirical Perspectives on Mediation and Malpractice' (1997) 60(1) *Law and Contemporary Problems* 107, 151.

370 See, eg, Riskin and Welsh (n 51) 875; Nancy A Welsh, 'Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically' [2008] (1) *Journal of Dispute Resolution* 45, 48 ('Looking Down the Road Less Traveled'); Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 801; Kovach and Love, 'Mapping Mediation' (n 294) 96; Gordon, 'Why Attorneys Support Mandatory Mediation' (n 324) 226, 227; Elizabeth Ellen Gordon, 'Attorneys' Negotiation Strategies in Mediation: Business as Usual?' (2000) 17(4) *Conflict Resolution Quarterly* 377, 383; Welsh, 'The Inevitable Price of Institutionalization?' (n 26); Welsh, 'Disputants' Decision Control in Court-Connected Mediation' (n 245); McEwen, Rogers and Maiman (n 323) 1375; Welsh, 'Stepping Back through the Looking Glass' (n 360) 577, 590.

371 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 44; Rundle, 'Are We Here to Resolve our Problem or Just to Reach a Financial Settlement?' (n 214) 13; Micheline Dewdney, 'Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them' (2006) 17(4) *Australasian Dispute Resolution Journal* 200, 206.

372 Rundle, 'Court-Connected Mediation Practice' (n 38) 244–5, 289, 341–2.

373 Olivia Rundle, 'Lawyers' Participation in Mediation and Professional Ethical Disposition' (2015) 18(1) *Legal Ethics* 46, 60; Olivia Rundle, 'Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 77, 81, 83 ('Barking Dogs'); Rundle, 'Court-Connected Mediation Practice' (n 38) 337–8, 340–1, 343–5, 348, 366. See also Woodward, 'Lawyer Approaches' (n 33) 2, 13, 15, ch 5.

374 Leonard L Riskin, 'The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. V. Joseph Oat Corp' (1991) 69(4) *Washington University Law Quarterly* 1059, 1105.

375 See above Chapter II at 33–5.

disputants who prefer to be actively involved, to speak and be 'heard,'[377] with lawyers who limit client participation to prevent adversely affecting potential future litigation.[378] Limiting disputant participation and lawyer control features in the empirical data.[379]

Whilst lawyers and mediators influence the way in which disputants participate, some research suggests difficulties exist regarding the extent to which mediators can 'control' lawyers.[380] Other research indicates lawyers attempt to control mediators and the process, making mediation lawyer-centric.[381] Certain difficulties experienced by mediators include interacting with the 'absent lawyer,' the 'legal takeover' and the 'passive legal representative.'[382] as well as lawyers who 'sabotage' mediation.[383] These findings expose tensions between lawyers and mediators,[384] and led authors to question whether the ADR 'movement' has been 'hijacked' by lawyers.[385] Tensions between mediators and lawyers feature in this thesis.[386]

Some studies also suggest that lawyers import an adversarial mindset into mediation, remaining within their strict legal 'representation' role.[387] Maintaining competitive, adversarial and rights-based styles engender an emphasis on positional bargaining, causing the values of self-determination, empowerment and interest-based problem-solving to disappear.[388] Given that much has been written regarding the roles and functions of lawyers,[389] I focus upon their understandings,

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376 See below Chapter II at 47.

377 See, eg, Relis (n 360) 142; Welsh, 'Stepping Back through the Looking Glass' (n 360) 619.

378 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 54. See also John Woodward, 'Exploring the Relationship between Confidentiality and Disputant Participation in Court-Connected Mediation' [2020] (15) *Newcastle Law Review* 53, 65.

379 See below Chapter IV at 118 and 120–1, Chapter V at 144 and Chapter VI at 185 and 192.

380 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) ix.

381 Jeff Trueman, 'Mediation in the World of Commercial Dispute Litigation: An Inside Look at the Challenges for Counsel, Mediators, and Insurance Claims Professionals' [2020] (63) *Washington University Journal of Law and Policy* 207, 208, 225.

382 Ruth Charlton, Micheline Dewdney and Geoff Charlton, *The Mediator's Handbook: Skills and Strategies for Practitioners* (Lawbook, 3rd ed, 2014) 333–5. See also Donna Cooper, 'Lawyers Behaving Badly in Mediations: Lessons for Legal Educators' (2014) 25(4) *Australasian Dispute Resolution Journal* 204.

383 See, eg, Roman Lifson, 'How to Sabotage a Mediation Nine Easy Steps', *dri Lawyers Representing Business* (Web Page, July 2022) <https://www.dri.org/publications/featured-article/2022/sabotage-mediation>; Mitchell Rose, 'How to Sabotage a Virtual Mediation: Another Impractical Guide for Lawyers', *Canadian Lawyer* (Web Page, February 2021) <https://www.canadianlawyermag.com/news/opinion/how-to-sabotage-a-virtual-mediation-another-impractical-guide-for-lawyers/338225>; Mitchell Rose, 'How to Sabotage a Mediation: An Impractical Guide for Lawyers', *Canadian Lawyer* (Web Page, May 2013) <https://www.canadianlawyermag.com/news/opinion/how-to-sabotage-a-mediation-an-impractical-guide-for-lawyers/269013>; Jeff Kichaven, 'Six Ways to Sabotage a Mediation', *International Risk Management Institute* (Web Page, September 2005) <https://www.irmi.com/articles/expert-commentary/six-ways-to-sabotage-a-mediation>.

384 Lisa Webley, 'Gate-Keeper, Supervisor or Mentor? The Role of Professional Bodies in the Regulation and Professional Development of Solicitors and Family Mediators Undertaking Divorce Matters in England and Wales' (2010) 32(2) *Journal of Social Welfare and Family Law* 119, 128.

385 Hensler, 'A Research Agenda' (n 80) 15; Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 797; Max Kimber, 'Have Lawyers Hijacked the Promise of Mediation?' (Seminar Paper, Australian Disputes Centre, 18 May 2017).

386 See below Chapter IV, Chapter V and Chapter VI. See also Chapter VII at 213, 220, 229 and 233–5 and Chapter VIII at 239.

387 See, eg, Chiara-Marisa Caputo, 'Lawyers' Participation in Mediation' (2007) 18(2) *Australasian Dispute Resolution Journal* 84, 84; Christine McCarthy, 'Can Leopards Change Their Spots? Litigation and Its Interface with Alternative Dispute Resolution' (2001) 12(1) *Australasian Dispute Resolution Journal* 35, 46; Welsh, 'The Inevitable Price of Institutionalization?' (n 26) 5.

388 Kathy Douglas, 'The Evolution of Lawyers' Professional Identity: The Contribution of ADR in Legal Education' (2013) 18(2) *Deakin Law Review* 315, 320–1 ('The Evolution of Lawyers' Professional Identity'); Field and Roy (n 35) 10.

389 See, eg, Rundle, 'Barking Dogs' (n 373); Olivia Rundle, 'Lawyers' Participation in Mediation and Professional Ethical Disposition' (2015) 18(1) *Legal Ethics* 46; Boulle and Field, *Mediation in Australia* (n 27)

expectations and experiences regarding the three themes, which I contend impact upon mediation dynamics, outcomes reached and affect disputant participation.[390]

(d) Compulsion to Mediate and Conduct Standards

Unlike in non-court-connected contexts, where disputants can occasionally simply 'walk away' from negotiations,[391] courts have the power to order litigants to mediate.[392] Some authors argue mediation is best conducted 'in the shadow of litigation', which provides the incentive and compulsion for unwilling disputants to 'come to the table',[393] despite research remaining inconclusive on whether compulsory referral affects settlement rates or disputant satisfaction.[394]

Whilst limited evidence exists regarding the necessary conditions for effective mediation,[395] some courts have expressed that disputants might benefit from mediation[396] and that some disputes, particularly where the costs of litigation are grossly disproportionate to the quantum in dispute, 'cry out' for it.[397]

A theme within the literature relates to matters being 'ripe for mediation',[398] which features in case law.[399] However, the absence of evidence-based criteria for referring or declining to refer

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116–24; Chris Phillips, 'Mediation Preparation and Approaches' (2017) 44(9) *Brief* 8; Lillian Corbin, Paula Baron and Judy Gutman, 'ADR Zealots, Adjudicative Romantics and Everything in Between: Lawyers in Mediations' (2015) 38(2) *University of New South Wales Law Journal* 492; Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediation at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758; Donna Cooper, 'Representing Clients from Courtroom to Mediation Settings: Switching Hats between Adversarial Advocacy and Dispute Resolution Advocacy' (2014) 25(3) *Australasian Dispute Resolution Journal* 150; Donna Cooper, 'The "New Advocacy" and the Emergence of Lawyer Representatives in ADR' (2013) 24(3) *Australasian Dispute Resolution Journal* 178; Hardy and Rundle (n 39); Caputo (n 387) 84; Ruth Chartlton 'Lawyers' Roles in Mediation: Whose Mediation is This Anyway?' (2007) 45(1) *Law Society Journal* 44; Anne Adargh and Guy Cumes, 'Lawyers in Mediation: Beyond the Adversarial System?' (1998) 9(1) *Australian Dispute Resolution Journal* 72; Sordo 'The Lawyer's Role in Mediation' (n 40); Laurence Street, 'Representation at Commercial Mediations' (1992) 2(1) *Australian Dispute Resolution Journal* 255.

390 See above Chapter I at 15. See below Chapter IV at 108 and 130, Chapter V at 132 and 167–9, Chapter VII at 170, 199, 202, Chapter VII at 205–6, 212 and Chapter VIII at 238.

391 Howard Raiffa, *The Art and Science of Negotiation* (Harvard University Press, 1982) 14.

392 See generally Michael Dawson, 'Non-Consensual Alternative Dispute Resolution: Pros and Cons' (1993) 4(1) *Australian Dispute Resolution Journal* 173; David Spencer, 'Mandatory Mediation and Neutral Evaluation: A Reality in New South Wales' (2000) 11(4) *Australasian Dispute Resolution Journal* 237, 251 ('Mandatory Mediation and Neutral Evaluation'); Richard Ingleby, 'Court Sponsored Mediation: The Case Against Mandatory Participation' (1993) 56(3) *Modern Law Review* 441; David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) ch 8. See below Chapter III at 96. See also McWilliam et al (n 30) 2–4, 14–15.

393 Henry Brown, 'Creating Confidence in Mediators and the Process: An Exploration of the Issues' (Conference Paper, Annual Mediation Symposium, 27 October 2010) 11; John Tyrril, 'Practical Commercial Mediation Issues' (1996) 6(46) *Australian Construction Law Newsletter* 31, 32.

394 Mack, *Criteria and Research* (n 80) 4, 47.

395 See, eg, ibid 5–14; Kathy Mack, 'Court Referral to ADR: The Legal Framework in Australia' (2005) 22(1) *Law in Context* 112.

396 See, eg, *Mills v Queensland* [2009] FCA 1431, [31]; *State Central Authority v Truman* [2009] FamCA 1175. See also *Swain-Mason v Reeves [No 2]* [2012] EWCA Civ 498, [64] (Davis LJ).

397 See, eg, *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, [53].

398 See, eg, Mack, *Criteria and Research* (n 80) 12, 40; Boulle, *Mediation: Principles, Process, Practice* (n 71) 320–4. See also Sourdin, *Alternative Dispute Resolution* (n 75) 579.

399 See, eg, *Idoport* (n 259) [27] (Einstein J); *Johnston v Johnston* [2004] NSWSC 497, [3] (Barrett J) ('*Johnston*'); *MM Constructions (Aust) Pty Ltd v Port Stephens Council [No 2]* [2010] NSWSC 242, [15] (Johnson J); *Welker v Rinehart [No 2]* [2011] NSWSC 1238, [51] (Brereton J); *Rinehart v Welker* [2012] NSWCA 95, [193]–[194] (Bathurst CJ).

'appropriate' matters to mediation has caused Australian court referrals to remain 'impressionist and inconsistent'.[400]

Some case law suggests courts ought be 'slow' to order mediation where a disputant, upon advice of their lawyers, demonstrates considered and adamant opposition that mediation will be costly and futile.[401] However, there is a body of case law for compulsory referrals[402] over objection, signifying a shift in judicial attitudes.[403] Notwithstanding this, precedent remains against compulsory mediation.[404]

The absence of a single list of criteria for the referral of 'appropriate' matters for mediation increase the potential for expectation gaps.[405] Varying levels of 'encouragement' to mediate likely impact upon disputant decision-making in having their action referred to mediation.[406]

Furthermore, unlike in non-court-connected contexts, legislation and court rules impose participation and conduct standards, for example, to participate and negotiate in 'good faith'.[407] The requirement to attend in good faith features in some guidelines[408] and industry rules.[409] Courts have the power to order indemnity costs where disputants fail to attend[410] and can take a failure to

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400 Boulle and Field, *Mediation in Australia* (n 27) 289.

401 *Kilthistle No.6 Pty Ltd (rec and mgr apptd) v Austwide Homes Pty Ltd* [1997] FCA 1383, [6] (Lehane J) ('*Kilthistle*'), cited in *Morrow* (n 299) [45]–[46] (Barrett J) and *Stevenson v Landon Pty Ltd* [2005] QDC 11, [19] (Newton DCJ) ('*Stevenson*') and *Southern Waste Resourceco Pty Ltd v Adelaide Hills Region Waste Management Authority [No 2]* [2019] SASC 191, [13] (Hinton J) ('*Southern Waste Resourceco*').

402 *Hopcroft* (n 299) [40]; *Barrett v Queensland Newspapers Pty Ltd* [1999] QDC 150, 9–10 (Samios DCJ); *Baulderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clarke Pty Ltd* [2000] SASC 159 (Perry J); *Waterhouse v Perkins* [2001] NSWSC 13, [100] (Levine J) ('*Waterhouse*'); *Dickenson v Brown* [2001] NSWSC 714, [5] (Bryson J); *Idoport* (n 259) [49] (Einstein J); *Higgins v Higgins* [2002] NSWSC 455, [15] (Austin J) ('*Higgins*'); *Yoseph* (n 257) [14] (Barrett J); *Singh v Singh* [2002] NSWSC 852, [3]–[4] (Hamilton J); *Browning v Crowley* [2004] NSWSC 128, [7] (Bryson J) ('*Browning*'); *Johnston* (n 399) [12] (Barrett J); *Azmin Firoz Daya v CNA Reinsurance Co Ltd* [2004] NSWSC 795, [15] (Einstein J) ('*Azmin Firoz Daya*'); *Unconventional Conventions Pty Ltd v Accent Oz Pty Ltd* [2004] NSWSC 1050, [6] (Hamilton J); *Facer v WorkCover Queensland* [2005] QDC 025, [19] (Tutt DCJ) ('*Facer*'); *Australian Securities and Investment Commission v Rich* [2005] NSWSC 489, [3], [17] (Austin J) ('*Rich*'); *Lidoframe Pty Ltd v New South Wales* [2006] NSWSC 1262, [10] (Campbell J); *New Idafe Inc v Barnard* [2007] NSWSC 1107, [19] (Brereton J) ('*Barnard*'); *Skalski v Brown* [2008] QDC 263, [12]–[18] (Kingham DCJ) ('*Skalski*'); *Oasis Fund Management v ABN Amro* [2009] NSWSC 967, [24] (McDougall J); *Lee* (n 299) 4 (Fryberger J); *Simic v LTH Investments (Qld) Pty Ltd* [2013] QDC 240, 14 (Irwin DCJ) ('*Simic*'); *Elford v Nolan* [2014] QDC 257, [49] (Durward SC DCJ); *Bissaker v Croft* [2014] NSWSC 1647, [43] (Wilson J); *Sweeney* (n 77) [30]–[31] (Long DCJ). See also Andrew Robertson, 'Compulsion, Delegation and Disclosure: Changing Forces in Commercial Mediation' (2006) 25(2) *Arbitrator and Mediator* 91, 92.

403 *Remuneration Planning Corp Pty Ltd v Fitton* [2001] NSWSC 1208, [3] (Hamilton J) ('*Fitton*'), cited in *Southern Waste Resourceco* (n 401) [21]–[27] (Hinton J).

404 See, eg, *Trelour v JH McDonald Pty Ltd* [2001] QDC 53, [17] (Robertson DCJ) ('*Trelour*'); *Blake v John Fairfax Publications* [2001] NSWSC 885, [19] (Levine J); *Harrison v Schipp* [2002] NSWCA 27, [22] (Mason P); *Australian Competition and Consumer Commission v Collagen Aesthetics Australia Pty Ltd* [2002] FCA 1134, [28] (Cooper J); *Harvey v Alecci* [2002] NSWSC 898, [29] (Einsten J); *Roy v Roy* [2004] NSWSC 463, [13] (Campbell J); *Cawthorne v Olsen* [2005] SASC 34, [15] (Perry J); *Stevenson* (n 401) [19] (Newton DCJ); *Lewis v Nortex Pty Ltd (in liq)* [2005] NSWSC 1127, [5] (Hamilton J); *Dimento v Dimento* [2007] NSWSC 420, [10] (Brereton J); *Meredith v Newman* [2012] QSC 136, 7 (Henry J); *Baldwin v Simala* [2014] QDC 21, [16] (Long SC, DCJ); *Matthews v The Tap Inn Pty Ltd* [2015] SADC 20, [26] (Slattery J); *Spina v Shimeld* [2017] QDC 303, [29] (Fantin DCJ).

405 See below Chapter VI at 174 and 176.

406 See below Chapter VI at 171–2. See also Chapter VII at 221.

407 Boulle and Field, *Mediation in Australia* (n 27) 113–16. See also Chapter III at 105 and VII at 209, 227 and 231.

408 See, eg, *Guidelines for Parties in Mediations* (n 40) rr 5, 9; *Guidelines for Lawyers in Mediations* (n 40) r 2; Law Society of New South Wales, *Dispute Resolution Kit* (December 2012) 22–5. See also Law Society of New South Wales, *Mediation and Evaluation Information Kit* (1 January 2008) 20–1 ('*NSW Information Kit*').

409 *Mediation Rules* (n 183) r 6.

410 See, eg, *Re Staway Pty Ltd (in liq) (rec apptd)* [2017] NSWSC 485, [15].

participate in good faith into account when awarding costs.[411] Mediators in some courts are required to certify that disputants have 'attempted' mediation.[412]

Additionally, debates continue about the meaning and achievability of 'voluntariness'.[413] Boulle and Field argue that *voluntary participation* has also lost its contemporary relevance,[414] as mediation in courts is often mandatory, 'soft mandatory' or 'presumptively mandatory', and is thus not 'authentically' voluntary.[415]

Voluntary participation is relevant to the empirical data when exploring whether referrals to mediation are party-driven, encouraged or ordered by the Court.[416]

(e) Lack of Creative Potential

Mediation is usually praised for its ability to enable disputants to craft flexible and creative outcomes,[417] reflecting mediation's *responsiveness* value.[418] The potential to achieve flexible, creative, consensual and 'non-legal' outcomes, which courts cannot order, has also received judicial attention.[419]

In contrast, research from the United States suggests only a small percentage of settlements in court-connected mediation produce 'creative, non-monetary settlements'.[420] Similarly, there was minimal recognition amongst lawyers in the Supreme Court of Tasmania regarding mediation's potential to increase the range of possible outcomes, with some reporting that the range of outcomes are limited to 'legally available' ones.[421]

Mediation's r*esponsiveness* value is relevant to the exploration of Stakeholder reports regarding mediation's *purpose*[422] and *practice*.[423]

Tensions exist when connecting mediation to the courts. The five particular characteristics that feature in court-connected mediation that may not feature or be less prevalent in non-court-connected contexts, reveal the potential for gaps between theory and practice. The discussion reinforces why it is productive to divide the analysis of mediation within the Court into the three

411 See eg, *Capolingua v Phyllum* (1991) 5 WAR 137; *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] 153 FLR 236; *Idoport* (n 259); *Western Australia v Taylor* (1996) 134 FLR 211.

412 See below Chapter III at 88–9.

413 Bobette Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15(3) *Australian Bar Review* 213, 214–15. See also Bronwen Gray, 'Mediation as a Post-Modern Practice: A Challenge to the Cornerstones of Mediations' Legitimacy' (2006) 17(4) *Australasian Dispute Resolution Journal* 208, 217.

414 Boulle and Field, *Mediation in Australia* (n 27) 54–8, 379.

415 Ibid 55–8; Alexander, 'Ten Verdicts on Court-Related ADR' (n 81) 11–12, 15.

416 See below Chapter IV at 171.

417 Riskin and Welsh (n 51) 869.

418 See above Chapter II at 35.

419 See generally *Coric v Grotto* [2007] NSWSC 1080, [18] (Bryson AJ) ('*Coric*'); *Addstead Pty Ltd (in liq) v Simmons [No 2]* [2005] SASC 25, [18] (Bleby J) ('*Simmons*'); *Hopeshore* (n 269) [31]–[32] (Branson J); *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [15] (Dyson LJ) ('*Halsey*'); *Dunnett v Railtrack Plc* [2002] EWCA Civ 303, [14] (Brooke LJ) ('*Dunnett*'); *Victorian Council for Civil Liberties* (n 76) [41]. See also McWilliam et al (n 30) 36–40, 59.

420 Peter N Thompson, 'Enforcing Rights Generated in Court-Connected Mediation: Tension between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice' (2004) 19(2) *Ohio State Journal on Dispute Resolution* 509, 568; Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 813; Metzloff, Peeples and Harris (n 369) 151.

421 Rundle, 'Court-Connected Mediation Practice' (n 38) 253.

422 See below Chapter IV.

423 See below Chapter V.

themes of *purpose*, *practice* and *procedure*.[424] It further provides context for the exploration of the Court's rules-based framework.[425]

I now turn to the first theme I will develop in the thesis.

B *The Varying Purpose(s) of Mediation*

There is no single settled purpose of mediation or a single definitive list of *purposes*.[426] A variety exist, largely context dependent,[427] with some more ideological than practical, others more qualitative than quantitative in nature.

I discuss a range purposes cited in the literature and have grouped them according to seven categories below.[428] These purposes fall along the ideology-practice continuum[429] and some feature in the six mediator functions specified in the NMAS ('the six mediator functions').[430] Some are more prominent in the empirical data than others.[431] I have also summarised descriptors used by some authors into table format to demonstrate the existence of the seven categories and to highlight some purposes featured within the four practice models.[432]

This discussion provides the foundation for an exploration of some purposes that dominate within court-connected mediation.[433] It also provides the foundation to debates regarding the four practice models discussed in the next part of the Chapter.[434]

Some authors argue that varying mediation purposes are interrelated and not mutually exclusive.[435] Conversely, others argue because different purposes are based upon different ideologies, they are incompatible and cannot be sought simultaneously.[436]

Certain purposes highlight tensions with mediation's core values.[437] For example, between satisfying *effectiveness* and *efficiency* objectives, on the one hand, and satisfying *self-determination*, *non-adversarialism* and *responsiveness* values, on the other.[438]

The varying *purposes* reveal the potential for uncertainty and expectation gaps, particularly as *purposes* may differ between mediation participants. Mediators' own understanding of mediation's *purpose* guides their understanding of what they 'can' and 'ought' to do during mediation.[439] Mediators' personal and professional values and philosophies also influence their conduct of

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424 See below Chapter IV, V and Chapter VI.
425 See below Chapter III.
426 Alexander, 'Understanding Practice' (n 57) 105–6.
427 Marian Roberts (n 43) 70.
428 See below Chapter II at 49.
429 See above Chapter II at 31.
430 *Practice Standards* (n 222) r 2.2(a)–(f).
431 See below Chapter V at 144.
432 Appendix E: Varying *Purposes* of Mediation According to Four Archetypical 'Models'.
433 See below Chapter II at 52.
434 See below Chapter II at 63.
435 Alexander, 'Ten Verdicts on Court-Related ADR' (n 81) 17.
436 Bush and Folger, *The Promise of Mediation* (n 204) 45, 228, 262–3.
437 See above Chapter II at 33–5.
438 See, eg, Bush and Folger, *The Promise of Mediation* (n 204) 260. See also Welsh, 'The Inevitable Price of Institutionalization?' (n 26) 5, 14.
439 Bush and Folger, *The Promise of Mediation* (n 204) 2, 19, 119, 215. Hardy and Rundle argue that purpose 'should drive practice': Hardy and Rundle (n 39) xix.

practices and procedures.[440] This reinforces my contention that *purpose* drives *practice* and *procedure*[441] and exemplifies that *purpose* is linked with the other two themes.[442]

1 *The Varying Purposes of Mediation*

Authors interchangeably use differing labels when describing varying mediation purposes, such as 'goals',[443] 'objectives',[444] 'purposes',[445] and 'stories'[446]. Many discussions regarding mediation purposes overlap with discussions concerning mediation's 'core'[447] and 'variable' features,[448] core values,[449] its uses – such as *scoping*, *dispute settlement*, *transactional*, *policy-making*, *conflict management* and *preventative* mediation[450] – and its private and/or public benefits.[451]

I use the broader term 'purpose' throughout this thesis to encompass what Boulle and Field describe as four mediation 'objectives' — *accessibility*, *effectiveness*, *efficiency* and *transformation of individual or societal relations*[452] — in addition to descriptions by others who utilise different labels to describe various mediation *purposes*.

(a) Effective and Efficient Delivery of Settlement

Some literature suggests the dominant purpose of mediation is to facilitate the effective and efficient delivery of settlements[453] or narrowing of issues in dispute.[454] This is reflected within mediation guidelines[455] and rules.[456]

Boulle and Field describe *effectiveness* as a multifaceted value that is quantitatively measured by 'settlement rates', though it also encompasses partly subjective measures relating to the quality of outcomes and the durability of agreements over time.[457] Conversely, they describe *efficiency* as a

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440 See, eg, Bush and Folger, *The Promise of Mediation* (n 204) 1, 232–3; Linda Fisher, 'What Mediators Bring to Practice: Process, Philosophy, Prejudice, Personality' (2000) 5(4) *ADR Bulletin* 60.

441 See above Chapter I at 13. See below Chapter IV at 113 and 125–30, Chapter V at 131 and 141–2, Chapter VI at 181, 192, 197 and 200 and Chapter VII at 208, 210 and 234.

442 See above Chapter I at 13.

443 See, eg, Lande, 'Toward More Sophisticated Mediation Theory' (n 363) 323; Robert P Burns, 'Some Ethical Issues Surrounding Mediation' (2001) 70(3) *Fordham Law Review* 691, 701; Rundle, 'Court-Connected Mediation Practice' (n 38) 367; Folberg and Taylor (n 333) 8.

444 See, eg, Alexander, 'Understanding Practice' (n 57) 105–6; Boulle and Field, *Mediation in Australia* (n 27) 60–5; Boulle, *Mediation: Principles, Process, Practice* (n 71) 28–9, 92–7.

445 Allport (n 44) 175–85, 198.

446 Bush and Folger, *The Promise of Mediation* (n 204) 9–21.

447 See above Chapter II at 33.

448 Ibid.

449 See above Chapter II at 34.

450 Boulle, *Mediation: Principles, Process, Practice* (n 71) 30–34. See also Boulle and Field, *Mediation in Australia* (n 27) 5, 143.

451 See, eg, Hardy and Rundle (n 39) 5–10; Bush and Folger, *The Promise of Mediation* (n 204) 18–22, 50–1, 79–82, 260.

452 Boulle and Field, *Mediation in Australia* (n 27) 60–5; Boulle, *Mediation: Principles, Process, Practice* (n 71) 289, 92–7. See also Boulle and Field, *Law and Practice* (n 78) ch 4.

453 Alexander, 'Understanding Practice' (n 57) 102, 106–7, 109; Bush and Folger, *The Promise of Mediation* (n 204) 19; See also Rundle, 'Court-Connected Mediation Practice' (n 38) 247, 255.

454 Spencer, 'Mandatory Mediation and Neutral Evaluation' (n 392) 251.

455 See, eg, *Guidelines for Parties in Mediations* (n 40) 4–8; *Guidelines for Lawyers in Mediations* (n 40) 3–7.

456 *Mediation Rules* (n 183) r 5.

457 Boulle and Field, *Mediation in Australia* (n 27) 62. See also Boulle and Alexander, *Skills and Techniques* (n 17) 16. See also Boyle's metaresearch into what makes an 'effective' mediator and her identification of 'simple' versus 'complex' effectiveness: Alysoun Boyle, 'What is an Effective or Good Mediator: Exploring Empirical Research on Mediator Attributes and Behaviours' (PhD Thesis, University of Newcastle, 2020) 1, ch 3. Boyle drew upon 47 empirical studies selected from a compilation of the American Bar Association Task Force on Mediator Techniques: American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (Report, American Bar Association, June 2017)

multifaceted value that operates at multiple levels: disputants, governments and courts and societal. It is usually measured by short-term quantitative indicators relating to the use and allocation of finite private and public resources to achieve time- and cost-effective dispute resolution.[458]

Both *effectiveness* and *efficiency* objectives closely align with advisory/evaluative and settlement mediation, though feature within facilitative mediation.[459] These two objectives feature prominently within the empirical data.[460]

(b) Accessibility and Procedural Fairness

Accessibility operates at two levels, denoting easy, direct, affordable, informal and understandable access to mediation services for disputants and greater public access within civil justice systems.[461] This value coincides with access to justice discourse,[462] and as Alexander argues, a key component in access to justice is providing a 'fair forum'.[463] There is overlap between this value and procedural fairness considerations, which pertain to disputants' experiences of a procedurally 'fair' process.[464] Procedural fairness is an important part of the NMAS.[465] I explore some of the debates relating to 'justice' within the court-connected mediation context below.

(c) Disputant Decision-making

The facilitation of disputant decision-making, which is a manifestation of self-determination, is promoted within the literature as one of mediation's primary purposes.[466]

Boulle argues that the broad term 'decision-making' best reflects reality than the frequently used terms: 'conflict resolution' and 'dispute settlement'. He argues that not all interpersonal/intrapersonal conflicts are 'resolved' by mediation, implying that the root of the problem has been addressed, the conflict has ended and been cognitively and/or emotionally

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<https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf>.

458 Boulle and Field, *Mediation in Australia* (n 27) 62–4.

459 See below Chapter II at 64–6.

460 See below Chapter IV, Chapter V and Chapter VI.

461 Boulle and Field, *Mediation in Australia* (n 27) 61, 211, 215; Boulle, *Mediation: Principles, Process, Practice* (n 71) 92. See also Bush and Folger, *The Promise of Mediation* (n 204) 11–13. But see Mary Anne Noone, 'The Disconnect between Transformative Mediation and Social Justice' (2008) 19(2) *Australasian Dispute Resolution Journal* 114.

462 See, eg, *Access to Justice Arrangements* (n 340) 384; Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice in Mediation within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528, 561.

463 See, eg, Alexander, 'Understanding Practice' (n 57) 106–7, 109, 112.

464 See, eg, Roselle L Wissler, 'Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences' (2011) 26(2) *Ohio State Journal on Dispute Resolution* 271, 301–2; Donna Shestowsky and Jeanne M Brett, 'Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study' (2008) 41(1) *Connecticut Law Review* 68; Steven L Blader and Tom R Tyler, 'A Four Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process' (2003) 29(6) *Personality and Social Psychology Bulletin* 747; Mack, *Criteria and Research* (n 80) 51–3; Jill Howieson, 'Procedural Justice in Mediation: An Empirical Study and a Practical Example' (2002) 5(7) *ADR Bulletin* 109; Wissler, 'Court-Connected Mediation in General Civil Cases' (n 363) 690; Deborah Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' (2002) 1(1) *Journal of Dispute Resolution* 81, 85–95 ('Challenging Mediation Ideology'); Tom R Tyler and E Allan Lind, 'Procedural Justice' in Joseph Sanders and Lee V Hamilton (eds), *Handbook of Justice Research in Law* (Kluwer Academic Publishers, 2001) 65, 69; Burns (n 443) 701; Menkel-Meadow, 'Repeat Players in ADR' (n 51) 61. See also Boulle and Alexander, *Skills and Techniques* (n 17) 16.

465 *Practice Standards* (n 222) ss 7, 10.1(c).

466 Folberg and Taylor (n 333) xi; Boulle and Field, *Mediation in Australia* (n 27) 8; Alexander, 'Understanding Practice' (n 57) 103–4, 106, 111; Christopher W Moore (n 180) 47.

accepted by disputants.[467] Conversely, 'settlement' can connote that disputants have to compromise, inferring notions of victory and defeat.

Disputant decision-making closely aligns with facilitative mediation, with its focus upon self-determination. It is promoted in the NMAS[468] and in mediation guidelines.[469]

(d) Satisfaction of Disputant Needs and Interests

Some suggest the overriding purpose of mediation is to satisfy disputant needs and interests,[470] whether substantive, procedural or psychological/relationship.[471]

The satisfaction purpose reflects the collaborative interest-based ('win-win') problem-solving method advanced by the seminal work by Fisher and Ury.[472] Its focus is to ensure disputants attack 'the problem, not the people'[473] and upon interests, not positions.[474]

Satisfaction of needs and interests, the basis of facilitative mediation,[475] is one of the six mediator functions.[476]

(e) Communication and Disputant Understanding

Some literature suggests that facilitating constructive communication and providing disputants the opportunity to re-establish or improve their communication is a crucial mediation purpose.[477] The 'cathartic effect' of having disputants 'listen to one another' has received brief judicial attention.[478]

Facilitating communication and disputant understanding is one of the six mediator functions[479] and closely aligns with facilitative and transformative mediation.

(f) Maintaining or Repairing Relationships

The opportunity for disputants to establish, retain or rectify relationships is also recognised within the literature as being an important purpose of mediation.[480] This has received some judicial consideration, as courts have acknowledged that mediation enables disputants address aspects of their business or family relationship, both past and future, in ways not possible in court proceedings.[481]

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467 Boulle, *Mediation: Principles, Process, Practice* (n 71) 26, 32. See also Riskin, 'A Grid for the Perplexed' (n 208) 23, citing Michael J Keating and Margaret L Shaw, '"Compared to What?": Defining Terms in Court-Related ADR Programs' (1990) 6(3) *Negotiation Journal* 217.

468 *Practice Standards* (n 222) pt 1, Introduction, 2, ss 2.1, 2.2(f).

469 See, eg, Commentary to rule 1 of the *Ethical Guidelines for Mediators* (n 254) 3.

470 See, eg, Boulle, *Mediation: Principles, Process, Practice* (n 71) 28; Bush and Folger, *The Promise of Mediation* (n 204) 9–10, 20; Folberg and Taylor (n 333) 7–8.

471 Christoper W Moore (n 180) 128.

472 Fisher and Ury (n 9) 11.

473 Ibid ch 2; Roger Fisher, Elizabeth Kopelman and Andrea Kupfer Schneider, *Beyond Machiavelli: Tools for Coping with Conflict* (Penguin Books, 2nd ed, 1996).

474 Fisher and Ury (n 9) ch 3.

475 See below Chapter II at 66.

476 *Practice Standards* (n 222) ss 2.2(b), 7.5.

477 Allport (n 44) 178–9; Boulle, *Mediation: Principles, Process, Practice* (n 71) 28–9.

478 *Azmin Firoz Daya* (n 402) [12], cited in *Southern Waste Resourceco* (n 401) [27] (Hinton J).

479 *Practice Standards* (n 222) ss 2.2(a), 4.1, 7.5.

480 See, eg, Boulle, *Mediation: Principles, Process, Practice* (n 71) 29; Allport (n 44) 179–82. See also Boulle and Alexander, *Skills and Techniques* (n 17) 17.

481 See eg, *Idoport* (n 259) [19] (Einstein J); *Yoseph* (n 257) [11]; *Newman* (n 36) [13]; *Higgins* (n 402) [14] (Austin J); *Halsey* (n 419) [15] (Dyson LJ); *Johnston* (n 399) [8] (Barrett J); *Coric* (n 419) [18] (Bryson AJ);

Maintaining or repairing relationships closely align with facilitative and transformative mediation,[482] and overlaps with transformation of individual and societal relations.

(g) Transformation of Individual and Societal Relations

The *transformation of individual and societal relations* is multifaceted and operates at individual and societal levels.[483] It denotes transformation of the quality of *conflict interaction* from negative to positive by fostering *empowerment* and *recognition* shifts.[484] Bush and Folger define *empowerment* as the restoration of an individual's value, strength and decision-making capacity and *recognition* as 'the evocation in individuals of acknowledgment, understanding, or empathy for the situation and the views of the other'.[485] They argue that conflict transformation is not limited to disputes involving pre-existing or ongoing relationships.[486] The value denotes more than mere settlement or satisfaction of needs and interests,[487] but stresses educative outcomes for collaborative and constructive conflict resolution into the future, which they refer to as 'upstream effects'.[488] At the societal level it includes transformation of the 'disputing culture'.[489]

This value is prominent in transformative mediation[490] with elements overlapping with facilitative mediation.[491] It also shares commonalities with tradition-based mediation, which focus on healing, restoring group relationships, reconciliation, restorative justice, public symbolism and prioritisation of community values.[492]

Though transformative mediation encompasses similar purposes as some types of therapy,[493] Bush and Folger argue it is a communication-based rather than a psychological approach to practice.[494]

2 *The Purposes of Court-Connected Mediation*

Out of the range of purposes cited in the literature that I grouped according to seven categories above, some purposes are more prominent within court-connected mediation than non-court-connected contexts. This discussion illustrates that despite the overlap in some purposes, they can differ according to the perspective of the courts and of disputants. For example, the predominant purpose of court-connected mediation is both achieving institutional effectiveness and efficiencies for courts, on the one hand, and the effective and efficient delivery of settlement for disputants, on the other hand. These two perspectives also features in the empirical data.[495]

Evans v Evans [2011] NSWCA 92, [146] ('*Evans*'), cited in *Cacas v Megameg Pty Ltd* [2016] SADC 73, [8] (Beazley J).

482 See below Chapter II at 66–7.

483 Boulle and Field, *Mediation in Australia* (n 27) 64–5.

484 Bush and Folger, *The Promise of Mediation* (n 204) 13, 21–2, 53–6, 65–6, 217.

485 Ibid 22.

486 Ibid 58, 219.

487 Ibid 37, 52–3, 214; Boulle and Field, *Mediation in Australia* (n 27) 7; Micheline Dewdney, 'Transformative Mediation: Implications for Practitioners' (2001) 12(1) *Australasian Dispute Resolution Journal* 20, 21–3.

488 Bush and Folger, *The Promise of Mediation* (n 204) 219, 221. See also Cynthia J Hallberlin, 'Transforming Workplace Culture through Mediation: Lessons Learned from Swimming Upstream' (2001) 18(2) *Hofstra Labor and Employment Law Journal* 375.

489 See, eg, Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Wolters Kluwer Law & Business, 2009) 12; Bush and Folger, *The Promise of Mediation* (n 204) 14, 24–5.

490 See below Chapter II at 66.

491 See below Chapter II at 65.

492 Alexander, 'Understanding Practice' (n 57) 113–15.

493 Bush and Folger, *The Promise of Mediation* (n 204) 227–8, citing Samuel Forlenza, 'Mediation and Psychotherapy: Parallel Processes' in Karen Duffy, James W Grosch and Paul V Olczak (eds), *Community Mediation: A Handbook for Practitioners and Researchers* (Guilford Press, 1991) 227.

494 Bush and Folger, *The Promise of Mediation* (n 204) 233.

495 See below Chapter IV at 110–13.

I explore four ways the court-connected context impacts upon *purpose*(s) below. This discussion and the discussion in the previous part provide the theory base against which I will examine the way the Court's rules-based framework addresses mediation's purpose.[496] It also provides the theory base against which I will explore Stakeholder reports regarding *purpose*.[497]

(a) Court-Connected Program Goals: Institutional Effectiveness, Efficiencies and 'Settlement Rate' Success

Court-connected mediation programs serve a variety of goals because of the needs and expectations of key stakeholder groups including the judicial system, mediators and the public.[498] Court-connected mediation program goals may therefore differ from the mediation preferences and objectives held by Stakeholders and disputants.[499]

Australian court-connected mediation programs rarely articulate program goals,[500] and, as Rundle argues, ill-defined institutional objectives cause diversity of lawyer and mediator expectations.[501] In the absence of clearly defined goals, the quality of a mediation program is more difficult to determine.[502]

However, court-connected programs have historically been evaluated by 'settlement rate' success (quantitative effectiveness and efficiencies) and disputant 'satisfaction'.[503] Settlement rates are a common theme amongst the courts, mediation organisations, mediation agencies and private mediators.[504] It also features in the empirical data.[505]

Despite the range of differing mediation purposes, the courts prioritise quantitative efficiencies.[506] From an institutional perspective, the primary purpose of court-connected mediation is to settle civil disputes with minimal cost pre-trial.[507]

Quantitative efficiency arguments suggest mediation facilitates the efficient disposition of cases and reduces court backlogs thus minimising public expenses and providing earlier access to justice.[508]

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496 See below Chapter III at 98.

497 See below Chapter IV.

498 Della Noce, Folger and Antes, 'Assimilative, Autonomous, or Synergistic Visions' (n 312) 16.

499 Hensler, 'Challenging Mediation Ideology' (n 464) 81–6; Resnik, 'Mediating Preferences' (n 360) 155.

500 Mack, *Criteria and Research* (n 80) 15–17.

501 Rundle, 'Court-Connected Mediation Practice' (n 38) iv, 4, 8, 177.

502 Hilary Astor, 'Quality in Court Connected Mediation Programs' (Issue Paper, Australian Institute of Judicial Administration, 2001) 5.

503 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 207, 387; Mack, *Criteria and Research* (n 80) ch 3; Wayne D Brazil, 'Court ADR 25 Years After Pound: Have We Found a Better Way?' (2002) 18(1) *Ohio State Journal on Dispute Resolution* 93, 121; Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"' (1991) 19(1) *Florida State University Law Review* 1, 23 ('Pursuing Settlement in an Adversary Culture').

504 See generally Ojelabi and Boyle (n 17) 52, citing Alysoun Boyle, 'Effectiveness in Mediation: A New Approach' (2017) 12(1) *Newcastle Law Review* 148, 150–51; Charlton, Dewdney and Charlton (n 382) 358; Philip Davenport, 'What is Wrong with Mediation' (1997) 8(1) *Australian Dispute Resolution Journal* 133, 134; James H Stark, 'The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator' (1997) 38(2) *South Texas Law Review* 769, 795 ('The Ethics of Mediation Evaluation').

505 See below Chapter IV at 125.

506 Rundle, 'Barking Dogs' (n 373) 88; Alexander, 'Ten Verdicts on Court-Related ADR' (n 81) 17; Laurence Boulle, 'Minding the Gaps: Reflecting on the Story of Australian Mediation' (1999) 11(2) *Bond Law Review* 216, 223–4 ('Minding the Gaps').

507 See, eg, Olivia Rundle, 'The Purpose of Court-Connected Mediation from the Legal Perspective' (2007) 10(2) *ADR Bulletin* 28, 29; Rundle, 'Court-Connected Mediation Practice' (n 38) 272.

508 See, eg, Rundle, 'Court-Connected Mediation Practice' (n 38) 269–80, 287; Bush and Folger, *The Promise of Mediation* (n 204) 80–1; Deborah R Hensler, 'In Search of "Good" Mediation: Rhetoric, Practice, and Empiricism' in Joseph Sanders and Lee V Hamilton (eds), *Handbook of Justice Research in Law* (Kluwer

Whilst efficiency arguments are weighed heavily in the literature, some suggest they have been overstated and lack evidentiary support.[509] McAdoo and Welsh argue judges, lawyers and mediators perceive mediation as cost-effective for both courts and disputants despite the lack of objective measures to support this.[510]

Critics argue that the institutionalisation of mediation in the courts and its 'skewed' prioritisation of settlement[511] has diluted mediation's *self-determination* value[512] and diminishes the ability to maximise satisfaction of disputant needs and interests.[513] It also undermines the importance of voluntary participation and subordinates mediation's 'problem-solving and relationship-building goals to cost-efficiency and docket-clearing objectives'.[514] Others argue that quantitative-efficiency objectives promote advisory/evaluative and settlement practices, to the detriment of facilitative and transformative practices,[515] and can lead to allegations of direct or indirect 'settlement coercion'.[516] These concerns have led authors in the United States to suggest that mediation has begun to emulate pre-trial settlement conferences rather than the 'alternative' process intended by its proponents.[517]

Emphasising settlement rates also discourages appreciation of many other societal values that ADR programs can promote.[518]

(b) Effective and Efficient Delivery of Settlement for Disputants

Achieving the institutional purposes of effectiveness and efficiencies for courts overlaps with the effective and efficient delivery of settlement *for* disputants.

The primary purpose of court-connected mediation in contemporary Australian legislation is achieving settlement.[519] Ample Australian legislation and court rules expressly, or by implication, state that mediation's purpose is to assist disputants settle disputes,[520] refine or narrow issues in

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Academic Publishers, 2001) 231, 257–8 ('In Search of "Good" Mediation'). See also in *Trelour* (n 404) [11] (Robertson DCJ).

509 See, eg, Mark J Rankin, 'Settlement at All Cost: The High Price of an Inexpensive Resolution?' (2009) 20(3) *Australasian Dispute Resolution Journal* 153, 155; Hensler, 'Challenging Mediation Ideology' (n 464) 81; Hensler, 'In Search of "Good" Mediation' (n 508) 258; Hensler, 'A Research Agenda' (n 80); Marc Galanter, 'A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States' (1985) 12(1) *Journal of Law and Society* 1, 2, 8. See also Boulle and Field, *Mediation in Australia* (n 27) 387–8.

510 McAdoo and Welsh (n 366) 427.

511 Bush and Folger, *The Promise of Mediation* (n 204) 104, 237, 242, 262.

512 Hensler, 'In Search of "Good" Mediation' (n 508); Welsh, 'The Inevitable Price of Institutionalization?' (n 26) 33; Bush and Folger, 'Reclaiming Mediation's Future' (n 245) 743.

513 Rundle, 'The Purpose of Court-Connected Mediation from the Legal Perspective' (n 507) 29.

514 Edward F Sherman, 'A Process Model and Agenda for Civil Justice Reforms in the States' (1994) 46(6) *Stanford Law Review* 1553, 1571.

515 Boulle and Field, *Mediation in Australia* (n 27) 302.

516 James J Alfini and Catherine G McCabe, 'Mediating in the Shadow of the Courts: A Survey of Emerging Case Law' (2001) 54(2) *Arkansas Law Review* 171, 173, 205; Frank EA Sander, 'The Obsession with Settlement Rates' (1995) 11(4) *Negotiation Journal* 329, 330.

517 Senft and Savage (n 360) 335.

518 See, eg, Dorothy Wright Nelson, 'ADR in the Federal Courts: One Judge's Perspective' (2002) 17(1) *Ohio State Journal on Dispute Resolution* 1, 9, citing Brazil, 'A View from the Courts' (n 325) 37–8.

519 Boulle, *Mediation: Principles, Process, Practice* (n 71) 31. See also Chapter III at 98.

520 See eg, *Court Procedures Act 2004* (ACT) s 52A; *Court Procedures Rules 2006* (ACT) r 1176; *Civil Procedure Act 2005* (NSW) s 25; *Uniform Civil Procedure Rules 2005* (NSW) r 20.6(1); *Supreme Court Act 1979* (NT) s 83A(1)(6); *Local Court (Civil Jurisdiction) Rules 1998* (NT) rr 32.07(4)(6), 32.11(1); *Supreme Court Rules 2008* (NT) ord 48, pt 2, r 48.13(1); *Civil Proceedings Act 2011* (Qld) ss 39, 40, 48; *Uniform Civil Procedure Rules 1999* (Qld) rr 329, 330, 332, 514(3)(4); *Supreme Court Rules 2000* (Tas) rr 519(1)(a), 521; *Alternative Dispute Resolution Act 2001* (Tas) s 3(2); *Civil Procedure Act 2010* (Vic) s 3; *Supreme Court Act 1935* (WA) s 71(1)(2); *Rules of the Supreme Court 1971* (WA) ords 4A RR 8(3A), (4)(e)(ii); *Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 16(1)(o)(ii), 37(2); *District Court Rules 2005* (WA) rr 35(4)(7)(b), 35AA(1); *Magistrates Court (Minor Cases Procedure) Rules 2005* (WA) r 32. See also *South*

dispute.[521] The public interest in achieving settlement[522] or narrowing issues[523] is recognised in case law. Case law supporting compulsory referral to mediation over objection also recognises, expressly or by implication, the purpose of mediation as settling litigation through some 'give and take'.[524] Case law suggests mediators assist the administration of justice by facilitating a process whereby 'the speedy, efficient and just disposition of proceedings' might be effected.[525]

Intertwined with the four main drivers of settlement – substantive endowments, procedural endowments, transaction costs and risk preferences[526] – is one view that lawyers and disputants choose to mediate in order to reach commercially acceptable outcomes to avoid the costs, delays, uncertainties and agony of litigation.[527] This view also features in the empirical data.[528]

Some authors argue that if disputants mediate solely out of the necessity to avoid litigation costs, this will intensify public perceptions of a failing legal system,[529] that mediation offers 'cheap' or 'second class justice' to 'first class justice' through litigation,[530] and fails to take into account public interest or social justice.[531] In contrast, Irvine argues that mediation settlements, rather than representing second-class justice, may enhance the legitimacy of the legal system, which has implications for theories of justice.[532]

Australian Civil and Administrative Tribunal Act 2013 (SA) s 51(4); *Austral Hotel (SA) Pty Ltd v Austral Properties Pty Ltd* [2019] SADC 136, [48] (Judge Slattery).

521 For example, *Supreme Court Act 1979* (NT) s 83A(1)(b); *Uniform Civil Procedure Rules 1999* (Qld) r 330; *Supreme Court Rules 2000* (Tas) r 519(1)(b); *Rules of the Supreme Court 1971* (WA) r (4)(e)(ii); *Civil Procedure Act 2010* (Vic) s 3; *District Court Rules 2005* (WA) r 35AA(1). See also *Swaris v Seneviratna* [2013] ACTSC 231, [91] (Refshauge J).

522 See eg, *IPA Manufacturing Pty Ltd v Industrial Pyrometers Pty Ltd* [2001] SASC 224, [18] (Lander J) ('*IPA Manufacturing*'); *Studer v Boettcher* [2000] NSWCA 263, [74] (Fitzgerald JA) ('*Boettcher*'), citing *Tresize v National Australia Bank* (1994) 50 FCR 134, 137 (Black CJ), 148 (Sweeney and Heerey JJ); *Studer v Konig* (Supreme Court of New South Wales, McLelland CJ, 4 June 1993) [10]; *Brown* (n 310) [8] (Mr Stuart Isaacs); *Ezekiel-Hart v Law Society (ACT) [No 2]* [2012] ACTSC 135, [26] (Refshauge J) ('*Ezekiel-Hart*'); *Lewis v Australian Capital Territory [No 8]* [2018] ACTSC 218, [63] (Refshauge J).

523 See eg, *Kilthistle* (n 401) [4]–[5] (Lehane J); *Australian Competition and Consumer Commission v Lux Pty Ltd* [2001] FCA 600, [21] (Nicholson J) ('*Lux*'); *ET Petroleum Holdings Pty Ltd v Clarenden Pty Ltd [No 2]* [2005] NSWSC 562, [21] (White J); *Barnard* (n 402) [17] (Brereton J); *Skalski* (n 402) [13], [15] (Kingham DCJ); *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288, [39] (Kay, Beatson and Briggs LJJ) ('*PGF II SA*'); *Sweeney* (n 77) [23] (Long DCJ).

524 See above Chapter II at 46. See, eg, *Hurst v Leeming* [2002] EWHC 1051 (Ch), [13] (Whiteman J); *Lux* (n 522) [28] (Nicholson J); *AWA 18/03/1992* (n 353) [6]–[7].

525 *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 477, [5] (Palmer J). See also *Browning* (n 402) [6].

526 See, eg, Mnookin, Peppet and Tulumello (n 3) 102–6, citing George L Priest and Benjamin Klein, 'The Selection of Disputes for Litigation' (1984) 13(1) *Journal of Legal Studies* 1; Samuel R Gross and Kent D Syverud, 'Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial' (1991) 90(2) *Michigan Law Review* 319; Mnookin and Kornhauser (n 302); Raiffa (n 391) 75. See also Wade, 'Evaluative Mediation' (n 57) 3.

527 See, eg, Rundle, 'Court-Connected Mediation Practice' (n 38) 251–2; Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 800–1, citing Bobbi McAdoo, 'A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota' (2002) 25(3) *Hamline Law Review* 403, 408; Anthony Murray Gleeson, 'Individualised Justice: The Holy Grail' (1995) 69(6) *Australian Law Journal* 421, 431; Gross and Syverud (n 526) 320.

528 See below Chapter IV at 110–13.

529 Bruce E Meyerson, 'The Dispute Resolution Profession Should Not Celebrate the Vanishing Trial' (2005) 7(1) *Cardozo Journal of Conflict Resolution* 77, 78.

530 See eg, Boulle and Field, *Mediation in Australia* (n 27) 229; Martin A Frey, 'Does ADR Offer Second Class Justice?' (2001) 36(4) *Tulsa Law Journal* 727, 765; Wade, 'Current Trends and Models in Dispute Resolution: Part I' (n 339) 61; Gina Hughes, 'The Institutionalisation of Mediation: Fashion, Fad or Future' (1997) 8(1) *Australian Dispute Resolution Journal* 288, 293.

531 Bush and Folger, *The Promise of Mediation* (n 204) 15–17.

532 Charlie Irvine, 'What Do "Lay" People Know About Justice? An Empirical Enquiry' (2020) 16(2) *International Journal of Law in Context* 146.

(c) Substantive Justice, 'Just About Settlement' or Procedural Justice?

Debate exists regarding whether mediation is concerned with 'justice',[533] pertaining to whether the purpose is to reach substantive *justice* outcomes,[534] the outcome 'is not about *just* settlement it is *just about settlement*',[535] or whether it ought deliver disputants procedural justice.[536]

Opinions vary regarding whether mediators should be concerned with substantive justice outcomes.[537] Some argue that mediators are not concerned with substantive justice.[538] Beyond ensuring a procedurally fair process, mediators are not tasked with ensuring whether substantive outcomes are fair or reasonable, because this remains the task of lawyers.[539] Furthermore, a 'fair outcome' requires a 'value judgment', which is inconsistent with the mediator's role.[540]

Others argue mediation merely facilitates 'accelerated compromise' within a civil litigation system in which settlement is 'the norm'.[541] These views initially appear uncontroversial given the acknowledgment that most cases in civil litigation generally settle 'in the shadow of the law'.[542] Case law acknowledges that most cases settle ordinarily between lawyers[543] and litigation is frequently resolved with 'no vindication of rights, but [is] purely practical and commercial'.[544] Similarly, mediation also provides lawyers the opportunity to explain their positions, which may encourage disputants to take a more pragmatic approach and lower their expectations to a point where reaching a commercial agreement is possible.[545]

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533 See, eg, Lola Akin Ojelabi, 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' (2012) 31(3) *Civil Justice Quarterly* 318, 320–1.

534 See, eg, Noone and Ojelabi (n 462) 540.

535 See, eg, Genn, *Judging Civil Justice* (n 207) 117. See also Joshua Rozenberg, 'Dame Hazel Genn Warns of "Downgrading" of Civil Justice', *Law Society of England and Wales Gazette* (online, 18 December 2008) <http://www.lawgazette.co.uk/analysis/dame-hazel-genn-warns-of-downgrading-of-civil-justice/48739.fullarticle>.

536 See, eg, Wayne D Brazil, 'Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns' (1999) 14(3) *Ohio State Journal on Dispute Resolution* 715, 727–8; Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 793.

537 See, eg, Ellen Waldman and Lola Akin Ojelabi, 'Mediators and Substantive Justice: A View from Rawls' Original Position' (2016) 30(3) *Ohio State Journal on Dispute Resolution* 391, 393, 418.

538 Genn, *Judging Civil Justice* (n 207) 118.

539 See, eg, Jonathan Rothfield, 'What (I Think) I Do as the Mediator' (2001) 12(4) *Australasian Dispute Resolution Journal* 240, 244. See also 'Issues of Fairness' (n 171) 24.

540 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 104.

541 See, eg, Hazel Genn, 'Civil Mediation: A Measured Approach?' (2010) 30(2) *Journal of Social Welfare and Family Law* 195, 199; Gordon, 'Why Attorneys Support Mandatory Mediation' (n 324) 224; Hazel Genn, 'The Central London County Court Pilot Mediation Scheme' (Evaluation Report, 1998) <https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/central_london_county_court_mediation_scheme.pdf>; Dawson (n 392) 176; MacFarlane, 'Culture Change?' (n 323) 284.

542 See, eg, *Access to Justice Arrangements* (n 340) 2; Sourdin, 'Not Teaching ADR in Law Schools?' (n 71) 150; Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1(3) *Journal of Empirical Legal Studies* 459, 460, 481–2, 485, 516, 529; Mnookin, Peppet and Tulumello (n 3) 99–100; Marc Galanter and Mia Cahill, '"Most Cases Settle": Judicial Promotion and Regulation of Settlements' (1994) 46(6) *Stanford Law Review* 1339; Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about our Allegedly Contentious and Litigious Society' (1983) 31(1) *University of California at Los Angeles Law Review* 4, 27; Marc A Franklin, Robert H Chanin and Irving Mark 'Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation' (1961) 61(1) *Columbia Law Review* 1, 10–11, 32.

543 See eg, *Halsey* (n 419) [15] (Dyson LJ).

544 See, eg, *Southern Waste Resourceco* (n 401) [48] (Hinton J). See also *Newman* (n 36) [13] (McLelland J); *Idoport* (n 259) [9] (Einstein J).

545 *Old v Miniter [No 2]* [2020] NSWDC 519, [23] (Judge Levy SC). See also *Hickman v Lapthorn* [2006] EWHC 12 (QB), [24] (Jack J).

However, some authors have historically warned of the 'dangers' of pursuing settlement in our adversarial system.[546] Settlements achieved through oppression or the exercise of vulgar force have serious repercussions for the civil justice system.[547]

Others emphasise a 'mixed view' whereby substantive 'justice does not reside in entirely in the realm of formal legal processes nor is it entirely absent from the world of bargaining'.[548]

Finally, exponents of procedural justice argue that procedural justice affects disputants' perceptions of distributive justice, the legitimacy of the institution providing the process and ultimately compliance with the outcome of such process.[549] For example, they argue that the exclusion of disputants from mediation, bypassing or marginalising initial Joint Sessions and the 'early and aggressive' use of legally evaluative mediator interventions are inconsistent with procedural justice.[550] I discuss some of these interventions further in the *practice*[551] and *procedure* discussions below.[552]

The themes of 'just' settling and procedural fairness also feature in the empirical data.[553]

(d) Transformation of Individual and Societal Relations?

There is substantial resistance to transformative values and practices, emanating from the institutionalisation of mediation and the demand of institutional users and stakeholders such as the courts,[554] who prioritise efficiency measures.[555] Lawyers have not universally accepted transformative practices[556] and, particularly commercial litigators, express disdain for transformative – and facilitative – techniques.[557]

Some authors oppose the incorporation of transformative mediation within the court context. For example, Hensler argues transformative values are inappropriate goals for a public justice system and that disputants seeking assistance with self-empowerment and honing their communication skills ought seek the services of mental health professionals 'who will more likely be found within the therapeutic community than in the bar'.[558] Others argue that disputants involved in adversarial litigation and ordered to mediation desire dispute resolution based on principles of law rather than enhancing communication or maximising creative potential.[559]

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546 See, eg, Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture' (n 503) 6; Owen M Fiss, 'Against Settlement' (1984) 93(6) *Yale Law Journal* 1073, 1075–6; Laura Nader, 'Disputing Without the Force of Law' (1979) 88(5) *Yale Law Journal* 998, 1019–21.

547 Law Council of Australia, Submission No 96 to the Productivity Commission, *Inquiry into Access to Justice Arrangements* (13 November 2013) 85 [338].

548 Marc Galanter, 'Worlds of Deals: Using Negotiation to Teach about Legal Process' (1984) 34(2) *Journal of Legal Education* 268, 275.

549 Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 791, 817; Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* 1; Nolan-Haley, 'Court Mediation and the Search for Justice through Law' (n 239) 90.

550 Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 857.

551 See below Chapter II at Part C.

552 See below Chapter II at Part D.

553 See below Chapter IV at 124–6 and Chapter V at 151.

554 Bush and Folger, *The Promise of Mediation* (n 204) 3, 81, 86.

555 Nolan-Haley, 'Court Mediation and the Search for Justice through Law' (n 239) 62.

556 Burns (n 443) 706–17.

557 Trueman (n 381) 233, citing MacFarlane, 'Culture Change?' (n 323) 244–5.

558 Hensler, 'Challenging Mediation Ideology' (n 464) 98. See also Deborah R Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System' (2003) 108(1) *Penn State Law Review* 165; Gordon, 'Why Attorneys Support Mandatory Mediation' (n 324) 229.

559 Peter N Thompson (n 420) 568; Nolan-Haley, 'Court Mediation and Search for Justice through Law' (n 239) 90. But see above Chapter II at 47.

The varying purposes reveal the potential for uncertainty and expectation gaps as well as the potential for gaps between theory and practice. They also reveal tensions between some of mediation's core values and mediating in the 'shadow of the law'.[560] This discussion reinforces why it will be productive to explore mediation's *purpose* within the Court.[561]

I now turn to the second theme I will develop in the thesis.

C *Diversity in Practices: Mediation Models, Mediator Roles, Functions and Interventions*

There is no singularly accepted mediation *practice*. Diverse practices exist, reflecting diversity of user demand.[562] Attempts to categorise different practices according to archetypical 'models', reveals four predominant models: advisory/evaluative, settlement, facilitative and transformative.[563]

The four models largely coincide with the four dispute resolution categories[564] and fall along the ideology-practice continuum.[565] Despite overlap between them, debates continue regarding whether they are mutually exclusive rather than interrelated, which I explore below. Further, I discuss the underlying assumptions and distinguishing key features of each of the four models below.

The discussion illustrates how practice encapsulates understandings of the mediator's role, functions, and intervention in the process and/or content of disputes. It also exemplifies that *practice* is linked with the other two themes.[566] Certain practices highlight tensions with some of mediation's core values.[567] For example, advisory/evaluative practices impact upon direct disputant participation and may affect procedural fairness considerations.[568]

The diversity in practices reveals the potential for uncertainty and expectation gaps, particularly as expectations regarding practices may differ between mediation participants. Just as lawyers influence their clients' participation,[569] mediators' practices influence how all participants engage and participate in mediation.[570]

1 *Categorising Mediation Practices According to 'Models'*

Authors interchangeably use differing labels when describing diverse mediation practices including 'approaches',[571] 'behaviours',[572] 'frameworks',[573] 'models',[574] 'orientations',[575] 'styles',[576]

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560 See above Chapter II at 38.

561 See below Chapter IV.

562 Bush and Folger, *The Promise of Mediation* (n 204) 261.

563 Various iterations and derivatives of the four models exist, which are not central to the thesis. For example, tradition-based mediation in indigenous communities, does not neatly fit within any of the four models, though shares commonalities with transformative mediation and Alexander's categorisation of wise counsel mediation: Alexander, 'Understanding Practice' (n 57) 113–14. See also Larissa Behrendt, *Aboriginal Dispute Resolution* (Federation Press, 1995); Ian MacDuff, 'What Would You Do with a Taniwha at the Table?' (2003) 19(3) *Negotiation Journal* 195; Ian MacDuff, 'Part II: What Would You Do-With a Taniwha at the Table?' (2003) 19(4) *Negotiation Journal* 291.

564 See above Chapter II at 30.

565 See above Chapter II at 31.

566 See above Chapter II at 47. See below Chapter II at 108.

567 See above Chapter II at 33–5.

568 See above Chapter II at 50.

569 See above Chapter I at 14–5 and Chapter II at 42.

570 Indeed, the mediators' presence (both actual presence and the personal qualities that their physical presence brings into the mediation room), influence participants and *vice versa*: Daniel Bowling and David Hoffman, 'Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation' (2000) 16(1) *Negotiation Journal* 5, 10 ('Bringing Peace into the Room').

571 See, eg, Folberg and Taylor (n 333) ch 6; Wall, Stark and Standifer (n 237) 377–8; Joseph McMahon, 'Distinguishing Evaluation from Prediction in Commercial Mediation' (2014) 13(1) *Association for Conflict Resolution Magazine* 16.

'techniques'[577] or 'types'.[578] I have summarised these descriptors into table format according to the four models.[579] Furthermore, some argue that mediators have a default 'style of practice' influenced by their personalities, life experiences, education, training, and professional background.[580] Their practice styles impact on mediation dynamics and can therefore affect options considered during mediation.[581]

Increasing acknowledgment exists within the literature regarding distinct 'models' of practice, which are not simply stylistic variations of different approaches used to reach the same outcome.[582] However, there is no universal agreement regarding which model best satisfies the definition/description of 'mediation' or the 'ideal type' of practice.

Models delineate styles, variations and tendencies in practice[583] and provide utility within a complex array of practices falling within the umbrella term 'mediation'.[584] They enhance disputant choices and promote decision-making regarding their primary needs – whether to achieve settlement, interest-based outcomes or conflict transformation.[585] However, models cannot capture the complexity of what occurs during mediation.[586]

There is no universal agreement regarding whether the models are fluid, interchangeable or fixed. The discussion that follows illustrates that the purists do not accept that different practice models

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572 Hensler, 'In Search of "Good" Mediation' (n 508) 239, 255; Dorcas Quek Anderson, 'Facilitative Versus Evaluative Mediation: Is There Necessarily a Dichotomy?' [2013] *Asian Journal on Mediation* 66.

573 Bush and Folger, *The Promise of Mediation* (n 204) 262.

574 See, eg, Ojelabi and Boyle (n 17) 16; Della Noce, Folger and Antes, 'Assimilative, Autonomous, or Synergistic Visions' (n 312) 48; Boulle and Field, *Mediation in Australia* (n 27) 3.

575 Riskin, 'Rethinking the Grid of Mediator Orientations' (n 354) 24; Leonard L Riskin, 'Decisionmaking in Mediation: The New Old Grid and the New New Grid System' (2003) 79(1) *Notre Dame Law Review* 1, 34 ('Decisionmaking in Mediation'); Riskin, 'A Grid for the Perplexed' (n 208) 17–18, 44–5; Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem-Solving' (1984) 31(4) *UCLA Law Review* 754, 759–60, 777, 794.

576 See generally Susan S Silbey and Sally E Merry, 'Mediator Settlement Strategies' (1986) 8(1) *Law and Policy* 7, 19; Kenneth Kressel et al, 'The Settlement-Orientation vs. the Problem-Solving Style in Child Custody Mediation' (1994) 50(1) *Journal of Social Sciences* 67, 68; Lorig Charkoudian, 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles' (2012) 5(4) *Negotiation and Conflict Management Research* 367, 371, 382. See also Sourdin and Balvin (n 361) 142. James Wall and Timothy Dunne identify 25 'strategies' (or groups of techniques) within the literature and condense them to five 'styles': neutral, relational, transformative, analytic and pressing. See James Wall and Kenneth Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 403, 413; James A Wall and Timothy C Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217, 227, 237.

577 Lande, 'Toward More Sophisticated Mediation Theory' (n 363) 323.

578 John Wade, 'Preparing for Mediation and Negotiation in Succession Disputes' (Conference Paper, British Columbia Annual Succession Conference, 28 September 2010) 1 <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1319&context=law_pubs> ('Preparing for Mediation').

579 See Appendix F: Description of Mediation *Practices* According to Four Archetypical 'Models'. I have also summarised some additional characteristics relating to *purpose*, *practice* and *procedure* into table format to highlight some important features between the four models: see Appendix G: Characteristics of the Four Mediation 'Models' by Reference to *Purpose*, *Practice* and *Procedure*.

580 See, eg, Riskin, 'A Grid for the Perplexed' (n 208) 22, 37; Alexander, 'Understanding Practice' (n 57) 103; Wall, Stark and Standifer (n 237) 377–8; Boulle and Field, *Mediation in Australia* (n 27) 8, 98.

581 Alexander, 'Understanding Practice' (n 57) 97–8.

582 Bush and Folger, *The Promise of Mediation* (n 204) 2, 99–100, 234–5, 259. But see Folberg and Taylor (n 333) 130–1.

583 Boulle, *Mediation: Principles, Process, Practice* (n 71) 43; Boulle and Field, *Mediation in Australia* (n 27) 3, 35, 371.

584 Alexander, 'Understanding Practice' (n 57) 97–8. See also Spencer and Hardy (n 231) 144–72.

585 Bush and Folger, *The Promise of Mediation* (n 204) 263.

586 Riskin, 'Rethinking the Grid of Mediator Orientations' (n 354) 25.

are fluid and flexible. The pragmatists argue that they are interchangeable, not mutually exclusive, they overlap and a variety of different styles exist within them.[587] Conversely, transformative theory suggests different mediator orientations cannot be combined or integrated as they are based upon different ideologies and have incompatible objectives that generate conflicting practices.[588]

Many attempts at categorisation embrace the process-content (or process-problem) dichotomy, featured within the literature and the NMAS,[589] despite the lack of unanimity between the different models regarding 'appropriate' levels of mediator intervention in the process and/or content. Most also depict mediator roles, functions, and interventions between two paradigms, viewed as polar opposites, [590] referred to as the facilitative-advisory distinction [591] or facilitative-evaluative dichotomy.[592] I discuss these dichotomies before discussing the four practice models.

(a) Process-Content Dichotomy

The discussion that follows highlights debates about the differences between process and content interventions.[593] Alexander describes 'process' or procedural interventions as comprising two elements.[594] First, the structure of mediation procedures including the use of Joint Sessions, Private Sessions, Shuttle Negotiation and agenda setting. Secondly, mediation dynamics, include the language mediators use to frame discourse and reframe disputant statements, the way mediators channel communication and the order of speaking. Alexander describes 'problem' or content interventions as mediator involvement in the subject-matter and merits of disputes, such as the provision of legal, technical or other 'information', advising on options external to mediation, evaluating, suggesting options and proposing settlement terms. Process interventions can impact upon content and *vice versa*. Mediator conduct also impacts upon the discourse during mediation.[595]

Although assertions about the problem-process dichotomy are 'useful generalisations', some argue that many mediations are 'hybrids' because mediators, consciously or subconsciously, utilise a range of styles, procedures and techniques,[596] irrespective of their predominant process or problem orientation, to cater to context, disputant needs, and mediation dynamics.[597] If, for example, participants mandate the mediator to 'get a settlement', the mediator will likely be interventionist in

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587 See, eg, Boulle and Alexander, *Skills and Techniques* (n 17) 20–1; Alexander, 'Understanding Practice' (n 57) 117–18.

588 Bush and Folger, *The Promise of Mediation* (n 204) 45, 228, 262–3.

589 See above Chapter II at 32.

590 See, eg, Jeffrey W Stempel, 'Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role' (1997) 24(4) *Florida State University Law Review* 949, 951.

591 See above Chapter II at 35 and 61.

592 I group both of these dichotomies together for convenience: see below Chapter II at 61. See also Woodward who refers to the 'directive facilitative debate': Woodward, 'Lawyer Approaches' (n 33) 1, 89.

593 See above Chapter II at 28.

594 Alexander, 'Understanding Practice' (n 57) 103–5.

595 See below Chapter II at 64.

596 Wade, 'Terminological Debate' (n 208) 205–6.

597 Folberg and Taylor (n 333) 131; Riskin, 'A Grid for the Perplexed' (n 208) 25, 35–8, 40–1; Alexander, 'Realities of Mediation Practice' (n 177) 127, 131; Rothfield (n 539) 245; Tom Stodulka, 'Adapting Your Current Legal Skills for Negotiation and Mediation' (Seminar Paper, Legalwise Seminars, 2011) 7; Ian Hanger, 'A Discussion on Some Ethical Issues That Have Arisen in Mediations' (Conference Paper, Australian Bar Association Dublin, 27 June 2005) 2–3 <http://web.archive.org/web/20130413035611/http://portal.barweb.com.au/Upload/FCK/Paper%20by%20Ian%20Hanger%20QC.pdf>; Michael Williams, 'Can't I Get No Satisfaction? Thoughts on the Promise of Mediation' (1997) 15(2) *Mediation Quarterly* 143; David A Hoffman, 'Confessions of a Problem-Solving Mediator' (1999) 23(3) *Society of Professionals in Dispute Resolution News* 1; Nadja Alexander, 'The Chameleon Mediator' (2004) 6(9) *ADR Bulletin* 165, 166.

the content, whereas if they mandate the mediator facilitate discussions only, the mediator may be less interventionist to enable disputants to 'fully participate' in the process.[598]

(b) Facilitative-Advisory/Evaluative Dichotomy

In the following discussion I explore a leading debate within the literature pertaining to whether mediators do or should perform advisory/evaluative functions.[599]

I have identified four schools of thought. First, those who self-describe as mediation 'purists' maintain an 'exclusivist view' that practices other than facilitative mediation – with its commitment to 'pure' or 'authentic' application of self-determination – cannot be considered 'mediation' and advocate that evaluative mediation is 'oxymoronic'.[600] The purists argue that mediators should be 'prohibited' from providing legal advice or evaluations.[601] Mediators who provide legal advice or evaluations risk offering incomplete, erroneous or biased information that may benefit one disputant over another, thereby damaging the mediator's impartiality, and also assume an overly influential role in decision-making, which is detrimental to mediation's core values.[602]

Secondly, those who self-describe as pragmatists who acknowledge that advisory and evaluative propensities exist in 'mediation' practice,[603] and recognise that evaluation, depending upon the circumstances, can either impair or enhance self-determination.[604] They acknowledge that mediators often predict what courts might decide and proffer legal advice or information when exercising their 'reality testing' function.[605] It is also easy for lawyer-mediators to provide information and 'indirect hints' by their questions and in many mediations 'questioning is little more than evaluation by Socratic dialogue'.[606]

The third group argue that lawyer-mediators should be 'required' to offer legal advice or evaluations, particularly to unrepresented disputants,[607] who require information and advice to make

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598 See, eg, Rothfield (n 539) 244–5; Redfern, 'Capturing the Magic: The Analytical Factor' (n 323) 261; Michael Redfern, 'Capturing the Magic: Non-Participation as a Factor in Mediation Practice' (2000) 11(2) *Australasian Dispute Resolution Journal* 102, 105; Henry Brown (n 393) 3.

599 James Alfini and Gerald S Clay, 'Should Lawyer-Mediators be Prohibited from Providing Legal Advice or Evaluations?' (1994) 1(1) *Dispute Resolution Magazine* 8; Robert A Baruch Bush, 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications' [1994] (1) *Journal of Dispute Resolution* 1, 29–31, 54; Riskin, 'A Grid for the Perplexed' (n 208) 9; Joseph B Stulberg, 'Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock' (1997) 24(4) *Florida State University Law Review* 985–6; Kovach and Love, 'Mapping Mediation' (n 294); Richard Birke, 'Evaluation and Facilitation: Moving Past Either/Or' [2000] (2) *Journal of Dispute Resolution* 309, 311; Ellen A Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82(1) *Marquette Law Review* 155, 156; Boulle and Field, *Mediation in Australia* (n 27) 153.

600 Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 847; Kimberlee K Kovach and Lela P Love, '"Evaluative" Mediation is an Oxymoron' (1996) 14(3) *Alternatives to the High Cost of Litigation* 31, 32; Lela Porter Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24(4) *Florida State University Law Review* 937, 940; Bush and Folger, 'Reclaiming Mediation's Future' (n 245) 750.

601 Alfini and Clay (n 599) 11.

602 Stark, 'The Ethics of Mediation Evaluation' (n 504) 775–9.

603 Boulle and Field, *Mediation in Australia* (n 27) 154, 382. See also Lande, 'How Will Lawyering and Mediation Transform Each Other?' (n 204) 842, 845, 856.

604 Riskin, 'Rethinking the Grid of Mediator Orientations' (n 354) 23. See also Stark, 'The Ethics of Mediation Evaluation' (n 504) 772.

605 See generally *Practice Standards* (n 222) s 10.1(b)(viii); Boulle and Field, *Mediation in Australia* (n 27) 368. There is no consensus in the literature – or amongst ADR practitioners – as to the meaning and nature of 'reality testing', when or how reality testing interventions are used, or on which approaches could be said to typify it: Ojelabi and Boyle (n 17) 9, 14–15, ch 2, 164–5, 168. Similarly, the NMAS lacks clear guidance about reality testing, including its meaning or use: Ojelabi and Boyle (n 17) 161. See also n 230.

606 Stark, 'The Ethics of Mediation Evaluation' (n 504) 787–8. See also Guthrie (n 294) 145–8, 150.

607 Alfini and Clay (n 599) 8, 11.

informed decisions.[608] If disputants choose a lawyer-mediator on the basis of their subject-matter expertise and ability to provide legal advice, evaluations, and predict how a judge or arbitrator may rule, prohibiting the mediator from doing so removes disputant choice and impacts upon their ability to make informed decisions.[609]

A fourth group argues that the facilitative-advisory/evaluative debate is unhelpful and the appropriateness of evaluation, advice- or information-giving depends on a variety of factors encompassing disputant needs, circumstances of the dispute, forum and mediator characteristics.[610]

This spectrum of views is a further example of the debates, dichotomies and distinctions within the literature, and amongst ADR practitioners, regarding what mediation 'is' or 'should be'. For example, debates about whether mediators 'should do no more than facilitate negotiation and the extent to which any greater intervention is acceptable' have received judicial attention.[611] Debates between the purists, the pragmatists, and those critical of academic constructs also feature within the empirical data, despite mediation being defined in the rules-based framework.[612]

Though much ink has been spilt on the facilitative-evaluative dichotomy,[613] there is no universal agreement regarding the scope and limits of each. There is a tendency in practice to portray facilitative mediation with 'hands-off and 'non-directive' approaches in contrast to advisory/evaluative mediation with 'hands-on' and 'arm-twisting' approaches.[614] This view also features in the empirical data.[615] However, where facilitation ends and evaluation begins remains a matter of perception.[616] Whilst the staunchest purist may intend to *solely* facilitate, observers may interpret the impact of their behaviours or interventions as evaluative.[617]

Evaluation encompasses a continuum of behaviours.[618] It may be indirect such as the characteristic raised eyebrow to express doubt and stymie overconfidence[619] or by the way mediators frame questions during reality testing and playing devil's advocate.[620] Evaluation need not be explicit, such as by providing 'advice', 'an opinion', a 'proposal,' or 'information', but be implicit and unintentional, which is subtler and includes both verbal and non-verbal communication including

608 Stark, 'The Ethics of Mediation Evaluation' (n 504) 792–3.

609 Ibid 775–9.

610 Ibid 779, 798.

611 See, eg, *Boettcher* (n 522) [59] (Sheller JA).

612 See below Chapter IV, Chapter V and Chapter VI.

613 See, eg, Riskin, 'A Grid for the Perplexed' (n 208) 23–4; Welsh, 'The Inevitable Price of Institutionalization?' (n 26) 27–33; Sourdin, *Alternative Dispute Resolution* (n 75) 82–3, ch 6; Spencer and Hardy (n 231) 146; Boulle and Alexander, *Skills and Techniques* (n 17) 20–1.

614 Macfarlane and Keet (n 323) 696; Lande, 'How Will Lawyering and Mediation Practices Transform Each Other? (n 204) 849–56.

615 See below Chapter V.

616 Boulle and Field, *Mediation in Australia* (n 27) 136.

617 Riskin, 'Rethinking the Grid of Mediator Orientations' (n 354) 23; Murray S Levin, 'The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion' (2000) 16(2) *Ohio State Journal of Dispute Resolution* 267, 269–70. See also Charkoudian (n 576) 369.

618 Stark, 'The Ethics of Mediation Evaluation' (n 504) 774.

619 See, eg, Trueman (n 381); John Wade, 'Persuasion in Negotiation and Mediation' (2007) 10(1) *ADR Bulletin* 1, 8–12; Dwight Golann, 'How to Borrow a Mediator's Powers' (2004) 30(3) *Litigation* 41, 46; Lela P Love and Kimberlee K Kovach, 'ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process' [2000] (2) *Journal of Dispute Resolution* 295, 303; John Wade, 'Forever Bargaining in the Shadow of the Law: Who Sells Solid Shadows (Who Advises What, How and When?)' (1998) 12(3) *Australian Journal of Family Law* 1, 19 ('Forever Bargaining in the Shadow of the Law').

620 See, eg, Stephen Walker, *Mediation Advocacy: Representing Clients in Mediation* (Bloomsbury, 2015) 64 ('*Representing Clients in Mediation*'). See also Ojelabi and Boyle (n 17) 38, 40.

mediators generating options, facial expressions and silence.[621] Stark argues that mediators ultimately draw their own lines between 'proper' and 'improper' evaluation.[622]

The blurring of the facilitative-evaluative distinction, whether described as direct/indirect, explicit/implicit, or intentional/unintentional also features within the empirical data.[623]

A further debate attempts to distinguish between the legitimate furnishing of 'information' versus the illegitimate provision of 'advice'.[624] Some consider this distinction to be a false dichotomy because 'information' in mediation is frequently inexplicit 'advice'.[625] Moreover, it is difficult to distinguish between 'advice', 'information' and 'opinion', particularly as categories of 'information' often contain implied 'advice'.[626] Disputants may treat information and different 'advice types'[627] the same, irrespective of the mediator's intention. This may explain why some mediators suggest disputants obtain their own legal or other advice.[628]

Whilst mediators may intend to provide 'information', and not 'advice', observers would note that they provide varying levels of procedural and other advice, whether directly or indirectly, with varieties of tone, language, timing, and form of questions asked, which may affect participant emotions, beliefs and behaviours and therefore outcomes.[629] Further, providing information about common options, whilst purportedly not directive 'advice', is 'never neutral' and the manner in which they are expressed typically indicate that certain options may be favoured over others.[630] It is for these reasons that Wade argues it is impossible to be an 'adviceless mediator'.[631]

The advice-versus-information debates[632] become obfuscated for lawyer-mediators. Just as 'advice' is slippery in meaning, the word 'legal' is a weasel word, which broadly means anything expressed by a lawyer.[633] Whilst it may not qualify as 'legal' advice, questions posed by mediators in confident language, which cause disputants to have doubts, risk being regarded as 'legal'.[634] Distinctions between 'legal information' and 'legal advice' remain unclear in practice.[635]

The NMAS provide no guidance about the purported distinctions between 'information' and 'advice'. Although mediators are not permitted to evaluate or advise 'on the merits',[636] it is unclear whether they are permitted to provide 'information', an 'opinion' or suggest 'options', or whether doing so falls within the ambit of 'advice'. Blended processes, such as advisory/evaluative

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621 Jacqueline Nolan-Haley, 'Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective' (2002) 7(1) *Harvard Negotiation Law Review* 235, 278.

622 Stark, 'The Ethics of Mediation Evaluation' (n 504) 784.

623 See below Chapter V.

624 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 106–7. See also *Connecting the Dots* (n 278) 21–3, Focus Group Results, 8; 'Conciliation' (n 232) xii, 11, app 6.

625 Stark, 'The Ethics of Mediation Evaluation' (n 504) 785.

626 Wade, 'Forever Bargaining in the Shadow of the Law' (n 619) 1–2.

627 For example, procedural, revealed or guessed life and business goals/risks, 'in my experience', common options and guessed future court events, judicial behaviour and range of predicted outcomes: Wade, 'Evaluative Mediation' (n 57) 6–10. See also John Wade, 'Systematic Risk Analysis for Negotiators and Litigators' [2006] 6(1) *ALTA Law Research Series* 13.

628 See, eg, *Barry v City West Water Ltd* [2002] FCA 1214, [27] (Allsop J) ('*Barry*').

629 Wade, 'Evaluative Mediation' (n 57) 4–5, 7, 13.

630 Ibid 9.

631 Wade, 'Forever Bargaining in the Shadow of the Law' (n 619) 29.

632 Wade, 'Terminological Debate' (n 208) 206.

633 Wade, 'Forever Bargaining in the Shadow of the Law' (n 619) 1–2.

634 Wade, 'Evaluative Mediation' (n 57) 10.

635 Nolan-Haley, 'Court Mediation and Search for Justice through Law' (n 239) 3–5.

636 *Practice Standards* (n 222) s 2.2. See above Chapter II at 32.

mediation or conciliation, which involve the provision of advice, are accommodated in the NMAS, despite 'advice' not being a defined term.[637]

The advice-versus-information debates highlight the indeterminacy of language and reinforce my earlier discussion regarding the difficulty in defining 'mediation'.[638] The legal advice-versus-legal information distinction also features in the empirical data.[639] Having discussed the process-content and facilitative-advisory/evaluative dichotomies, I now discuss the four practice models.

(c) Four Practice Models

The four models illustrate differences between many variables and assumptions including: different values, premises and principles underlying approaches to practice;[640] varying *purposes* of mediation;[641] the mediator's role and functions;[642] levels of mediator intervention in process and/or content; the management, control or avoidance of emotional expression;[643] and whether mediators are required to have subject-matter qualifications, experience or expertise.[644]

They also illustrate differences and assumptions regarding the structure of mediation *procedures*[645] and the three types of discourse that occur within different contexts.[646] Distributive/positional bargaining involves linear concession making over finite resources (a 'fixed pie') towards compromise, whereas integrative/interest-based negotiations involve exploration of underlying disputant needs and interests to 'expand the pie'.[647] Dialogue focuses upon 'relational development and perspective sharing' to assist disputants make positive changes in their communication and affected relationships for the purposes of reconciliation and social transformation.[648]

In the discussion that follows I explore the four models that fall along the ideology-practice continuum, starting with the most practical and concluding with the most ideological.

(i) Advisory/Evaluative

There is overlap between advisory and evaluative practices. For example, Boulle categorises advisory mediation under the title evaluative mediation.[649] Conversely, Alexander distinguishes expert advisory and wise counsel mediation, suggesting both are settlement-oriented and advisory

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637 Ibid s 10.2. See above Chapter II at 33.

638 See above Chapter II at 31.

639 See below Chapter V.

640 Bush and Folger, *The Promise of Mediation* (n 204) 1, 232–3.

641 See above Chapter II 48.

642 Boulle and Field, *Mediation in Australia* (n 27) ch 4; Bush and Folger, *The Promise of Mediation* (n 204) 43–4.

643 Ibid 54, 62, 214, 228, 234–5, 239–61; Bush and Folger, 'Reclaiming Mediation's Future' (n 245) 748.

644 See, eg, Tom Arnold, '20 Common Errors in Mediation Advocacy' (1995) 13(5) *Alternatives to the High Cost of Litigation* 69; Riskin, 'A Grid for the Perplexed' (n 208) 46; Nolan-Haley, 'Court Mediation and the Search for Justice through Law' (n 239) 79; Cris M Currie, 'Mediating Off the Grid' (2004) 59(2) *Dispute Resolution Journal* 9, 12; Jon Linden, 'The Expert Mediator Versus the Subject Expert', *Mediate.com: Everything Mediation* (Blog Post, 23 November 2004) <http://www.mediate.com/articles/linden20.cfm?nl=66>. Different views regarding whether mediators should have subject-matter expertise also feature in the empirical data: see below Chapter V at 158.

645 See below Chapter II at Part D.

646 Alexander, 'Realities of Mediation Practice' (n 177) 126.

647 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 176–7; William Ury, *Getting Past No: Negotiating in Difficult Situations* (Bantam Books, 2007) 5–6, 17–18 ('*Getting Past No*'); William Ury, *The Power of a Positive No: Save the Deal, Save the Relationship — and Still Say No* (Bantam Books, 2007) 35, 37, 39–40 ('*The Power of a Positive No*'); Fisher and Ury (n 9) xi, xxvi, 10–11, 42–3, 59–61; Fisher, Kopelman and Schneider (n 473) 38; Raiffa (n 391) 14, 33, 131.

648 Alexander, 'Understanding Practice' (n 57) 102–3; Alexander, 'Realities of Mediation Practice' (n 177) 126.

649 Boulle, *Mediation: Principles, Process, Practice* (n 71) 44; Boulle and Field, *Mediation in Australia* (n 27) 6.

in nature, but acknowledges there is no clear distinction between expert advisory mediation, conciliation, case appraisal, and neutral evaluation.[650] Given this overlap, I group them together as 'advisory/evaluative' mediation.

Advisory/evaluative mediation involves a high level of content intervention.[651] The mediator's role is to exercise advisory functions including expressing opinions, advising on the law and evidence and influencing options and outcomes.[652] They characteristically utilise the following techniques: make proposals,[653] recommendations[654] or 'endorse' potential settlements;[655] direct or urge disputants to settle/accept position-based compromises; predict court or other outcomes and the impact of not settling; and assess strengths and weaknesses.[656]

The discourse is usually positional bargaining.[657] Advisory/evaluative (and settlement) mediators are typically disinterested regarding the causes of the 'conflict'.[658]

They typically discourage and limit the expression of negative emotions,[659] and consider that emotional or inflammatory remarks are destructive and counterproductive to reaching settlement.[660] They guide disputants towards outcomes in substantial conformity with legal rights,[661] which reflects the value of normative standards in influencing outcomes. They are typically selected because of their subject-matter expertise, status or seniority, rather than particular mediation qualifications.[662]

(ii) Settlement

Settlement mediation does not fit neatly within one of the four dispute resolution categories and straddles advisory/evaluative and facilitative mediation, subject to circumstances and levels of process and content interventions.[663] Boulle suggests settlement mediation involves a limited level of mediator intervention in the process,[664] whereas Alexander suggests it is more interventionist in process than content, though some offer a combination of both.[665]

The mediator's role is to supervise incremental bargaining over quantifiable items, with disputants inducing concessions from each other and expecting a compromise midpoint between their initial

650 Alexander, 'Understanding Practice' (n 57) 97, 108, 112–13.
651 Ibid 107, 112–13.
652 Boulle and Field, *Mediation in Australia* (n 27) 3.
653 See, eg, Riskin, 'A Grid for the Perplexed' (n 208) 37; Mohamed Sweify, 'Mediator's Proposal and Mediator's Neutrality: Finessing the Tension' (2017) 28(2) *Australasian Dispute Resolution Journal* 129, 133–4.
654 See, eg, Wade, 'Evaluative Mediation' (n 57) 4–5.
655 See, eg, Walker, *Representing Clients in Mediation* (n 620) 176–7.
656 Riskin, 'A Grid for the Perplexed' (n 208) 27–8, 29–32, 35; Boulle and Field, *Mediation in Australia* (n 27) 106.
657 Alexander asserts that the discourse in expert advisory mediation is usually positional bargaining whereas in wise counsel mediation it is integrative: Alexander, 'Understanding Practice' (n 57) 107, 112.
658 Wade, 'Preparing for Mediation' (n 578) 8.
659 Bush and Folger, *The Promise of Mediation* (n 204) 97, 240.
660 Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 810–11.
661 See, eg, Boulle and Alexander, *Skills and Techniques* (n 17) 64; Bush and Folger, *The Promise of Mediation* (n 204) 44. See also Alexander, 'Understanding Practice' (n 57) 108, 112.
662 See, eg, Boulle, *Mediation: Principles, Process, Practice* (n 71) 44; Alexander, 'Understanding Practice' (n 57) 107, 112; John Settle, *The Advocate's Practical Guide to Using Mediation* (Dewey Publications, 2005) 32.
663 Boulle and Field, *Mediation in Australia* (n 27) 7.
664 Boulle, *Mediation: Principles, Process, Practice* (n 71) 44.
665 Alexander, 'Understanding Practice' (n 57) 109–10.

ambit positions.[666] Mediators characteristically separate participants for Private Sessions early and shuttle offers, counter-offers and concessions.[667]

The discourse usually involves positional bargaining. Settlement mediation is common where participants are negotiating over a 'fixed pie' such as in single-issue disputes. It reflects the values of compromise, efficiency and effectiveness. Mediators are typically selected for their technical or legal expertise or experience.[668]

(iii) Facilitative

Facilitative mediation, depicted within the literature as the 'orthodox', 'standard' or 'classical' model, is extensively taught in industry training in Australia.[669] Boulle argues that facilitative mediation attempts to uphold mediator impartiality,[670] the process-content dichotomy,[671] the minimalist intervention style[672] and the consensuality of outcomes.[673] It involves a high level of mediator intervention in the process without mediators making assessments, suggestions, proposals, opinions, endorsing possible outcomes or advising upon content or outcomes.[674] Alexander argues that facilitative mediators do not provide disputants with 'legal information'.[675]

Facilitative mediators characteristically utilise techniques centred upon the six mediator functions,[676] which feature within the empirical data.[677]

The discourse usually involves interest-based negotiation and provides disputants with the opportunity to reach 'creative' interest-based outcomes based on broader interests rather than those narrowly defined in litigation[678] that meets their respective needs.[679] It reflects mediation's *self-determination* value. Facilitative mediators may enquire about the causes of the 'conflict'[680] and encourage the expression, acknowledgment and validation of disputants' feelings and emotions.[681] Facilitative theory dictates that mediators do not require subject-matter expertise or experience, as process and communication skills are 'paramount'.[682]

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666 Boulle and Field, *Mediation in Australia* (n 27) 3, 107, 176.

667 Alexander, 'Understanding Practice' (n 57) 110.

668 Ibid 109.

669 Boulle and Field, *Mediation in Australia* (n 27) 4, 67; Boulle, *Mediation: Principles, Process, Practice* (n 71) 43, 46; Alexander, 'Understanding Practice' (n 57) 104.

670 See generally Boulle, *Mediation: Principles, Process, Practice* (n 71) 71–80.

671 Ibid 35–7.

672 Ibid 37–42.

673 Boulle, *Mediation: Principles, Process, Practice* (n 71) 46.

674 Boulle and Field, *Mediation in Australia* (n 27) 3, 107; Charlton, Dewdney and Charlton (n 382) 344; Riskin, 'A Grid for the Perplexed' (n 208) 7, 24, 28–9, 32–5.

675 Alexander, 'Understanding Practice' (n 57) 111. See above Chapter II at 63.

676 *Practice Standards* (n 222) s 2.2(a)–(f).

677 See below Chapter V at 142.

678 See above Chapter II at 41.

679 See, eg, Alexander, 'Understanding Practice' (n 57) 111; Bush and Folger, *The Promise of Mediation* (n 204) 44.

680 Wade, 'Preparing for Mediation' (n 578) 8.

681 Boulle and Field, *Mediation in Australia* (n 27) 173.

682 Alysoun Boyle, *Mediation: A Practitioner's Guide* (Institute of Arbitrators and Mediators Australia, rev ed, 2009) 90. See also Alexander, 'Understanding Practice' (n 57) 111; Boulle, *Mediation: Principles, Process, Practice* (n 71) 44.

(iv) Transformative

Transformative theory suggests that conflicts frequently have 'little to do' with the issues that led to mediation.[683] Mediators assist disputants explore the 'true nature' of their conflict interaction[684] and how to have a 'constructive conversation'.[685]

Transformative theory discourages mediator directiveness, judgment and process control.[686] It maintains that separating process and content is impossible.[687] Decisions of *any* kind belong to disputants and mediators offer *all* choices to them (called 'check-ins') to respect the principle of 'party control'.[688] The mediator's role is to proactively maintain a 'microfocus' on the moment-to-moment conflict interaction and 'follow', rather than lead, disputants to foster and support opportunities for *empowerment* and *recognition*.[689] Mediators do not deliver messages between disputants, to avoid the mediator becoming the speaker's advocate and putting the listener on the spot.[690] They only offer tentative suggestions reinforcing the opportunity for disputant choice.[691]

The discourse is dialogue-based.[692] Transformative mediators enquire about the causes of the 'conflict' to a greater extent,[693] supporting disputants' expressions of emotion or 'conflict talk'[694] by 'following the heat', without intervening, defusing, containing or filtering the tone, feeling or substance of disputant expression.[695]

Transformative theory advocates that *empowerment* is independent of any particular outcome and that solving problems *for* disputants undermines genuine *empowerment* and *recognition*.[696] Transformative mediators assist disputants define and decide *for themselves* what is a successful outcome[697] and they never commandeer, shape settlement, impose common ground or force mutual understanding.[698] Transformative theory suggests that reliance on lawyers disempowers disputants and, if adversariness is allowed or encouraged, it destroys the possibility for recognition, mutual engagement and communication.[699] It also advocates that having qualifications and skills from the 'skilled helper professions',[700] are more beneficial than subject-matter expertise or experience.[701]

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683 James R Antes, Joseph P Folger and Dorothy J Della Noce, 'Transforming Conflict Interactions in the Workplace: Documented Effects on the USPS REDRESS Program' (2001) 18(2) *Hofstra Labor and Employment Law Journal* 429, 431–2.

684 Bush and Folger, *The Promise of Mediation* (n 204) 226.

685 Della Noce, Antes and Saul (n 23) 1023–4.

686 Bush and Folger, *The Promise of Mediation* (n 204) 225–6; Bush and Folger, 'Reclaiming Mediation's Future' (n 245) 749.

687 Ibid 66, 153, 258; Della Noce, Antes and Saul (n 23) 1026, 1033.

688 Bush and Folger, *The Promise of Mediation* (n 204) 157, 183, 186, 211, 213, 222, 257.

689 Ibid 104, 193, 214, 215, 221–2. See above Chapter II at 52.

690 Bush and Folger, *The Promise of Mediation* (n 204) 146.

691 Ibid 224, citing Della Noce, Antes and Saul (n 23).

692 Alexander, 'Understanding Practice' (n 57) 103, 115; Boulle and Field, *Mediation in Australia* (n 27) 3.

693 Wade, 'Preparing for Mediation' (n 578) 8.

694 Della Noce, Antes and Saul (n 23) 1030–31.

695 Bush and Folger, *The Promise of Mediation* (n 204) 103, 153–4, 224–6.

696 Ibid 71, 75, 196.

697 Ibid 79, 217–18, 250, 258.

698 Ibid 66, 214, 217.

699 Ibid 37, 89, 238.

700 Gerard Egan and Robert J Reese, *The Skilled Helper*: *A Problem-Management and Opportunity-Development Approach to Helping* (Cengage Learning, 11th ed, 2018).

701 Boulle and Field, *Mediation in Australia* (n 27) 7; Alexander, 'Understanding Practice' (n 57) 111; Boulle, *Mediation: Principles, Process, Practice* (n 71) 115; Bush and Folger, 'Reclaiming Mediation's Future' (n 245) 752.

2 *Court-Connected Mediation Practice*

Out of the range of practices cited in the literature that I grouped according to the four models above, some characteristics are more prominent within court-connected mediation than non-court-connected contexts. I discuss four of these below.

This discussion illustrates that court-connected mediation usually reflects advisory/evaluative and settlement mediation involving compromisory or competitive conferencing styles rather than interest-based negotiation. This discussion and the discussion in the previous part provide the theory base against which I will examine the way the Court's rules-based framework addresses *practice* encompassing the mediator's role, functions and interventions.[702] It also provides the theory base against which I will explore Stakeholder reports regarding practice models utilised in the Court and the way they describe the mediator's role, functions and levels of 'appropriate' mediator intervention in process and/or content.[703]

(a) Academic Categorisations and the Exigencies of Practice

Similar to the uncertainty regarding the importance and meaningful difference between conciliation and mediation, an 'uneasy' relationship exists between academic constructs of mediation and the exigencies of practice within legal contexts.[704]

There is little evidence that mediation users, advisers or referring bodies elect a particular model but rather appoint a mediator on the basis of experience, reputation, subject-matter expertise or 'high legal status'.[705] The existence of different practice models has received brief mention in case law,[706] without detailed discussion considering their similarities or differences. Moreover, some literature suggests many judges, lawyers and mediators view the facilitative-evaluative dichotomy as 'purely academic dialogue' largely irrelevant to the exigencies of practice.[707]

These findings imply divergence between practitioners, who may be less mindful of the distinctions between different practice models, and academics, who may be more mindful of such distinctions. This gap between academic constructs and the exigencies of practice also features in the empirical data.[708]

(b) No Legislative or Policy Constraints on Models

As discussed earlier, there is no uniformity in legislation and court rules regarding definitions/descriptions of mediation. Bush and Folger argue that both mediators and mediation programs characteristically favour one model, depending upon the goals and values of the mediator or program in which they partake.[709] Conversely, Rundle argues there are generally no legislative or policy constraints that limit court-connected mediation to specific practice models and that, in the absence of clearly established guidelines, potential exists for a range of different practices to be adopted within the court-connected context.[710] Such divergent views illustrate why it will be

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702 See below Chapter III at 99.

703 See below Chapter V.

704 Boulle and Field, *Mediation in Australia* (n 27) 154.

705 Ibid 3. See also below Chapter V.

706 *Aiton Australia* (n 411) 252 [69] (Einstein J), citing Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR – its Role in Federal Dispute Resolution* (Issues Paper No 25, June 1998) ch 6, [6.20].

707 Welsh, 'The Inevitable Price of Institutionalization?' (n 26) 32–3.

708 See below Chapter V.

709 Bush and Folger, *The Promise of Mediation* (n 204) 230.

710 Rundle, 'Court-Connected Mediation Practice' (n 38) 3–4, 21, 47, 81.

productive to explore what the Court's rules-based framework stipulates about practice models compared to Stakeholder reports regarding practice.[711]

(c) Advisory/Evaluative Practices and Preferences of Legal Actors

Studies from the United States suggest mediation in the civil litigation sphere is usually evaluative, rather than facilitative and yields distributive, rather than integrative, outcomes within 'the shadow of the law'.[712] Other literature suggests advisory/evaluative practices are a growing trend within the Australian court-connected context, particularly amongst experienced lawyer-mediators and retired judge-mediators.[713] For example, some mediators in the Supreme and County Courts of Victoria reported expressing their views to disputants regarding what they considered to be 'the likely outcome' if the matter was litigated.[714]

Advisory/evaluative mediation is the model that lawyers are familiar with and *prefer* as it enables Shuttle Negotiation and retains lawyer 'control' over both process and content.[715]

The use of advisory/evaluative techniques, such as mediator suggestions as to potential settlement[716] or making observations about the practicality of litigating and commenting upon prospects of success at trial,[717] is recognised as legitimate in some case law.

Literature from Australia[718] and the United States[719] suggests that senior lawyers or retired judges are nominated as mediators because of their subject-matter expertise, status or gravitas, and that lawyers *expect* mediators will utilise advisory/evaluative interventions to facilitate settlement.[720] Sourdin suggests that mediator choice is typically left to lawyers, who choose mediators because of their expertise or previous association, rather than their mediation knowledge.[721] This is contrary to mediation guidelines that suggest lawyers and disputants should consider a mediator's 'skill and experience' before considering their subject matter expertise.[722] The need for 'suitably qualified and experienced' expert mediators has been mentioned in case law.[723] Whilst most case law does not

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711 See below Chapter III and Chapter V.

712 Hensler, 'In Search of "Good"' Mediation' (n 508) 258–9; Robert A Baruch Bush, 'Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation and What It Means for the ADR Field' (2002) 3(1) *Pepperdine Dispute Resolution Journal* 111, 113; Hensler, 'A Research Agenda' (n 80) 17; Coben (n 367) 740; Stark, 'The Ethics of Mediation Evaluation' (n 504) 770–71, 779.

713 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 3, 154, 262, 380; Boulle and Field, *Law and Practice* (n 78) 314–15, 319; Alexander, 'Realities of Mediation Practice' (n 177) 126; Boulle, *Mediation: Principles, Process, Practice* (n 71) 46. But see Macfarlane and Keet (n 323) 693–4.

714 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 57.

715 See, eg, Wade, 'Evaluative Mediation' (n 57) 11; Carole J Brown, 'Facilitative Mediation: The Classic Approach Retains Its Appeal' (2003) 4(2) *Pepperdine Dispute Resolution Journal* 279, 280, 287.

716 See, eg, *Boettcher* (n 522) [68] (Fitzgerald JA); *Tapoohi v Lewenberg [No 2]* [2003] VSC 410, [76] (Habersberger J) ('*Tapoohi*'). See also *Northrop Grumman Mission Systems Europe* (n 353) [59], [69] (Ramsey J).

717 *Collins v Queensland* [2020] QSC 154, [9], [39], [41] (Holmes CJ) ('*Collins*').

718 Boulle and Field, *Mediation in Australia* (n 27) 106; Hanger (n 597) 2–3; John Wade, 'My Mediator Must be a QC' (1994) *Australian Dispute Resolution Journal* 161.

719 See, eg, Welsh, 'Looking Down the Road Less Traveled' (n 370) 48; Currie (n 644) 12–13; Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 805; Stempel (n 590) 973; Alfini, 'Is This the End of "Good Mediation"?' (n 315) 66–73. See also Relis (n 360) 205.

720 See, eg, Trueman (n 381) 222–3; Relis (n 360) 205; McAdoo and Welsh (n 366) 419; Welsh, 'Stepping Back through the Looking Glass' (n 360) 573, 589–90; MacFarlane, 'Culture Change?' (n 323) 244, 285; Kovach and Love, 'Mapping Mediation' (n 294) 71, 96. But see Macfarlane and Keet (n 323) 693. This view also features in the empirical data: see below Chapter V at 138–9, 149–50 156, 160, 163, 167–8.

721 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 68.

722 *Guidelines for Lawyers in Mediations* (n 40) 4–5.

723 See, eg, *Idoport* (n 259) [24] (Einstein J); *Bailey v Bailey* [2009] NSWSC 1048, [16] (Rein J); *Simic* (n 402) 13–14 (Irwin DCJ); *PGF II SA* (n 523) [48] (Kay, Beatson and Briggs LJJ); *Breecass Pty Ltd v Owners of*

specify whether suitably qualified and experienced encompasses both subject-matter expertise *and* knowledge and understanding of mediation, some suggests courts expect mediators to have 'an independent and experienced legal mind'[724] to assist disputants consider 'the risks of litigation'.[725]

Experienced lawyer/barrister-mediators can strongly influence both disputants and lawyers by undertaking advisory/evaluative functions.[726] This can cause further tensions with some of mediation's core values.[727] It may give rise to allegations of 'improper' mediator pressure to settle,[728] which has received judicial attention.[729] However, none of the four practice models regard it appropriate for mediators to pressure or coerce settlement[730] and the NMAS expressly state mediators 'must support participants to reach agreements freely, voluntarily, without undue influence and on the basis of informed consent'.[731]

The literature also suggests that lawyer-mediators usually focus on the legal issues in dispute rather than relational issues and rely on their legal knowledge of disputes rather than exploring the emotional aspects of conflict.[732] For example, Boulle argues that where the 'shadow of the law' is prominent, many mediations conducted by lawyer-mediators resemble 'an auction over dollars than an exploration of interests and outcomes'.[733] This can also cause tension with some of the purposes of mediation.[734]

These findings exemplify a gap between the mediator's 'purely facilitative' role, as envisaged by NADRAC[735] and reflected in the NMAS,[736] and the occurrence of advisory/evaluative mediation, which suggests practice has grown beyond the theory.[737] This has led some pragmatists to question the circumstances and contexts in which mediators should engage in advisory/evaluative practices.[738] Some also acknowledge concerns regarding the ability of advisory/evaluative mediators to achieve disputant self-determination ethically and the need for quality control and ethical frameworks to prevent 'rogue' mediators making *de facto* determinations.[739]

Strate Plan 61419 [2019] NSWCATCD 23, [70] (Senior Member Sarginson); *Southern Waste Resourceco* (n 401) [15] (Hinton J).

724 *Facer* (n 402) [18] (Tutt DCJ)

725 *Sweeney* (n 77) [27] (Long DCJ).

726 David Jesser, 'Mediator: Not Legal Adviser' (2003) 14(3) *Australasian Dispute Resolution Journal* 211, 212.

727 See above Chapter II at 33–5.

728 See, eg, Welsh, 'Stepping Back through the Looking Glass' (n 360) 573, 648; Bobbi McAdoo and Art Hinshaw, 'The Challenge of Institutionalising Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri' (2002) 67(3) *Missouri Law Review* 473, 532; Wissler, 'Court-Connected Mediation in General Civil Cases' (n 363) 688. See also Ojelabi and Boyle (n 17) 41, 155.

729 See, eg, *Raggio v Horlock* [2016] SADC 79, [58] ('*Raggio*'); *Tapoohi* (n 716) [49], [86] (Habersberger J); *Pittorino v Meynert* [2002] WASC 76, [127] (Scott J) ('*Pittorino*'); *Boettcher* (n 522) [58]–[59] (Sheller JA); *McIntyre v Varendorff* [1999] QBT 159, [14]–[15].

730 Boulle and Field, *Mediation in Australia* (n 27) 107.

731 *Practice Standards* (n 222) s 7.4. See also *Guidelines for Parties in Mediations* (n 40) r 1.

732 Currie (n 644) 12; Raymond Albert, 'Mediator Expectations and Professional Training: Implications for Teaching Dispute Resolution' [1985] (1) *Missouri Journal of Dispute Resolution* 73, 84–5; Kathleen W Marcel and Patrick Wiseman, 'Why We Teach Law Students to Mediate' [1987] (1) *Missouri Journal of Dispute Resolution* 77, 82.

733 Boulle, 'Extending the Courts' Shadow over ADR' (n 71) 119.

734 See above Chapter II at 49.

735 See above Chapter II at 32.

736 Unless they utilise a blended process subject to specific requirements: see above Chapter II at 33 and 63.

737 Boulle, 'Minding the Gaps' (n 506) 225; Alexander, 'Understanding Practice' (n 57) 119; Riskin, 'Rethinking the Grid of Mediator Orientations' (n 354) 23.

738 Boulle, 'Minding the Gaps' (n 506) 225; Rothfield (n 539) 245.

739 Boulle and Field, *Mediation in Australia* (n 27) 382, 388.

(d) Compromisory and Competitive Lawyer Dominated Negotiations

As lawyers are ethically prohibited from having direct contact with their opponents' clients,[740] mediation is the first and potentially only opportunity to directly engage with them in constructive dialogue.[741] However, some Australian literature suggests that court-connected mediations are usually dominated by lawyers with limited direct disputant participation,[742] and reflect settlement practices akin to Settlement Conferencing.

For example, 'abbreviated conferencing' was used in personal injury disputes in the Supreme and County Courts of Victoria, under the guise of 'mediation'.[743] These conferences were often conducted in less than 2 hours, plaintiffs were largely uninvolved and negotiations were compromisory or competitive.[744]

Furthermore, Rundle suggests two styles of bargaining occur in mediations within the Supreme Court of Tasmania. She describes the first style as a 'facilitated settlement negotiation', reflecting settlement mediation focused on incremental bargaining and compromise encompassing the following characteristics: concentration on legally defined contentious issues rather that non-legal interests; lawyer dominated rather than disputant-centred; settlement is the desired outcome reflecting 'purely monetary outcomes'.[745] She describes the second style as a 'facilitated settlement conference', reflecting the 'traditional' settlement conference, encompassing the following characteristics: concentration upon legal arguments; lawyers dominate and attempt to persuade their counterparts to compromise via competitive and adversarial approaches; and settlements accord with legally available outcomes. Such styles denote a departure from mediation's core values[746] and resemble settlement and advisory/evaluative practices in contrast to facilitative or transformative mediation.

The diversity of 'mediation' practices reveals the potential for uncertainty and expectation gaps as well as the potential for gaps between theory and practice. They also reveal tensions between some of mediation's core values, such as *self-determination*, *non-adversarialism* and *responsiveness*,[747] and between lawyers and mediators relating to control.[748] The discussion reinforces why it will be productive to explore mediation practices within the Court.[749]

I now turn to the third theme I will develop in the thesis.

D *Variety of Mediation Procedures*

Many authors, industry models and training providers conflate procedures, which describe the particular stages of mediation, with practices, encompassing the mediator's role, functions and interventions,[750] under the general term mediation 'models'.[751] Conflating *procedures* with *practices* features in the empirical data.[752]

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740 *Australian Solicitors' Conduct Rules 2015* (n 35) r 33.

741 Robert Angyal, 'The Ethical Limits of Advocacy in Mediation' (Seminar Paper, New South Wales Bar Association: Bar Practice Course, 20 May 2011) 2.

742 See above Chapter II at 42.

743 Sourdin and Balvin (n 361) 144.

744 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iii, vi, 71–2, recommendation 9.

745 Rundle, 'Court-Connected Mediation Practice' (n 38) 245–7, 255, 470. See above Chapter II at 47.

746 Ibid 287–9. See above Chapter II at 33–5.

747 See above Chapter II at 34–5.

748 See above Chapter II at 42.

749 See below Chapter V.

750 See above Chapter II at 58.

Procedures differ from practices in that a mediator can follow the stages of a particular industry model but operate in a predominantly facilitative, settlement or advisory/evaluative manner. Consequently, I have separated the discussion of procedures below from the discussion of practice models in the previous part of this Chapter to illustrate the various stages of mediation, depending on the procedure utilised. I use the term 'procedure' to differentiate the stages of mediation[753] from the different 'processes' within the ADR spectrum[754] and to further highlight the process-content dichotomy.[755] I maintain this structure during the exploration of the data.[756]

There is no singularly accepted mediation *procedure*, despite references to a 'standard model'.[757] I discuss the purposes of each stage of eight procedures, commonly referred to in the literature and taught by industry training bodies.[758] Some Stakeholders expressed being taught one or more of these procedures.[759]

I have summarised the titles of eight procedures into table format to demonstrate their different stages.[760] Most of these procedures are associated with facilitative mediation and follow a similar pattern comprising seven to ten stages. The main differences include their diagrammatical designs and differing labels used to describe their procedural stages. Some combine multiple stages into one whereas others separate each under its own heading. I utilise the headings used by LEADR, the predecessor to the RI,[761] to describe the stages, for they largely coincide with the terminology used within other procedures.

The variety of procedures and differences in the purposes of each of their stages reveal the potential for uncertainty and expectation gaps, particularly as expectations regarding procedures may differ between participants. Certain procedures highlight tensions with some of mediation's core values.[762] For example, the use of Private Sessions and Shuttle Negotiation impact upon direct disputant participation and can affect procedural fairness considerations.[763] Others impact upon the mediator's role and functions when recording mediation outcomes.

1 *'Typical' Mediation Procedures and the Purposes of Each Stage*

There is no uniform or 'standard' mediation procedure. Procedure depends on many factors including the number of disputants and mediators, the attendance of lawyers and other representatives including insurers and support persons.[764] There are also procedural variations such as co-mediation,[765] tele-med[766] and online mediation.[767]

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751 See, eg, Boyle (n 682) 8, 21–3; Troy Peisley, 'Blended Mediation: Using Facilitative and Evaluative Approaches to Commercial Disputes' (2012) 23(1) *Australasian Dispute Resolution Journal* 26, 27, 30; the LEADR and the RI procedures: see Appendix H.1: Stages of Eight Mediation *Procedures*.

752 See below Chapter V at 138.

753 See below Chapter II at 72.

754 See above Chapter II at 28.

755 See above Chapter II at 60.

756 See below Chapter V at 131 and Chapter VI at 180–3.

757 For example, the Egg Diagram and the Two Triangles Diagram: Charlton, Dewdney and Charlton (n 382) 3, 7–8. See also Appendix H.2: Three Mediation Procedural Diagrams.

758 See also Sourdin, *Alternative Dispute Resolution* (n 75) ch 3; Boulle and Alexander, *Skills and Techniques* (n 17) 121; Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 5th ed, 2016) ch 7; Boulle, *Mediation: Principles, Process, Practice* (n 71) ch 7.

759 See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

760 See Appendix H.1: Stages of Eight Mediation *Procedures*.

761 See above Chapter I at 11.

762 See above Chapter II at 33–5.

763 See above Chapter II at 50.

764 Charlton, Dewdney and Charlton (n 382) 3.

765 *Dispute Resolution Terms* (n 17) 5.

Procedures also differ between the four practice models.[768] Facilitative mediation involves mediators guiding disputants through a linear procedure centred upon six mediator functions.[769] Both advisory/evaluative and settlement mediators likely utilise a procedure like the conciliation process in the Administrative Appeals Tribunal ('AAT')[770] and involve either Shuttle Mediation or mainly Shuttle Negotiation.[771] Conversely, the premise of transformative mediation is that structure and order should not be imposed upon disputants but is 'emergent', occasioned by the ongoing conflict interaction as the mediator attends to empowerment and recognition.[772] Transformative mediators do not guide participants through sequential stages but assist them to cycle through four 'different spheres of activity' with conversation cycles developed in a nonlinear fashion.

(a) Pre-Mediation

Most of the procedures I have summarised into table format commence with a Pre-Mediation.[773] Some authors distinguish Pre-Mediation – whereby the mediator convenes the 'first Private Session' with each disputant, their lawyers and support persons before mediation – from a Preliminary Conference – whereby the mediator brings *all* participants together to address issues and agree on the method of proceeding before mediation commences.[774] These two terms are used interchangeably both within the literature and mediation guidelines.[775]

The varying purposes of Pre-mediation include for the mediator to establish the suitability of both the dispute and the mediator to the particular dispute and to declare potential conflicts of interest.[776] Mediators use this stage to establish: their role and functions;[777] the role of disputants and their authority to settle;[778] and who will be attending, such as support persons[779] and experts.[780]

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766 Boulle and Alexander, *Skills and Techniques* (n 17) 289–91; Boulle and Field, *Mediation in Australia* (n 27) 88–95.

767 See, eg, Thomas Bathurst, 'ADR, ODR and AI-DR, or Do We Even Need Courts Anymore?' (Speech, Supreme Court of New South Wales, 20 September 2018) 7, 12; Michael Legg, 'The Future of Dispute Resolution: Online ADR and Online Courts' (2016) 27(4) *Australasian Dispute Resolution Journal* 227; Civil Justice Council, Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (Report, February 2015) 7 <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>; *Dispute Resolution Terms* (n 17) 9.

768 See above Chapter II at 63.

769 *Practice Standards* (n 222) s 2.2(a)–(f). See above Chapter II at 32 and 48.

770 See 'Conciliation Process Model' (n 285). See above Chapter VII at 229. See also Appendix T: Summary of the Administrative Appeal Tribunal Mediation and Conciliation 'Processes'.

771 See below Chapter II at 77.

772 Bush and Folger, *The Promise of Mediation* (n 204) 109, 224–5, citing Dorothy Della Noce, 'Mediation as a Transformative Process: Insights on Structure and Movement' in Joseph Folger and Robert Bush (eds), *Designing Mediation: Approaches to Training and Practice Within a Transformative Framework* (Institute for the Study of Conflict Transformation, 2001) 71, 77, 81; James Antes et al, 'Is a Stage Model of Mediation Necessary?' (1999) 16(3) *Mediation Quarterly* 287, 294.

773 See Appendix H.1: Stages of Eight Mediation *Procedures*.

774 See, eg, Helen Shurven, 'Pre-Mediation for Mediators' (2011) 12(6) *ADR Bulletin* 120.

775 See, eg, *Guidelines for Parties in Mediations* (n 40) 6; *Guidelines for Lawyers in Mediations* (n 40) 3, 6.

776 Boyle (n 682) 25–31.

777 See, eg, Rothfield (n 539) 244–5; *Mediation Rules* (n 183) r 5.

778 See, eg, James R Madison, 'Everything You Need to Know About Authority to Settle a Mediation' (2008) 63(2) *Dispute Resolution Journal* 20; *Ethical Guidelines for Mediators* (n 254) r 1; *Guidelines for Parties in Mediations* (n 40) 5; *Mediation Rules* (n 183) r 6.

779 See, eg, Boulle and Alexander, *Skills and Techniques* (n 17) 307; Charlton, Dewdney and Charlton (n 382) 389; *Guidelines for Parties in Mediations* (n 40) 4; *NSW Information Kit* (n 408) 14.

780 See generally Peter Holmes, 'Timely Use of Experts in Mediations' (2016) 37(10) *Bulletin (Law Society of South Australia)* 36; Laurence Boulle, 'Duelling Experts in ADR' (1999) 1(9) *ADR Bulletin* 116; John H Wade 'Dueling Experts in Mediation and Negotiation: How to Respond When Eager Expensive Entrenched Expert Egos Escalate Enmity' (2004) 21(4) *Conflict Resolution Quarterly* 419; FY Kingham, 'Refresher on the Planning and Environment Court' (Conference Paper, Queensland Law Society Property Law Conference, 28 November 2008).

Mediators also use this stage to: assist with administrative arrangements and emotionally prepare disputants; [781] facilitate pre-mediation information gathering and exchange; [782] and discuss confidentiality[783] and privacy.[784] It is during this stage that participants execute the Agreement to Mediate,[785] which addresses matters including participants' roles and responsibilities, fees, methods of terminating mediation, privacy and confidentiality.[786] Many of these purposes form an integral part of the NMAS[787] and feature in mediation rules.[788]

The importance of Pre-Mediation is acknowledged within the literature.[789] Some argue it is the most important stage of the procedure,[790] with fewer mediation sessions required to settle disputes as a consequence.[791] Rooney argues it is a principal contributor to success, in terms of process and outcomes, as it assists facilitation of non-contentious administrative and discovery issues before disputants and lawyers become 'most defensive' during Private Sessions.[792] Conversely, Boulle and Field submit that there is little evidence to substantiate claims that more preparation undertaken during Pre-Mediation increases chances of settlement.[793]

(b) Opening

Most of the procedures commence with an 'Opening', to convene the 'meeting, greeting and seating routines'.[794] This stage enables the mediator to: confirm disputants have authority to make decisions and reach settlement;[795] confirm mediation is voluntary, confidential and *without prejudice* insofar as the law allows;[796] ensure there are no conflicts of interest[797] and that the Agreement to Mediate is executed.[798] The mediator explains the purpose(s) of mediation, the role of mediator, disputants, advisers and support persons[799] and the stages of the procedure and obtains participant commitment to communication guidelines and to the process.

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781 Jill Howieson and Lisanne Iriks, 'Before Mediation: Designing Processes for the Next Decade: Matching Process with Purpose' (2017) 28(1) *Australasian Dispute Resolution Journal* 51, 52.

782 Boulle and Field, *Mediation in Australia* (n 27) 71–2.

783 See, eg, *Practice Standards* (n 222) ss 3.2(b), 9, 10.1(c)(vii); Joe Harman, 'Mediation Confidentiality: Origins, Application and Exceptions and Practical Implications' (2017) 28(2) *Australasian Dispute Resolution Journal* 106; *Ethical Guidelines for Mediators* (n 254) r 5. See also Rachael Field and Neal Wood, 'Marketing Mediation Ethically: The Case of Confidentiality' (2005) 5(2) *Queensland University of Technology Law and Justice Journal* 143, 149–54.

784 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 316, citing *Cahill v Kenna* [2014] NSWSC 1763, [174].

785 Charlton, Dewdney and Charlton (n 382) 3, 183, 189–91; *Guidelines for Lawyers in Mediations* (n 40) 5; *Guidelines for Parties in Mediations* (n 40) r 8.

786 Boulle and Field, *Mediation in Australia* (n 27) 74, 347.

787 *Practice Standards* (n 222) s 3.

788 *Mediation Rules* (n 183) r 7.

789 See, eg, Stephen Lancken, 'The Preliminary Conference: Option or Necessity?' (2000) 11(3) *Australasian Dispute Resolution Journal* 196, 202; Anne Prior and Rosemary Thompson, 'Are Pre-Mediation Sessions Helpful?' (1999) 10(4) *Australasian Dispute Resolution Journal* 285, 291–2; Rhonda Payget, 'The Purpose of an Intake Process in Mediation' (1994) *Australian Dispute Resolution Journal* 190, 198.

790 Boyle (n 682) 26.

791 Shurven (n 774) 121.

792 Greg Rooney, 'The Australian Experience of Legislated Pre-Action ADR Requirements: Challenges and Opportunities' (Conference Paper, Law Society of South Australia Forum, 11 February 2016) 22–3.

793 Boulle and Field, *Mediation in Australia* (n 27) 69.

794 Ibid 75; Boulle and Alexander, *Skills and Techniques* (n 17) 62–3, 123.

795 Wade, 'Bargaining in the Shadow of the Tribe and Limited Authority to Settle' (n 18).

796 Boulle and Field, *Mediation in Australia* (n 27) ch 10.

797 *Practice Standards* (n 222) s 7.2; *Ethical Guidelines for Mediators* (n 254) r 3.

798 See below Chapter VI at 177.

799 Boulle and Field, *Mediation in Australia* (n 222) 110–24; Hardy and Rundle (n 39) ch 5; Boulle and Alexander, *Skills and Techniques* (n 17) 307; Charlton, Dewdney and Charlton (n 382) 389–90.

Unlike procedures that involve the delivery of a formal opening *to* disputants, transformative mediators commence an 'Opening Conversation' *with* participants,[800] inviting them to identify their values, goals, and expectations regarding confidentiality and ground rules. Transformative mediators inform disputants that they can design the procedure as it unfolds, reliant upon what disputants feel will be useful, and that mediation has a broader focus than achieving settlement.[801] They also explain their role as being largely supportive to disputant choices about their interaction.[802]

(c) Parties' Opening Comments

During this stage in most of the procedures, disputants are invited to briefly introduce 'why they are at mediation', 'how they have been affected' and 'what they would like to achieve', with in-depth discussion to follow in the later stages of the process.[803] Disputants are actively encouraged to make their Opening Comments, however, they can delegate that function to their lawyers or support person.[804] Lawyers are also invited to volunteer additional information their client(s) may have overlooked.[805]

(d) Reflection and Summary

During this stage in most of the procedures, the mediator summarises what disputants have articulated during the Parties' Opening Comments using 'reported speech'.[806] The purpose is for disputants to feel validated by having their expressed concerns acknowledged and provides disputants an opportunity to make additional comments about pertinent issues they may have omitted during Parties' Opening Comments. It also assists the mediator identify existing areas of agreement or 'common ground'.[807] Conversely, transformative mediators highlight topics of both disputed issues *and* common ground to enable greater interpersonal understanding.[808]

(e) Agenda Setting

This stage features in most of the procedures. The mediator establishes a cooperative agenda in neutral and mutualised terms.[809] The purpose of the agenda is to guide discussions and to provide a yardstick to objectively measure progress.[810] It also provides a further opportunity for disputant concerns to be visibly validated and for the dispute to be condensed to manageable parts.[811] Multiple agenda items are recorded to identify disputant concerns and issues in dispute, to avoid the creation of a single issue/position agenda, that may lead disputants into 'horse-trading' and further

800 Bush and Folger, *The Promise of Mediation* (n 204) 109, 142.

801 Sally Pope, 'Beginning the Mediation: Party Participation Promotes Empowerment and Recognition' in Joseph Folger and Robert Bush (eds), *Designing Mediation: Approaches to Training and Practice Within a Transformative Framework* (Institute for the Study of Conflict Transformation, 2001) 85, 86–9.

802 Bush and Folger, *The Promise of Mediation* (n 204) 142.

803 Hensler, 'A Research Agenda' (n 80) 17; Boulle and Field, *Mediation in Australia* (n 27) 77; Boulle and Alexander, *Skills and Techniques* (n 17) 130–7.

804 *Practice Standards* (n 222) s 7.5; Charlton, Dewdney and Charlton (n 382) 23.

805 Charlton, Dewdney and Charlton (n 382) 23, 31.

806 Boyle (n 682) 42–3.

807 Ibid 92; Boulle and Alexander, *Skills and Techniques* (n 17) 139.

808 Bush and Folger, *The Promise of Mediation* (n 204) 97; Della Noce, Antes and Saul (n 23) 1031–32.

809 Boulle and Field, *Law and Practice* (n 78) 78; Boulle and Alexander, *Skills and Techniques* (n 17) 140–45.

810 Charlton, Dewdney and Charlton (n 382) 48; Boulle, *Mediation: Principles, Process, Practice* (n 71) 239.

811 Boyle (n 682) 45.

reinforce entrenched positions.[812] Conversely, transformative mediators do not identify issues or move disputants through mediator-driven agendas.[813]

(f) Issue Exploration

This stage forms an integral part in each of the procedures. The purpose is for the mediator to assist disputants to identify and explore their respective interests, issues, and underlying needs[814] in Joint Session. The mediator endeavours to moves disputants from adversarial bargaining or competitive negotiation to cooperative interest-based problem solving and change the focus by encouraging disputants to communicate directly, rather than with the mediator.[815] This is usually the most time-consuming stage and some authors argue that mediators should remain at this stage as long as possible.[816] This is reflected pictorially in the Egg Diagram, the Two Triangles, the LEADR, IAMA and RI procedures.[817] Spending the most time in Joint Session is characteristic of facilitative mediation, whereas evaluative mediators typically restrict or control direct disputant communication and spend more time in Private Sessions.[818]

Whilst facilitative mediation theory proposes that mediators should spend most time in Joint Session, Issue Exploration is occasionally skipped in practice, with mediators conducting the remainder of mediation by Shuttle Negotiation.[819] The demise of the Joint Session appears to be a growing phenomenon in the United States.[820] Some argue that lawyers justify bypassing the Joint Session because they perceive it as being a waste of time given 'participants already know what the dispute is about', coupled with their 'psychological preference' for the resolution of disputes based on the application of law, and they prefer to avoid, rather than constructively address, emotional client outbursts and underlying disputant interests.[821] Others criticise such practices as reducing the role of mediator to no more than 'water carrier between rooms'.[822]

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812 Charlton, Dewdney and Charlton (n 382) 59, 294, 355, 382.

813 Bush and Folger, *The Promise of Mediation* (n 204) 115, citing Patricia Gonsalves and Donna Hudson, 'Supporting Difficult Conversations: Articulation and Application of the Transformative Framework at Greenwich Mediation' (Web Page, July 2005) <Mediate.com <https://www.mediate.com/articles/greenwichM1.cfm#>.

814 See, eg, *Practice Standards* (n 222) s 4.1; Boyle (n 682) 48–54; Ury, *Getting Past No* (n 647) 78–80; Boulle and Alexander, *Skills and Techniques* (n 17) 188–93.

815 See, eg, Charlton, Dewdney and Charlton (n 382) 68. But see Folberg and Taylor (n 333) 55–6.

816 Boyle (n 682) 49; Boulle and Field, *Mediation in Australia* (n 27) 78; Sourdin and Balvin (n 361) 145; Michael Redfern, 'Mediation and the Legal Profession' (2002) 13(1) *Australasian Dispute Resolution Journal* 15, 18.

817 Appendix H.1: Stages of Eight Mediation *Procedures*. See also Appendix H.2. Three Mediation Procedural Diagrams.

818 Riskin, 'A Grid for the Perplexed' (n 208) 31.

819 Charlton, Dewdney and Charlton (n 382) 168. See below Chapter II at 77.

820 See, eg, Nancy A Welsh, 'Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation' (2017) 70(3) *Southern Methodist University Law Review* 721, 727; Eric Galton and Tracy Allen, 'Don't Torch the Joint Session' (2014) 21(1) *Dispute Resolution Magazine* 25, 25; Lynne S Bassis, 'Face-to-Face Sessions Fade Away: Why is Mediation's Joint Session Disappearing?' (2014) 21(1) *Dispute Resolution Magazine* 30; Carrie Menkel-Meadow, 'Ex Parte Talks with Neutrals: ADR Hazards' (1994) 12(9) *Alternatives to the High Cost of Litigation* 1. But see Walker, *Representing Clients in Mediation* (n 620) 254.

821 See, eg, Riskin and Welsh (n 51) 924. See also Galton and Allen (n 820) 25; Basis (n 820). See also *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 478, [26] (Palmer J).

822 Geoff Sharp, 'In Praise of Joint Sessions' (2009) 11(4) *ADR Bulletin* 1. See also Trueman (n 381); Boulle and Field, *Mediation in Australia* (n 27) 138.

(g) Private Sessions

Private Sessions feature in most of the procedures[823] and the NMAS.[824] Their purpose is for disputants to be forthright and share sensitive or confidential information with the mediator.[825] They allow mediators to discuss options and alternatives, reality test, 'play devil's advocate' and undertake role reversals in preparation for the Option Generation and Negotiation stage. A further purpose is for the mediator to seek to address impasses.[826] Before breaking into Private Sessions, mediators reiterate confidentiality, with nothing to be discussed with those not present at the session without express disputant consent.

Most of the procedures provide that Private Sessions should be held later in the process after the issues have been explored and discussed in Joint Session.[827] Three reasons proposed for this include the tendency for disputants to repeat information previously said in the Parties' Opening Comments, reinforce their opening positions, and rush to proposing solutions rather than addressing the underlying issues.[828] Whilst rushing to scratch the 'Private Session itch' is discouraged, in practice, many mediators reportedly rush to Private Sessions at the first possible opportunity.[829] Rushing to Private Sessions also features in the empirical data.[830]

Private Sessions are undertaken throughout mediation on a needs basis, before mediators either reconvene for further Issue Exploration or transition to option generation and negotiation.

A distinction exists between Private Sessions, as a distinct stage of the eight procedures, and two variations: Shuttle Mediation and Shuttle Negotiation. These two terms are used interchangeably in some literature.[831] Shuttle Negotiation features in the NMAS, though is not a defined term. [832]

NADRAC described Shuttle Mediation as a facilitative process whereby the mediator 'shuttles' between disputants who are kept separate for the entire mediation, either by location or alternate times.[833] Shuttle Mediation is typically used where there is: a history of violence; a perceived power or status imbalance; or no possibility of constructive dialogue due to continuing animosity between disputants that may lead to mediation becoming a further forum for combat.[834] Participants usually agree in advance of Shuttle Mediation that the mediator's role will be 'messenger' or 'communication agent' and that they will remain separated at all times.[835]

Conversely, Shuttle Negotiation describes the process that can occur typically in the later stages of Joint Session, particularly during heavy bargaining, whereby the mediator 'shuttles' between disputants conveying their messages and responses. Shuttle Negotiation may occur because

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823 Folberg and Taylor and Bush and Folger acknowledge that Private Sessions are optional, though Bush and Folger argue that the mediator has no role in calling them: Bush and Folger, *The Promise of Mediation* (n 204) 167; Folberg and Taylor (n 333) 43, 276.

824 *Practice Standards* (n 222) s 4.

825 Charlton, Dewdney and Charlton (n 382) 96–105.

826 See generally Sander and Goldberg (n 107) 54–9; Robert H Mnookin, 'Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict' (1993) 8(2) *Ohio State Journal of Dispute Resolution* 235.

827 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 55.

828 Charlton, Dewdney and Charlton (n 382) 6, 9, ch 6.

829 Ibid 92–3, 240; Boulle and Alexander, *Skills and Techniques* (n 17) 151–58.

830 See below Chapter VI at 188 and 195.

831 Rosemary Thompson and Ann Prior, 'Is To and Fro the Way to Go?: Practice and Effectiveness of Shuttle Mediation' (2001) 12(3) *Australasian Dispute Resolution Journal* 160; Mieke Brandon, 'Use and Abuse of Private Session and Shuttle in Mediation and Conciliation' (2005) 8(3) *ADR Bulletin* 1; David A Hoffman, 'Mediation and the Art of Shuttle Diplomacy' (2011) 27(3) *Negotiation Journal* 263.

832 *Practice Standards* (n 222) ss 3.1(a), 4.1.

833 *Dispute Resolution Terms* (n 17) 10.

834 Boulle and Alexander, *Skills and Techniques* (n 17) 153, 279–83, 359–60.

835 Charlton, Dewdney and Charlton (n 382) 169–71. See also Appendix I: Shuttle Mediation *Procedure*.

disputants: cannot appropriately communicate whilst being in the same room; require a break from each other to speak freely; and to address lawyer concerns regarding their client's heighted emotional reactivity.[836]

Some argue that Shuttle Negotiation should only be used in 'special circumstances' and that continuous Shuttle Negotiation is not appropriate if it simply aids the mediator's comfort level or because lawyer-mediators are used to conducting negotiations in this manner.[837] Others report minimising Shuttle Negotiation in line with their preferred facilitative practice.[838] Boulle and Field submit there is little evidence that Shuttle Negotiation produces more effective outcomes and greater disputant satisfaction than combinations of Joint and Private Sessions.[839]

(h) Option Generation and Negotiation

Option Generation and Negotiation stages are present within all eight procedures. The mediator assists disputants transition from an issue exploration to problem solving mindset and from focussing on the past to solving the problems both in the present and the future.[840] Assisting disputants navigate from a past to a future focus is a common feature of facilitative mediation. Conversely, transformative mediators do not steer the conflict talk and 'follow' the conversation about the past without shifting to a future focus.[841]

This stage has three distinct purposes.[842] First, the mediator assists disputants to generate a range of options and alternatives that may meet their collective needs and interests.[843] Secondly, the mediator assists disputants move from an adversarial bargaining or competitive negotiation mindset to joint interest-based problem solving and developing objective criteria against which to evaluate those options.[844] Thirdly, the mediator assists disputants address issues of 'workability' and 'durability' including agreed actions, responsibilities, timeframes and strategies to address future contingencies.[845]

Some authors suggest mediators should only encourage Option Generation and Negotiation after all issues have been explored and not engage in settlement discussions prematurely, even if disputants, or their lawyers, insist on immediate solutions or horse-trading over positions.[846]

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836 Charlton, Dewdney and Charlton (n 382) 167–9; Rothfield (n 539) 246.

837 Ibid 68, 95, 120, 167–8, 169. See below Chapter II at 81.

838 Rothfield (n 539) 246.

839 Boulle and Field, *Mediation in Australia* (n 27) 94.

840 Charlton, Dewdney and Charlton (n 382) 108.

841 See, eg, Bush and Folger, *The Promise of Mediation* (n 204) 97, 209; Della Noce, Antes and Saul (n 23) 1029–31; Sally Ganong Pope, 'Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition' (1996) 13(4) *Mediation Quarterly* 287, 292.

842 Boyle (n 682) 70–5.

843 See, eg, Fisher, Kopelman and Schneider (n 473) 85–90; Michael Wheeler, *The Art of Negotiation: How to Improvise Agreement in a Chaotic World* (Simon & Schuster, 2013) 216–17.

844 Folberg and Taylor (n 333) 55–7; Fisher and Ury (n 9) 86–7, 189; Fisher, Kopelman and Schneider (n 473) 75–82; Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Penguin Books, 2006) 207–8; Roger Fisher and Danny Ertel, *Getting Ready to Negotiate: A Step-by-Step Guide to Preparing for Any Negotiation* (Penguin Books, 1995) 6, 61; Douglas Stone, Bruce Patton and Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (Penguin Books, 2nd ed, 2011) 214; Ury, *Getting Past No* (n 647) 21, 122.

845 Boulle and Field, *Mediation in Australia* (n 27) 79; Fisher and Ertel (n 844) 96, 105.

846 Charlton, Dewdney and Charlton (n 382) 294, 383; Fisher and Ury (n 9) 174.

(i) Agreement and Closure

Each of the procedures has an Agreement and Closure stage. The purpose of this stage is for the mediator to assist disputants close the 'last gap'[847] and facilitate formalisation of their agreement, adjourn or terminate mediation.[848]

There is no uniformity between the procedures regarding 'who' records the agreement and the level of 'assistance' provided to disputants during this stage. In Folberg and Taylor's procedure the mediator prepares a 'working document' for disputants to sign and provides them with a copy before adjourning to a Legal Review/Processing stage, during which the terms of the mediated plan are reviewed by lawyers or ratified by the 'true decision makers'.[849] Conversely, the IAMA procedure explicitly provides that disputants are responsible for recording their agreed terms, indicating it is inappropriate for mediators to 'hijack' this responsibility – though disputants may defer this task to their lawyers.[850]

Where there is partial resolution, disputants may sign an Interim Agreement, summarising their in-principle agreement, subject to finalisation,[851] or a 'Statement of Unresolved Issues', which may assist limiting the issues and can be used as a negotiation tool at a later date.[852]

Where no agreement is reached, the mediator informs disputants of their intention to suspend or terminate mediation[853] and makes closing remarks during which areas of agreement are summarised, the disputants' progress is acknowledged, confidentiality is reiterated and the mediation is closed.

(j) Post-Mediation

The final stage in most of the procedures is Post-Mediation. The purpose of this 'follow-up' or 'review meeting' is to address any problems that may arise with implementation of the agreement and/or review and revise its terms.[854]

2 *Procedural Characteristics Common in Court-Connected Mediation*

Some procedural characteristics are more prominent within court-connected mediation and I discuss seven of these below.

This discussion illustrates that court-connected mediation are usually dominated by lawyer control entail Shuttle Negotiation with less demarcated stages than those within the literature and in industry models. This discussion and the discussion in the previous part provide the theory base against which I will examine the way the Court's rules-based framework addresses mediation procedures and whether mediators must adhere to a particular procedure with specific stages.[855] It

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847 John Wade, 'The Last Gap in Negotiations: Why is it Important? How Can it be Crossed' (1995) 6(1) *Australasian Dispute Resolution Journal* 92.

848 *Practice Standards* (n 222) ss 6, 6.2(f), 10.1(b)(ix); Charlton, Dewdney and Charlton (n 382) 125; Boyle (n 682) 78.

849 Folberg and Taylor (n 333) 60–3.

850 Boyle (n 682) 78–9.

851 Ibid 76.

852 Charlton, Dewdney and Charlton (n 382) 131.

853 Boulle and Field, *Mediation in Australia* (n 27) 84; *Ethical Guidelines for Mediators* (n 254) r 6; *Practice Standards* (n 222) s 5.1.

854 Folberg and Taylor (n 333) 65–9; Boyle (n 682) 76, 86–7.

855 See below Chapter III at 101.

also provides the theory base against which I will explore Stakeholder reports regarding mediation *procedure*.[856]

(a) Minimal Compliance with Industry Models

Some studies suggest that mediators within court-connected contexts do not follow any industry models and depart from them by doing little to support direct disputant participation.[857] For example, many 'mediations' within the Supreme and County Courts of Victoria departed so significantly from industry models and the NMAS that they are more accurately described as 'conciliations, conferences or evaluations'.[858]

(b) No Uniform Pre-Mediation Procedures

There is no uniformity in Pre-Mediation procedures among Australian court-connected mediation programs. Research suggests that Pre-mediation occurs in most actions in the New South Wales District and Supreme Courts, and conducted face-to-face or via telephone.[859] Intake, screening, diagnosis and referral occur in the Land and Environment Court of New South Wales.[860] Registrars in the Federal Court historically arranged a 'first meeting' with disputants and their appointed mediator, to enable discussion about their forthcoming mediation.[861]

A 'culture of no intake' operates in the Supreme and County Courts of Victoria and intake or Pre-Mediation is held in a minority of actions.[862] Rundle suggests mediators infrequently conduct Pre-Mediation in the Supreme Court of Tasmania,[863] though more recently, it appears they may convene Pre-Mediation by teleconference, usually involving lawyers without disputants.[864]

It is unclear whether Pre-Mediation procedures exist in the higher courts of South Australia, though I have located one unreported case that refers to the availability of a 'pre-mediation hearing' in judicial mediations.[865]

This lack of uniformity is an important finding as Pre-mediation enables mediators to explore, clarify and manage participant understandings and expectations and assist them in their preparation for mediation, which can impact upon satisfaction as to both process and outcomes.[866]

(c) Use of Position Papers

In some court-connected mediation contexts, lawyers prepare a 'Mediation Book' assembling the primary court documents, expert reports and letters of instruction.[867] They may also exchange Issue Statements[868] or Position Papers,[869] though some authors argue they are a waste of resources for

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856 See below Chapter VI.

857 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iii, 48.

858 Ibid iv, 48; Sourdin and Balvin (n 361) 147.

859 Sourdin and Matruglio (n 81) 39, 49.

860 See, eg, Preston, 'Operating an Environment Court' (n 199) 10; Preston, 'Moving Towards a Multi-Door Courthouse: Part I' (n 199) 79–82; Preston, 'Moving Towards a Multi-Door Courthouse: Part II' (n 199) 147–50.

861 Black (n 305) 139–40.

862 Sourdin and Balvin (n 361) 52, 144.

863 Rundle, 'Court-Connected Mediation Practice' (n 38) 208, 459.

864 Jim Connolly, 'Mediation' (Information Paper, Supreme Court Tasmania, May 2021) 1 <https://www.supremecourt.tas.gov.au/the-court/mediation/>.

865 *Merlino* (n 32) 11 (Master Blumberg).

866 See below Chapter III at 73. See also Chapter VI at 180 and Chapter VII at 221, 223–6 and 231.

867 Mal Byrne, 'ADR in Personal Injury: Plaintiff's Perspective' (Conference, Personal Injury Law: Retrospect and Prospect, 13 March 2014) 10–12.

868 Wolski, 'On Mediation, Legal Representatives and Advocates' (n 323) 42.

they usually reiterate disputed issues or merely re-state the pleadings, which further polarise and entrench disputant positions.[870]

(d) Delivery of Parties' Opening Comments by Lawyers

Some Australian research suggests that lawyers deliver 'opening statements' in most court-connected mediations in lieu of disputants,[871] conceivably with 'traditional' lawyer posturing.[872] Delivering brief opening statements in Joint Session, or none at all, may be explained by an assumption by lawyers that all participants 'already knows what occurred' and that time will be better spent 'hammering out' a settlement.[873]

Sourdin argues that the exclusion or restriction of disputant comment in the early stages of mediation increases the likelihood of rights-based and positional approaches and decreases the likelihood of exploration of broader disputant interests.[874] Hearing from lawyers *only* is contrary to industry models that focus on eliciting disputant interests, promote integrative rather than distributive bargaining, ensure disputants are satisfied with process, and promote outcomes that meet substantive, procedural and broader disputant interests.[875] It also impacts upon mediation's *self-determination* and *responsiveness* value.[876]

(e) Minimal Use of Agenda Setting, Visual Aids and Identifying 'Common Ground'

Literature, industry models and statutory procedures[877] emphasise the importance of utilising a visual 'map' to assist disputants understand and 'track' the progress during mediation.[878]

However, Boulle posits that this stage tends to be overlooked in practice especially where participants are fixated on monetary issues.[879] Most mediators in the Supreme and County Courts of Victoria reported not using visual aids such as a whiteboard or butcher's paper, though some expressed noting issues, topics, common ground or an agenda on paper, but not displayed for disputants.[880] The most common agenda items reported were 'liability', 'quantum', 'evidentiary issues' and 'size of asset pool', suggesting that agenda topics focus on rights rather than topics that enable interest-based conversations. Similarly, 'the issues' in dispute are usually the focus in mediations in the Supreme Court of Tasmania, rather than areas of 'common ground'.[881]

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869 Boulle and Alexander, *Skills and Techniques* (n 17) 87.

870 Charlton, Dewdney and Charlton (n 382) 62, 202–3. See below Chapter III at 96, Chapter VI at 179 and Chapter VII at 207 and 225.

871 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 48, 53–5; Sourdin and Matruglio (n 81) 46; Rundle, 'Court-Connected Mediation Practice' (n 38) 210.

872 See, eg, *Barry* (n 628) [77].

873 Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 840.

874 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 54.

875 Sourdin and Balvin (n 361) 144.

876 See above Chapter II at 34–5.

877 See, eg, 'Mediation Process Model', *Administrative Appeals Tribunal* (Web Page) <https://www.aat.gov.au/steps-in-a-review/taxation-and-commercial/taxation-and-commercial/alternative-dispute-resolution-adr>: see below Chapter VII at 229.

878 Sourdin and Balvin (n 361) 145.

879 Boulle, *Mediation: Principles, Process, Practice* (n 71) 239.

880 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 48, 54–5, 57.

881 Rundle, 'Court-Connected Mediation Practice' (n 38) 211. See also Chapter VI at 186.

(f) Prevalence of Private Sessions and Shuttle Negotiations

Some studies suggest the default mode of mediators within the court-connected contexts is to bypass or marginalise the Joint Session by breaking early for Private Sessions and may not return to Joint Session until an agreement is reached.[882]

This three-stage procedure of an initial Joint Session for Opening and Parties' Opening Comments followed by an immediate break for Private Sessions and the remaining process conducted by Shuttle Negotiation appears to be the 'orthodox'[883] procedure within court-connected mediation.[884] Shuttle Negotiation coincides with settlement and advisory/evaluative mediation practices, particularly where mediators are barristers or retired judges.[885]

Wade suggests advisory/evaluative mediation is common in legal cultures and describes this as the 'Single Issue Monetised Shuttle No Intake Lawyer Controlled' mediation, during which: lawyers 'do the talking'; issues are defined as 'legal', typically monetised topics; mediators separate camps, shuttling messages, offers and counter-offers; and use their 'legal' experience to create doubt about each camp's confidence in their preferred solution.[886]

Research suggests lawyers are more comfortable with procedures similar to accustomed legal negotiations,[887] such as Private Sessions akin to settlement conferences[888] and Shuttle Negotiations.[889]

Whilst courts have jurisdiction to restrain lawyers from participating in mediation[890] and some case law acknowledges mediations can involve 'lawyer-free' sessions,[891] it is not uncommon for court-connected mediators to have Private Sessions with lawyers without their clients,[892] which is also acknowledged in case law.[893]

These examples are illustrative of further tensions between some of mediation's core values, such as *self-determination*, *non-adversarialism* and *responsiveness*.[894] Furthermore, the early tendency to break for Private Sessions is inconsistent with industry models, which focus on issue exploration, identification of underlying needs and interests and the facilitation of direct disputant communication.[895]

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882 Hensler, 'A Research Agenda' (n 80) 17; Welsh, 'Making Deals in Court-Connected Mediation' (n 326) 809; Riskin and Welsh (n 51) 876; Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 48, 55; Alfini, 'Is This the End of "Good Mediation"?' (n 315) 67.

883 See, eg, *Collins* (n 717) [13], [22], [26], [28], [33] (Holmes CJ); *Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 272, [8].

884 See also *Abriel v Australian Guarantee Corp* [2000] FCA 1198, [9]; *National Australia Bank Ltd v Freeman* [2000] QSC 295, [62]; *Tapoohi* (n 716) [21]–[22]; *Lee* (n 299) 3 (Fryberger J); *National Australia Bank v Koller* [2011] VSC 228, [41] (Daly J) ('*Koller*'); *Fuge v Commonwealth Bank of Australia* [2019] FCA 1621, [119], [136]–[137] (Lee J); *Collins* (n 717) [13] (Holmes CJ).

885 Boulle and Field, *Mediation in Australia* (n 27) 93–4.

886 Wade, 'Preparing for Mediation' (n 578) 1; Wade, 'Evaluative Mediation' (n 57) 5.

887 Boulle and Field, *Law and Practice* (n 78) 94.

888 Trueman (n 381) 234.

889 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iv, 70.

890 See, eg, *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 478, [32] (Palmer J), citing *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (Thomas J); *Black v Taylor* [1993] 3 NZLR 403 (Cooke P, Richardson and McKay JJ); *Grimwade v Meagher* [1995] I VR 446 (Mandie J).

891 *Barry* (n 628) [26].

892 Gordon, 'Why Attorneys Support Mandatory Mediation' (n 324) 383.

893 See, eg, *Bar Chambers Pty Ltd v Maxcon Constructions Pty Ltd* [2020] SAERDC 29, [16] (Judge Gilchrist) ('*Bar Chambers* [2020]').

894 See above Chapter II at 34–5.

895 Sourdin and Balvin (n 361) 145; Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 55.

(g) Mediator's Role as Scribe or Dictator?

Best practice suggests agreements be reduced to writing before mediation ends.[896] However, one of the debates within the literature relates to 'who' records the agreement? If mediators, do they act as 'scribe' or 'dictator'?

Though NMAS accredited mediators must have skills in facilitating the recording of mediated outcomes,[897] the NMAS does not specify the extent to which they act as scribe or dictator. Whilst some guidelines suggest mediators should encourage disputants to continue mediation until they have addressed any enforceability issues and recorded the settlement terms, they state mediators must 'be cautious about direct involvement in drafting' settlement terms, which 'may be construed as providing legal advice'.[898] Wade argues that mediators often have no realistic choice where disputants are unrepresented but to draft or dictate the first, and frequently final, draft, to avoid disadvantaging the 'poor and middle class'.[899] The difficulties that arise where mediators dictate settlement terms have received limited judicial attention.[900]

Much Australian legislation and court rules are silent regarding the scribe-dictator distinction.[901] However, some statutes require mediators to prepare a draft setting out the main points of agreement including a statement relating to a cooling off period for the proposed agreement.[902] Some tribunals require mediators to inform disputants they can assist with preparing both agreed lists of issues 'in' and 'not in dispute'.[903]

Divergence exists within the empirical data relating to 'who' records settlement agreements and the level of 'assistance' provided to disputants during this stage, particularly where disputants are unrepresented,[904] highlighting the scribe-dictator distinction.[905]

The variety of procedures and differences in the purposes of each of their stages reveals the potential for uncertainty and expectation gaps as well as the potential for gaps between theory and practice. They also reveal tensions between some of mediation's core values[906] and between lawyers and mediators relating to control.[907] The discussion reinforces why it will be productive to explore mediation *procedure* within the Court.[908]

E *Conclusion*

'Mediation' is a complex, contested, and context dependent term. Debates, dichotomies, and distinctions exist regarding the definition/description of 'mediation' and relating to *purpose(s)*, *practice(s)* and *procedure(s)*. These illustrate the potential for expectation gaps. Tensions exist when connecting mediation to the courts and certain characteristics feature in court-connected mediation that may not feature or are less prevalent in non-court-connected contexts.

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896 See, eg, *Guidelines for Parties in Mediations* (n 40) r 11; John Wade, 'Liability of Mediators for Pressure, Drafting and Advice' (2003) 6(7) *ADR Bulletin* 131, 133.

897 *Practice Standards* (n 222) s 10.1(b)(ix).

898 *Ethical Guidelines for Mediators* (n 254) r 7(c), 6–7. See below Chapter V at 199.

899 Wade, 'Liability of Mediators for Pressure, Drafting and Advice' (n 896) 132–3.

900 *Tapoohi* (n 716) [30] (Habersberger J).

901 See nn 310 and 520.

902 See, eg, *Farm Debt Mediation Act 1994* (NSW) s 18J.

903 Queensland Civil and Administrative Tribunal, *Practice Direction No 6 of 2010: Compulsory Conferences and Mediations*, 20 April 2010.

904 See Appendix A: Qualitative Research Methodology.

905 See below Chapter VI at 194–5. See also Chapter VII at 204, 220 and 228.

906 See above Chapter II at 33–5.

907 See above Chapter II at 42.

908 See below Chapter VI.

There is no single settled *purpose* of mediation. Various purposes exist that fall along the ideology-practice continuum, with some more qualitative than quantitative. The primary purpose of court-connected mediation is achieving institutional effectiveness and efficiencies and the effective and efficient delivery of settlement. However, the single criterion of 'settlement rates' fails to embrace other qualitative purposes and outcomes touted by mediation advocates as being inherently beneficial to participants and which distinguish mediation from other dispute resolution processes.

There is no singularly accepted mediation *practice*. Diverse 'mediation' practices exist and attempts to categorise different practices reveals the existence of four archetypical practice models. Whilst the distinctions between various models are clear in theory, debates pertain to whether they are fluid, interchangeable or fixed and whether they reflect the exigencies of practice. Court-connected mediation usually reflects advisory/evaluative and settlement mediation involving compromisory or competitive conferencing styles rather than interest-based negotiation, with these practices being preferred by lawyers and lawyer-mediators.

There is no singularly accepted mediation *procedure*. Debates pertain to different stages within procedures and to the mediator's role and functions during these stages. Court-connected mediation procedures are usually dominated by lawyer control and entail Shuttle Negotiation with less demarcated stages than those within the literature and in industry models.

This Chapter has provided a comprehensive review of the literature and has revealed how mediation's varying *purposes*,[909] diversity in *practices*,[910] and variety of *procedures*,[911] create the potential for uncertainty and expectation gaps and the potential for gaps between theory and practice. This illustrate why it will be productive to explore Stakeholder reports regarding the three themes.

In the next Chapter I introduce the Court's jurisdiction and explore its rules-based framework by comparing it with the theory base set out in this Chapter. I also draw against this theory base when exploring the empirical data, discussing the existence of expectation gaps,[912] and making recommendations to address them.[913]

909 See above Chapter II at 49.
910 See above Chapter II at 58.
911 See above Chapter II at 71.
912 See below Chapter IV Chapter V and Chapter VI.
913 See below Chapter VII.

'Mediation' is a complex, contested, and context dependent term.[914] Debates, dichotomies, and distinctions exist regarding the definition/description of 'mediation' and relating to *purpose(s)*, *practice(s)* and *procedure(s)*, which illustrate the potential for expectation gaps.[915] Certain tensions exist when connecting mediation to the courts and certain characteristics are common when mediating 'within the shadow of the law'.[916]

This research examines Stakeholder understandings, expectations, and experiences of mediation in the Court by reference to Stakeholder reports regarding *purpose*, *practice* and *procedure*.

This Chapter comprises two parts. Part A provides an overview of the Court's jurisdiction, development of mediation and current program features, including incentives encouraging settlement of actions by mediation. I provide an idea of the scale of the program using quantitative data regarding the mediation of civil actions conducted from 1999.

Part B explores the Court's rules-based framework in place during the years that I undertook qualitative interviews with Stakeholders.[917] These preceded the commencement of the *Uniform Civil Rules 2020* (SA) ('*UCRs*') on 18 May 2020. After distinguishing mediation from the other processes within the Court's ADR suite, the remaining Chapter focuses on the three themes of *purpose*, *practice* and *procedure*.

The exploration reveals that mediators are afforded considerable flexibility and discretion despite being restricted to 'purely' facilitative practice. However, the Chapter illustrates that the rules-based framework is at times silent, terse, or insufficiently definitive on many factors relating to *purpose*, *practice* and *procedure* explored in the literature review.[918] These findings are important because they increase the potential for Stakeholders to have divergent understandings, expectations and experiences. Later in the thesis it will be seen that the *UCRs* are similarly silent, terse, or insufficiently definitive on factors relating to the three themes.[919]

This Chapter provides the foundation against which the empirical data will be presented in the remaining Chapters of this thesis.

A *Magistrates Court of South Australia*

1 *Jurisdiction of the Court*

The Court handles the greatest proportion of litigation, which includes approximately 80% of all civil disputes filed within the State.[920] There are currently forty-six magistrates in South

914 See above Chapter II at 30, 48 and 83.

915 See above Chapter II at 83.

916 See above Chapter II at 38–48.

917 *Magistrates Court (Civil) Rules 2013* (SA) ('*Rules*'), later repealed by the *Uniform Civil Rules 2020* (SA) r 1.3 ('*UCRs*').

918 See above Chapter II, Part A, Part B and Part C.

919 See below Chapter VII. See also Appendix J: Comparison between *the Act*, *Rules* and *Practice Directions* and the *UCRs* regarding *Purpose*, *Practice* and *Procedure*.

920 Courts Administration Authority of South Australia, *Annual Report 2021–22* (Report, October 2022) 17; Courts Administration Authority of South Australia, *Annual Report 2020–21* (Report, October 2021) 17 ('*CAA 2020–21 Annual Report*'); 'Our Courts', *Courts Administration Authority of South Australia* (Web Page, 2022) <https://www.courts.sa.gov.au/our-courts/>. It used to be more than 90% of all civil disputes filed within the State. See generally Courts Administration Authority of South Australia, *Annual Report 2001–02* (Report, October 2002) 23 ('*CAA 2001–02 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2002–03* (Report, October 2003) 25 ('*CAA 2002–03 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2003–04* (Report, October 2004) 25 ('*CAA 2003–04 Annual*

Australia.[921] The central Court is located in Adelaide, with three suburban, seven country courts and 23 country circuit locations.[922]

The Court is established by section 4 of the *Magistrates Court Act 1991* (SA) ('*the Act*') and is divided into five Divisions: Civil (General Claims), Civil (Consumer and Business), Civil (Minor Claims),[923] Criminal and Petty Sessions.[924]

The jurisdictional limit of the General Claims Division is $100,000.00.[925] The Supreme and District Courts of South Australia generally hear disputes regarding higher quantum,[926] though disputants may waive any monetary limit on the Court's civil jurisdiction.[927] The jurisdictional limit of the Minor Claims Division is $12,000.00.[928] Disputants are usually not permitted by the Court to be legally represented at trial in this Division, subject to certain exceptions.[929] The Court is encouraged to explore avenues to achieve a negotiated settlement at or before trial in Minor Claims,[930] which typically include neighbourhood and fencing disputes.[931]

Civil actions within the Minor Claims and General Claims jurisdiction include debt recovery, personal injury claims, motor vehicle property damage claims, worker's liens, second-hand vehicle dealer disputes, applications concerning registrations of births, deaths and marriages, fencing,

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Report'); Courts Administration Authority of South Australia, *Annual Report 2004–05* (Report, October 2005) 25 ('*CAA 2004–05 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2005–06* (Report, October 2006) 19 ('*CAA 2005–06 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2006–07* (Report, October 2007) 17 ('*CAA 2006–07 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2007–08* (Report, October 2008) 17 ('*CAA 2007–08 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2008–09* (Report, October 2009) 24 ('*CAA 2008–09 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2009–10* (Report, October 2010) 16 ('*CAA 2009–10 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2010–11* (Report, October 2011) 25 ('*CAA 2010–11 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2011–12* (Report, October 2012) 26 ('*CAA 2011–12 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2012–13* (Report, October 2013) 27 ('*CAA 2012–13 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2013–14* (Report, October 2014) 27 ('*CAA 2013–14 Annual Report*'); Courts Administration Authority of South Australia, *Annual Report 2014–15* (Report, October 2015) 13 ('*CAA 2014–15 Annual Report*').

921 'Our Judiciary', *Courts Administration Authority of South Australia* (Web Page, 2022) <https://www.courts.sa.gov.au/our-judiciary/>.

922 'Court Locations', *Courts Administration Authority of South Australia* (Web Page, 2022) <https://www.courts.sa.gov.au/our-courts/>.

923 'Minor civil action' is an action founded on a small claim (a monetary claim for $12 000 or less), a claim for relief in relation to a neighbourhood dispute or a minor statutory proceeding: *the Act* (n 322) s 3(1)–(2) (definition of 'minor civil action' and 'small claim'); *UCRs* (n 917) rr 2.1 (definition of 'minor civil action'), 331.1.

924 *The Act* (n 322) s 7.

925 Ibid s 8. See also the *Statutes Amendment (Courts Efficiency Reforms) Act 2012* (SA) s 23, which increased the jurisdictional limit of Minor Claims from $6,000.00 to $25,000.00; *CAA 2013–14 Annual Report* (n 920) 4, 27.

926 *Supreme Court Act 1935* (SA) s 17; *District Court Act 1991* (SA) s 8.

927 *The Act* (n 322) s 8(2).

928 Ibid ss 3(2), 8. See also the *Magistrates Court (Monetary Limits) Amendment Act 2016* (SA) s 4.

929 *The Act* (n 322) s 38(4); *Rules* (n 917) r 13(4). See also *CAA 2001–02 Annual Report* (n 920) 23; *CAA 2002–03 Annual Report* (n 920) 25; *CAA 2003–04 Annual Report* (n 920) 25; *CAA 2004–05 Annual Report* (n 920) 21; *CAA 2005–06 Annual Report* (n 920) 19; *CAA 2006–07 Annual Report* (n 920) 17; *CAA 2007–08 Annual Report* (n 920) 17; *CAA 2008–09 Annual Report* (n 920) 24; *CAA 2009–10 Annual Report* (n 920) 26; *CAA 2010–11 Annual Report* (n 920) 25; *CAA 2011–12 Annual Report* (n 920) 26; *CAA 2012–13 Annual Report* (n 920) 27; *CAA 2013–14 Annual Report* (n 920) 27; *CAA 2014–15 Annual Report* (n 920) 13; Courts Administration Authority of South Australia, *Annual Report 2015–16* (Report, 2016) 20 ('*CAA 2015–16 Annual Report*').

930 *The Act* (n 322) s 38(2). See below Chapter VI at 171.

931 See, eg, *CAA 1998–99 Annual Report* (n 947) 9; *CAA 2015–16 Annual Report* (n 929) 20.

building and neighbourhood disputes.[932] The Consumer and Business Division deals with warranty claims concerning second-hand motor vehicles and landlord and tenant disputes.[933] The Criminal and Petty Sessions Divisions deal with expiation notices, summary offences and minor indictable offences.[934]

As lawyers are unlikely to be regularly involved in the Minor Claims Division and Final Notice mediations, particularly given the Court's jurisdictional limits regarding quantum in dispute, I discuss them briefly in this Chapter. I also discuss the Court's different Divisions when exploring how actions are referred to mediation.[935]

2 *Development of Mediation within the Court and Current Program Features*

I outline four developments that have impacted on mediation within the court, and its mediation culture,[936] most of which remain current features of the Court's mediation program. Two schemes for mediating civil disputes were introduced in the 1990s by Dr Andrew Cannon, former Deputy Chief Magistrate of South Australia that provided the foundations for the Court's mediation program and culture. The third development was the establishment of a Panel of Private Qualified Mediators. Most recently, a listing fee with a 50% reduction has been introduced to encourage disputants who 'attempt to settle' at mediation.

(a) Mediation Pilot-Project in the Adelaide Civil Registry in 1996

As discussed in the literature review, mediation pilot programs were trialled in Australian courts and tribunals during the 1980s and 1990s.[937] Similarly, in South Australia, a pilot was conducted in May 1996,[938] by magistrates and registrars who had completed mediator training by LEADR.[939] The three objectives of the pilot were to: offer litigants a 'mediation opportunity'; bring about settlements earlier in the pre-trial process and minimise litigation costs; and provide a mediation opportunity that litigants perceived as fair.[940]

A new procedure was introduced requiring litigants to attend a directions hearing during which they were informed of the nature of the litigation process, including the likely costs, and the mediation 'alternative'.[941] In Minor Claims, where a decision to mediate was made at the directions hearing, senior non-judicial court staff conducted them with unrepresented litigants whereas magistrates conducted mediations in General Claims, with legally represented disputants.[942] Thirty litigants and eight lawyers were interviewed to assess the pilot project and their perceptions of mediation.[943] The pilot was successful in promptly settling actions and was well received by disputants and their lawyers. Although three participants expressed dissatisfaction with the outcome of mediation, they

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932 *CAA 2013–14 Annual Report* (n 920) 28.
933 *The Act* (n 322) s 10.
934 Ibis ss 9, 9A.
935 See below Chapter VI at 172.
936 See above Chapter I and below Chapter VII and VIII. For example, the Court's mediation program won the Australian Dispute Centre award for Courts and Tribunals ADR Group of the Year: *CAA 2020–21 Annual Report* (n 920) 5.
937 See above Chapter II at 38.
938 Cannon, 'An Evaluation' (n 96).
939 See above Chapter I at 11.
940 Cannon, 'An Evaluation' (n 96) 51, 61.
941 Ibid 50, 52.
942 Ibid 54.
943 Ibid 51.

reported satisfaction with fairness of the process.[944] I discuss Stakeholder views regarding procedural fairness in the next two Chapters.[945]

(b) Electronic Final Notice ('Pre-Lodgment') in South Australia in July 1999

The Courts Administration Authority ('CAA') claims to be the first both in Australia, and internationally, to enable potential litigants 24/7 online access to a Final Notice of Claim (akin to a letter of demand) for a nominal fee.[946] The purpose of the pre-lodgment scheme is to encourage potential litigants to resolve civil disputes before proceedings are filed.[947] Recipients have 21 days from receipt of the Final Notice to settle the intended action or apply for it to be referred to mediation.[948] Whilst there is no legal obligation to respond to a Final Notice – for it does not constitute a 'claim'[949] – this non-binding invitation provides potential litigants the opportunity to mediate their intended action, before instituting proceedings. The Court also offers mediation on a *pro bono* basis for pre-lodgment actions if all disputants agree to attend. Despite not being a central part of this thesis, I briefly discuss pre-lodgment mediations in this Chapter for completeness as the Court continues to have a panel of private mediators who undertake *pro bono* mediations in the Minor Claims Division.[950]

(c) Initial Conduct of Mediation and Establishment of the Panel of Private Qualified Mediators in 2013

When mediation was first introduced, magistrates and senior court administrators conducted them.[951] A handful of Court employees were employed to conduct mediations from 2001 to 2003.[952] In 2003 mediations commenced within the suburban courts[953] and thereafter throughout the State.[954] Thereafter several Court employees conducted mediations from 2007 to 2010.[955] Since 2009, one mediator has been based at the Adelaide Magistrates Court and conducts mediations throughout the State.[956] The CAA Reports are silent as to how many mediators the Court employed from 2016 to 2018 and from 2019 to 2021. In 2018 two additional senior court staff underwent mediation training as a 'back-up' for the Court's internal mediator.[957] In 2021 to 2022, one internal mediator was based in the Adelaide Magistrates Court.[958]

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944 Ibid 54. See also Chapter II at 50.

945 See below Chapter IV at 126 and Chapter V at 143 and 151.

946 Courts Administration Authority of South Australia, *Annual Report 1999–2000* (Report, October 2000) 53 ('*CAA 1999–2000 Annual Report*'). The fee is currently $24.00: 'Magistrates Court Civil (General) and Civil (Minor) Claims Divisions Fees', *Courts Administration Authority of South Australia* (Web Page, 1 July 2022) <https://www.courts.sa.gov.au/rules-forms-fees/fees/magcourt-civil-genminor-fees/>.

947 Courts Administration Authority of South Australia, *Annual Report 1998–99* (Report, September 1999) 29 ('*CAA 1998–99 Annual Report*'). 'Mediation', *Courts Administration Authority of South Australia* (Web Page, 2022) <https://www.courts.sa.gov.au/civil-cases/mediation/>.

948 See Form P1 Final Notice: 'Uniform Civil Rules 2020', *Courts Administration Authority of South Australia* (Web Page, 2022) <https://www.courts.sa.gov.au/rules-forms-fees/ucr2020/>; 'Mediation' (n 947). See also Appendix D.1: Form P1 Final Notice.

949 See below Chapter III at 96.

950 *CAA 2020–21 Annual Report* (n 920) 17.

951 *CAA 1998–99 Annual Report* (n 947) 9.

952 *CAA 2001–02 Annual Report* (n 920) 25; *CAA 2002–03 Annual Report* (n 920) 27.

953 *CAA 2003–04 Annual Report* (n 920) 26.

954 *CAA 2005–06 Annual Report* (n 920) 23.

955 *CAA 2007–08 Annual Report* (n 920) 18; *CAA 2008–09 Annual Report* (n 920) 26; *CAA 2009–10 Annual Report* (n 920) 29.

956 *CAA 2010–11 Annual Report* (n 920) 28; *CAA 2011–12 Annual Report* (n 920) 29; *CAA 2012–13 Annual Report* (n 920) 33; *CAA 2014–15 Annual Report* (n 920) 15; *CAA 2015–16 Annual Report* (n 929) 23.

957 Magistrate 2 and Magistrate 3.

958 *CAA 2021–22 Annual Report* (n 920) 18; *CAA 2020–21 Annual Report* (n 920) 17.

In 2013 the Court established a Panel of Private Qualified Mediators to mediate actions at a cost according to the Court Scale fees.[959] The first mediation conducted by a Panel Mediator occurred in September 2014.[960]

Similar to Courts in other Australian jurisdictions,[961] the principal registrar must employ 'qualified mediators' and keep a panel of Private Qualified Mediators (referred to in the CAA Reports as 'external mediators') and a list of those that are willing to provide *pro bono* mediations in accordance with an Electronic Final Notice.[962]

To be a 'qualified' mediator, a person must be NMAS accredited, though the Court has discretion to appoint non-NMAS accredited mediators where deemed necessary by cultural, regional or other considerations.[963] No additional requirements are prescribed. The accreditation requirement implies mediators adhere to nationally recognised standards, have certain 'knowledge and skills' underlined by 'ethical principles' to properly execute their role and functions,[964] to promote 'quality, consistency and accountability' and to inform participants about what to expect from the Court's mediators.[965] It is unclear whether this NMAS accreditation requires mediators to engage in 'purely facilitative' practice, given the NMAS accommodates 'blended' processes.[966]

The Panel has remained in place since its introduction. I interviewed 16 out of the 30 individuals listed on the Court's website representing 53% of the total members of the Panel during 2016 to 2018.[967] Twenty-five mediators are currently listed as members of the Panel.[968] Unlike interstate courts,[969] apart from their names, no reference is made to their qualifications, expertise, or experience or the types of action they are suitably qualified to mediate.[970]

(d) Introduction of Listing Fee and Reduction of Where Mediator Certifies 'Attempt to Settle'

During the years that I undertook qualitative interviews with Stakeholders, and prior to the introduction of the *UCRs*, the costs payable by disputants for attending mediation differed for Minor Claims and for General Civil claims.[971] The Court also has discretion to provide mediation at no cost where disputants are impecunious.[972]

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959 *CAA 2013–14 Annual Report* (n 920) 4, 30.

960 *CAA 2014–15 Annual Report* (n 920) 15.

961 See, eg, Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 1; Rundle, 'Court-Connected Mediation Practice' (n 38) 212–13; 'List of External Mediators: LEM', *Magistrates' Court of Victoria* (Web Page, 24 August 2022) <https://www.mcv.vic.gov.au/news-and-resources/publications/single-list-external-mediators-slem>.

962 *Rules* (n 917) r 72. In the 1999–2000 reporting period the Court had 46 registered mediators in its *pro bono* Mediation Scheme: *CAA 1999–2000 Annual Report* (n 946) 53. It is unclear from the CAA Reports how many mediators were registered for the Court's *pro bono* Mediation Scheme since then.

963 *Rules* (n 917) r 2. See also the *Court Procedures Act 2004* (ACT) s 52A.

964 *Practice Standards* (n 222) s 10.1.

965 Ibid pt 1, Introduction, 2, s 1.2(b). See above Chapter II at 32. See also Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) ix, recommendation 16. But see below Chapter VII at 205.

966 See above Chapter II at 33 and 63. But see below Chapter III at 95–6.

967 See Appendix A: Qualitative Research Methodology at 262.

968 'Mediation' (n 947).

969 See, eg, 'List of Accredited Mediators', *Supreme Court of the Northern Territory* (Web Page, 2022) <https://supremecourt.nt.gov.au/__data/assets/pdf_file/0007/727612/LIST-OF-ACCREDITED-MEDIATORS-as-at-18.01.22.pdf>; 'ADR Panel of Convenors', *Queensland Courts* (Web Page, 1 August 2022) <https://www.courts.qld.gov.au/courts/land-court/resolving-disputes-without-a-hearing/adr-panel-of-convenors>. See also *Supreme Court Rules 2008* (NT) ord 48, pt 2, r 48.13(10).

970 See below Chapter VII at 219.

971 *Rules* (n 917) r 72(2)(a)(b)(c); Magistrates Court of South Australia, *Practice Direction: Consolidated Civil Practice Directions*, 1 October 2015, cl 11(6) ('*Practice Directions*'). For Minor Claims the cost was $500.00 plus GST: *Rules* (n 917) sch 3, cost scale 2, item 4. For General Civil claims the cost was $500 or 2% of the

The rules-based framework encourages disputants to mediate by costs incentives and disincentives. Prior to amendments to *the Act*,[973] where mediation did not result in settlement, disputants were not required to attend to any additional costs payable to the Court for proceeding to trial.

Amendments to the *Act* in 2019 introduced a tiered fee lodgement system and a listing fee in all General Claims, Minor Claims, or Consumer and Business Divisions.[974] The listing fees are payable by plaintiffs within 14 days after the trial date is set.[975] The introduction of such fees is a further disincentive for disputants to proceed to trial rather than settling at mediation.

To further encourage disputant engagement in mediation, the listing fee payable may be discounted by 50% where they 'attempt to settle' by mediation, if certified by the mediator.[976] The introduction of the listing fee (a costs disincentive) coupled with the 50% reduction in attempting mediation (a costs incentive) is a further attempt by the Court to encourage disputants to engage in mediation and promote settlement of actions.

In Chapter VI I consider the views of three magistrates regarding the mediator's certification role when exploring what the *procedure* entails.[977] This 'carrot and stick' approach to encouraging mediation and whether these amendments will assist with the improvement and efficiency of civil litigation is yet to be determined.[978]

3 *Mediations Conducted in the Court and 'Settlement Rates'*

Mediations originate from two sources: Minor Claims referred by registrars from Minor Claims directions hearings[979] and General Civil Claims referred by magistrates.[980]

To provide further context to the Court's mediation program, I have summarised quantitative data relating to the mediation of civil actions conducted from the only publicly available sources.[981] I have tabled the data according to yearly civil lodgements, number of actions referred to mediation

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amount claimed plus GST (whichever is the greater): *Rules* (n 917) sch 3, cost scale 1, item 11. At the current date, fees are not specifically addressed in *the Act* or the *Magistrates Court Regulations 2021* (SA). Despite *UCR* r 131.3(9), the fees which are charged by external mediators for the purposes of Court ordered mediation are not published on the CAA website. See below Chapter VII at 209. See also Appendix J: Comparison between the *Act*, *Rules*, *Practice Directions* and *UCRs* regarding *Purpose*, *Practice* and *Procedure.*

972 *Rules* (n 917) r 72(1); *Practice Directions* (n 971) cl 11(6). See also *UCRs* (n 917) r 131.1(10).

973 *Statutes Amendment (Court Fees) Act 2017* (SA); *Magistrates Court (Fees) (Listing Fees) Variation Regulations 2018* (SA); *Magistrates Court (Fees) Regulations 2019* (SA).

974 *Magistrates Court (Fees) Regulations 2019* (SA) reg 4(1).

975 Ibid reg 4(2). The listing fee for Minor Claims less than $4,000.00 is currently $226.00. For Minor Claims over $4,000.01 it is $681.00. For prescribed corporations in General Claims, it is $1,136.00. For individuals in General Claims it is $853.00: 'Mediation' (n 947).

976 *Magistrates Court Regulations 2021* (SA) reg 4(2).

977 See below Chapter VI at 200–1.

978 See below Chapter VII at 227 and Appendix A: Qualitative Research Methodology.

979 *CAA 2007–08 Annual Report* (n 920) 18; *CAA 2008–09 Annual Report* (n 920) 26; *CAA 2009–10 Annual Report* (n 920) 29; *CAA 2010–11 Annual Report* (n 920) 28; *CAA 2011–12 Annual Report* (n 920) 29; *CAA 2012–13 Annual Report* (n 920) 32; *CAA 2013–14 Annual Report* (n 920) 31; *CAA 2014–15 Annual Report* (n 920) 15; *CAA 2015–16 Annual Report* (n 929) 23.

980 *CAA 2001–02 Annual Report* (n 920) 25; *CAA 2002–03 Annual Report* (n 920) 27; *CAA 2003–04 Annual Report* (n 920) 26; *CAA 2004–05 Annual Report* (n 920) 22; *CAA 2005–06 Annual Report* (n 920) 20; *CAA 2006–07 Annual Report* (n 920) 18.

981 See Court Performance — Criminal and Civil Statistics for the Magistrates Court of South Australia in 'Statistics', *Courts Administration Authority of South Australia* (Web Page, 30 June 2021) <https://www.courts.sa.gov.au/publications/statistics/>. See also the 2020–21 data in 'Courts Administration Authority: Annual Report: At a Glance', *Data SA: Sout Australian Government Data Directory* (Web Page, 2022) <https://data.sa.gov.au/data/dataset/caa-ar-at-a-glance> ('CAA Annual Report: At a Glance').

and their 'settlement rates'.[982] I have separated the data into separate tables to differentiate the civil actions mediated by the Court's internal mediators from those by members of the Panel of Private Qualified Mediators. I have also summarised data relating to the pre-lodgement *pro bono* mediations.[983]

The term 'settled' encompasses various events in closing a Court file including discontinued, settled by consent, default judgment, dismissed, summary judgment and transferred to another jurisdiction.[984] However, 'settlement' is used in the CAA Reports from 1999 to 2016 to describe the 'mutually agreeable resolution' of civil actions at mediation. The CAA Reports record mediation 'success', from the Court's perspective, by 'settlement rates' rather than the more qualitative indicators of success such as disputant satisfaction with outcome or process.[985]

The quantitative outcomes, as summarised in the appendices, reveal four findings.

First, not all civil lodgements filed within each reporting period are referred to mediation. This may be due to numerous reasons including that magistrates consider some actions are unsuitable for mediation despite the absence of evidence-based criteria for referring or declining to refer 'appropriate' actions.[986] It also suggests magistrates are not referring all actions to mediation as a matter of course.[987] It may be a consequence of 'cultural' resistance by lawyers to mediation,[988] costs concerns,[989] and lawyer 'discomfort' with mediation,[990] specifically the notion that proposing mediation can be (mis)interpreted as a 'sign of weakness'.[991] It may also be a consequence of litigants remaining unaware[992] of the 'mediation opportunity',[993] or not having an appetite to mediate, such as the action has become 'a matter of principle' or disputants are not willing to collaborate or compromise.[994]

Secondly, the Court resolves 'far more' civil actions by mediation than judicial determination, with less than five percent of civil actions resolved by trial.[995] This finding is consistent with opinions within the literature that settlement is 'the norm'.[996]

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982 Appendix K: Number of Civil Actions Mediated in the Court by the Court's Internal Mediators from 2000 to 2016 and Number of Civil Actions Mediated by External Panel Mediators from 2013 to 2016.

983 Appendix L: Final Notice *pro bono* Mediations in the Court from 1999 to 2016.

984 Cannon, 'An Evaluation' (n 96) 53.

985 See above Chapter II at 53. See also Chapter IV at 108 and 113.

986 See above Chapter II at 46.

987 See below Chapter VI at 171. See also below Chapter VII at 217.

988 See, eg, Matthew Shepherd, 'Understanding and Working with Lawyers: How Lawyers Attempt to Influence and Persuade at Mediation' (Conference Paper, LEADR, 10 September 2013) <http://www.shepherdsfamilylaw.com.au/leadr-presentation-lawyers-at-mediation/>; Tania Sourdin, 'Not Teaching ADR in Law Schools?' (n 71) 154; Henry Brown (n 393) 9–10; Sourdin, 'ADR in the Australian Court and Tribunal System' (n 75) 58. See also Sander and Goldberg (n 107) 54.

989 See, eg, *Trelour* (n 404) [10] (Robertson DCJ).

990 Howieson, 'What Is It About Me?' (n 38) 183.

991 See, eg, Spigelman (n 75) 65, cited in *Idoport* (n 259) [39], [43] (Einstein J); *Rich* (n 402) [18] (Austin J); *Southern Waste Resourceco* (n 401) [24] (Hinton J). See also *Fitton* (n 403) [3] (Hamilton J), cited in *Simic* (n 402) 12 (Irwin DCJ). See also Michael Slattery, 'The Spedley Mediation from the Inside' [1993] (27) *New South Wales Bar News* 23, 24; Charlie Irvine, 'Mediation: Business as Usual?' [2012] (April) *Law Society of Scotland* 1.

992 'Mediation Information Service Policy', *University of Adelaide* (Web Page, 28 September 2022) 1 <https://law.adelaide.edu.au/free-legal-clinics/magistrates-court-legal-advice-service>. See nn 993, 2192, 2207, 2890, 2891, 2909, 3309, 3468 and 3317.

993 See *Yoseph* (n 257) [11]. See also nn 2809, 2891, 2909, 3309, 3468 and 3317.

994 Cannon, 'An Evaluation' (n 96) 54.

995 *CAA 2003–04 Annual Report* (n 920) 12.

996 See above Chapter II at 56.

Thirdly, the Court's internal mediator undertakes more mediations than the Panel of Private Qualified Mediators.[997]

Fourthly, the reported settlement rates are higher than some other court-connected mediation programs, such as 41% in the Supreme Court of Victoria,[998] 56% in the County Court of Victoria,[999] 46% in the Local Court of Western Australia,[1000] and comparable to the 69% in the Supreme and District Courts of New South Wales,[1001] and between 55% to 65% in the Supreme Court of Tasmania.[1002] The number of mediations undertaken within the Court is incomparable with the low numbers reported within the higher courts in South Australia over these same periods.[1003]

The quantitative outcomes provide an idea of the scale of the program. However, five significant gaps exist within the CAA Reports regarding mediation.

First, the *CAA 2015–16 Annual Report* is the last to contain coherent data relating to mediation within the Court and the higher courts. In contrast, the reports from 2016 to 2019 are silent whereas the 2020-2021 report identifies 653 actions referred to mediation, without specifying which courts or divisions.[1004] Furthermore, mediation 'statistics' detailed on the CAA and the South Australian Government Data Directory websites are limited and unclear.[1005] For example, they do not separate mediations conducted by the Court's internal mediator from those by the Panel or pre-lodgment mediations.

Secondly, the CAA Reports do not differentiate 'settlement rates' according to each of the Court's separate Divisions nor to the different types of actions that fall within its jurisdiction. They also do not specify the number and percentage of actions settled within 30 days of mediation.[1006]

Thirdly, the data regarding 'settlement rates' fails to specify the time at which actions are referred and the average time at which most actions settle during their lifecycle.[1007]

Fourthly, they are silent regarding the average duration of mediations and the percentage of disputants that are represented by lawyers and/or counsel during mediations. The general consensus amongst some Stakeholders was that mediations last between three to five hours.[1008] This finding is consistent with research detailing the average duration of court-connected mediation as spanning two to three hours.[1009]

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997 I explore this finding further in Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

998 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 61.

999 Ibid 62.

1000 Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (n 549) [91].

1001 Sourdin and Matruglio (n 81) 16.

1002 Rundle, 'Court-Connected Mediation Practice' (n 38) 260–1, 268–9, 287.

1003 I summarise some of this data in Appendix M: Number of Civil Actions Mediated in the Higher Courts of South Australia from 1998 to 2015.

1004 *CAA 2020–21 Annual Report* (n 920) 14.

1005 See above n 981. It is thus difficult to assess whether the number of actions referred to mediation have increased or decreased since the introduction of trial listing fees and the introduction of the *UCRs*: see below Chapter VII at 218 and Chapter VIII at 247.

1006 Cf Supreme Court of Tasmania, *Annual Report 2020/2021* (Report, 12 November 2021) 6, 18, 39 <https://www.supremecourt.tas.gov.au/publications/annual-reports/>.

1007 I discuss referral practices when exploring the Court's mediation *procedure* in Chapter VI and Chapter VII.

1008 Mediator 5; Mediator 8; Mediator 11; Mediator 12; Mediator 14; Lawyer 2 (Bar 1); Lawyer 7. This is consistent with the requirement for disputants to allow at least three hours for an ADR conference in Form 78C Notice of Alternative Dispute Resolution Conference: 'Uniform Civil Rules 2020' (n 948). See also Appendix D.2: Form 78C Notice of Alternative Dispute Resolution Conference.

1009 Rundle, 'Court-Connected Mediation Practice' (n 38) 207; Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iii, 71, 149; Dame Hazel Genn et al, 'Twisting Arms: Court Referred and Court

Fifthly, they do not detail the extent of disputant adherence to Settlement Agreements nor to satellite litigation arising from alleged breaches of, challenges to, applications to set-aside or applications to enforce Settlement Agreements.[1010]

These gaps are significant as they make it difficult to establish what percentage and types of actions settled within each of the Court's Divisions.[1011] The gaps also make it difficult to establish the stages at which most actions were referred to mediation whether 'early' in the litigation process, after the close of pleadings,[1012] before discovery,[1013] or later towards trial.[1014]

Moreover the gaps make it difficult to establish the proportion of mediations that resulted in 'immediate settlement', settled 'after mediation', or those finalised without mediation or any other ADR process.[1015] Consequentially, it is difficult to assess the extent to which mediation is satisfying *effectiveness* and *efficiency* objectives;[1016] namely, it is unclear whether the Court has experienced improvements in time efficiency[1017] or cost efficiency[1018] since the 1996 pilot.[1019]

I explore ways to address these gaps and make additional recommendations for future research later in the thesis.[1020]

I now explore the rules-based framework, which provides the foundation against which the empirical data will be presented throughout the remaining Chapters.

B *Rules-Based Framework: The Act, the Rules, and the Practice Directions*

In this part of the Chapter I explore the miscellany of information about mediation in the Court's rules-based framework, in place during the years that I undertook interviews, which includes *the Act*, *Magistrates Court (Civil) Rules 2013* (SA) ('*Rules*'), *Consolidated Civil Practice Directions 2015* ('*Practice Directions*') [1021] and on the Court's website. This information provides Stakeholders, and disputants, with a basic guide regarding what mediation 'is', its *purpose*, and what *practice* and *procedure* likely entails.[1022] However, the rules-based framework is at times silent, terse, or insufficiently definitive on many factors relating to the three themes.[1023] These gaps are important because they increase the potential for Stakeholders to have different understandings, expectations and experience regarding these themes and consequently may promote misunderstandings and engender inconsistencies. In addition, they may be indicative of gaps between theory and practice.

Linked Mediation under Judicial Pressure' (Research Paper No 1/07, Ministry of Justice, May 2007) 11, 26, 128; Wissler, 'Court-Connected Mediation in General Civil Cases' (n 363) 651–2.

1010 See below Chapter VI at 196, Chapter VII at 220 and 228 and Chapter VIII at 247.

1011 See also Chapter VII at 217. This reinforces my recommendation for future research: see below Chapter VII and VIII.

1012 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) 194, 288.

1013 Macfarlane and Keet (n 323) 682, 689, 694.

1014 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) vi, 89, 142.

1015 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) 256–9.

1016 Cf ibid 280–7. See above Chapter II at 49. See also Chapter VII at 217 and VIII at 247.

1017 See above Chapter II at 53.

1018 Ibid 49.

1019 See below Chapter VII, recommendation 3 and Chapter VIII at 247.

1020 See below Chapter VII and Chapter VIII.

1021 *Practice Directions* (n 971) 5.

1022 See below Chapter VII, recommendations 1, 4, 7, 8 and 9.

1023 See above Chapter II.

1 *The Court's ADR Suite*

The *Rules* governed civil litigation within the Court and were introduced in 2012. Several ADR processes were introduced into the *Rules*,[1024] consistent with the multi-door courthouse concept,[1025] which I discuss further below. The *Rules* applied to all 'actions' commenced on or after 1 July 2013, until commencement of the *UCRs*.

The 'Duty of the Court', according to the *Rules*, is to 'promote the expeditious, economical and just conduct and resolution' of actions 'by negotiated agreement or judicial determination'.[1026] This provision is like the overriding 'objectives', 'objects' and 'purposes' sections in legislation and rules from other Australian courts, the purposes of which are to facilitate the just, efficient, timely and cost-effective resolution of the 'real issues' in dispute.[1027]

The definition of 'ADR' is substantially the same as the NADRAC definition.[1028] It has been tailored to the court-connected context confirming the purpose of ADR is for an 'impartial person' to assist disputants resolve the 'issues between them and to conduct their litigation in a cost efficient manne'.[1029] This echoes the efficient expenditure of cost while reinforcing the ideological proposition that recourse to courts ought be a forum of 'last resort'.[1030]

The definition falls short of suggesting that the Court has a preventative, 'conflict coaching' or educative role that enables disputants to 'prevent or manage' their disputes without outside assistance.[1031] The definition does not suggest that the Court is tasked with empowering litigants to prevent 'conflicts' from developing into legal disputes or educating potential litigants in how to manage interpersonal/intrapersonal conflict,[1032] which I discuss further below.[1033]

The definition falls short of indicating that Primary Dispute Resolution ('PDR'), used to describe processes that took place before, or instead of, determination by a court,[1034] are available to disputants within the Court's jurisdiction. For example, the definition makes no reference to counselling[1035] or conciliation counselling.[1036] This is consistent with my contention that court-connected mediation is distinguishable from the 'wide range of processes designed to assist people to solve personal and interpersonal issues and problems',[1037] such as counselling and therapy,[1038] that are available within other non-court-connected contexts.

1024 For example, 'ADR', 'arbitration', 'judicial intimation', 'mediation', 'qualified mediator, conciliator or arbitrator': *Rules* (n 917) r 2.

1025 See above Chapter II at 30.

1026 *Rules* (n 917) r 3.

1027 See, eg, *Federal Court of Australia Act 1976* (Cth) s 37M; *Civil Procedure Rules 1998* (UK) SI 1998/3132, r 1.1; *Court Procedures Act 2004* (ACT) s 5A; *Civil Procedure Act 2005* (NSW) s 56; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Civil Procedure Act 2010* (Vic) s 7. See also Michael Legg, *Case Management and Complex Litigation* (Federation Press, 2011) ch 2. See also Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) ix, recommendation 16. See also Boulle, 'Extending the Courts' Shadow over ADR' (n 71) 118. See above Chapter II at 41. See also Chapter VII at 210.

1028 See above Chapter II at 32.

1029 *Rules* (n 917) r 2.

1030 See, eg, Margaret Castles, 'Civil Mediation in the Magistrates Court' (2015) 37(3) *Bulletin (Law Society of South Australia)* 12; *The Resolve to Resolve* (n 170) 1, 16, 71, 174; Folberg and Taylor (n 333) 335.

1031 See above Chapter II at 28.

1032 But see below Chapter IV at 123.

1033 But see the discussion in the empirical data relating to the phenomenon of 'two parts' existing to all actions: the 'legal' and the 'other'. See nn 1343, 1409, 1833, 1853, 2428 and 3432.

1034 See above Chapter II at 28.

1035 See above Chapter II at 29 and 41.

1036 See above Chapter II at 28.

1037 *Dispute Resolution Terms* (n 17).

1038 See above Chapter II at 41.

The *Rules* also introduced a 'genuine steps' provision,[1039] which requires disputants to take 'genuine steps to resolve an action before it is commenced including considering the use of ADR'.[1040]

Mediation is one type of process within the Court's ADR suite. According to the *Rules*, mediation is a facilitative process and is distinguishable from advisory, determinative and hybrid ADR processes as discussed in the literature review.[1041] The advisory processes include 'expert opinion',[1042] 'expert appraisal',[1043] 'expert investigation',[1044] and judicial intimation.[1045] The determinative processes include arbitration.[1046]

Two 'hybrid' processes also exist, which are not central to the exploration of mediation in this thesis. A co-mediation model is unique to the Court in building and construction disputes, whereby the Court's internal mediator conducts a 'strictly facilitative' mediation[1047] with the involvement of the Court's internal expert who provides opinions about cost, quality of workmanship *et cetera* during an inspection.[1048] This hybrid model is separate to 'conciliation'[1049] undertaken by the Court's internal expert in building disputes where, after meeting disputants, the expert undertakes an 'on-site' inspection, may meet with expert witnesses, and endeavours to settle the action by offering an independent opinion about the subject-matter in dispute.[1050]

Two 'Judicial ADR' processes[1051] are architected into the civil litigation process by *the Act*[1052] and the *Rules*: settlement conferences[1053] and 'conciliation' before a magistrate.[1054] Judicial ADR is not central to this thesis, though I briefly discuss conciliation conferences when exploring the referral of actions to mediation.[1055]

Several Restorative Justice processes are also available within the Court's criminal jurisdiction, which are also not central to the exploration of mediation within this thesis.[1056] The Court's Mediation Unit in conjunction with the Youth Court's Family Conferencing Team developed 'Adult Restorative Conferencing' in 2004.[1057] Furthermore, where a civil dispute has led to an

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1039 See, eg, *Civil Dispute Resolution Act 2011* (Cth) ss 3, 4. See also Tania Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' (2012) 35(3) *University of New South Wales Law Journal* 889.

1040 *Rules* (n 917) 27(2). See also Chapter VII at 206.

1041 See above Chapter II at 30.

1042 *The Act* (n 322) s 29; *Rules* (n 917) rr 2, 21A(6).

1043 *Rules* (n 917) rr 73(4), 74(1)(c).

1044 *The Act* (n 322) s 29; *Rules* (n 917) rr 69(2), 94(6).

1045 *Rules* (n 917) rr 2, 74(1)(c), 77.

1046 Ibid rr 72–5.

1047 Magistrate 1.

1048 Magistrate 2; Magistrate 4; Magistrate 5.

1049 Whilst the *Rules* and the *UCRs* provide for conciliation, the *CAA Reports* make no reference to the number of conciliations conducted to date: see below Chapter VII at 217.

1050 Magistrate 1. This process might be better described as 'expert appraisal' than 'conciliation': see, eg, Andrew J Cannon, 'If You Sent the File to the Litigation Section You Failed the Client: Managing Conflict in the Context of the South Australian Magistrates Court' (2019) 38(1) *Arbitrator and Mediator* 81, 85. See also *Rules* (n 917) rr 73(4), 74(1)(c). See below n 2777 and accompanying text.

1051 *Dispute Resolution Terms* (n 17) 8.

1052 *The Act* (n 322) ss 27(2b)–(2c).

1053 *Rules* (n 917) rr 106(7), 74(1).

1054 Ibid r 76. See also Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

1055 See below Chapter VI at 173.

1056 See, eg, *Young Offenders Act 1993* (SA); 'Family Conferences', *Courts Administration Authority of South Australia* (Web Page, 2023) <https://www.courts.sa.gov.au/going-to-court/court-locations/youth-court/family-conferences/>. See also Boulle and Field, *Mediation in Australia* (n 27) 26.

1057 Consenting victims and offenders meet, post guilty plea before sentencing, to discuss the harm caused by the offending and possible outcomes. See generally: *CAA 2003–04 Annual Report* (n 920) 27; *CAA 2004–05 Annual Report* (n 920) 24; *CAA 2005–06 Annual Report* (n 920) 21; Andrew Goldsmith, Mark Halsey and David Bamford, 'Adult Restorative Justice Conferencing Pilot: An Evaluation' (Final Report, Flinders

intervention order being sought by the police or an individual, suitable actions can be referred for 'intervention order mediations'.[1058] The Court also offers Aboriginal dispute resolution.[1059] The first Aboriginal Sentencing Court in Australia (Nunga Court) began operation at Port Adelaide Magistrates Court in 1999.[1060]

In the remainder of this thesis I concentrate on mediation of civil disputes though make comparisons with 'conciliation' before a 'conciliator',[1061] which are distinguished as a separate process. This discussion builds on the ongoing debates and difficulties within the literature regarding the conciliation-mediation distinction,[1062] which also feature in the empirical data.[1063]

2 *What 'Is' Mediation?*

As explained in the literature review, mediation can be viewed as both an *ideology* and a *practice*.[1064] I circumvent deeper exploration of the complexity in defining mediation because it is defined in the rules-based framework.

'Mediation' is not defined in *the Act* but in the *Rules* and the *Practice Directions*:

> *"mediation"* is a process where parties with the assistance of a mediator identify disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in relation to the content of the dispute or its resolution but may advise on or determine the process of the mediation.[1065]

The significant feature of this definition is it envisages 'purely' facilitative mediation, not advisory/evaluative mediation, which involve advising on the facts, law, evidence and possible outcomes.[1066]

The definition is almost identical to the NADRAC definition[1067] and is like the description in the NMAS.[1068] Whilst no express reference is made to mediation's core values,[1069] self-determination is implied, as disputants appear as the primary actors assisted by the mediator. The definition includes reference to some of the six mediator functions specified in the NMAS,[1070] limits on the mediator's role,[1071] though contains no express reference to any particular stages of the procedure.[1072] The

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University of South Australia, August 2005); Andrew Cannon, 'Sorting out Conflict and Repairing Harm: Using Victim Offender Conferences in Court Processes to Deal with Adult Crime' (2008) 18(1) *Journal of Judicial Administration* 85; Mark Halsey, Andrew Goldsmith and David Bamford, 'Achieving Restorative Justice: Assessing Contrition and Forgiveness in the Adult Conference Process' (2015) 48(4) *Australian and New Zealand Journal of Criminology* 483, 484.

1058 *CAA 2012–13 Annual Report* (n 920) 33; *CAA 2013–14 Annual Report* (n 920) 4, 30; *CAA 2014–15 Annual Report* (n 920) 15; *CAA 2015–16 Annual Report* (n 929) 23. See *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21(4)(a).

1059 See, eg, *Sentencing Act 2017* (SA) s 22. See also Boulle and Field, *Mediation in Australia* (n 27) 13–15.

1060 See, eg, *CAA 1999–2000 Annual Report* (n 946) 21; 'Aboriginal Community Courts', *Courts Administration Authority of South Australia* (Web Page, 2022) <https://www.courts.sa.gov.au/going-to-court/court-locations/adelaide-magistrates-court/court-intervention-programs/aboriginal-community-courts/>. See also *Sentencing Act 2017* (SA) s 22. See also *Magistrates Court (Nunga Court) Amendment Act* 2022 (SA).

1061 *Rules* (n 917) r 2. See below Chapter III at 100.

1062 See above Chapter II at 35.

1063 See below Chapter V.

1064 See above Chapter II at 31

1065 *Rules* (n 917) r 2; *Practice Directions* (n 971) r 2, cl 11(1). See also Chapter VII at 210.

1066 See above Chapter II at 29.

1067 See above Chapter II at 32.

1068 *Practice Standards* (n 222) s 2.2. See above Chapter II at 32.

1069 See above Chapter II at 33–5.

1070 See above Chapter II at 32 and 48.

1071 See below Chapter III at 99.

definition is also more detailed than some definitions within other Australian legislation and court rules.[1073]

3 *What Are the Court's Powers Regarding Mediation?*

Similar to some courts[1074] and civil tribunals, [1075] the Court has the power to appoint a mediator and refer actions or issues arising therein for mediation with or *without* disputant consent.[1076] Legislative reforms empowering courts to refer actions to mediation without disputant consent reflect a view that mediation 'may be productive' despite initial participant reluctance.[1077] The Court also has power to make rules regulating the *practice* and *procedure* of the Court including regarding the referral of actions to mediation and 'the conduct of mediations'.[1078]

However, neither *the Act* nor the *Rules* provide guidance as to what factors the Court should consider when deciding to refer an action to mediation and whether circumstances must be 'appropriate' to make a referral order.[1079] Furthermore, neither *the Act* nor the *Rules* provide explicit guidance regarding referral orders relating to: disputant involvement and authority to settle; the scope of mediation; conduct of mediation procedure; or grounds for review of referral decisions.[1080] Further, similar to Supreme Court of Tasmania,[1081] the Court has not established any publicly accessible referral criteria or judicial guidelines for intake screening, diagnosis and referral of 'appropriate' actions to mediation. This finding is relevant to the empirical data regarding the referral of actions to mediation.[1082]

4 *What Can Be Referred to Mediation?*

The Court manages 'actions' that fall within its jurisdiction. An '*action*' or '*claim*' are defined terms.[1083] The scope of these terms makes it clear that the Court has the power to hear, manage and endeavour to resolve 'legal disputes' as defined by the pleadings.[1084] In short, actions, claims, requests or originating applications that have a *prima facie* basis at law or in equity – including mediation regarding an 'intended claim' – and are within the Court's Civil Division jurisdiction.

The defined categories of 'action' or 'claim' are narrower compared to the NMAS, which refers to 'disputes, conflicts or differences'.[1085] Consequentially, causes of disharmony, tensions, or interpersonal/intrapersonal 'conflicts'[1086] regardless of how they are described, that do not satisfy

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1072 See above Chapter II at 71–9.

1073 See nn 292–3.

1074 See eg, *Civil Procedure Act 2005* (NSW) s 26(1); *Supreme Court Act 1935* (SA) s 65(1); *District Court Act 1991* (SA) s 32(1); *Dispute Resolution Act 2001* (Tas) s 5(1); *Supreme Court Act 1935* (WA) s 167(1)(q)(i); *Alternative Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 23(1), 34; *District Court Rules 2005* (WA) r 35(4). See also *Federal Court of Australia Act 1976* (Cth) s 53A(1A).

1075 See, eg, *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 51(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88(2).

1076 *The Act* (n 322) s 27(1); 'Mediation' (n 947).

1077 See, eg, Spigelman (n 75) 65; *Kilthistle* (n 401) [4] (Lehane J); Spencer, 'Mandatory Mediation and Neutral Evaluation' (n 392) 246.

1078 *The Act* (n 322) s 49(c)(cb). See also *Rules* (n 917) r 6.

1079 Cf *Civil Procedure Act 2005* (NSW) s 26(1); *Supreme Court Act 1979* (NT) s 83A(1); *Alternative Dispute Resolution Act 2001* (Tas) s 5(1).

1080 See, eg, Boulle and Field, *Mediation in Australia* (n 27) 286–8.

1081 See, eg, Rundle, 'Court-Connected Mediation Practice' (n 38) 188.

1082 See below Chapter VI at 171. See also Chapter VII, recommendation 5.

1083 *Rules* (n 917) r 2.

1084 Pleadings in actions within the General Claims must comply with the former *Supreme Court Civil Rules 2006* (SA) whereas a short form of pleading was sufficient in Minor Claims: See *Rules* (n 917) r 24(1). See also *UCRs* (n 917) rr 333.1(3), 63.1(5)(b).

1085 See above Chapter II at 32.

1086 See above Chapter II at 40.

the above definition, do not fall within the Court's jurisdiction. The practical consequence of the Court's jurisdiction being limited to matters that have developed into legal disputes acts as a filter that restricts access to the Court. This is consistent with the discussion in the literature review regarding mediating legally defined 'causes of action' rather than 'conflict'.[1087]

However, 'disputes, conflicts or differences' that may not satisfy the definition of an 'action' or 'claim' may still appear at the Mediation Unit via the pre-lodgment scheme, which was introduced to encourage potential litigants to resolve 'intended claims' before filing proceedings. The Mediation Unit may therefore be referring actions to mediation that might otherwise be dismissed by the Court for not having a legally recognised cause of action. This is not the place to explore this possibility, as exploration of the pre-lodgment scheme is not central to addressing the three research questions.

The distinction between the resolution of 'conflict' outside the court-connected context in contrast to the resolution of 'legal disputes' within the court context is apparent in the rules-based framework. It reflects the distinctive nature of court-connected mediation and its focus upon the resolution of legal disputes. This is another factor that distinguishes court-connected mediation from mediation within other settings that may not involve 'mediating within the shadow of the law'.[1088] My contention is reinforced by the empirical data, where Stakeholders described mediation's *purpose* as 'settlement' of legal disputes rather than 'conflict resolution'.[1089]

5 *What Occurs When an Action is Referred to Mediation?*

Rules 72 to 75 outline the administrative steps the Court takes to arrange mediation. The *Rules* provide litigants the opportunity to mediate for Minor Claims and General Claims *after* legal proceedings are commenced.[1090] Mediation is also available on a *pro bono* basis *before* legal proceedings are commenced via the pre-lodgment process, discussed above.

Once an action is referred to mediation, the Court's Mediation Unit forwards disputants a copy of the *Practice Directions*, information about mediation costs, the list of Panel Mediators and request they select a mediator within seven days.[1091] If disputants either fail to choose a mediator, or do not agree on a mediator,[1092] the registrar nominates one and arranges the mediation.[1093] The Mediation Unit provides mediators with a copy of the pleadings,[1094] which enables them to 'check' for conflicts of interest before accepting the mediation.[1095]

No further information is provided regarding who will be attending mediation, which, according to best practice literature, is addressed during Pre-mediation procedures and enables mediators to assess potential conflicts of interest.[1096]

Mediations can be held at Magistrates Court locations (Adelaide, Christies Beach, Elizabeth or Port Adelaide and Country Magistrates Courts).[1097]

1087 Ibid.
1088 See above Chapter II at 38–47.
1089 See below Chapter IV at 114.
1090 'Mediation' (n 947).
1091 *Practice Directions* (n 971) cl 11(3); Magistrate 1; Magistrate 3.
1092 *Practice Directions* (n 971) cl 11(3).
1093 *Rules* (n 917) r 72(2). 'Mediation' (n 947).
1094 Mediator 9; Mediator 10.
1095 Mediator 5; Mediator 7; Mediator 8.
1096 See above Chapter II at 73. See also Chapter VII, recommendation 6.
1097 'Mediation' (n 947). See below Chapter VI at 189. See also Appendix A: Qualitative Research Methodology.

6 *What is the Purpose of Mediation?*

The Court has not defined the institutional purposes of its mediation program. It is thus unclear whether these relate to institutional effectiveness, efficiencies and 'settlement rate' success,[1098] the effective and efficient delivery of settlements,[1099] or substantive justice, 'just about settlement' or procedural justice.[1100] Consequently, it is also unclear whether the Court's institutional purposes converge or diverge with the varying purposes that may be pursued by Stakeholders and disputants.[1101] This is not surprising, given many court-connected mediation programs have no clearly articulated program goals.[1102] However, it does create the potential for expectation gaps.[1103]

The rules-based framework does not expressly state what the primary purpose of mediation is and whether varying purposes co-exist.[1104] Mediation is broadly described as a facilitative problem-solving and outcome-focussed process to settle legal dispute(s).[1105] This description is consistent with the literature,[1106] legislation and court rules that suggest mediation's purpose is to settle actions or refine or narrow the legal and factual issues in dispute.[1107]

The *Rules* outline five mediation outcomes:[1108] settlement of 'an action' (full settlement); settlement of 'any aspect of' an action (partial settlement); settlement of 'no aspect of an action' and where the mediator, with disputant consent, can attach a report on factual matters that were agreed during mediation; [1109] adjournment to provide additional time for the mediator to complete the mediation;[1110] or no settlement.[1111]

No reference is made to mediation's core values[1112] or to any of the qualitative purposes explored in the literature review,[1113] which coincide with some of the six mediator functions.[1114]

The legislative framework does not imply that mediation's *purpose* is to manage and resolve interpersonal/intrapersonal 'conflict'. That is not to say that underlying non-legal interests and needs as well as interpersonal/intrapersonal conflict cannot intentionally or inadvertently emerge during mediation. Interpersonal/intrapersonal conflict may even be partially resolved during mediation as a consequence of settlement or partial settlement. Equally, settlement can leave interpersonal/intrapersonal conflicts unresolved.[1115]

The rules-based framework does not contain an express description of what might constitute a 'satisfactory mediation',[1116] or to mediation's potential to reach a wide range of flexible, creative, consensual and 'non-legal' outcomes,[1117] nor does it state that a purpose of mediation includes

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1098 See above Chapter II at 53.
1099 See above Chapter II at 49 and 53.
1100 See above Chapter II at 56.
1101 See above Chapter II at Part B.
1102 See above Chapter II at 53.
1103 See below VII, recommendation 1.
1104 Cf Connolly (n 864) 1. See above Chapter II at 49. The settlement purpose is more obvious in the *UCRs* than in the *Rules* and the *Practice Directions*: see Chapter VII at 209.
1105 *Rules* (n 917) r 2; *Practice Directions* (n 971) cl 11(2). See above Chapter II at 31 and 38.
1106 See above Chapter II at 53.
1107 See nn 310 and 520–1. See also *UCRs* (n 917) rr 2.1(1), 131.3(4)(6).
1108 *Rules* (n 917) rr 72(4)–(5).
1109 Ibid r 72(5).
1110 Ibid r 72(7).
1111 The narrative of 'settlement' also features in *the Act* (n 322) s 27(2b)–(5).
1112 See above Chapter II at 34.
1113 See above Chapter II at 50–2.
1114 *Practice Standards* (n 222) r 2.2(a)–(f). See above Chapter II at 32 and 48.
1115 See above Chapter II at 50.
1116 Cf *Farm Debt Mediation Act 2018* (SA) s 4(1).
1117 See above Chapter II at 47. See also Chapter IV at 113.

disputants leaving 'feeling like they have at least achieved something useful'.[1118] However, the *Practice Directions* expressly refer to three 'benefits' of mediation including the: opportunity to settle early and in private resulting in 'saving costs, time and stress'; encouragement of 'effective communication under the direction of an impartial mediator'; conduciveness of 'maintaining ongoing relationships'.[1119] Furthermore, the Court's website indicates that mediation's purpose is for disputants to negotiate to 'find an agreement they can live with', stating it is in the best interests of disputants to 'come to an agreement and avoid formal court proceedings'.[1120]

The terseness of the rules-based framework relating to *purpose* is significant as they increase the potential for Stakeholders differing understandings and expectations regarding purpose and success. They also promote misunderstandings and inconsistencies between the existence of institutional purposes and purposes from the perspectives of both Stakeholders and disputants.

7 *Mediation Practice Models: What is the Mediator's Role, Functions, and 'Appropriate' Interventions?*

As explained in the literature review, attempts to categorise different practices according to archetypical 'models', reveals four predominant models.[1121] The rules-based framework makes no reference to these models,[1122] nor are they referred to in the *UCRs*.[1123] Furthermore, like the Supreme Court of Tasmania,[1124] no guidelines have been set by the Court regarding the practice model to be adopted within the Court's program, which may generate variation and mixed practices. Rundle argues that the advantage of 'such flexibility' includes 'adaptability', whereas the disadvantage includes 'lack of clarity'.[1125] Nonetheless, the conciliation-mediation distinction is pronounced in the *Rules*,[1126] which acknowledges the respective roles and functions of these two different interveners.[1127] Accordingly, there *are* restrictions on the 'kinds' or 'style of mediation' that may be practiced in the Court.[1128]

As the definition of mediation corresponds with the NADRAC and NMAS descriptions of 'purely facilitative' practice,[1129] mediators are restricted to undertaking a 'purely' facilitative role. The description includes some of the six mediator functions.[1130] Though no express reference is made to mediators supporting disputant communication, information exchange and understanding, identification and exploration of interests and underlying needs, negotiation and decision-making, such functions are implied, for without disputant decision-making, there can be no negotiation and hence no agreement reached. As long as mediators engage in 'purely' facilitative mediation, *practice* and *procedure* rest within their discretion. They are thus permitted to act according to what they deem disputants need to identify issues, develop options, consider alternatives, and endeavour to reach agreement.

1118 *Guidelines for Lawyers in Mediations* (n 40) 7.

1119 *Practice Directions* (n 971) cl 11(2).

1120 Some of the 'advantages of mediation' are also listed on the Court's website such as having greater control over process and outcomes and the opportunity of reaching 'flexible solutions' to suit disputant needs, quickly, confidentially and in private: 'Mediation' (n 947). See also Chapter IV at 125.

1121 See above Chapter II at 58.

1122 See above Chapter II at 63.

1123 See below Chapter VII at 216.

1124 See, eg, Rundle, 'Court-Connected Mediation Practice' (n 38) 176, 178, 286. See also *Supreme Court Rules 2000* (Tas) r 519(2)(3).

1125 Rundle, 'Barking Dogs' (n 373) 89.

1126 See above Chapter II at 35. See also the heading to s 27 of *the Act* (n 322).

1127 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) 177–8, citing the *Alternative Dispute Resolution Act 2001* (Tas) s 3(2).

1128 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) iv, 4. However, the conciliation-mediation distinction is less pronounced in the *UCRs*: see below Chapter VII at 215 and 230.

1129 See above Chapter II at 32.

1130 *Practice Standards* (n 222) pt 1, Introduction, 2, s 2.2.

Apart from the requirement to be NMAS accredited, the rules-based framework provides little guidance as to what facilitative practice is or ought to be. For example, no reference is made to mediators acting like a chairperson of a meeting, whether they may play the role of 'devil's advocate' to test disputants' understanding of the issues and options, or that they are not decision-makers, nor do they make findings of fact.[1131]

Furthermore, no reference is made to mediators being tasked with assisting disputants maintain or repair relationships, address interpersonal/intrapersonal conflicts or improve disputant conflict management skills, that predominantly feature in PDR processes,[1132] counselling and transformative mediation.[1133] This accords with my two earlier contentions that the Court is tasked with settling 'actions' and not resolving purely interpersonal/ intrapersonal conflict and that 'success' from the Court's perspective is recorded by settlement rates.[1134] However, this contention is partly contestable when exploring Stakeholder views relating to mediation's *purpose* and the by-products of successful mediation.[1135]

Despite the little guidance regarding what facilitative practice is or ought to be, the definition contains a prescription that mediators have 'no advisory or determinative role' regarding the content of actions or their resolution.[1136] This prescription does not explicitly state that mediators 'must not give advice', irrespective if they are subject-matter experts,[1137] or encourage or assist disputants in reserving or establishing legal rights nor act as an adjudicator or arbitrator.[1138] However, the definition illustrates the facilitative-advisory distinction,[1139] indicating that advisory mediation and advisory techniques are not permitted. While the definition does not contain an express prescription against mediator 'evaluation', the inference to be drawn from the description of mediators having a purely facilitative 'process' *only* and non-advisory role suggests that evaluation regarding content and outcomes is not permitted.[1140] Conversely, the definition of conciliation, a condensed version of the NADRAC definition,[1141] states that conciliators 'will advise on the matters in dispute/or options for resolution, but will not make a determination'.[1142]

Whilst the conciliation-mediation distinction is pronounced in the *Rules* and the rules-based framework restricts mediators to 'purely' facilitative practice, it is insufficiently definitive on many factors regarding *practice*. For example, can mediators utilise styles or techniques from other practice models such as transformative mediation? In assisting disputants 'develop options' to reach agreement, are mediators permitted or encouraged to make proposals, recommendations or endorse alternatives?[1143] Would Stakeholders consider these interventions 'appropriate' irrespective of whether they blur the process-content dichotomy[1144] and fall outside their 'purely' facilitative role? This is not the place to answer these questions conclusively, but does illustrate the potential for expectation gaps. Furthermore, Stakeholders may have divergent understandings and expectations concerning mediation practices, particularly as there is no universal agreement regarding the scope

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1131 See, eg, Connolly (n 864) 2.
1132 See above Chapter III at 93.
1133 See below Chapter II at 29 and 66.
1134 See above Chapter III at 90.
1135 See below Chapter IV at 114.
1136 See above Chapter II at 32.
1137 See, eg, rule 3 in 'Mediators Code of Conduct', *Victorian Civil and Administrative Tribunal* (Web Page) <https://www.vcat.vic.gov.au/documents/mediators-code-conduct>.
1138 Cf *Farm Debt Mediation Act 2018* (SA) s 21(2).
1139 See above Chapter II at 35 and 61.
1140 See above Chapter II at 32.
1141 See above Chapter II at 28 and 31.
1142 *Rules* (n 917) r 2.
1143 See above Chapter II at 64.
1144 See above Chapter II at 60.

and limits of the facilitative-advisory/evaluative dichotomy.[1145] In particular, do Stakeholders expect purely 'hands-off' 'non-directive' facilitation or 'hands on' and 'arm-twisting' conciliation?[1146]

Additionally, the conciliation-mediation distinction may not accurately reflect the realities of mediation practice in the Court. As mediators are guided by their own understanding and expectations[1147] of 'pure facilitation' there may be variation and mixed practices, with some mediators venturing into the realm of conciliation whilst simultaneously considering their practice as being 'facilitative'.[1148] Accordingly, this lack of *practice* predictability is another factor that could cause participants – particularly repeat players[1149] — to experience inconsistency in *practice*.

Similar to the previous discussion regarding *purpose*, the terseness of the rules-based framework is also significant as it increases the potential for Stakeholders to have differing understandings and expectations regarding *practice*.

8 *Must Mediators Adhere to a Particular Mediation Procedure?*

As explained in the literature review, there are a variety of mediation *procedures*.[1150] However, the rules-based framework does not mandate mediators to adhere to a particular procedure with specific stages, which may give rise to variation and mixed practices. It is therefore unclear whether Stakeholders can expect any of the following: do mediators usually commence with all participants in an initial Joint Session[1151] or is there usually Shuttle Mediation?[1152] Will participants remain in Joint Session more or less throughout mediation or will there be Shuttle Negotiation?[1153] This is not the place to answer these questions conclusively, however, such questions are important as they account for tensions between lawyers and mediators relating to control.[1154]

Similar to some legislation governing tribunals,[1155] the *Rules* expressly provide that mediators advise on or determine the procedure,[1156] indicating they have discretion to both determine and manage the procedure. This is consistent with Rundle's finding that both the styles of mediation practice and procedures in the Supreme Court of Tasmania remain under mediator discretion, but influenced by lawyer preferences.[1157]

I have summarised in table format information gleaned from the *Rules*, the *Practice Directions*, and the Court's website[1158] about the basic descriptions relating to *procedure*.[1159] The descriptions suggest it entails between four and six stages, reflecting some of the six mediator functions[1160] and certain stages of some procedures explored in the literature review.[1161] The fewer number of stages

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1145 See above Chapter II at 35 and 61.
1146 See above Chapter II at 62.
1147 See above Chapter II at 48.
1148 See below Chapter V at 141 and 167–8.
1149 See above Chapter I at 16 and below Chapter VII at 231–3.
1150 See above Chapter II at 71
1151 See, eg, Connolly (n 864) 3.
1152 See above Chapter II at 76–7.
1153 Ibid.
1154 See above Chapter II at 42.
1155 See, eg, *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 51(7); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88(7).
1156 See above Chapter III at 95.
1157 Rundle, 'Court-Connected Mediation Practice' (n 38) 178, 203–4, 219, 240.
1158 'Mediation' (n 947).
1159 Appendix N: Information Regarding Mediation *Procedure* in the Court: the *Rules*, *Practice Directions* and Court's Website.
1160 See above Chapter II at 32 and 48. See also Chapter V at 144.
1161 See above Chapter II at 71–9.

are less demarcated than those in the literature and in industry models, suggesting that the procedure might be an abbreviated process.

The key features of the procedure include the following. The mediator will commence with an introduction to explain 'the process'[1162] and set 'ground rules'.[1163] Disputants will be invited 'to make a brief opening statement'[1164] to 'explain what they think the problem is' with each provided the opportunity to speak.[1165] This implies disputants, not their lawyers or counsel, will 'present their cases', rather than possibly being 'invited to speak… at an appropriate time',[1166] which is inconsistent with the literature regarding limited direct disputant participation and dominance of lawyer control.[1167]

The mediator will 'summarise' disputant statements[1168] and assist identifying 'the key issues in dispute'.[1169] Disputants will 'have the opportunity to discuss these issues and try to resolve them'.[1170] As in other legislation and court rules,[1171] the mediator can to talk to disputants separately to clarify issues and discuss settlement options with discussions remaining confidential subject to disputant consent.[1172]

Before leaving mediation, the mediator must assist disputants 'record the agreement and any agreed consequences upon default of its terms and report that outcome to the Court'.[1173] The mediator can adjourn where additional time is required[1174] or if they consider 'there is good cause'.[1175] Where 'no aspect of an action' is settled, the mediator, with disputant consent, can attach a report on factual matters agreed.[1176] Once mediation is complete, the mediator must report to the Court 'any other matters' considered 'appropriate'.[1177]

At the conclusion of mediation, mediators are required to complete two forms.[1178] First, the 'Record of Outcome' form which contains administrative information including: party names; the time mediation commenced, was adjourned or concluded; whether the action settled and, if not, whether a report on factual matters agreed is attached.[1179] With the introduction of trial listing fees, mediators are also required to certify that disputants have 'attempted to settle'.[1180] The Record of Outcome is more limited than mediation forms in other courts, which require mediators to record information such as the: type of matter; stage at which mediation was called; final offers to settle; mediator's estimate of settlement; and the mediator's opinion about whether mediation was successful.[1181]

1162 'Mediation' (n 947).
1163 *Practice Directions* (n 971) cl 11(4).
1164 'Mediation' (n 947).
1165 *Practice Directions* (n 971) cl 11(4).
1166 Cf Connolly (n 864) 2.
1167 See above Chapter II at 42. But see below Chapter V at 118 and 120–1 and Chapter VI at 185 and 192.
1168 'Mediation' (n 947).
1169 *Practice Directions* (n 971) cl 11(4).
1170 'Mediation' (n 947).
1171 See, eg, *Civil Proceedings Act 2011* (Qld) s 39(2)(c)(d); *Uniform Civil Procedure Rules 1999* (Qld) r 326(3).
1172 *Practice Directions* (n 971) cl 11(4).
1173 *Rules* (n 917) r 72(4); *Practice Directions* (n 971) cl 11(7).
1174 *Rules* (n 917) r 72(7).
1175 *Practice Directions* (n 971) cl 11(7).
1176 *Rules* (n 917) r 72(5).
1177 *Practice Directions* (n 971) cl 11(7).
1178 Some Stakeholders commented upon these two forms: see below Chapter VI at 196.
1179 Appendix D.3: Record of Outcome.
1180 *Rules* (n 917) r 72(5).
1181 Rundle, 'Court-Connected Mediation Practice' (n 38) 139.

Secondly, if settlement is reached, the 'Settlement Agreement' contains administrative information including: the terms of agreement; an adjourned 'for mention only' date; a default provision relating to the defendant; and a confidentiality undertaking.[1182]

However, the description in the *Rules*, *Practice Directions* and on the Court's website is silent, terse, or insufficiently definitive on many procedural matters explored in the literature review.[1183] These gaps are significant because they increase the potential for inconsistency and for Stakeholders to have divergent expectations and experiences regarding *procedure*.

I explore nine of these gaps below, many of which remain unaddressed in the *UCRs*.[1184]

First, no guidance is provided as to how the mediator 'will make the process clear before it commences'.[1185] This is further complicated as no guidelines have been set for the conduct of mediation[1186] nor codes of mediator conduct.[1187] Moreover, little guidance is provided regarding the 'ground rules', which, together with some of the other procedural matters explored below, are usually agreed during Pre-Mediation.[1188] However, no mention is made in the rules-based framework or on the Court's website to the existence of a Pre-Mediation procedure.[1189]

However, three matters present in the rules-based framework as ground rules include the following. The first being mediation is a voluntary process and disputants 'may withdraw at any time'.[1190] Mediation is not 'authentically' voluntary,[1191] however, as the Court has power to refer an action without disputant consent[1192] and mediators must certify disputants have attempted to settle their action.[1193]

The second relates to rules governing privacy, confidentiality and privilege, to encourage full and frank discussions on a *without prejudice* basis.[1194] Mediators must not disclose any information obtained in the course or for the purposes of mediation except where 'required or authorised to do so by law'.[1195] No reference is made to whether mediators may disclose information obtained during mediation where there are reasonable grounds to believe that the disclosure is necessary to prevent harm to a person or property or for statistical analysis/evaluation purposes of the mediation program.[1196] Furthermore, whilst disputants may 'be asked to sign a confidentiality agreement',[1197] the rules-based framework does not mandate that they do so or that they sign an Agreement to

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1182 Appendix D.4: Settlement Agreement and Annexure.

1183 See above Chapter II at 73–4.

1184 See below Chapter VII at 206 and recommendation 2.

1185 *Practice Directions* (n 971) cl 11(1).

1186 See, eg, *Supreme Court Rules 2000* (Tas) r 519(3).

1187 See, eg, 'Mediators Code of Conduct' (n 1137) rr 2, 5.

1188 See above Chapter II at 73–4.

1189 Cf *Court Procedures Act 2004* (ACT) s 52A; *Uniform Civil Procedure Rules 2005* (NSW) r 20.4; *Civil Proceedings Act 2011* (Qld) s 39(2)(a); *Farm Debt Mediation Act 2018* (SA) s 23; *Practice Standards* (n 222) s 3.2(e).

1190 Clause 11(4) of the *Practice Directions* (n 971), which is similar to the *Alternative Dispute Resolution Act 2001* (Tas) s 6.

1191 See above Chapter II at 47.

1192 *The Act* (n 322) s 27(1).

1193 See above Chapter III at 88–9. See below Chapter III at 105–6.

1194 See above Chapter II at 38 and 74. See also *the Act* (n 322) s 27(3); *Evidence Act 1929* (SA) s 67C.

1195 *The Act* (n 322) s 27(2a).

1196 Cf *Alternative Dispute Resolution Act 2001* (Tas) s 11. Cf *Supreme Court Rules 2008* (NT) ord 48, pt 2, r 48.13 (8), (14).

1197 *Practice Directions* (n 971) cl 11(5).

Mediate before commencement,[1198] which is typically executed by disputants during Pre-Mediation.[1199]

The third relate to rules governing discovery of documents. Disputants must file and serve a list of documents that are directly relevant to their pleadings seven days before the first directions hearing,[1200] which typically occur before an action is referred to mediation. Copies of all discovered documents, in which privilege is not claimed, must be filed seven days before mediation 'if the Court directs'[1201] but 'may be excused' where 'unduly onerous' or 'for other cause'.[1202] Because of the non-determinative nature of the mediator's role, mediation does not place the same emphasis upon documentation and the presentation and testing of evidence as determinative processes.[1203] Whilst 'all information' need not be discovered in all actions for mediation to be effective,[1204] facts and documents are required for disputants to make informed decisions regarding 'their present circumstances and future plans' rather than for the resolution of liability and quantum issues.[1205]

Secondly, despite mediators having powers delegated by the Court,[1206] the rules-based framework makes no reference to whether mediators have the power to make orders or give directions for the preparation and conduct of mediation,[1207] such as discovery to the mediator.[1208] Similarly, the *UCRs* state that a judicial or non-judicial court officer presiding over a mediation 'may make orders and give directions' for the purpose of an 'ADR process',[1209] however, no further guidance is provided regarding this power. In addition, no reference is made to the steps mediators can take to prepare themselves or to the existence of any power that mediators have to 'gather information about the nature and facts of the dispute in any way' they decide.[1210] Furthermore, the rules-based framework does not contain any obligations regarding the preparation and exchange of Mediation Books, Issues Statements, Position Papers or the like before mediation,[1211] which may account for expectation gaps between Stakeholders regarding levels of pre-mediation information exchange including the use of Position Papers.[1212] However, the *UCRs* contain clearer provisions regarding pre-mediation information exchange and stipulate that the Court may make orders that disputants exchange Position Papers, provide limited particulars of their cases, provide limited discovery and exchange expert reports for mediation.[1213]

Thirdly, no mention is made to various other procedural matters outlined in the literature review,[1214] which are important as they increase the potential for variation between mediators and increase the potential for Stakeholders to experiences expectation gaps. For example, unlike legislation and rules from interstate courts,[1215] the rules-based framework is less explicit regarding who must attend

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1198 See below Chapter VI at 177.

1199 See above Chapter II at 73.

1200 *Rules* (n 917) r 71(1).

1201 Ibid r 71(6); *Practice Directions* (n 971) cl 11(3). See also Chapter VI at 178.

1202 *Rules* (n 917) r 71(7).

1203 Boulle and Field, *Mediation in Australia* (n 27) 156.

1204 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) vi, recommendation 11.

1205 Boulle and Alexander, *Skills and Techniques* (n 17) 85.

1206 *The Act* (n 322) s 27(2).

1207 Cf *Civil Procedure Act 2005* (NSW) s 32; *Magistrates Court (Civil Division) Rules 1998* (Tas) r 85(2).

1208 See, eg, *Simmons* (n 419).

1209 *UCRs* (n 917) r 131.1(6).

1210 Cf *Uniform Civil Procedure Rules 1999* (Qld) r 326(1).

1211 See above Chapter II at 80.

1212 See below Chapter VI at 178.

1213 *UCRs* (n 917) r 131.3(2)(d)–(g). See below Chapter VII at 206–7.

1214 See above Chapter II at 73.

1215 See eg, *Uniform Civil Procedure Rules 2005* (NSW) r 20.6(1); *Local Court (Civil Jurisdiction) Rules 1998* (NT) r 32.07(3)(4); *Supreme Court Rules 2008* (NT) ord 48, pt 2, r 48.13(5); *Civil Proceedings Act 2011* (Qld) s 44; *Supreme Court Rules 2000* (Tas) r 519(4); *Rules of the Supreme Court 1971* (WA) ord 4A, div 2, r 8(3A); *District Court Rules 2005* (WA) r 35(4); *Magistrates Court (Civil Proceedings) Rules 2005* (WA) r 50.

mediation and authority to settle.[1216] The *UCRs* contain a clearer requirement regarding both matters,[1217] which addresses a concern in the literature regarding lawyers attending mediation without adequate authority to settle.[1218] Moreover, neither the *Rules* nor the *Practice Directions* contain protocols for addressing conflicts of interests nor do they require disclosure of any association with a disputant, adviser or representative, which could reasonably be seen to affect mediator impartiality.[1219] No mention is made to the role of support persons[1220] and whether mediators must approve their attendance.[1221] No mention is made to whether mediators: have the power to allow or exclude 'strangers' from attending participating or can permit persons with a 'legitimate interest' in the dispute to attend;[1222] and can decide whether a disputant may be represented,[1223] and, if so, their permissible level of participation.[1224] Additionally, no mention is made to whether mediators have the power to join 'appropriate persons' as parties to mediation.[1225]

Fourthly, the *Rules* and *Practice Directions* do not contain conduct standards.[1226] They do not expressly state that disputants must participate 'appropriately', 'constructively, 'genuinely', in 'good faith', 'reasonably' or use 'reasonable endeavours' to settle, as feature in some Australian legislation[1227] and court rules.[1228] The *UCRs* contain more guidance by making explicit that the Court *expects* disputants 'to participate appropriately' and 'negotiate in good faith' with a view to resolve the action.[1229]

Fifthly, no guidance is provided regarding what might constitute 'good cause' for adjourning mediation[1230] or the circumstances that might justify its termination.[1231]

Sixthly, no guidance is provided regarding the level of 'assistance' mediators must provide disputants in recording settlement terms, such as whether their role is restricted to scribe or dictator,[1232] or whether they prepare a draft setting out the main points of agreement.[1233]

Seventhly, no guidance is provided regarding what constitutes an 'attempt' to settle.[1234] It is thus unclear whether 'attempt' requires disputants to: merely attend mediation; cooperate;[1235] or make

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1216 *Rules* (n 917) r 75(1).

1217 *UCRs* (n 917) rr 131.1(5), 131.3(2)(b)(c). Appendix D.2: Form 78C Notice of Alternative Dispute Resolution Conference: 'Uniform Civil Rules 2020' (n 948). See below Chapter V at 147 and Chapter VI at 176–7.

1218 See, eg, Trueman (n 381) 212–13.

1219 Cf *Ethical Guidelines for Mediators* (n 254) r 3.

1220 See above Chapter II at 73.

1221 Cf *Guidelines for Parties in Mediations* (n 40) 4; *South Australian Employment Tribunal Act 2014* (SA) ss 43(11)(b).

1222 Cf *Ethical Guidelines for Mediators* (n 254) 4.

1223 Cf *Uniform Civil Procedure Rules 1999* (Qld) r 326(2); *Farm Debt Mediation Act 2018* (SA) s 23(5).

1224 Cf the Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution*, 19 December 2018, para 34.

1225 Cf *Farm Debt Mediation Act 2018* (SA) s 23(2).

1226 See above Chapter II at 46–7.

1227 *Civil Procedure Act 2005* (NSW) s 27.

1228 See eg, *Court Procedures Rules 2006* (ACT) r 1180; *Local Court (Civil Jurisdiction) Rules 1998* (NT) r 32.10; *Uniform Civil Procedure Rules 1999* (Qld) rr 322, 325; *Supreme Court Civil Supplementary Rules 2014* (SA) r 207(5)(6); *District Court Civil Supplementary Rules 2014* (SA) r 207(5)(6).

1229 *UCRs* (n 917) r 131.3(3). See below Chapter VII at 209.

1230 Cf *Farm Debt Mediation Act 1994* (NSW), s 18E(1A)(b).

1231 Cf *Uniform Civil Procedure Rules 1999* (Qld) r 330; *Farm Debt Mediation Act 1994* (NSW) s 18E(1A)(c). See also *Ethical Guidelines for Mediators* (n 254) r 6; *Guidelines for Parties in Mediations* (n 40) r 10; Resolution Institute, *Mediation Rules* (n 183) r 8.

1232 See above Chapter II at 82.

1233 Cf *Farm Debt Mediation Act 1994* (NSW) s 18J. I discuss Stakeholder reports regarding recording settlement terms when exploring mediation *procedure* in Chapter VI at 196.

1234 *Rules* (n 917) r 72(5).

1235 See, eg, *District Court Rules 2005* (WA) r 35(8)(b); *Rules of the Supreme Court 1971* (WA) ord 4A, div 1, r 8(5)(b).

'appropriate', 'constructive, 'genuine' or 'reasonable' offers/counter-offers to compromise their position before the mediator *may* certify that an attempt has occurred.[1236] The *UCRs* emulate this provision without providing any further guidance.[1237]

Eighthly, no mention is made to a Post-Mediation procedure, whether referred to as 'post-mediation sessions'[1238] or 'follow-up'.[1239]

Ninthly, no reference is made to the requirement that any settlement reached must not be inconsistent with any relevant Act[1240] and mediators do not have the power to make determinations or orders necessary to give effect to settlement terms,[1241] both of which are common within statutory conciliation contexts.[1242]

On one view, the absence of a streamlined or systematised procedure, apparent flexibility and discretion afforded to mediators and minimalist approach regarding 'ground rules' reflects mediation's inherent flexibility and *responsiveness* value.[1243] On another view, the apparent flexibility and discretion afforded to mediators coupled with the gaps identified above increase the potential for procedural unpredictability, similar to the *practice* unpredictability contended above. Hence, this procedural unpredictability is another factor that could cause participants to experience inconsistency in *procedure*, particularly as no singularly accepted *procedure* exists.[1244]

Similar to the previous discussions regarding *purpose* and *practice*, the terseness of the rules-based framework is also significant as it increases the potential for Stakeholders to have differing understandings and expectations regarding *procedure*.

C *Conclusion*

This Chapter has provided an introduction to the Court's jurisdiction and its rules-based framework. The Court has promoted mediation since the pilot project in 1996. Quantitative data from 1999 reveal that the Court resolves 'far more' civil disputes by mediation than judicial determination. The Court has various powers regarding mediation but only has jurisdiction to refer 'actions' to mediation and not purely interpersonal/intrapersonal conflict that have no *prima facie* basis at law or in equity.

The exploration in this Chapter reveals that the Court's rules-based framework is silent, terse, or insufficiently definitive on many factors relating to the three themes, as discussed in the literature review, particularly to *practice* and *procedure*.

Whilst the rules-based framework does not expressly state what the primary purpose of mediation is and whether varying purposes co-exist, nor contain express reference to mediation's more qualitative purposes, mediation is described as a facilitative problem-solving and outcome-focussed process to settle legal disputes.

1236 Only two Stakeholders briefly commented upon what an 'attempt to settle' might entail: see below Chapter VI at 200–1.

1237 *UCRs* (n 917) r 131.3(8). See below Chapter VII at 227.

1238 Cf *Civil Proceedings Act 2011* (Qld), s 39(2)(a).

1239 Cf *Court Procedures Act 2004* (ACT) s 52A; *Civil Procedure Act 2005* (NSW) s 30(1); *Alternative Dispute Resolution Act 2001* (Tas) s 10(1).

1240 Cf *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 51(10); *South Australian Employment Tribunal Act 2014* (SA) ss 43(15)(a), 46 (10)(a).

1241 Cf *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 51(8).

1242 See above Chapter II at 36.

1243 See above Chapter II at 35.

1244 See above Chapter II at 72.

Apart from the requirement to be NMAS accredited, the rules-based framework provides little guidance as to what facilitative practice is or ought to be.

The rules-based framework does not mandate a streamlined or systematised procedure and mediators are afforded considerable flexibility and discretion to determine and manage mediation, which may give rise to variation and mixed practices.

The apparent flexibility and discretion afforded to mediators coupled with the gaps in the former, and current, rules-based framework increase the potential for Stakeholders to have divergent understandings, expectations and experiences regarding the three themes of *purpose*, *practice* and *procedure*, which can also impact upon practices, behaviours and mediator interventions and upon outcomes. Moreover it may promote inconsistency and diverge from best practice theory. Could the potential for inconsistency also cause procedural fairness issues? Consequently, is a more prescriptive approach required? This is not the place to answer these questions conclusively. However, it reinforces why it will be productive to explore Stakeholder reports regarding mediation's *purpose(s)*,[1245] *practice(s)* – including Stakeholder views of the meditator's role, functions and levels of 'appropriate' mediator intervention[1246] – and *procedure(s)*.[1247]

The exploration of the empirical data in the following Chapters will provide contemporary insight into Stakeholder perspectives of mediation by reference to the themes and the gaps in the rules-based framework that were identified in this Chapter.

1245 See below Chapter IV.
1246 See below Chapter V.
1247 See below Chapter VI.

CHAPTER IV: STAKEHOLDER PERSPECTIVES ON PURPOSE

This research examines Stakeholder understandings, expectations, and experiences of mediation in the Court by reference to the three themes of *purpose*, *practice* and *procedure*.[1248] The previous Chapter showed that the Court's rules-based framework is silent, terse, or insufficiently definitive on many factors relating to the three themes, particularly to *practice* and *procedure*.[1249]

This is the first Chapter in which I draw on the qualitative data and address the first research question by examining mediation's *purpose*. Stakeholders have the convergent view that mediation's primary *purpose*, in quantitative terms, is to settle actions. Given this broad convergence between Stakeholders, this Chapter is briefer than the discussion of *practice* and *procedure* in the next two Chapters, which contain more gaps between Stakeholder reports. The data also includes Stakeholder responses concerning what constitutes 'success' in mediation. Analysis of this data revealed these responses could be incorporated into the *purpose* discussion, despite questions about 'success' eliciting different answers from questions about 'purpose'. Notably, descriptions of 'success' included qualitative concepts such as satisfaction regarding both outcomes and process, rather than focusing solely on quantitative purposes.

This Chapter illustrates the relationship between Stakeholder understandings and expectations of mediation's *purpose*(s) and what constitutes success. Whilst *purpose* and success are interrelated concepts, Stakeholders did not share unanimous views about either concept. These findings are important as they highlight the potential for expectation gaps, which make assessing what constitutes 'success' difficult to define[1250] and measure. Expectation gaps illustrate the potential for inconsistency, *practice* and *procedural* unpredictability and mixed approaches.[1251] They can also impact upon practices, behaviours, mediator interventions, mediation dynamics, outcomes reached,[1252] and affect participant experiences. They also create tensions between Stakeholders and illustrate the potential for participants to seek varying objectives, some of which highlight tensions with some of mediation's core values, which I explored in the literature review.[1253]

This Chapter will reinforce my contention that the three themes are interrelated and that *purpose* drives *practice* and *procedure*.[1254] This will become more evident in the next two Chapters where I demonstrate how Stakeholder understandings and expectations of *purpose* are linked with their understandings and expectations of both *practice*,[1255] and *procedure*.[1256]

I explain the research methodology, the selection criteria and limitations elsewhere.[1257] In the introduction to the thesis I explained that I chose not to include disputants as part of the sample for exploration of their perspective was not central to addressing the three research questions.[1258] I

1248 See above Chapter II, Part A, Part B and Part C.

1249 See above Chapter III.

1250 See above Chapter I at 17.

1251 See above Chapter III at 101 and 106. See below Chapter V at 132 and 168, Chapter VI at 170, 176, 180, 188, 201 and 204, Chapter VII at 205, 208, 213 and 220 and Chapter VIII at 238.

1252 See above Chapter I at 15 and Chapter II at 45. See below Chapter IV at 130, Chapter V at 132 and 167–9, Chapter VII at 170, 199, 202 and 204, Chapter VII at 205–6, 212 and Chapter VIII at 238.

1253 See above Chapter II at 33–5. See also below Chapter VII at Part B.

1254 See above Chapter I at 13 and Chapter II at 47. See below Chapter IV at 113, 125–30, Chapter V at 131, 141–2 and 169, Chapter VI at 181, 192, 197 and 202, Chapter VII at 205, 208, 210 and 234 and Chapter VIII at 237 and 239.

1255 See below Chapter IV at 113, 125–6 and 130 and Chapter V at 131, 141, 147–151, 158–165.

1256 See below Chapter VI at 185, 192–4 and 197–8.

1257 See Appendix A: Qualitative Research Methodology.

1258 See above Chapter I at 12.

acknowledge the importance of disputants in Chapter VIII and recommend they be included in future research.[1259]

A *The Purpose of Mediation*

In this Chapter I explore three key findings regarding *purpose*.

First, there was no unanimous view amongst Stakeholders regarding their understandings and expectations concerning *purpose*.

Secondly, most Stakeholders described the primary purpose quantitatively as to settle actions. However, there was no uniform description of what 'settlement' meant, with descriptions comprising both quantitative and qualitative elements.

Thirdly, many described 'other' qualitative purposes secondary to settlement that reflect some of the seven categories of mediation's varying *purposes* [1260] and elide the ideology-practice continuum.[1261] Some also correspond with some of the six mediator functions specified in the NMAS,[1262] which I explore in the next Chapter.[1263]

1 *The Varying Purpose(s) of Mediation*

As discussed in the literature review, there are a variety of *purposes*, some more practical than ideological, others more qualitative than quantitative in nature.[1264] I group them according to seven categories, some which feature in the six mediator functions.[1265]

As discussed in the previous Chapter, the rules-based framework does not expressly state what the primary *purpose* of mediation is and whether varying purposes co-exist. Mediation is broadly described as a facilitative, problem-solving and outcome-focussed process.[1266]

Many Stakeholders separated their descriptions of purpose into two perspectives: their perception of the Court's perspective and of the disputant perspective. Some also separated their descriptions into two categories: primary and secondary purposes, with no uniformity amongst them nor ranking them in order of importance.

None of the Stakeholder descriptions suggest that mediation is *either* an *ideology* of 'peace-seeking, transformative conflict-resolving human problem solving' or a *practice* of 'task oriented, communication enhancing dispute settlement,'as discussed in the literature review.[1267] Furthermore, none of their descriptions suggest that *ideology* and *practice* are contradictory.[1268] Rather, their views about primary and secondary purposes encompass descriptions of mediation as comprising both *ideology* and *practice*, consistent with Allport's research findings.[1269] It is also consistent with

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1259 See below Chapter VII and Chapter VIII at 244.
1260 See above Chapter II at 49.
1261 See above Chapter II at 31.
1262 *Practice Standards* (n 222) s 2.2(a)–(f). See above Chapter II at 32 and 48.
1263 See below Chapter V at 144.
1264 See above Chapter II at 48.
1265 See above Chapter II at 32 and 48.
1266 See above Chapter III at 98. But see also Chapter VII, recommendation 2. See also See also Appendix J: Comparison between the *Act*, *Rules*, *Practice Directions* and *UCRs* regarding *Purpose*, *Practice* and *Procedure.*
1267 See above Chapter II at 31.
1268 Cf Chapter II at 31.
1269 See, eg, Allport (n 44) 171–2, 197.

those authors who argue that the varying mediation purposes are not mutually exclusive, overlap exists between them, and are interrelated.[1270]

I summarise below Stakeholder reports regarding *purpose*, using some of the seven categories from the literature review[1271] as headings. I have placed Stakeholder descriptions that correspond most closely with each category, despite the overlap between differing descriptions. I have also incorporated data regarding success, which provides further insight, and illustrates the relationship between these two concepts.

There was greater variation amongst mediator reports in contrast to magistrates and lawyers, which may be attributed to their greater sample size. Further, as not all mediators were lawyer-mediators, some may have prioritised qualitative purposes over *efficiency* and *effectiveness* objectives. Conversely, as some magistrates and most lawyers had not undergone mediation training,[1272] they may not be as familiar as mediators with mediation's qualitative purposes.[1273] Alternately, they may prioritise achieving the effective and efficient delivery of settlement over qualitative purposes.[1274]

(a) Institutional Effectiveness and Efficiencies for the Court

Some magistrates[1275] and most lawyers[1276] and mediators[1277] held the convergent view that mediation's primary purpose, from the Court's perspective, is to settle actions. Their descriptions centred on two overlapping premises.

First, reducing the Court's trial load by clearing out the Court list.[1278] This was emphasised by two magistrates who stated that the Court is attentive to the possibility of settlement: it averts the need for trial, and writing a judgment,[1279] and insulates against the risks of appeal.[1280] These views coincide with a theme in the literature that suggests judicial officers have a 'preference for settlement' and 'commitment to avoiding adjudication', echoed within court rules and case management principles, that 'a bad settlement is almost always better than a good trial'.[1281] These views reinforce opinions that common law courts have long traditions of encouraging settlement through the doctrine of *without prejudice* privilege, informal signals to lawyers and disputants[1282] and judges using their status to encourage settlements 'informally' without the use of mediation proper.[1283] They also reflect 'settlement value', a concept encapsulating the certainty of settlement and the advantages derived from saving legal fees and trial costs, whilst avoiding associated emotional distress and reducing risk at trial and on appeal.[1284]

1270 See above Chapter II at 59.
1271 See above Chapter II at 48.
1272 Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.
1273 See above Chapter II at 50–2.
1274 See above Chapter II at 53–4.
1275 Magistrate 1; Magistrate 2; Magistrate 4.
1276 Lawyer 2 (Bar 1); Lawyer 3; Lawyer 5 (Bar 3); Lawyer 6.
1277 Mediator 2; Mediator 6; Mediator 7; Mediator 8; Mediator 9; Mediator 11; Mediator 13; Mediator 14; Mediator 15.
1278 Magistrate 4; Lawyer 6; Lawyer 3.
1279 Magistrate 2.
1280 Magistrate 1.
1281 Resnik, 'Mediating Preferences' (n 360) 157–8.
1282 Boulle and Field, *Mediation in Australia* (n 27) 303.
1283 Annesley H Degaris, 'The Role of Federal Court Judges in the Settlement of Disputes' (1994) 13(2) *University of Tasmania Law Review* 217; *the Act* (n 322) ss 27(2b), 27(2c). See above Chapter III at 86.
1284 Randall Kiser, *How Leading Lawyers Think: Expert Insights into Judgment and Advocacy* (Springler, 2011) 187.

Some mediators expressed mediation's purpose is to reduce the pressure on the 'overburdened' Court and address the perceived backlog of actions.[1285] Similarly, one lawyer opined that some referrals are driven by the Court's desire to minimise the caseload of 'overloaded' magistrates, avoid dealing with 'messy' actions and the need to write a judgment.[1286] This view is a variation on a theme in the literature that suggests some lawyers direct clients to mediation because it helps them settle 'hard cases'.[1287] This too is a variation on a theme in the empirical data; namely, having the mediator 'deal with it' by doing the 'heavy lifting' for lawyers.[1288] There is overlap between these findings and the data regarding referral practices.[1289]

Secondly, reducing expenditure of Court resources by 'diverting'[1290] actions from litigation[1291] creating efficiencies in the Court's administration.[1292] One magistrate emphasised the significant cost difference to the taxpayer between mediation, which involves a mediator and assistance from the Court's Mediation Unit, in contrast to trial, which involve a magistrate, tipstaff, a clerk, recording equipment and ancillary costs.[1293] One mediator noted the important public interest[1294] of the efficient use of State resources, while acknowledging the social benefits in achieving durable settlements rather than Court-imposed decisions.[1295] Other mediators emphasised the 'flow-on' effects that diverting actions to mediation has for some disputants.[1296] For example, if actions do not settle at mediation, it can provide the impetus for settlement at a later date, after disputants have weighed up the costs of proceeding to litigation.[1297]

These findings are consistent with literature that suggests institutional effectiveness, efficiencies, and 'settlement rate' success are prioritised within the court-connected context in contrast to more qualitative mediation purposes.[1298] These findings are echoed in the next part of the discussion, which illustrate the relationship between Stakeholder perceptions of the Court's perspective and the disputant perspective. As discussed in the literature view, achieving the institutional purposes of effectiveness and efficiencies for courts, on the one hand, overlaps with the effective and efficient delivery of settlement for disputants, on the other hand.[1299]

(b) Effective and Efficient Delivery of Settlement for Disputants

Most magistrates,[1300] all lawyers and most mediators[1301] had the convergent view that mediation's primary purpose, from the disputant perspective, is for disputants to settle their actions. Their descriptions centred on three premises.

1285 Mediator 2; Mediator 6; Mediator 7; Mediator 13; Mediator 15.

1286 Lawyer 5 (Bar 3).

1287 See, eg, Howieson, 'What Is It About Me?' (n 38) 182; Laurence Boulle, *Mediation: Skills and Techniques* (Butterworths, 2001) 289.

1288 See below Chapter V at 151 and Chapter VI at 190.

1289 See below Chapter VI at 190. See also Chapter VII, recommendation 5.

1290 Mediator 4; Mediator 7; Mediator 9.

1291 Lawyer 2 (Bar 1); Lawyer 5 (Bar 3).

1292 Mediator 8.

1293 Magistrate 4.

1294 See above Chapter II at 49 and 52–3. See also Appendix G: Characteristics of the Four Mediation 'Models' by Reference to *Purpose*, *Practice* and *Procedure*.

1295 Mediator 12. See also Appendix G: Characteristics of the Four Mediation 'Models' by Reference to *Purpose*, *Practice* and *Procedure*.

1296 Mediator 2; Mediator 8; Mediator 11.

1297 Mediator 9.

1298 See above Chapter II at 53.

1299 See above Chapter II at 54.

1300 Magistrate 2; Magistrate 3; Magistrate 4; Magistrate 5.

1301 Mediator 1; Mediator 2; Mediator 3; Mediator 4 Mediator 5; Mediator 6; Mediator 7; Mediator 8; Mediator 9; Mediator 10; Mediator 11; Mediator 12; Mediator 13; Mediator 14; Mediator 15.

First, generating expeditious outcomes in a timelier manner earlier in the lifecycle of disputes[1302] than would ordinarily be obtained by determination following trial.[1303]

Secondly, avoiding trial thereby reducing costs and legal fees.[1304] One magistrate stated that disputants generally do not understand the costs of trial and the consequences of 'losing', stating if settlement is reached at mediation, they will save time and risks of exposure to legal costs.[1305]

Thirdly, minimising the 'stress',[1306] 'hassle'[1307] and 'angst'[1308] that disputants would likely experience at trial.

These views are consistent with the 'Duty of the Court' to 'promote the expeditious, economical and just conduct and resolution' of actions 'by negotiated agreement or judicial determination[1309] and echo the 'benefits' of mediation expressed in the *Practice Directions*.[1310] They also centre upon the three major issues which disputants face in litigation: stress and emotional commitment, risks, and costs.[1311] These findings accord with the literature,[1312] legislation and court rules that indicate the purpose of court-connected mediation is to achieve effective and efficient delivery of settlement.[1313]

The settlement purpose aligns closely with advisory/evaluative and settlement mediation[1314] and corresponds with the description of *dispute settlement mediation*.[1315] I explore mediation *practice* in the next Chapter.[1316]

Two mediators expressed mediation's purpose is to explore *whether* actions can be settled. One stated it is simply to investigate the possibilities for disputants to settle, though emphasised mediation does *not* equate with 'justice'.[1317] This description indicates respect for disputant *self-determination*, despite this mediator expressed 'conciliating'.[1318] Another expressed caution in not saying the purpose is to 'resolve' actions as that creates a perception that disputants *must* settle or else mediation was futile.[1319] This mediator suggested such a view accentuates 'the wrong perspective' and that mediation's purpose is to determine whether actions are 'able to be' resolved, citing the chief focus on process rather than outcome, because focussing on outcomes can 'skew behaviours'.[1320]

1302 Lawyer 2 (Bar 1); Lawyer 6; Mediator 3; Mediator 4; Mediator 7; Mediator 8.
1303 Magistrate 2; Magistrate 5.
1304 Magistrate 2; Lawyer 2 (Bar 1); Lawyer 5 (Bar 3); Lawyer 6; Lawyer 7; Mediator 1; Mediator 3; Mediator 4; Mediator 7; Mediator 8; Mediator 9; Mediator 14.
1305 Magistrate 2. See also Chapter VI at 171.
1306 Magistrate 5; Lawyer 1; Lawyer 5 (Bar 3); Mediator 3.
1307 Magistrate 2.
1308 Mediator 1; Mediator 4; Mediator 7; Mediator 8.
1309 *Rules* (n 917) r 3(1)(a); *UCRs* (n 917) r 1.5. See above Chapter III at 93. See also Chapter VII at 206.
1310 *Practice Directions* (n 971) cl 11(2). See above Chapter III at 99.
1311 *IPA Manufacturing* (n 522) [31]–[33] (Lander J).
1312 See above Chapter II at 49.
1313 See nn 310 and 520–1.
1314 See above Chapter II at 64–5.
1315 See above nn 450.
1316 See below Chapter V.
1317 Mediator 6. See below Chapter IV at 124.
1318 See below Chapter V at 136.
1319 Mediator 12.
1320 Mediator 12.

These two views align more closely with facilitative mediation.[1321] They reinforce that *purpose* drives *practice* and *procedure*,[1322] for they imply that, if mediation's sole purpose is to achieve settlement, mediators might 'skew behaviours' to obtain outcomes.

The findings in this part of the Chapter suggest that Stakeholders prioritise *efficiency* and *effectiveness* objectives over 'other' purposes I explore in turn below.

Though settlement was identified as the driving purpose, there was no uniform description of what 'settlement' meant, as the three following examples demonstrate.

A minority described settlement, from the disputant perspective solely in quantitative terms as 'full settlement of all issues in dispute', embodied in a Settlement Agreement, with immediate effect evincing finality of the action.[1323] These views suggest there are only two mediation outcomes: 'settlement' and 'no settlement'.[1324]

A different minority described settlement to mean Settlement Agreements that are durable over time,[1325] reflecting mediation's *effectiveness* objective.[1326] However, the data suggests most Stakeholders prioritise achieving immediate settlement to end actions than upon achieving durable outcomes. Later in the thesis I explore two magistrate reports that settlements occasionally become 'unstuck' post-mediation, which impact upon *effectiveness* and *efficiency* objectives.[1327]

Conversely, most descriptions were not restricted *solely* to quantitative terms of 'full settlement', or 'partial settlement', which I discuss below, but also comprised qualitative elements including satisfaction regarding both outcomes and process.

Further, many views illustrate the overlap between certain purposes that I grouped according to seven categories.[1328] For example, whilst most mediations relate to quantum,[1329] some mediators expressed that settlement is not always 'just about money' but may be an acknowledgment, apology or recognition, which has little or nothing to do with 'the money.'[1330]

The discussion that follows will further illustrate the overlap between the quantitative purposes of 'full' and 'partial' settlement and bringing actions to an end, with more qualitative purposes such as facilitating disputant understanding, satisfaction of needs and interests and satisfaction regarding both outcomes and process.

(c) Ending the Action within the Court, Not the Underlying 'Conflict' for Disputants

The terms 'conflict resolution' and 'dispute settlement' are frequently used within the literature.[1331] However, not all interpersonal/intrapersonal conflicts are 'resolved' by mediation, implying that the root of the problem remains unresolved.[1332] In line with this view, one magistrate expressed that an additional purpose of mediation is to formally end what has been identified as the 'legal dispute' –

1321 See above Chapter II at 65.
1322 See above Chapter I at 13 and Chapter II at 48. See below Chapter IV at 125, Chapter V at 131 and 141–2, Chapter VI at 181, 192, 197 and 202 and Chapter VII at 208, 210 and 234.
1323 Magistrate 2; Lawyer 6 referred to *Masters v Cameron* (1954) 91 CLR 353.
1324 See above Chapter III at 98.
1325 Lawyer 1; Mediator 1; Mediator 5.
1326 See above Chapter II at 49.
1327 See below Chapter VI at 197.
1328 See above Chapter II at 48.
1329 Mediator 5; Mediator 6; Mediator 8; Mediator 9; Mediator 13; Mediator 15.
1330 Mediator 5; Mediator 13; Mediator 14; Mediator 15. See below Chapter IV at 119.
1331 See above Chapter II at 50.
1332 Ibid.

by abandoning it or by reaching an agreement that is remote from it.[1333] This magistrate stated that – putting aside the inherent 'self-interest issue', as writing judgments is 'hard work and appealable' – going to trial and having a judgment does not bring the dispute to an end. It merely brings it to an end in that court and there is always a risk of appeal whereas 'settlement brings it to an end. There's no appeal against settlement.'[1334]

'Ending' actions overlaps with the settlement purpose discussed in the two earlier parts of this Chapter and aligns more with advisory/evaluative, settlement and facilitative mediation,[1335] than with transformative mediation.[1336]

Unlike the minority of magistrates, whose views are explored further below, lawyers and mediators made no express reference to the distinction between the 'legal' and the 'other' dispute. However, most lawyers and many mediators described that three elements exist in actions: the legal, the commercial and the emotional.[1337]

Apart from the single magistrate just discussed, no other Stakeholder expressed that 'ending the conflict' was mediation's purpose. Instead, a minority of mediators expressed a by-product of settlement is that actions are brought to an end,[1338] which reduces the 'pain and suffering' of litigation[1339] and enables disputants to stop focussing on the past and 'move on' with their lives.[1340] One mediator expressed a by-product of mediation is that disputants can resolve actions at a deeper level rather than 'just a legal level'.[1341] This is consistent with research that suggests mediation is 'cathartic or healing' and one of its purposes is to 'end the cycle of conflict', which aligns closer with an ideological understanding of mediation.[1342] It also consistent with descriptions by magistrates, discussed below, that two parts exist to actions: the 'legal' and 'the other' dispute; the latter incorporating disputant feelings, emotion and 'the principle' that some mediators suggest are the 'real reasons' behind most actions and drive disputants to Court.[1343]

No other Stakeholder used the 'conflict resolution' narrative to describe mediation purposes.[1344] Rather, most described the purpose is to settle actions, with no reference to resolving interpersonal/intrapersonal 'conflict'. This finding suggests Stakeholders understand mediation's purpose is to address narrowly defined legal 'disputes' rather than broader notions of 'conflict', reflective of one of the five characteristics that feature in court-connected mediation.[1345] The finding reinforces my contention that mediation's *purpose* in the Court is to reach outcomes that end actions, without resolving underlying interpersonal/intrapersonal 'conflict', that may continue after actions are settled.[1346]

1333 Magistrate 1.
1334 Magistrate 1.
1335 See above Chapter II at 64–7.
1336 See above Chapter II at 29 and 66. See below Chapter IV at 123.
1337 Lawyer 1; Lawyer 3; Lawyer 5(Bar 3); Lawyer 7; Mediator 4; Mediator 5; Mediator 7; Mediator 9; Mediator 10; Mediator 12; Mediator 13; Mediator 15; Mediator 16. The mediators described the latter two 'elements' in terms of disputant needs and wants.
1338 Mediator 11.
1339 Mediator 16.
1340 Mediator 2; Mediator 3; Mediator 4; Mediator 15.
1341 Mediator 3.
1342 Allport (n 44) 177–8.
1343 Mediator 4; Mediator 16. See also Chapter IV at 119–20 and Chapter V at 146.
1344 See above Chapter II at 50. See also Chapter III at 97.
1345 See above Chapter II at 40.
1346 See above Chapter II at 50. See also Chapter III at 98.

(d) Partial Settlement or Narrowing Issues in Dispute

Consistent with the majority views regarding 'full settlement' discussed above, a minority of lawyers[1347] and mediators[1348] had convergent views that mediation's secondary purpose is to narrow, clarify or reach agreement on issues that otherwise need to be litigated.

A minority suggested that narrowing or clarifying the disputed issues during mediation has two positive consequences. First, it limits the issues to be determined at trial resulting in a shorter trial,[1349] minimising expenditure in costs and time and diminishing disputant angst.[1350] Secondly, moving disputants 'closer together' with regards to settlement offers,[1351] increases the chances of the action settling before trial.[1352]

One lawyer provided an example of using mediation despite knowing it was unlikely to settle, because the defendant's representatives indicated that no monetary offers would be made.[1353] Rather than bypassing the 'mediation opportunity',[1354] the parties attended for the purposes of attempting to prepare a joint Statement of Agreed Facts, agree on evidence and resolve 'side issues'. Consequently, they avoided having large skirmishes over what expert reports would be tendered, which facilitated a 'smoother and quicker' trial.[1355]

These findings reinforce the view that some Stakeholders prioritise *efficiency* and *effectiveness* objectives over 'other' mediation purposes explored in this Chapter. They are also consistent with legislation and court rules that expressly or by implication state that mediation's purpose is to refine or narrow disputed issues.[1356]

The purposes identified so far are measurable quantitatively: 'full' and 'partial' settlement, as expressed in the *Rules*.[1357] Stakeholders also identified 'other' purposes of a more qualitative nature, which correspond with some of the six mediator functions.[1358] I discuss each of these in turn below.

(e) Disputant Decision-Making

Stakeholder reports regarding disputant decision-making differed. No magistrate or lawyer made express reference to mediation's *self-determination* value,[1359] transformative mediation's *empowerment* and *recognition*,[1360] nor express that mediation's purpose is to assist disputants make decisions *themselves*. However, a minority described the purpose is to enable disputants to reach 'outcomes by agreement',[1361] that they 'have more control over'[1362] and assist them 'move on' by achieving outcomes they can 'live with',[1363] implying respect for disputant decision-making.[1364]

1347 Lawyer 1; Lawyer 3; Lawyer 5 (Bar 3); Lawyer 7.
1348 Mediator 1; Mediator 5; Mediator 9.
1349 Magistrate 5.
1350 Mediator 1.
1351 Lawyer 2 (Bar 1).
1352 Lawyer 3; Mediator 1.
1353 Lawyer 5 (Bar 3).
1354 See above Chapter III at 86.
1355 Lawyer 5 (Bar 3).
1356 See nn 310 and 520–1. See also Chapter III at 98.
1357 See above Chapter III at 98.
1358 *Practice Standards* (n 222) s 2.2(a)–(f). See above Chapter II at 32 and 48.
1359 See above Chapter II at 34.
1360 See above Chapter II at 52.
1361 Lawyer 4 (Bar 2).
1362 Magistrate 5.
1363 Lawyer 5 (Bar 3). See above Chapter IV at 125.
1364 See also Chapter V at 147.

Whilst it is unclear the extent to which these descriptions encompass the various other elements of mediation's *self-determination* value,[1365] they incorporate responsibility for consensual outcomes. They also illustrate the overlap between achieving settlement and *efficiency* and *effectiveness* objectives with elements of mediation's *self-determination* value.[1366]

Only two mediators expressly referred to empowering disputants. One reported the Opening enables mediators to 'calm and disarm' participants so they can feel 'empowered'.[1367] Another reported preferring disputants be 'empowered' by being in the room and actively part of the process, rather than having a process conducted separate to them.[1368] However, neither of these mediators expressed mediation's purpose is to achieve *empowerment* of the self and *recognition* of the other.[1369]

No mediator expressly referred to mediation's *self-determination* value. However, descriptions from some encompass various elements of it, such as decision-making, autonomy, direct participatory involvement and responsibility for consensual outcomes.

Typical responses included that mediation's *purpose* is to assist disputants to take 'ownership'/'control'[1370] of *their* actions, develop outcomes[1371] of their *own* choosing to 'fix' it together,[1372] so that they can 'move on',[1373] rather than abdicating control to their lawyers[1374] or requiring outcomes to be imposed upon them by the Court.[1375] One mediator expressed ensuring disputants are the central focus, rather than their lawyers, by having them actively involved in both communication and decision-making from the outset.[1376]

Promoting disputant decision-making is consistent with one mediator function specified in the NMAS[1377] and corresponds closely with facilitative mediation.

The inference to be drawn from these findings is that mediators prioritise mediation's *self-determination* value[1378] more than some magistrates and lawyers. This is consistent with the findings in the next Chapter where some Stakeholder descriptions of the mediator's role, particularly mediators, included reference to facilitating disputant decision-making.[1379]

1365 Namely, autonomy, direct participatory involvement, procedural involvement and disputants' own voices: see above Chapter II at 34 and 49.

1366 See above Chapter II at 34.

1367 Mediator 6. See below Chapter VI at 184. However Mediator 6 expressed 'conciliating': see below Chapter V at 164.

1368 Mediator 13. See below Chapter V at 145. See also Chapter VI at 209.

1369 See above Chapter II at 52. It is therefore difficult to infer from this data that Stakeholder views align with transformative theory, which suggests *empowerment* is mediation's primary goal and independent of any outcome reached: see above Chapter II at 67.

1370 Mediator 9; Mediator 4. See also Chapter V at 146.

1371 Mediator 9.

1372 Mediator 16.

1373 Mediator 7.

1374 Mediator 16.

1375 Mediator 2; Mediator 3; Mediator 4; Mediator 9; Mediator 13; Mediator 16.

1376 Mediator 4. See also Chapter VI at 187.

1377 *Practice Standards* (n 222) ss 2.1, 2.2(f).

1378 See above Chapter II at 34.

1379 See below Chapter V at 147 and 150.

(f) Satisfaction of Disputant Needs and Interests

Most magistrates[1380] and a minority of lawyers[1381] and mediators[1382] had the convergent view that a purpose of mediation is to assist disputants identify and articulate underlying needs and interests so mutually acceptable outcomes can be reached meeting those needs and interests.

Magistrates provided more comprehensive descriptions than lawyers and mediators, centred upon achieving 'non-legal remedies'. One stated that mediation's purpose is to provide disputants the opportunity of 'finding answers' to solve the dispute 'that may be different to legal answers' and explore the possibility of crafting outcomes not restricted to legal remedies.[1383] Another stated it is to assist disputants identify 'solutions' not emerging from an adversarial process.[1384] Another explains to disputants at the first directions hearing that mediation provides the opportunity to agree to 'fluid and flexible' agreements, for example, to control behaviours in neighbourhood disputes, that go beyond the scope of the Court's powers as constrained by the *Act*.[1385] These findings accord with the discussion regarding the importance of the first directions hearing 'opportunity' and the Court's practice of encouraging disputants to mediate so that they can reach an agreement that meets their needs.[1386]

These views are consistent with literature suggesting mediation enables disputants to craft flexible, creative, and 'non-legal' outcomes, which a court cannot order.[1387]

These descriptions, which denote reaching collaborative interest-based ('win-win'), outcomes as opposed to adversarial, competitive or 'win-lose' approaches, are consistent with mediation's *non-adversarialism* value.[1388] The satisfaction purpose is the basis of facilitative mediation[1389] and is one of the mediator functions specified in the NMAS.[1390]

One lawyer described mediation as especially useful where actions are legally complex or emotive for one or other disputant.[1391] Another commented on mediation's ability to identify disputants' 'true positions' and 'needs', despite not expressly stating that mediation's purpose is to assist disputants separate the 'legal' from the 'other' dispute:

> After everybody's had the opportunity to vent their spleens, in a forum where parties can directly address each other – if you allow that to happen[1392] – that can assist getting to the issues that actually matter and then you can start identifying the parties' true positions, after stripping away the formality of the pleadings. Commercially what people want, emotionally what people need, that can all be flushed out from a mediation and you are left with a much clearer idea of what the big moving parts are in a negotiated settlement process.[1393]

1380 Magistrate 1; Magistrate 2; Magistrate 3; Magistrate 4.

1381 Lawyer 3; Lawyer 7.

1382 Mediator 1; Mediator 7; Mediator 10.

1383 Magistrate 1.

1384 Magistrate 3.

1385 Magistrate 4.

1386 See below Chapter VI at 189.

1387 See above Chapter II at 47. However, as most Stakeholders did not comment on the percentage of mediations that produce creative, non-monetary settlements, it is difficult to make accurate generalisations about the extent to which outcomes reached lack creative potential or whether outcomes fall within the range of likely legal outcomes that might be obtained post-trial: see above Chapter II at 47 and 66. This reinforces my recommendation for future research: see below Chapter VII and Chapter VIII.

1388 See above Chapter II at 34–5.

1389 See above Chapter II at 66. But see below Chapter VI at 118.

1390 *Practice Standards* (n 222) ss 2.2(b), 4.1.

1391 Lawyer 5 (Bar 3).

1392 See below Chapter IV at 120.

1393 Lawyer 3.

This description reflects the finding above where most lawyers and many mediators explained that three elements exist in actions: the legal, the commercial and the emotional. At first blush, this description accords with the interest-based negotiation literature.[1394] However, this lawyer opined that the reality of mediation is more indicative of compromise, concession and accommodation than the 'win-win' method and stated 'the old aphorism is "everybody walks away from a successful mediation somewhat disappointed", so it's about finding middle ground'.[1395] This view is consistent with literature suggesting participants leave mediation with an outcome they can 'live with'[1396] rather than 'happy with the outcome'.[1397] This is echoed on the Court's website, which states that 'mediation will not always produce an outcome that everyone is happy with'.[1398] This theme has also received limited judicial attention.[1399]

This view contradicts mediation's *non-adversarialism* value though is consistent with another view in the literature suggesting the 'win-win' concept is a misconception given disputants in reality experience 'pain-pain', as they can usually 'cope' with a settlement if they feel 'the pain is shared'.[1400] This view accords with the data below regarding satisfaction – more accurately described as 'contentment' – as to outcome rather than disputant 'happiness'.

A minority of lawyers and some mediators[1401] expressed reaching outcomes that satisfy disputant needs and interests are by-products of successful mediation. One lawyer stated mediation is successful where it has exposed the 'real issues in dispute', which can be difficult to achieve by the exchange of pleadings,[1402] and assist identify disputants' 'true' positions, rather than focussing exclusively upon the merits.[1403] Another stated that success is obtaining an outcome that takes into account the 'broader issues', which may be more valuable to disputants than 'money, liability, and quantum', such as maintaining an ongoing commercial relationship.[1404]

These views correspond with one mediator function specified in the NMAS[1405] and align closely with facilitative mediation.[1406] These findings also suggest that a minority of Stakeholders understand and expect that disputants' non-legal and non-financial needs and interests may be *most* valuable to disputants, indicating an acknowledgement of mediation's *self-determination* and *responsiveness* values.[1407]

Some of these findings are echoed in the next Chapter where Stakeholders described the mediator's role includes facilitating identification and exploration of interests, issues, and underlying needs.[1408]

1394 See above Chapter II at 51 and 65.
1395 Lawyer 3.
1396 See, eg, Genn, *Judging Civil Justice* (n 207) 117.
1397 Rothfield (n 539) 247.
1398 'Mediation' (n 947).
1399 See, eg, *Yoseph* (n 257) [11]; *Dunnett* (n 419) [14], cited in *Halsey* (n 419) [15] and *Ezekiel-Hart* (n 522) [27].
1400 David Richbell, *How to Master Commercial Mediation: An Essential Three-Part Manual for Business Mediators* (Bloomsbury, 2015) 68, 80.
1401 Mediator 3; Mediator 4; Mediator 5; Mediator 7; Mediator 10.
1402 Black (n 305) 143.
1403 Lawyer 3. See also Chapter V at 146.
1404 Lawyer 5 (Bar 3). See below Chapter IV at 122.
1405 *Practice Standards* (n 222) ss 2.2(b), 4.1.
1406 See above Chapter II at 66.
1407 See above Chapter II at 34–5.
1408 See below Chapter V at 146.

(g) Communication and Disputant Understanding

No Stakeholder expressed the primary purpose of mediation as re-establishing and improving disputant communication and disputant understanding.

No magistrate expressed mediation's purpose being for disputants to communicate. Their views centred upon settlement, rather than communication being an end in itself. However, they alluded to the importance of communication, in particular, two magistrates described two parts existing in all actions: the 'legal' and the 'other' dispute.[1409]

One suggested actions are often not about 'the legal issue' but about the fact that one disputant 'upset' another in the past and they have now 'found a proximate opportunity to have an argument'.[1410] This magistrate suggested mediation's secondary purpose is to provide disputants with constructive opportunities to 'tease out' the 'underlying causes' or 'original problems' from the 'immediate problem' or 'proximate dispute'. This magistrate expressed identifying the 'real factor' behind the dispute may assist disputants find solutions to end what has been identified as the 'legal dispute'.[1411]

Another magistrate described the 'legal dispute' as the legal issue(s) the Court is tasked with determining whereas the 'other dispute' concerns the 'baggage and history' between disputants, which the Court cannot determine. For example, the 'issues' common in fencing disputes tend not to relate to liability to pay for construction of the fence but what disputants are 'really' upset about is their unreasonable neighbour's behaviour. This magistrate explained that the Court does not have the time[1412] for disputants to air all the causes of their disharmony, particularly matters not relevant at trial, and the Court's role is to determine the 'legal problem'.[1413] Conversely, this magistrate suggested that mediation's secondary purpose is to enable disputants to air issues that are 'personally', but not 'legally', relevant to those requiring determination at trial, in a forum without the time constraints faced by the Court and facilitated by a mediator whose role is to assist them to problem-solve.[1414]

This description is consistent with literature that suggests one advantage of mediation is that discussions are not restricted to rights-based but extend to interest-based discourse enabling disputants to address non-legal elements,[1415] including emotions and feelings rather than just 'dollars and cents'.[1416]

Whilst not as explicit as the two magistrates just discussed, another two magistrates distinguished between mediating 'legal disputes', which involve disputed rights and remedies, and 'non-legal mediations' outside the Court, which relate to breakdowns in communication or family relationships.[1417]

1409 Magistrate 1; Magistrate 5. See also nn 1033, 1343,1833, 1853, 2428 and 3432.

1410 Magistrate 1.

1411 Magistrate 1. See above Chapter IV at 113–4.

1412 Limitations regarding time and conference room space were a common theme identified by some Stakeholders: see nn 1008, 1671, 1739, 2031, 2270, 2303, 2439 and 2943. See also Appendix A: Qualitative Research Methodology.

1413 Magistrate 5. Magistrate 4 and Mediator 16 echoed this view and expressed that some disputants mistakenly expect the Court will 'fix' their problem, rather than understanding the Court adjudicates disputes: See also Peter W Young 'Current Issues – ADR: A Generic, Holistic Concept' (2002) 76(4) *Australian Law Journal* 213, 213. See also Chapter I at 11.

1414 Magistrate 5.

1415 See above Chapter II at 41.

1416 Dewdney, 'Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them' (n 371) 205.

1417 Magistrate 3; Magistrate 4.

The descriptions by magistrates reinforce my contention that the conflict vis-à-vis legal disputes distinction is one factor that differentiates mediation within the court-connected context from mediating 'conflict' in other forums that do not fall within the shadow of the law.[1418] Their descriptions also reinforce my contention that the Court is tasked with determining 'legal disputes, the parameters of which are defined by the pleadings, and not resolving interpersonal/intrapersonal 'conflict'.[1419]

However, their descriptions also acknowledge that the 'other' dispute, which incorporates commercial, relational and emotional factors that accompany disputes, occasionally drive disputants to litigate. Furthermore, they emphasise that separating the 'legal dispute' from its non-legal elements enables disputants to explore broader interests than their narrowly defined legal problems.[1420]

These views are consistent with case law that acknowledges 'mediation might be directed to consideration of "*interests and needs"* independently of or against the backdrop of "*rights*'' though it 'is not conducted to the exclusion of "*rights*"'.[1421] I examine the two parts of actions in the next Chapter when exploring one of the six mediator functions; namely, identification and exploration of interests, issues, and underlying needs.[1422]

Analogous to the magistrates, no lawyer expressed mediation's purpose is for disputants to communicate.

One acknowledged mediation provides the opportunity for 'everybody to vent their spleens', though expressed concern that it can occasionally be counterproductive to have Joint Sessions to 'allow' direct disputant communication,[1423] and accordingly, communication must occur through the mediator or the lawyers.[1424] This view is consistent with literature suggesting lawyers are the primary actors in court-connected mediation, dominate the discourse and negotiations, and limit direct disputant participation.[1425] I examine direct disputant communication, or lack thereof from the lawyer perspective, when exploring the mediator's role, functions, 'appropriate' levels of intervention,[1426] and when exploring *procedure*.[1427]

A minority of mediators were more explicit than magistrates and lawyers and expressed providing disputants the opportunity to communicate to be one of mediation's purposes,[1428] though none stated it is its primary purpose.

They described the objective of getting disputants together so they can listen to what each have to say about the dispute, identify the reasons 'why it happened' and the impact it has had on them,[1429] and understand each other's position, to find common ground and work towards settlement.[1430] One suggested most actions can be settled by direct disputant communication after communication lines have re-opened.[1431]

1418 See above Chapter II at 38–47.
1419 See above Chapter III at 96–7.
1420 See above Chapter II at 41.
1421 *Waterhouse* (n 402) [92] (Levine J).
1422 See below Chapter V at 146 and Chapter VI at 188.
1423 See above Chapter IV at 117.
1424 Lawyer 3.
1425 See above Chapter II at 42.
1426 See below Chapter V at Part B and Part C.
1427 See below Chapter VI at Part C.
1428 Mediator 8; Mediator 15; Mediator 16.
1429 Mediator 16.
1430 Mediator 8.
1431 Mediator 15.

Unlike the magistrates, whose views are aimed at settlement, rather than communication being an end in itself, views from these mediators are consistent with literature that suggests one of mediation's purposes is to facilitate disputant communication and understanding,[1432] which is one of the mediator functions specified in the NMAS,[1433] closely aligns with facilitative and transformative mediation,[1434] and is consistent with the *Practice Directions*.[1435]

No Stakeholder expressed mediation's primary purpose is to facilitate disputant understanding, though a magistrate[1436] and mediator[1437] reported that mediation's secondary purpose is to provide disputants the opportunity to gain a better understanding of the disputed issues and each other's position.

Despite not reporting mediation's primary purpose is to facilitate disputant communication and understanding, a minority expressed successful mediation enables disputants to 'talk to each other',[1438] 'get everything off their chest',[1439] be both 'heard' and 'feeling heard',[1440] and gain a better understanding of the disputed issues[1441] and their respective positions and perspectives.[1442] The opportunity to communicate and 'vent'[1443] during mediation is consistent with suggestions that mediation can create a 'safe harbour' for the venting of feelings and emotions,[1444] which some authors argue is of significant societal value.[1445]

These findings suggest a gap between the expectations of some magistrates and the experiences of some mediators in contrast to the expectations and experiences of some lawyers regarding direct disputant communication. The lawyer who expressed direct disputant communication only occurs if they 'allow' their clients to communicate bolsters this gap. The inference to be drawn is that some lawyers might disallow their clients to speak freely or at length, which is indicative of limited direct disputant participation and the dominance of lawyer control.[1446] This is further reinforced by the fact that no lawyer reported mediation's purpose is to enable direct disputant communication. However, caution must be exercised in relying too heavily on one lawyer's view to support this inference, particularly as another suggested mediation is successful where disputants have had the opportunity to 'talk to each other' and leave mediation feeling heard, indicating mixed practices regarding direct disputant communication.[1447]

A further inference to be drawn is that Stakeholders prioritise other *purposes*, specifically achieving effective and efficient settlements. In particular lawyers, who view mediation as a settlement tool and consider enabling direct disputant communication and understanding, as well as the other qualitative factors that follow, as being less important driving factors for mediating.

1432 See above Chapter II at 32.
1433 *Practice Standards* (n 222) ss 2.2(a), 4.1.
1434 See above Chapter II at 66.
1435 *Practice Directions* (n 971) cl 11(2). See above Chapter III at 99.
1436 Magistrate 1.
1437 Mediator 5.
1438 Magistrate 1; Lawyer 1.
1439 Magistrate 5.
1440 Lawyer 1; Mediator 7; Mediator 8.
1441 Mediator 8.
1442 Lawyer 2 (Bar 1); Mediator 5.
1443 Lawyer 7.
1444 Sander and Goldberg (n 107) 56.
1445 See above Chapter II at 54.
1446 See above Chapter II at 42. The *UCRs* (n 917) make it explicit that the Court *expects* disputants 'to participate appropriately' and 'negotiate in good faith': see below Chapter VII at 209 and 227.
1447 See below Chapter V at Part B and Part C and Chapter VI at Part C.

However, some acknowledge the potential that communication and understanding facilitates settlement of actions during, and post-mediation, which reinforces the majority view that settlement is mediation's primary *purpose*. This is consistent with literature that suggests achieving settlement and satisfying *efficiencies* and *effectiveness* objectives are more prominent in court-connected than in non-court-connected contexts.[1448] This inference is supported by the experiences of a minority of mediators, explored in the next part, who reported that disputants are usually one-shotters,[1449] with no intention of having future contact post-mediation.

Some of these findings are echoed in the next Chapter where I explore Stakeholder reports regarding the mediator's role, some of which included facilitating communication and disputant understanding.[1450]

(h) Maintaining or Repairing Relationships

No Stakeholder expressed the primary purpose of mediation is for disputants to maintain or repair relationships despite an outlier reporting this as a secondary purpose.[1451]

However, a minority expressed that mediation is successful where disputant relationships are 'maintained',[1452] 'repaired'[1453] or 'enhanced',[1454] particularly when they have ongoing business or personal relations.[1455] These views align closer with facilitative and transformative mediation than advisory/evaluative and settlement mediation,[1456] and are consistent with the *Practice Directions*.[1457]

Yet some mediators reported most disputants in the Court are one-shotters and not concerned with maintaining ongoing relationships post-mediation, but with settling their action.[1458] Three stated that most actions are not 'relational', such as business disputes requiring disputants to work together into the future,[1459] or family law disputes whereby separating parents will have an ongoing connection through their children,[1460] but usually involve disputes between builders and dissatisfied clients.[1461] One mediator suggested it is common in most actions for disputants to express having no desire to maintain any commercial or other relationship beyond the dispute.[1462]

Despite being recognised within the literature as an important mediation purpose,[1463] the inference to be drawn from these findings is that maintaining or repairing relationships are not the driving force for mediating in the Court, which may be more common in non-court-connected contexts.[1464]

1448 See above Chapter II at 53.
1449 See above Chapter I at 16.
1450 See below Chapter V at 144.
1451 Mediator 11.
1452 Lawyer 5 (Bar 3); Mediator 3; Mediator 11.
1453 Magistrate 4. Magistrate 5. See also Appendix G: Characteristics of the Four Mediation 'Models' by Reference to *Purpose*, *Practice* and *Procedure*.
1454 Mediator 10.
1455 Mediator 1.
1456 See above Chapter II at 64–7.
1457 *Practice Directions* (n 971) cl 11(2). See above Chapter III at 99.
1458 Mediator 9; Mediator 15.
1459 Mediator 15.
1460 Mediator 7.
1461 Mediator 13.
1462 Mediator 13. This finding is consistent with Allport's research that suggests maintaining an ongoing relationship is frequently not a relevant factor for disputants engaged in 'small claims' in the United Kingdom (civil claims below £5,000) and that disputants are eager to settle without having further contact: Allport (n 44) 180.
1463 See also Chapter II at 51.
1464 See below n 1534.

These findings are also echoed in the next Chapter where no Stakeholder described the mediator's role involves assisting disputants maintain or repair relationships.[1465]

(i) Transformation of Individual and Societal Relations?

An outlier reported that mediation's secondary purpose is to assist disputants develop a better understanding of conflict management, enabling them to prevent future conflicts from developing into legal disputes.[1466]

The outlier expressed the primary measure of success in mediation is where disputants achieve 'peace' and stated that one of mediation's core values is to bring disputants 'to a level of harmony from a place of dispute. Replace anger with reconciliation.'[1467] This view aligns closely with transformative theory, which posits that assisting disputants change the quality of their conflict interaction arms them with the skills to respond with *empowerment* and *recognition* when future conflict arises.[1468]

This view suggests mediation's purpose is to assist disputants decide what is a successful outcome, irrespective of whether it is one the mediator considers fair or reasonable, or where the outcome is a decision to not settle.[1469] This view illustrates the overlap between mediation's *transformation* objective,[1470] *self-determination* value[1471] and *responsiveness* value.[1472] It also corresponds with the description of *conflict management mediation*.[1473] The outlier's view diverges from my contention that the definition of mediation in the *Rules*[1474] does not suggest that the Court is tasked with empowering litigants to prevent 'conflicts' from developing into legal disputes or educating litigants in how to manage future interpersonal/intrapersonal conflict.[1475]

No other Stakeholder expressed mediation's purpose is to assist disputants develop conflict management skills. Similarly, none used the terminology of peace, harmony, or reconciliation, though a minority described maintaining or repairing relationships as a by-product of a successful mediation.[1476] Instead, most reported mediation's primary purpose being for disputants to settle their actions, with no reference to resolving interpersonal/intrapersonal conflict.[1477]

One mediator expressed that mediation's purpose and the mediator's role are context dependent and also dependent upon which practice model is utilised.[1478] They opined that where the narrative and transformative models are utilised, such as in family law, the purpose is not solely to reach settlement but to assist disputants gain understanding, respect and empathy towards each other.[1479] This corresponds with transformative mediation's *empowerment* and *recognition*,[1480] where mutual

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1465 See below Chapter V at 151.
1466 Magistrate 1.
1467 Magistrate 1.
1468 Bush and Folger, *The Promise of Mediation* (n 204) 37.
1469 Ibid 71. See above Chapter II at 67.
1470 See above Chapter II at 51.
1471 See above Chapter II at 34.
1472 Ibid 35.
1473 See above Chapter II at 49.
1474 *Rules* (n 917) r 2. See above Chapter III at 95.
1475 See above Chapter III at 93.
1476 See above Chapter IV at 122.
1477 See above Chapter IV at 110–13.
1478 Mediator 15.
1479 Mediator 15. See also Appendix F: Description of Mediation *Practices* According to Four Archetypical 'Models'.
1480 See above Chapter II at 52.

understanding, acknowledgement, empathy and respect 'is the result' of mediation.[1481] Though disputants may benefit from gaining a better understanding and respect for each other by mediating, this mediator suggested that they do not *need* either to settle. Accordingly, they suggested it is thus quite unlikely that *empowerment* and *recognition* shifts are the primary purpose for mediating actions.[1482] Another mediator stated that whilst mediation often has an educative and frequently a therapeutic effect, this is a by-product rather than the *purpose* of mediation.[1483]

These findings suggest that most mediators understand and expect mediation not to involve transformative practices, which is consistent with literature that suggests settlement-oriented practices prevail in the court-connected context.[1484] These findings are echoed in the next Chapter where no Stakeholder described the mediator's role as extending to transformative practice,[1485] despite one mediator reporting using some of the skills and techniques from transformative and narrative models during the Joint Session.[1486]

(j) Substantive Justice, 'Just About Settlement' or Procedural Justice?

Debates exist within the literature regarding whether mediation's purpose is to reach substantive justice outcomes, 'just' settle, or to deliver disputants procedural justice.[1487]

No Stakeholder reported that mediation's purpose within the Court is to achieve 'justice' or *just* outcomes in accordance with the law.[1488] Indeed, one mediator emphasised that mediation is not 'a cure-all' nor 'always fair and reasonable… It may give "Justice" to nobody but on the balance of probabilities, it is simply the best possible deal of a bad situation, with no compulsion to take it.'[1489] This description of mediation *not* equating with 'Justice' suggests that outcomes reflect compromises and concessions to end actions. This finding accords with literature that suggests mediation is not an opportunity for disputants to reach a fair and equitable (*just*) resolution of their dispute, but rather for them to 'just settle'.[1490]

As no Stakeholder described mediation's purpose as being to reach substantive justice outcomes, it is unsurprising that many shared the convergent view that most outcomes are not the 'best',[1491] but, through compromises, they have 'got the best they're ever going to get'[1492] and will later realise they 'dodged a bullet' by settling.[1493] Indeed, one lawyer suggested it might not be possible to obtain the best outcome without succeeding at trial.[1494]

We saw above that one lawyer suggested 'everybody walks away from a successful mediation somewhat disappointed',[1495] a variation on the theme that 'no one walks away from mediation happy', as recorded in case law.[1496] This was a common view amongst some Stakeholders who

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1481 Mediator 15.
1482 See below Chapter V at 152.
1483 Mediator 10.
1484 See above Chapter II at 53–4.
1485 See above Chapter II at 66.
1486 See below Chapter V at 134.
1487 See above Chapter II at 56.
1488 See also above Chapter V at 151.
1489 Mediator 6.
1490 See above Chapter II at 56.
1491 Mediator 13; Lawyer 5 (Bar 3). See below Chapter IV at 124.
1492 Mediator 6.
1493 Mediator 14.
1494 Lawyer 5 (Bar 3).
1495 Lawyer 3. See above Chapter IV at 124.
1496 See, eg, *Collins* (n 717) [21] (Holmes CJ).

opined that most settlements result in disputants leaving somewhat 'unsatisfied' [1497] or 'unhappy'.[1498] These views coincide with some judicial commentary suggesting settlements do not leave disputants feeling 'completely satisfied' but they resolve matters 'acceptably well'.[1499] However, an outlier expressed that reaching 'an agreement that everyone can live with' is a secondary measure of success and subordinate to disputants achieving 'peace', explored in the preceding section.[1500]

These findings suggest most Stakeholders consider 'satisfaction' as to outcome, does not equate with disputant 'happiness' but to satisfaction of non-legal interests, and disputants compromising to end their action. For example, some Stakeholders described mediation as successful where disputants leave 'satisfied',[1501] with an outcome they can 'live with',[1502] because the action has ended,[1503] having reduced the risks of returning to Court,[1504] trial and the potential costs that follow.[1505]

These findings are reflective of the majority view that settlement is mediation's primary *purpose*. Achieving settlement that disputants 'can live with' through compromise aligns closely with settlement mediation.[1506] It also overlaps with advisory/evaluative mediation and its focus upon efficient and effective delivery of settlements.[1507] However, it also exemplifies the overlap with mediation's *self-determination* value and the satisfaction of needs and interests in facilitative mediation, rather than mediation's *transformation* objective.[1508]

The findings that mediation does not equate with 'justice' are echoed in the next Chapter[1509] where no Stakeholder described the mediator's role as administering substantive justice or achieving *just* outcomes in accordance with the law,[1510] which reinforces my contention that *purpose* drives *practice* and *procedure*. However, some Stakeholders described the mediator's role includes conducting a procedurally *fair* process,[1511] which is consistent with the discussion below.

Whilst the data suggests Stakeholders consider mediation's purpose is for disputants to 'just settle', the following findings indicate some Stakeholders, predominantly mediators, do not consider that settlement is desirable regardless of merits.

A minority of mediators acknowledged that whilst 'settlement rates' are the most widely acknowledged measure of success,[1512] they do not 'subscribe' to this narrative as it fails to take into account the merits or desirability of particular settlements,[1513] it is unrealistic to expect *all* actions to settle, and a portion will always require judicial determination.[1514]

1497 Mediator 11; Mediator 14.
1498 Mediator 9; Magistrate 5.
1499 *Raggio* (n 729) 62 (Slattery J).
1500 Magistrate 1. See below Chapter IV at 123.
1501 Magistrate 3; Lawyer 2 (Bar 1); Mediator 4; Mediator 13.
1502 Magistrate 4; Magistrate 5; Mediator 1; Mediator 9; Mediator 13; Mediator 15; Mediator 16.
1503 Lawyer 4 (Bar 2).
1504 Magistrate 4; Mediator 13; Mediator 15.
1505 Lawyer 5 (Bar 3); Lawyer 7.
1506 See above Chapter II at 65.
1507 See above Chapter II at 64–5.
1508 See above Chapter II at 51.
1509 See above Chapter V at 151.
1510 See above Chapter II at 56.
1511 See below Chapter V at 143 and 151.
1512 See above Chapter II at 53.
1513 Mediator 1; Mediator 4; Mediator 5; Mediator 6; Mediator 16; Lawyer 1.
1514 Mediator 8; Mediator 11; Mediator 16.

Some stated that mediators stereotypically refer to their '90% success rate' and queried whether that means a particular mediator's technique 'works 90% of the time' or whether mediators exhaust disputants into settlement.[1515] One suggested some mediators possibly 'bully' disputants to satisfy their 'settlement rate' and preferred their own approach of *not* 'settling at all costs'.[1516] Another suggested the 'settlement as success' narrative creates an imperative to 'lock the doors' and 'bang heads together', which can distort behaviours such that settlement may be a consequence of disputants being 'fatigued' and 'bludgeoned', rather than having genuinely resolved the dispute.[1517]

Similarly, one lawyer stated settlement does not always equate success, particularly if a disputant settled on an unfortunate basis simply out of exhaustion.[1518] Another opined that many actions settle at mediation because disputants have incurred more costs than the quantum in dispute and they simply cannot afford to proceed to trial.[1519]

The above views reinforce my contention that *purpose* drives *practice* and *procedure* for they imply that where mediation's primary purpose is settlement, mediator intervention may centre upon pressuring disputants to settle at all costs. I explore Stakeholder understandings and expectations of the mediator's role, functions, and 'appropriate' levels of intervention in the next Chapter.[1520]

Similar to the above findings, no Stakeholder expressed mediation's purpose is for disputants to experience 'procedural justice' rather than *just* settlement.[1521] However, a minority suggested a by-product of successful mediation is where disputants leave satisfied with the process,[1522] having undergone a fair process whereby they have been 'listened to'.[1523]

One mediator suggested mediation is successful if the mediator delivers the process as described from the outset; if they deviate from that description, mediation is unsuccessful, even if the action settled.[1524] This view assumes that mediators describe what the process will entail before its commencement, which is relevant to the exploration of *practice* and *procedure*.[1525]

These findings are consistent with the procedural fairness literature.[1526] They also illustrate the overlap between some mediation's purposes that I grouped according to seven categories,[1527] because satisfaction as to process straddles disputant decision-making, satisfaction of needs and interests and communication and disputant understanding. It also shows that satisfaction as to process encompasses *both* practical and ideological purposes.

These findings suggest that whilst Stakeholders do not consider disputant satisfaction as to process as mediation's primary *purpose*, some acknowledge it is an important part of the process and linked with what constitutes a successful mediation. The data suggests that some mediators are more

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1515 Mediator 6.

1516 Mediator 4. See also Chapter V at 148.

1517 Mediator 12. Cf Lawyer 5 (Bar 3) described the mediator's role as controlling 'big personalities and banging heads': see below Chapter V at 145.

1518 Lawyer 3.

1519 Lawyer 4 (Bar 2); Mediator 9.

1520 See below Chapter VI at Part B.

1521 See above Chapter II at 56.

1522 Mediator 11; Mediator 16.

1523 Magistrate 5.

1524 Mediator 12.

1525 But see the descriptions of mixed *practices* and *procedures* in the next two Chapters: below Chapter V and Chapter VI. Furthermore, like the *Rules*, the *UCRs* are at times silent, terse, or insufficiently definitive on many factors relating to the three themes, particularly to *practice* and *procedure*, which increase the potential for expectation gaps: see below Chapter VII at 207.

1526 See above Chapter II at 50.

1527 See above Chapter II at 48.

attuned to satisfying this purpose, by ensuring their processes are undertaken in ways to give disputants that satisfaction.[1528] This is a further example that supports my contention that *purpose* drives *practice* and *procedure*.

2 *Summary of Key Findings*

Most Stakeholders described mediation's purpose quantitatively as being to settle actions, reach partial settlement or narrow issues in dispute. This is consistent with literature that suggests court-connected mediation's primary *purpose* is settlement and satisfying *efficiency* and *effectiveness* objectives.[1529] Assisting disputants endeavour to reach agreement accords with the settlement-focus in the *Rules* and the *Practice Directions*.[1530] It also accords with the express reference in the *Rules* to the quantitative terms of full settlement or partial settlement,[1531] rather than more qualitative purposes such as maintaining or repairing relationships or managing and resolving interpersonal/intrapersonal 'conflict'.[1532] The inference to be drawn from these findings is that Stakeholders consider mediation's primary *purpose* is to achieve settlements to end actions, rather than to satisfy more qualitative purposes prevalent in non-court-connected contexts.[1533] This inference is consistent with research that suggests the objectives of obtaining outcomes that satisfy disputants' non-legal needs or represent the exercise of disputants' self-determination or enable disputants to maintain or enhance relationships are 'much less significant' in the court-connected context, particularly in the civil non-family context.[1534]

Resolving actions by *inter partes* agreement, from the Court's perspective, presumably reduces its trial load, addresses the perceived backlog of actions and minimises Court expenditure. Resolving actions, from the disputants' perspective, presumably results in efficient and cost-effective settlements whilst avoiding trial.[1535] These findings correspond with Hensler's view that ADR within the court context has been 'sold' as a way of reducing judicial caseloads and cutting time to the disposal of actions.[1536]

Though Stakeholders consider mediation's primary purpose is to achieve settlement, the findings suggest they are cognisant that actions do not need to be settled for mediation to be deemed successful. This suggests Stakeholders recognise mediation's value to satisfy 'other' non-settlement-driven factors, consistent with Allport's finding that a settlement-driven approach can incorporate other qualitative mediation purposes.[1537]

The findings also suggest Stakeholders consider satisfaction of some of the 'other' qualitative factors are by-products of successful mediation rather than being the primary purpose or 'driving factors' for mediating in the Court.[1538] They also suggest Stakeholders prioritise settlement and satisfying *efficiency* and *effectiveness* objectives than the 'other' mediation purposes explored in this Chapter.

1528 See also Chapter V at 143 and 1519. See also Chapter VI, recommendation 1, 6 and 10 and Chapter VIII at 247–8.

1529 See above Chapter II at 49.

1530 *Rules* (n 917) r 2. See above Chapter III at 98.

1531 *Rules* (n 917) r 72(4).

1532 See above Chapter III at 98. See also the discussion of transformative mediation in Chapter II.

1533 See above Chapter II at 50–2.

1534 McAdoo and Welsh (n 366) 426.

1535 See below n 3231.

1536 Hensler, 'A Research Agenda' (n 80).

1537 Allport (n 44) 290, 292.

1538 Such as ending the action, satisfaction of disputant needs and interests, communication and understanding, maintaining or repairing relationships and satisfaction as to process. I discuss these in the following Chapters: see below Chapter V, VI and VII. See also Chapter VIII at 247–8.

Furthermore, whilst not the primary purpose of mediation, the findings suggest that transformative purposes are not entirely absent from mediation. However, like some of the other more qualitative purposes discussed above, the descriptions by a minority of Stakeholders suggest that transformative purposes are occasionally by-products of mediation rather than being the primary purpose *for* mediating. These findings are unsurprising given the literature that suggests there is substantial resistance to transformative values and practices, particularly from lawyers.[1539] Further questioning if the Court's primary role is to manage conflict, remedy harm, and 'better equip' disputants to manage and resolve future conflict[1540] warrants further research despite not being central to the thesis.

B *Conclusion*

This Chapter has addressed the first research question by examining mediation's *purpose*. It has demonstrated that most Stakeholders perceive settlement to be mediation's primary *purpose*. Stakeholders view mediation, from both the Court and disputant perspectives, as a settlement tool centred upon achieving effective and efficient settlements by avoiding trial thereby reducing costs, legal fees and associated stress. This accords with the *Rules* and the *Practice Directions*.[1541]

However, many Stakeholders also described 'other' qualitative purposes secondary to settlement that elide the ideology-practice continuum and reflect some of the purposes that I grouped according to seven categories.[1542] Some correspond with some of the six mediator functions,[1543] which I explore in the next Chapter.[1544] This suggests many Stakeholders view mediation as an additional 'tool' within the Court's ADR suite to provide disputants the opportunity to address mediation's qualitative purposes, including satisfaction of their non-legal needs, though this purpose is less significant than the effective and efficient delivery of settlement.

These findings are consistent with mediation's varying *purposes* summarised within the literature spanning the most practical to the most ideological,[1545] which is consistent with various points along the ideology-practice continuum.[1546] Moreover, these findings reinforce that mediation purposes are context dependent,[1547] with some more prominent within court-connected than non-court-connected contexts.[1548]

The data is not indicative of any gap between Stakeholder views and the description of mediation in the rules-based framework regarding *purpose*, which describes mediation as a facilitative problem-solving and outcome-focussed process[1549] to settle legal dispute(s).[1550]

However, the data suggests a gap between facilitative mediation theory[1551] and the six mediator functions,[1552] on one hand, and practice, on the other,[1553] as Stakeholders consider the primary

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1539 See above Chapter II at 57.

1540 See, eg, Andrew J Cannon, 'Sustainable Justice: A Guiding Principle for Courts' (2017) 27(1) *Journal of Judicial Administration* 45, 49. See generally King et al (n 196).

1541 See above Chapter III at 99.

1542 See above Chapter II at 48.

1543 *Practice Standards* (n 222) s 2.2.

1544 See below Chapter V at 142.

1545 See above Chapter II at 49.

1546 See above Chapter II at 31.

1547 See above Chapter II at 48.

1548 See above Chapter II at 52.

1549 *Practice Directions* (n 971) r 2, cl 11(2). See above Chapter III at 98.

1550 See above Chapter II at 31 and 38.

1551 See above Chapter II at 50–2 and 66.

1552 *Practice Standards* (n 222) ss 2.1, 2.2(f).

purpose is settlement, rather than to facilitate decision-making, satisfy needs and interests or facilitate communication and disputant understanding.

This Chapter has also demonstrated the relationship between Stakeholder understandings and expectations of mediation's purpose and what constitutes success. No Stakeholder expressed the primary purpose is to facilitate disputant decision-making, re-establish and improve disputant communication or mutual understanding, maintenance or repair relationships or to transform individual and societal relations. Despite these qualitative purposes not being expressly referred to in the *Rules*,[1554] it is not to say that they cannot be achieved. Instead, some Stakeholders expressed achieving these qualitative purposes is simply a by-product of successful mediation and not the primary purpose *for* mediating. The findings suggest that mediation is not devoid of more qualitative and ideological purposes, but it is simply not the driving force for mediating in the Court. The findings also suggest that Stakeholders are cognisant that actions do not need to be settled for mediation to be successful.

The data suggests that mediators are more attuned to mediation's varying *purposes*, particularly to facilitating disputant decision-making[1555] than magistrates and lawyers, and appear predominantly process-focussed by facilitating direct disputant participation, reflective of their understanding of facilitative mediation theory.[1556] Conversely, most magistrates and lawyers appear more outcome-focussed, emphasising settlement than achieving more qualitative purposes.[1557] These findings highlight tensions between the purists and the pragmatists.[1558]

Though Stakeholders have a convergent view regarding mediation's primary purpose, the data illustrates two key expectation gaps regarding *purpose*. First, a gap between a minority of magistrates and some mediators, on one hand, and a minority of lawyers, on the other, regarding direct disputant communication during mediation. This gap will become more apparent in the next two Chapters.[1559] Secondly, a gap between the mediators who appear to prioritise respect for mediation's *self-determination* value more than some magistrates and lawyers. This gap will become more apparent in the next Chapter when I explore Stakeholder descriptions of the mediator's role.[1560]

These two gaps are consistent with literature suggesting limited direct disputant participation and dominance of lawyer control are common in the court-connected context.[1561] They also correspond with literature that suggests the institutionalisation of mediation in the courts and its prioritisation of settlement has diluted mediation's *self-determination* value, voluntariness, mutual engagement and communication.[1562] These two gaps illustrate a tension between some mediators and lawyers. This tension between mediator process control and lawyer dominance[1563] will also become more

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1553 See below Chapter V at 140–1, 153, 158, and165, Chapter VI at 194 and 202, Chapter VII at 234–5 and Chapter VIII at 240, 243 and 248.

1554 See above Chapter III at 98.

1555 See above Chapter II at 50.

1556 See above Chapter II at 50–2 and 66. See below Chapter V at 144, 168 and 185–7, Chapter VII at 208–11 and 229 and Chapter VIII at 240 and 245.

1557 See above Chapter II at 50–4.

1558 See above Chapter II at 37 and 60–2. See below Chapter V at 131, 141, 153 and 165–8, Chapter VII at 208 and Chapter VIII at 240 and 243.

1559 See below Chapter V and Chapter VI.

1560 In particular the lawyer descriptions suggesting they prioritise mediators obtain settlement *for* disputants through advisory/evaluative techniques: see below Chapter V at 150.

1561 See above Chapter II at 42–4.

1562 See above Chapter II at 54.

1563 See above Chapter II at 39 and 42–4 and 83 and Chapter IV at 122 and 129.

apparent in the next two Chapters.[1564] These two gaps are important because they can generate inconsistency and expectation gaps. They can also impact upon practices, behaviours, mediator interventions, mediation dynamics, outcomes reached and affect participant experiences.

The findings in this Chapter reinforce that the three themes are interrelated and that *purpose* drives *practice* and *procedure*.[1565] This will become more evident in the later Chapters which will show that Stakeholder views regarding *purpose* are linked with their understandings, expectations and experiences of both mediation *practice*[1566] and *procedure*.[1567] As settlement is the primary *purpose*, we can expect to see *practice* and *procedures* directed to that end rather than to more qualitative purposes that correspond with some of the six mediator functions.[1568]

In the next Chapter I explore the second research question and examine mediation *practice*.

1564 See below Chapter V at 142, 158 and 164 and Chapter VI at 187, 192, 187 and 201–2. See also Chapter VII at 210–11, 220, 227 and 232–4 and Chapter VIII at 240 and 248.

1565 See above Chapter I at 13, Chapter II at 47, Chapter IV at 108, 113 and 125. See below Chapter V at 131, 141–2, 169, Chapter VI at 181, 192, 197 and 202, Chapter VII at 205, 208, 210 and 234 and Chapter VIII at 237 and 239.

1566 See below Chapter V at 131, 141, 147–51, 158–165.

1567 See below Chapter VI at 185, 192–4 and 197–8.

1568 *Practice Standards* (n 222) s 2.2.

CHAPTER V: STAKEHOLDER PERSPECTIVES ON PRACTICE

In the previous Chapter I addressed the first research question by examining mediation's *purpose*. Stakeholders report mediation's primary *purpose* is to settle actions.

In this Chapter I address the second research question by examining mediation *practice.* As part of this question, I consider the following sub-themes, previously discussed in the literature review.[1569] Part A explores which of the four practice models[1570] is predominantly utilised.[1571] Part B considers the mediator's role and functions.[1572] Part C explores what Stakeholders consider to be an 'appropriate' level of mediator intervention.[1573] This Chapter illustrates the relationship between Stakeholder understandings and expectations of these sub-themes. Whilst many Stakeholders commented on the role of magistrates and lawyers, much of this data was not central to consideration of the mediator's role.[1574] However, I briefly explore the role of magistrates when exploring the referral of actions to mediation[1575] and the role of lawyers during mediation.[1576]

Consistent with the insights in the previous Chapter, this Chapter and the next Chapter will reinforce that *purpose* drives *practice* and *procedure*[1577] and will illustrate how Stakeholder understandings and expectations regarding *practice* are linked with their understandings and expectations of *purpose*[1578] and *procedure*.[1579]

As discussed in the literature review, many authors, industry models and training providers conflate mediation 'practices', such as advisory/evaluative, settlement or facilitative, with 'procedures', which describe the various stages of mediation,[1580] and include all concepts under the general term 'models'.[1581] I have separated the exploration of *practice* in this Chapter, from the exploration of *procedure* in the next Chapter,[1582] for two reasons. First, to differentiate between the four practice models, which illustrates differences between many variables and assumptions regarding the mediator's role, functions, and 'appropriate' levels of intervention.[1583] Secondly, to highlight the facilitative-advisory/evaluative[1584] and process-content dichotomies.[1585]

This Chapter will show gaps between Stakeholder understandings, expectations and experiences regarding practice models, the mediator's role, functions, and 'appropriate' levels of intervention, specifically between the facilitative mediation purists and the pragmatists.[1586] Many debates,

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1569 See above Chapter II at Part C.
1570 See above Chapter II at 63.
1571 See below Chapter V at 132.
1572 See below Chapter V at 142.
1573 See below Chapter V at 153.
1574 See below Chapter VIII at 244.
1575 See below Chapter VI at 170.
1576 See below Chapter VI at 184, 192 and 197.
1577 See above Chapter I at 13, Chapter II at 47, Chapter IV at 113 and 125. See below Chapter V at 141–2, Chapter VI at 181, 192, 197 and 202 and Chapter VII at 208, 210 and 234.
1578 See above Chapter IV at 113, 125–6 and 130.
1579 See below Chapter VI at 185, 192–4 and 197–8.
1580 See above Chapter II at 72.
1581 See above Chapter II at 71.
1582 I utilise the term *procedure* to explore the stages of mediation in the next Chapter.
1583 See above Chapter II at 63.
1584 See above Chapter II at 35 and 61.
1585 See above Chapter II at 60.
1586 See above Chapter II at 37 and 60–2. See below Chapter V at 141, 153 and 165–8, Chapter VII at 208 and Chapter VIII at 240 and 243.

dichotomies, and distinctions within the literature are echoed within the data, such as between process and content, conciliation and mediation and facilitative-advisory/evaluative paradigms.[1587]

These findings are important as they illustrate the potential for inconsistency, *practice* unpredictability and mixed approaches. They can also impact on behaviours, mediator interventions, mediation dynamics, outcomes reached and affect participant experiences.

A *Practice Models*

In this part of the Chapter I explore two key findings concerning practice models.

First, Stakeholders have different understandings and expectations regarding which practice model is predominantly utilised.

Secondly, gaps exist between the practice model some Stakeholders expect is being utilised in contrast to what others report experiencing.

1 *Mixed Practices Regarding Practice Models*

As discussed in the literature review, attempts to categorise different practices according to archetypical 'models' reveals four predominant models.[1588] Most depict mediator roles, functions, and interventions between two competing paradigms: the facilitative-advisory distinction[1589] or facilitative-evaluative dichotomy.[1590] The NMAS describes mediation in facilitative terms, though accommodates advisory/evaluative mediation or conciliation, which it describes as blended processes.[1591]

The rules-based framework requires mediators to be NMAS accredited[1592] and maintains the conciliation-mediation[1593] or facilitative-advisory distinctions,[1594] which restrict mediators to 'purely' facilitative practice.[1595]

I have summarised in table format the practice models Stakeholders reported either understanding, expecting or experiencing,[1596] and discuss them below.

Consistent with the insights in the next Chapter,[1597] some magistrates reported uncertainty about various aspects of *practice* given they take no part in it.[1598] Instead, their views regarding the three sub-themes were based on presumptions of what they expected occurs or 'should' occur.

A divergence in understandings, expectations, and experiences exist between six Stakeholder camps. First, most magistrates, at first blush, expect mediators to adhere to largely facilitative practices and most mediators reported utilising a 'purely' facilitative model. Secondly, a minority of mediators reported utilising techniques from 'other' models. Thirdly, a minority of mediators

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1587 See above Chapter II at 35 and 61.
1588 See above Chapter II at 58.
1589 See above Chapter II 35 and 61.
1590 See above Chapter II at 61.
1591 See above Chapter II at 33 and 63.
1592 See above Chapter III at 88. See also Chapter VII at 227 and Chapter VIII at 247.
1593 See above Chapter II at 35.
1594 See above Chapter II at 35 and 61.
1595 See above Chapter III at 95. See also Chapter VII, recommendation 1 and recommendation 2.
1596 Appendix O: Summary of Stakeholder Understandings, Expectations and Experiences of Mediation *Practice* Models within the Court.
1597 See below Chapter VI at Part C.
1598 See below Chapter VI at 181.

expressed undertaking 'conciliation' or whose descriptions suggest the use of quasi-advisory or evaluative techniques. Fourthly, one lawyer reported experiencing a 'highly evaluative model'. Fifthly, most lawyers were unacquainted with the existence or use of different models. Sixthly, a minority of mediators considered practice models to be 'purely academic' constructs.

(a) Facilitative

One magistrate expected that mediators adhere to a 'strictly facilitative' practice by managing the process *only* and not advising on outcomes, as required by the *Rules*.[1599] Others were less explicit and made no reference to the conciliation-mediation distinction contained in the *Rules*.[1600] One expected mediators adhere to a 'largely facilitative' model, stating it would be 'surprising' if they were using any 'other' model,[1601] and another expected they use the 'LEADR model',[1602] which is a facilitative model.[1603]

These findings, at first blush, suggest magistrates understand and expect mediators engage in 'purely' facilitative mediation, as described in the rules-based framework.[1604] They also suggest that when magistrates, at the first directions hearing, encourage disputants and their lawyers to consider mediation,[1605] the Court has the opportunity to foster realistic expectations regarding the mediator's facilitative rather than advisory/evaluative role. However, this contention is contestable as a minority of mediators reported participants occasionally attend with expectations of engaging in a 'mini-trial', explored below.[1606] Three magistrates also blurred the conciliation-mediation distinction when describing content interventions, such as supporting mediators making 'proposals',[1607] and expect mediators to be reasonably 'interventionist' and 'directive', indicative of conciliation.[1608]

Most mediators reported utilising a facilitative model, reflective of facilitative mediation literature.[1609] They either described their practice as 'facilitative'[1610] or described utilising the LEADR,[1611] IAMA[1612] or RI[1613] models, which are facilitative models.[1614] Some expected mediators would be utilising the facilitative model,[1615] given the requirement to be NMAS accredited.[1616] One expected mediators would be utilising a 'problem-solving' model, where they facilitate process *only* and do not intervene in content, reflective of facilitative practice.[1617]

Similar to the magistrates, no mediator expressly referred to the conciliation-mediation distinction,[1618] however, many emphasised practising mediation, not 'conciliation'.[1619]

1599 Magistrate 1. See above Chapter III at 95. See below Chapter V at 156.
1600 See above Chapter III at 99.
1601 Magistrate 4.
1602 Magistrate 2.
1603 See above Chapter II at 28 and 37.
1604 See above Chapter III at 95.
1605 See below Chapter VI at 171.
1606 See below Chapter V at 148.
1607 Magistrate 2, Magistrate 4 and Magistrate 5. See below Chapter V at 159.
1608 See below Chapter V at 159.
1609 See above Chapter II at 65.
1610 Mediator 3; Mediator 4; Mediator 7; Mediator 9; Mediator 10; Mediator 13; Mediator 15; Mediator 16.
1611 Mediator 5.
1612 Mediator 8.
1613 Mediator 11.
1614 See above Chapter II at 28 and 37.
1615 Mediator 3; Mediator 4; Mediator 5; Mediator 7; Mediator 9; Mediator 11; Mediator 13; Mediator 15; Mediator 16.
1616 Mediator 4; Mediator 10; Mediator 15. See above Chapter III at 88.
1617 Mediator 2. See below Chapter V at 143.
1618 See above Chapter III at 99.

These findings reflect the 'exclusivist view' by mediation 'purists' that they strictly adhere to the 'pure' or 'authentic' application of self-determination by not blurring the conciliation-mediation distinction.[1620] They also reflect the facilitative-advisory distinction in the NMAS[1621] and suggest these mediators engage in 'purely' facilitative mediation as required by the rules-based framework.[1622] However, in the next two parts of the Chapter we find no uniformity amongst the purists regarding the mediator's facilitative role[1623] and what they consider to be an 'appropriate' level of intervention.[1624]

(b) 'Other' Models and Techniques

Though their views were not unanimous, a minority of mediators presumed mediators might utilise different models[1625] or techniques from 'other models'.[1626]

For example, some considered it highly unlikely that mediators utilise a 'therapeutic model'[1627] as mediation in the Court 'does not lend itself to transformative mediation',[1628] and another queried whether fostering *empowerment* and *recognition*[1629] is particularly required in mediations within the Court.[1630] Conversely, another opined that mediators are likely adhering to the RI procedure whilst utilising techniques from transformative mediation.[1631] These findings, suggest most mediators understand and expect mediation not to involve transformative practices within the Court, consistent with literature suggesting settlement-oriented practices prevail in court-connected contexts.[1632] Another speculated that mediators might use an evaluative model but stressed the hazards of doing so, citing some mediators are not legally trained. [1633] For example, it would be problematic for non-lawyer-mediators to be evaluating actions on the basis of 'the layperson's view of the law' given their 'less informed view' of complex legal issues and legal principles.[1634]

One utilises the facilitative model as a procedural 'guide' but uses skills and techniques from transformative and narrative models during the Joint Session.[1635] Another utilises techniques from the Non-Violent Communication ('NVC') process,[1636] which centres upon uncovering universal human 'needs'.[1637] This mediator is also cognisant of moderating language when mediating in the Court. Rather than using 'needs/feelings language', and focusing upon the past, this mediator uses the NVC process to assist disputants unearth what is presently important or most needed.[1638] This

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1619 Mediator 2; Mediator 4; Mediator 5; Mediator 9; Mediator 10; Mediator 16.
1620 See above Chapter II at 35.
1621 See above Chapter II at 35 and 61.
1622 See above Chapter III at 95.
1623 See below Chapter V at Part B.
1624 See below Chapter V at Part C.
1625 Mediator 10.
1626 Mediator 2.
1627 Mediator 7.
1628 Mediator 2.
1629 See above Chapter II at 52.
1630 Mediator 15. See below Chapter V at 152.
1631 Mediator 16.
1632 See above Chapter II at 53–4.
1633 Mediator 4.
1634 Mediator 4.
1635 Mediator 3.
1636 Marshall B Rosenberg, *Nonviolent Communication: A Language of Life* (PuddleDancer Press, 2nd ed, 2003).
1637 See, eg, Marshall B Rosenberg, 'Nonviolent Communication and Conflict Resolution', *PuddleDancer Press* (Web Page, 2021) <https://www.nonviolentcommunication.com/learn-nonviolent-communication/nvc-conflict-resolution/>.
1638 Mediator 5.

mediator suggested the NVC process works best in relationship-based disputes in contrast to single-issue quantum concerns, typical in mediations in the Court.[1639]

Another utilises techniques from Eddy's High Conflict model.[1640] For example, reframing language from having disputants make 'offers' to inviting them to 'make a proposal'.[1641] Once a disputant makes a proposal, the recipient has three options: 'yes'; 'I want to think about'; or, if they want to say 'no', they have to make a counter-proposal.[1642] This technique shifts the dynamic between disputants as 'combatants' into problem-solvers and facilitates mutual problem-solving, which coincides with the interest-based method in facilitative mediation.[1643]

Eddy's model and the NVC process correspond closer to facilitative and transformative rather than advisory/evaluative or settlement mediation. I briefly explore the NVC process and Eddy's model in the next Chapter when discussing *procedure*.[1644]

These findings denote variation between a minority of mediators, who merge techniques from different models despite most reporting they engage in predominantly facilitative practice.[1645] Notwithstanding this, in the next part we find that a minority of mediators did not report adhering to a purely facilitative model.

(c) 'Conciliation' or Quasi-Advisory/Evaluative 'Techniques'?

Two mediators used the label 'conciliation' to describe their mediation practices.[1646] Another did not use the label 'conciliation', though described adhering to the 'Sir Laurence Street definition of mediation and Street's technique'.[1647] This suggests the use of advisory or evaluative techniques, as Street argued there is 'no distinction in substance', nor 'a cosmetic difference' between mediation and conciliation.[1648]

One reported utilising a 'blended process'[1649] whilst using the LEADR/RI 'steps' to guide the procedure.[1650] The 'model or approach' used, which they preferred to call 'conciliation', depends on whether disputants are legally represented. This mediator stated using a 'more facilitative process', where disputants can rely on lawyers to provide information and advice on the merits of their positions and technical aspects. Conversely, where disputants are unrepresented, this mediator described taking an initially facilitative role before transitioning to a 'more interventionist' conciliation role providing detailed information, particularly relevant to specific subject-matter.[1651]

Another reported practising what they prefer to call 'conciliation', particularly at the stage where disputants are 'desperate for an answer' and have developed such faith and confidence in the mediator that they ask 'well what would you do?'[1652] Whilst acknowledging that 'it goes against the

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1639 Mediator 5. But see above Chapter IV at 113 and 118–9.

1640 Bill Eddy, 'New Ways for Mediation: Explaining the Method Step-by-Step', *High Conflict Institute* (Web Page, 12 July 2012) <https://www.highconflictinstitute.com/hci-articles/new-ways-for-mediation-explaining-the-method-step-by-step>.

1641 Mediator 4.

1642 Mediator 4.

1643 See above Chapter II at 66.

1644 See below Chapter VI at 181–2.

1645 See above Chapter V at 133.

1646 Mediator 1; Mediator 6.

1647 Mediator 14. See below Chapter VI at 165.

1648 Street, *Bar Practice Course* (n 32) 7.

1649 Mediator 1.

1650 See below Chapter VI at 181.

1651 Mediator 1.

1652 Mediator 6.

tenets of mediation' to express a view, this mediator reported 'forewarning' disputants during the Opening,[1653] that one technique they might apply to settle the action includes providing a 'personal opinion'.[1654]

Though these three mediators used the labels 'conciliating' and providing a 'view', they stated this does not constitute giving 'advice'. This will become more apparent in the final part of the Chapter when I explore the way they described 'appropriate' levels of intervention.[1655]

It is difficult to extrapolate from this data the extent to which these lawyer-mediators comply with the NMAs requirements for engaging in blended processes;[1656] namely, whether they hold appropriate professional knowledge and experience in the subject-matter of *all* types of actions, and obtain express consent before providing 'information' or 'options' in a manner that respects disputant self-determination.[1657]

These findings are consistent with literature indicating mediators adopt a 'pragmatic approach' by acknowledging that facilitative and advisory/evaluative propensities exist in 'mediation' practice.[1658] They also suggest some mediators do not strictly adhere to the conciliation-mediation distinction,[1659] and blur the facilitative-advisory distinction,[1660] thus contradicting the definition of mediation in the *Rules*.[1661] These views are also consistent with literature suggesting many 'mediations' within the court-connected context are more accurately described as conciliations, conferences or evaluations.[1662] This contention was accentuated by one of the two self-described conciliators, who suggested conciliation likely occurs more often within the Court than 'pure facilitative mediation' and that 'everyone should be upfront in calling it what it is'.[1663] This will become more apparent in the final part of the Chapter when I explore what some Stakeholders describe as an 'appropriate' level of intervention in the content.[1664]

(d) Highly Evaluative

An outlier reported mostly experiencing 'a highly evaluative model', typically in building and construction disputes. This lawyer suggested 'the point of the process' is for mediators to 'cut through' lots of technical detail and assist by 'cutting it down' for disputants to consider their prospects of success.[1665] This comment suggests part of the mediator's role and functions is to 'cut through' disputant positions, which is mentioned in case law.[1666]

This lawyer's experience coincides with the descriptions by the minority of mediators who self-described 'conciliating' or whose descriptions suggest the use of quasi-advisory or quasi-evaluative techniques.[1667]

1653 See below Chapter VI at 184.
1654 Mediator 6. Cf Mediator 10: see below Chapter V at 138 and 161.
1655 See below Chapter V at Part C.
1656 See above Chapter II at 33 and 63.
1657 *Practice Standards* (n 222) s 10.2. See above Chapter II at 34. See also Chapter VII at 219. This reinforces my recommendation for future research: see below Chapter VII and VIII.
1658 See above Chapter II at 61.
1659 See above Chapter II at 35.
1660 See above Chapter II at 35 and 61.
1661 *Rules* (n 917) r 2 (definition of 'mediation'). See above Chapter III at 95.
1662 See above n 858.
1663 Mediator 1.
1664 See below Chapter V at 162.
1665 Lawyer 3.
1666 See, eg, *Northrop Grumman Mission Systems Europe* (n 353) [62] (Ramsey J).
1667 See above Chapter V at 135.

(e) Unsure or Unaware of the Particular or Predominant Use of Practice Models

Two magistrates were unsure which practice model is predominantly utilised.[1668] One acknowledged that mediators must be NMAS accredited.[1669] This magistrate suggested that, unlike conciliation, which is more 'directed' and 'hands on', mediation is not concerned with the merits of a dispute, but with reaching commercial outcomes against the risks of proceeding to trial. However, this magistrate opined that mediators do not adhere to a strictly facilitative model citing two reasons.[1670] First, they are limited by time and conference room space to undertake 'lots' of Private Sessions,[1671] which is inconsistent with the finding that most lawyers understand, expect, and prefer Private Sessions and Shuttle Negotiation, explored in the next Chapter.[1672] Secondly, disputants occasionally need to be 'more directed' than a purely 'hands-off' or 'passive' facilitative mediation.[1673]

Many mediators expressed being unaware of the practice model that others utilise,[1674] with some attributing this to the lack of communication between them.[1675]

Most mediators also expressed having never been asked by lawyers or disputants which practice model they will be utilising before mediation's commencement.[1676] A minority presumed that lawyers and disputants would not be cognisant of different practice models to make informed decisions about which one is best suited to their action.[1677] One described that many lawyers appear to lack awareness about mediation, emphasising it is not merely 'facilitated positional bargaining',[1678] inducing concessions and compromise.[1679] Others presumed both lawyers and disputants just want an outcome, and are not concerned with the existence or otherwise of practice models.[1680] A minority presumed that lawyers might be aware of the different models if they had completed mediation training[1681] and some may even have a model preference.[1682]

As expected by some mediators, most lawyers reported being unacquainted with different practice models or unaware which model is predominantly utilised within the Court.[1683] This suggests most are unfamiliar with the categorisation of different practices according to archetypical 'models'.[1684] This finding coincides with the data that most lawyers had not undergone mediation training.[1685] For example, one reported never having heard the terms 'facilitative, evaluative or transformative' prior to interview[1686] and another reported being unsure of mediation parlance.[1687] Another was

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1668 Magistrates 3; Magistrate 5.

1669 *Rules* (n 917) r 2. See above Chapter III at 88. See also Chapter VII at 227 and Chapter VIII at 247.

1670 Magistrate 3.

1671 See nn 1008, 1412, 1739, 2031, 2270, 2303, 2439 and 2943. See also Appendix A: Qualitative Research Methodology.

1672 See below Chapter VI at 192.

1673 Magistrate 3. See below Chapter V at 159.

1674 Mediator 1; Mediator 2; Mediator 5; Mediator 7; Mediator 8; Mediator 9; Mediator 11. See also Chapter VI at 181.

1675 Mediator 6; Mediator 10; Mediator 13. See also Chapter VII at 231.

1676 Mediator 2; Mediator 3; Mediator 5; Mediator 6; Mediator 8; Mediator 9; Mediator 10; Mediator 11; Mediator 13; Mediator 14. See also Woodward, 'Lawyer Approaches' (n 33) 1, 101.

1677 Mediator 2; Mediator 3; Mediator 10; Mediator 11; Mediator 13.

1678 Mediator 13.

1679 See above Chapter II at 64–5, 68 and 70–1. See below Chapter V at 146 and Chapter VI at 192.

1680 Mediator 9; Mediator 14; Mediator 15.

1681 Mediator 9.

1682 Mediator 10.

1683 See, eg, Lawyer 1 and Lawyer 7.

1684 See above Chapter II at 58. See also Woodward, 'Lawyer Approaches' (n 33) 2, 89.

1685 Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

1686 Lawyer 2 (Bar 1).

1687 Lawyer 6.

unaware of the different practice models but acknowledged different mediator practices, styles and techniques.[1688]

Only two commented upon the existence of different practice models in general practice. One described two different schools of thought regarding 'appropriate' intervention: the evaluative and the facilitative, where mediators do not comment upon the merits or advise disputants what they should do.[1689] Another stated three models exist: evaluative, transformative, and 'passive'.[1690]

Similar to the findings above, most lawyers reported mediators had never informed them that a particular model would be utilised, nor had they ever enquired about the mediator's preferred practice model,[1691] despite one mediator who emphasised explaining to lawyers and disputants that they utilise a facilitative model and do not provide opinions or advice.[1692] It is difficult to extrapolate from this data the extent to which mediators explain to lawyers what practice model they utilise and whether they invite participants to clarify the scope of their role and interventions.[1693]

Some lawyers responded to the question about which practice model is utilised by describing the stages of the *procedure* they had experienced,[1694] rather than referring to the four practice models.[1695] The inference to be drawn from their failure to distinguish between practice models and particular stages of the *procedure*,[1696] and discuss both concepts under the generic term 'models' is that lawyers are unaware of the differences between practice models and *procedure*. Alternatively, their conflation of *practice* and *procedure* under the umbrella term 'mediation' may indicate they consider both concepts are the same.

Most lawyers made no reference to the four practice models and none referred to the conciliation-mediation distinction in the *Rules*.[1697] However, most expressed a preference for 'active',[1698] 'evaluative,'[1699] 'highly involved',[1700] 'interventionist'[1701] or 'roll the sleeves up'[1702] approaches rather than 'passive'[1703] or 'less interventionist'[1704] mediators. The use of these different labels suggests they understand, expect, and have experienced different mediator interventions spanning the least to the most interventionist. The descriptions of 'passive' and 'hands-off' approaches correspond with an understanding that mediators *solely* facilitate the process without intervening in the content, reflective of facilitative mediation.[1705] Conversely, descriptions of 'active' or 'roll up the sleeves' approaches correspond with an understanding of active mediator involvement in the process *and* the content, reflective of advisory/evaluative mediation.[1706] The preference for advisory/evaluative, rather than purely facilitative, mediation will become more apparent in the next

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1688 Lawyer 4 (Bar 2).
1689 Lawyer 3.
1690 Lawyer 1.
1691 Lawyer 2 (Bar 1); Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 6; Lawyer 7.
1692 Mediator 10. See below Chapter V at 160.
1693 This too reinforces my recommendation for future research: see below Chapter VII and Chapter VIII.
1694 Lawyer 2 (Bar 1); Lawyer 5 (Bar 3); Lawyer 7.
1695 See above Chapter II at 63.
1696 See below Chapter II at 71–9.
1697 See above Chapter III at 99.
1698 Lawyer 1; Lawyer 2 (Bar 1).
1699 Lawyer 3; Lawyer 7.
1700 Lawyer 6.
1701 Lawyer 4.
1702 Lawyer 2 (Bar 1); Lawyer 3.
1703 Lawyer 1; Lawyer 6.
1704 Lawyer 4 (Bar 2).
1705 See above Chapter II at 66.
1706 See above Chapter II at 64–5.

two parts of the Chapter where I explore Stakeholder descriptions of the mediator's role[1707] and of 'appropriate' levels of mediator intervention.[1708]

An outlier amongst the lawyers reported a preference for Judicial ADR[1709] or evaluative subject-matter experts to settle actions *for* the lawyers, who have been unable to settle it themselves.[1710] This lawyer suggested lawyers prefer mediators to 'act as arbitrators' and comment upon weaknesses in disputant positions. This description accords closely with advisory/evaluative mediation and NADRAC's categorisation of advisory and hybrid processes.[1711]

Three inferences can be drawn from these findings. First, unlike most mediators, lawyers understand, expect, and prefer mediation to encompass advisory/evaluative practices, rather than being a purely facilitative, as prescribed by the *Rules*. This inference is consistent with literature suggesting advisory/evaluative mediation is the model that lawyers are familiar with and prefer.[1712] This will become more apparent in the next two parts of the Chapter.[1713] Secondly, lawyers may be unaware that the *Rules* provide for conciliation.[1714] Thirdly, lawyers may place little value upon, or consider the facilitative-advisory/evaluative dichotomy,[1715] process-content dichotomy,[1716] and conciliation-mediation distinction,[1717] unimportant, and instead prioritise obtaining settlement.[1718]

(f) 'Purely Academic'

A minority of mediators were critical of the existence of different practice models. Whilst acknowledging debates exist in the literature and amongst mediation practitioners, they suggested practice models are 'devised and argued by academics',[1719] not reflected in practice,[1720] and not as important as managing the process, the people and their problems.[1721]

Despite the resistance to practice models, one described mediators as having their own 'flavour', even though they all self-describe their practice as 'mediation'.[1722] This mediator drew an analogy with martial arts, saying there are many different schools that fall under the umbrella term 'karate', despite the distinctiveness of each Karate Master.[1723] Another acknowledged that mediators display different 'approaches' depending on the subject-matter in dispute and the various mediation contexts.[1724] Another acknowledged there are various degrees of mediator 'styles' ranging from encouraging disputant communication to mediators expressing quasi-opinions.[1725] This mediator

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1707 See below Chapter V at Part B.
1708 See below Chapter V at Part C.
1709 Judicial ADR is not central to addressing the three research questions: see above Chapter III at 94.
1710 Lawyer 6. See also Appendix A: Qualitative Research Methodology.
1711 See above Chapter II at 30.
1712 See above Chapter II at 69.
1713 See below Chapter V at Part B and Part C.
1714 See above Chapter III at 100. However, it is difficult to say whether conciliation occurs in lieu of or in addition to mediation because the CAA Reports make no reference to the number of conciliations conducted to date: see below Chapter VII at 218.
1715 See above Chapter II at 35 and 61.
1716 See above Chapter II at 60. See below Chapter V at 155.
1717 See above Chapter II at 35. See below Chapter V at 140.
1718 See above Chapter IV at 111.
1719 Mediator 6.
1720 Mediator 7; Mediator 12; Mediator 14.
1721 Mediator 9.
1722 Mediator 12.
1723 Mediator 12.
1724 Mediator 9.
1725 Mediator 14.

stated there is no clear demarcation between models in the Court,[1726] despite the conciliation-mediation distinction being clearly expressed in the rules-based framework.[1727]

These findings differ from literature that suggests the different models are not simply stylistic variations of different approaches used to reach the same outcome.[1728] They also exemplify the 'uneasy' relationship between academic constructs of mediation and the exigencies of practice within legal contexts.[1729]

One mediator acknowledged the 'clear distinction' within the mediation field, from 'the academic perspective', between the different levels of intervention in mediation and conciliation citing 'the old NADRAC definitions';[1730] namely, that mediators do not make settlement suggestions whereas conciliators make non-binding suggestions.[1731] However, 'in the commercial world, no one cares about that distinction' and what is more important is the mediator's personality and their reputation.[1732] Rather than becoming ensnared on the label used to describe 'mediation', whether it is 'facilitated negotiation', 'expert appraisal', 'conciliation' or any other synonymous labels, 'what really matters' is that participant expectations are 'aligned' so they know 'what they're getting in the box'.[1733] This finding reflects the pragmatic view that mediation and conciliation are synonymous and interchangeable paradigms and that disputant expectations are more important than attempts to differentiate between them.[1734] This view accords with the 'pluralist' views that accept the broad range of 'mediation' *practices* as long as they are clearly described to prospective mediation users to avoid expensive and embarrassing 'mismatches'.[1735] This view is a variation on a theme in some case law that the 'label' used to describe a particular dispute resolution process is not determinative of its character.[1736]

This mediator also highlighted the gap between the way mediators describe utilising a facilitative model and the way participants likely experience a 'very interventionist' outcome-focussed approach:

> Feedback from clients suggests it's a very interventionist process, which focuses upon the costs of the outcome, not wasting the parties' resources, the loss of control through the mediator, the lack of predictability in relation to the magistrate and the mediator 'getting into the pit' and pushing and shoving parties along in more of what you'd call a 'conciliation' than a 'hands-off' mediation. Having [more recently] been a party, that's what I perceived was taking place.[1737]

This experience corresponds with Hensler's view that anecdotal data and observational studies suggest mediators deliberately activate the stereotype promulgated by popular culture, legal scholarship and by legal professionals, that portrays litigation as expensive, time-consuming and emotionally exhausting, to impress upon disputants the value of settling.[1738] This mediator opined

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1726 Mediator 14.

1727 See above Chapter III at 99.

1728 See above Chapter II at 59.

1729 See nn 265, 704, 1719, 2813 and 2833.

1730 See above Chapter II at 28.

1731 Mediator 12. See above Chapter II at 37.

1732 Mediator 12.

1733 Mediator 12. See above Chapter IV at 126. See also Chapter VII at 213.

1734 See above Chapter II at 37.

1735 See, eg, Lande, 'How Will Lawyering and Mediation Transform Each Other?' (n 204) 842, 845, 856; Wade, 'Evaluative Mediation' (n 57) 2. See also nn 2139 and 2839.

1736 See, eg, *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2021) 138 SASR 106, 114 [27], 114 [29], 120–1 [60], citing *Toll (FHL) Pty Ltd v Prixcar Services Pty Ltd* [2007] VSC 187, [38] (Hollingworth J) and *Sturt Football Club Inc v Commissioner of State Taxation* [2010] SASC 279, [46] (White J).

1737 Mediator 12. This view exemplifies a gap between facilitative mediation theory and practice: see below Chapter V at 153, 158 and 165, Chapter VI at 194, Chapter VII at 234 and Chapter VIII at 240, 243 and 248.

1738 Hensler, 'A Research Agenda' (n 80) 16.

that mediators in the Court must be reasonably interventionist and 'push' disputants through a more outcome- than process-focussed procedure because of both time constraints and disputant tendencies in 'battling to the last inch'.[1739] This finding is consistent with findings in the final part of the Chapter where descriptions by some mediators suggest the use of advisory/evaluative mediation or quasi-advisory/evaluative techniques.[1740] It also reinforces the suggestion that some mediators may not be adhering to a 'purely' facilitative model,[1741] as required by the rules-based framework.[1742] This view reinforces the notion of a gap existing between facilitative mediation theory and practice,[1743] which will become clearer in the next two parts of the Chapter.[1744]

2 *Summary of Key Findings*

As indicated earlier in the Chapter, a divergence in understandings, expectations, and experiences exist between six Stakeholder camps.[1745] These encompassed different expectations and experiences regarding the use of a facilitative practice model, 'other' models, 'conciliation' or quasi-advisory/evaluative techniques, a 'highly' evaluative model, being unacquainted with different practice models, or considered them to be 'purely academic', notwithstanding the conciliation-mediation distinction in the rules-based framework.[1746]

These findings are consistent with literature that suggests diverse practices exist between pure facilitation and advice/evaluation.[1747] They also suggest variation and mixed practices between the purists and the pragmatists.[1748]

Though most mediators expressed adhering to purely facilitative practice, the data from a minority of pragmatists who self-described 'conciliating' or reported experiencing a highly evaluative model, suggests that they may not in fact be doing so. This may be explained by the limitations of 'self-regulation',[1749] as some mediators reported maintaining strict compliance with 'purely' facilitative practice, as required by the rules-based framework.[1750]

The inference to be drawn from these findings is that mediation is not 'purely' facilitative in all actions, as participants may experience 'conciliation' or quasi-advisory/evaluative practices, despite mediators deeming their practices neither advisory nor evaluative.[1751] This may be explained by the lack of practice predictability in the rules-based framework.[1752] It may also be explained by literature that suggests *practice* is guided by mediators' personal and professional values and philosophies[1753] and their understanding of *purpose*,[1754] further reinforcing that *purpose* drives

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1739 Mediator 12. See nn 1008, 1412, 1671, 2031, 2270, 2303, 2439 and 2943. See also Appendix A: Qualitative Research Methodology.

1740 See above Chapter V at Part C.

1741 See above Chapter V at 135–6.

1742 See above Chapter III at 95.

1743 See below Chapter V at 153, 158, 165, Chapter VI at 194 and 202, Chapter VII at 234–5 and Chapter VIII at 240, 243 and 248.

1744 See below Chapter V at Part B and Part C.

1745 See above Chapter V at 132.

1746 See above Chapter III at 99.

1747 See above Chapter II at 58–9.

1748 See Chapter IV at 129 and Chapter V at 131. See below Chapter V at 153 and 165–8, Chapter VII at 208 and Chapter VIII at 240 and 243.

1749 See Appendix A: Qualitative Research Methodology.

1750 See above Chapter III at 95.

1751 See below Chapter V at 168.

1752 See above Chapter III at 101.

1753 See above Chapter II at 48.

1754 See above Chapter II at Part B. See also Chapter IV.

practice and *procedure*;[1755] namely, that some mediators will adapt their practice to achieve settlement. This inference coincides with the majority view that mediation's primary *purpose* is to settle actions.[1756] It may also be because the pragmatists appear to place less value on the conciliation-mediation distinction[1757] than the purists. Mediators might also be yielding to the preference of lawyers or disputants for advisory/evaluative techniques.[1758]

The findings suggest gaps exist between facilitative mediation theory[1759] and the rules-based framework[1760] with what some Stakeholders expect, experience, and many prefer, to occur in practice.

The next two parts of the Chapter show the overlap between what Stakeholders reported about practice models, and about the mediator's role, functions, and 'appropriate' levels of mediator intervention, which reinforces my contention that *purpose* drives *practice* and *procedure*.[1761]

B *The Mediator's Role and Functions*

I now explore the mediator's role and functions, which provides further insight and reinforces the relationship between practice models and Stakeholder understandings, expectations, and experiences of the mediator's role and functions. When answering the question about what is the mediator's role, most Stakeholders did not stipulate whether their descriptions related to process and/or content.[1762] Rather, many provided comprehensive descriptions of process and/or content roles when describing 'appropriate' levels of mediator intervention, explored in the third part of the Chapter.[1763]

In this part of the discussion I identify two key findings.

First, Stakeholders have different understandings and expectations about various elements of the mediator's role and functions.

Secondly, gaps exist between what some Stakeholders expect regarding elements of the mediator's role and functions as opposed to what others report experiencing.

1 *Mixed Facilitative and 'Other' Roles and Functions*

As discussed in the literature review, the four practice models illustrate differences between many variables and assumptions regarding the mediator's role, functions, and 'appropriate' levels of intervention.[1764] The NMAS limits mediators to engage in a facilitative role, centered on six mediator functions,[1765] and to process interventions *only* with a prescription against evaluative or advisory roles, unless engaging in blended processes.[1766]

1755 See above Chapter I at 13, Chapter II at 47, Chapter IV at 113 and 125, Chapter V at 131. See below Chapter VI at 181, 192, 197 and 202 and Chapter VII at 208, 210 and 234.

1756 See above Chapter IV at 110–13.

1757 See above Chapter II at 35.

1758 See below Chapter V at 158. See below Chapter VI at 183 and Chapter VII at 213 and 220.

1759 See above Chapter II at 50–2 and 66.

1760 See above Chapter III at Part B.

1761 See above Chapter I at 13, Chapter II at 48, Chapter IV at 113 and 125, Chapter V at 131. See below Chapter VI at 181, 192, 197 and 202 and Chapter VII at 205, 208, 210 and 234.

1762 See above Chapter II at 60.

1763 See below Chapter V at Part C.

1764 See above Chapter II at 63.

1765 *Practice Standards* (n 222) s 2.2(a)–(f). See above Chapter II at 32 and 48.

1766 See above Chapter II at 33 and 63. The *Rules* require mediators to be NMAS accredited: see above Chapter III at 88. See also Chapter VII at 227.

A divergence in understandings, expectations, and experiences exist between two Stakeholder camps. Most descriptions of the mediator's role centre on the six mediator functions,[1767] discussed below, reflective of facilitative mediation,[1768] whereas some descriptions of 'other' roles extend beyond them.

Many Stakeholders initially provided brief responses to this question. For example, most magistrates,[1769] some lawyers[1770] and most mediators[1771] described the mediator's role as being one of 'facilitator', without describing the meaning and scope of 'facilitation'. Many descriptions of facilitation, at first blush, suggest the mediator's role is *solely* to facilitate the process, reflective of the conciliation-mediation distinction,[1772] facilitative-advisory/evaluative dichotomy[1773] and the process-content dichotomy.[1774] However, these dichotomies become blurry when exploring descriptions of the 'other' mediator roles described by some Stakeholders. They become even blurrier when exploring some Stakeholder descriptions of 'appropriate' levels of intervention in the content.[1775]

This part of the discussion comprises three parts. First, I introduce the data regarding the mediator as facilitator. Secondly, I explore those descriptions that centre on the six mediator functions. Thirdly, I explore descriptions of three 'other' mediator roles, which extend beyond the six mediator functions.

(a) 'Facilitator'

Most Stakeholders who reported the mediator's role is to 'facilitate' provided little commentary, apart from expressing this involves being independent,[1776] neutral[1777] or impartial.[1778]

The descriptions by these Stakeholders centred on two of the three elements of *impartiality*.[1779] First, conducting a procedurally *fair* process, consistent with the procedural fairness literature.[1780] Descriptions of 'fairness' included ensuring participants are 'comfortable' with the process',[1781] providing them an opportunity to 'talk' and feel 'heard'[1782] and treating them in an 'even-handed' manner,[1783] such as having Private Sessions of approximately equal time.[1784] Others described

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1767 See above Chapter II at 32 and 48.
1768 See above Chapter II at 66.
1769 Magistrate 1; Magistrate 3; Magistrate 4; Magistrate 5.
1770 Lawyer 1; Lawyer 5 (Bar 3); Lawyer 7.
1771 Mediator 1; Mediator 2; Mediator 3; Mediator 4; Mediator 5; Mediator 6; Mediator 9; Mediator 11; Mediator 13; Mediator 15; Mediator 16.
1772 See above Chapter II at 35.
1773 See above Chapter II at 35 and 61.
1774 See above Chapter II at 60.
1775 See below Chapter V at 158.
1776 Mediator 1; Mediator 3; Mediator 5; Mediator 7; Mediator 8; Mediator 9. Magistrate 3; Magistrate 4; Magistrate 5; Lawyer 1; Mediator 3; Lawyer 1; Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 7.
1777 Mediator 1; Mediator 5; Mediator 7; Mediator 11; Mediator 12; Mediator 13; Mediator 14; Magistrate 1; Lawyer 7.
1778 Mediator 7; Mediator 15; Magistrate 2. None explained the meaning or differences between these three concepts and some used them interchangeably, making it difficult to infer whether there has been a contemporary shift from concepts of neutrality and independence to *impartiality*: see above Chapter II at 34.
1779 See above Chapter II at 34.
1780 See above Chapter II at 50. See also Chapter IV at 124.
1781 Lawyer 1.
1782 Magistrate 5; Mediator 5.
1783 See, eg, *Guidelines for Parties in Mediations* (n 40) 5.
1784 Mediator 5; Mediator 6; Mediator 15. See also *Ethical Guidelines for Mediators* (n 254) rr 2, 3–4.

managing power imbalances,[1785] for example, between: those who appear to have attained higher levels of education than those who have not;[1786] unrepresented litigants and opponents who are represented by lawyers and experts, to minimise risks of intimidation;[1787] and to prevent one disputant being bullied by the other.[1788] Secondly, avoiding potential conflicts of interest by ensuring informed consent and avoiding perceptions of mediator favouritism/bias.[1789]

Whilst no Stakeholder referred to the third element of *impartiality* (that is, conducting mediation a *non-determinative* manner), some described their non-determinative role when discussing 'appropriate' levels of mediator intervention. Their descriptions are consistent with the procedural justice literature[1790] and accord with the requirements for procedural fairness and mediator impartiality in the NMAS.[1791]

I now explore descriptions of the mediator's role that centre on the six mediator functions, before exploring descriptions of 'other' mediator roles that extend beyond them.

(b) Six Mediator Functions

Mediators provided more comprehensive descriptions of their role than magistrates and lawyers, conceivably explained by their having undergone more mediation education and training[1792] and being NMAS accredited. Unsurprisingly, this data suggests mediators are more attuned to the different aspects of their role and functions.

Most descriptions of the mediator's role centre on the six mediator functions.[1793] Stakeholder descriptions of three of the six functions were convergent; namely, communication, information exchange, and disputant understanding, identification and exploration of interests, issues, and underlying needs and generation and evaluation of options.

Stakeholder descriptions of two other mediator functions were less consistent; namely, consideration of alternatives and negotiation. A minority of mediators also reported an expectation gap between some disputants and lawyers, on the one hand, and that of mediators, on the other, regarding the sixth mediator function: disputant decision-making.

I have placed Stakeholder descriptions that correspond most closely to each of the six functions below, noting some overlap between different descriptions.

(i) Communication, Information Exchange, and Disputant Understanding

Many Stakeholders described the mediator's role as facilitating communication.[1794] Descriptions encompassed encouraging direct disputant participation,[1795] including assisting them to take turns[1796] in expressing themselves,[1797] and 'hearing' each other.[1798] Some descriptions included

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1785 Lawyer 1; Mediator 7.
1786 Mediator 15.
1787 Mediator 1.
1788 Lawyer 5 (Bar 3).
1789 Mediator 5; Mediator 7; Mediator 8; Mediator 9. See also *Ethical Guidelines for Mediators* (n 254) rr 3, 4.
1790 See above Chapter II at 50 and 56–7.
1791 *Practice Standards* (n 222) s 7.
1792 Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.
1793 *Practice Standards* (n 222) s 2.2(a)–(f).
1794 Magistrate 3; Lawyer 5 (Bar 3); Lawyer 7; Mediator 2; Mediator 3; Mediator 4; Mediator 5; Mediator 13.
1795 Lawyer 7.
1796 Mediator 5; Mediator 7.
1797 Magistrate 5; Mediator 2; Mediator 3; Mediator 13.
1798 Lawyer 1.

reference to mediators actively listening[1799] to ensure disputants 'feel heard,'[1800] reframing and filtering language[1801] and questioning participants to elicit information, particularly in actions where disputants exhibit difficulties communicating.[1802]

These views accord with the NMAS, which provides mediation typically includes a Joint Session whereby participants communicate directly and mediators must provide opportunities for them to speak and be heard.[1803] They suggest the mediator's role includes encouraging direct disputant communication, as promoted in industry models.[1804] For example, one mediator reported preferring disputants be 'empowered' by being in the room and actively part of the process, rather than having a process conducted separate to them, such as their lawyers engaging in Shuttle Negotiation.[1805] These views are inconsistent with literature suggesting court-connected mediations is usually dominated by lawyers, with limited direct disputant participation.[1806]

However, views regarding direct disputant participation were not unanimous. For example, one lawyer reported the mediator's role involves either acting as a conduit of communication between disputants or facilitating the exchange of offers/counter-offers.[1807] This description corresponds with some lawyer reports regarding Shuttle Negotiation during mediation.[1808] It is thus difficult to generalise the extent to which disputants communicate *directly* with each other or indirectly through the mediator. This is consistent with findings in the next Chapter where Stakeholders have different expectations and experiences regarding direct disputant participation.[1809]

Other descriptions centred on managing participant language,[1810] tone,[1811] and interactions[1812] to ensure they remain respectful.[1813] Two lawyers expressed this includes managing and reigning in inappropriate and 'extremely combative'[1814] behaviour and controlling 'big personalities and banging heads', particularly where lawyers cannot 'control' unreasonable clients or when 'egos' are obstructing settlement.[1815]

Some described the mediator's role as including facilitating disputant understanding. Descriptions encompassed assisting disputants understand the issues 'on both sides',[1816] and consider different 'perspectives'[1817] and belief systems,[1818] to better understand each other's position[1819] including their strengths and weaknesses.[1820] For example, by asking probing questions and reality testing

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1799 Mediator 1.
1800 Lawyer 3; Mediator 11; Mediator 14.
1801 Mediator 1; Mediator 11; Mediator 13.
1802 Magistrate 5; Mediator 16.
1803 *Practice Standards* (n 222) ss 4.1, 7.5. See also Chapter VI at 185.
1804 See above Chapter II at 74.
1805 Mediator 13. See above Chapter IV at 116. But see below Chapter VI at 182–3 and 192.
1806 See above Chapter II at 42.
1807 Lawyer 3.
1808 See below Chapter VI at 182.
1809 See below Chapter VI at 185 and 192. This reinforces my recommendation for future research: see below Chapter VII and VIII.
1810 Mediator 4.
1811 Mediator 2; Mediator 5.
1812 Magistrate 4; Lawyer 7.
1813 Magistrate 5; Mediator 2; Mediator 5; Mediator 8; Mediator 16.
1814 Lawyer 3.
1815 Lawyer 5 (Bar 3).
1816 Mediator 9.
1817 Lawyer 4 (Bar 2); Mediator 2; Mediator 16.
1818 Magistrate 4.
1819 Mediator 2.
1820 Lawyer 3; Mediator 2.

positions, especially where evidentiary concerns are raised by opposing camps,[1821] and respectfully having lawyers re-think their approach or advice, without directly challenging them.[1822]

A minority described the mediator's role includes assisting disputants to identify 'common ground'[1823] and guide them from their entrenched positions[1824] to that 'common ground'.[1825] One magistrate stated the mediator's role includes assisting disputants 'find the nexus' they have been unable to find between themselves and suggested that in most actions, despite it feeling impossible at the outset, there is a 'sweet spot' where disputants are prepared to compromise.[1826] In short, assisting disputants shift from the 'litigation mindset' to the 'mediation mindset'.[1827]

These findings are consistent with findings in the previous Chapter, where some Stakeholders had the convergent view that successful mediation enables disputants to communicate and a minority reported mediation's secondary purpose is to provide disputants the opportunity to gain a better understanding of disputed issues and each other's position.[1828]

(ii) Identification and Exploration of Interests, Issues, and Underlying Needs

Many Stakeholders described this function. Descriptions included assisting disputants to identify the 'real'[1829] or 'actual' issues'[1830] in dispute[1831] and 'tease out' the problems and underlying causes.[1832] This is consistent with the description by two magistrates and two mediators that two parts exist in all actions: the 'legal' and the 'other' dispute.[1833]

Others centred on assisting disputants identify and explore their underlying concerns, needs, and interests,[1834] their 'true' positions and feelings,[1835] and clarify the issues.[1836] Two mediators described their role involves keeping disputants future-focussed after the issues have been sufficiently explored, rather re-hashing the past.[1837]

These findings are consistent with earlier findings that most magistrates and a minority of lawyers and mediators reported that a purpose of mediation is to assist disputants identify and articulate underlying needs and interests.[1838]

1821 Lawyer 5 (Bar 3).
1822 Lawyer 1.
1823 Lawyer 5 (Bar 3); Lawyer 6. See above Chapter II at 75.
1824 Magistrate 4.
1825 Mediator 8; Mediator 15.
1826 Magistrate 4.
1827 Mediator 4.
1828 See above Chapter IV at 121.
1829 Mediator 1; Mediator 7; Mediator 13; Mediator 15.
1830 Mediator 2.
1831 Lawyer 1; Lawyer 3; Lawyer 5 (Bar 3); Mediator 4; Mediator 5; Mediator 8; Mediator 9; Mediator 10; Mediator 11; Mediator 15; Mediator 16.
1832 Magistrate 1; Mediator 9. See below Chapter V at 156. See also Chapter IV at 119.
1833 See nn 1033, 1343, 1409, 1853, 2428 and 3432.
1834 Mediator 2; Mediator 10.
1835 Lawyer 3; Lawyer 7.
1836 Magistrate 5. See above Chapter III at 102, Chapter IV at 115 and Chapter VI at 186. See also Chapter VII at 209 and 213.
1837 Mediator 5; Mediator 6. See above Chapter II at 77. See also Chapter VI at 189.
1838 See above Chapter IV at 117.

(iii) Consideration of Alternatives

Some mediators described this function.[1839] For example, one described exploring with disputants in Private Session the impact of not settling, in terms of time and cost, reality testing and highlighting that legal issues are not always clear, and usually result in lengthy argument.[1840]

No magistrate or lawyer described consideration of alternatives. The inference to be drawn is that they do not distinguish this function from the next function.

(iv) Generation and Evaluation of Options

Many Stakeholders described this function. Descriptions included for mediators to assist disputants discuss possible solutions to their issues,[1841] 'see what people have to offer',[1842] and explore potential 'solutions'.[1843] Some descriptions centred on assisting disputants generate a range of possible options,[1844] by helping them 'think outside the square' to identify all potential settlement possibilities.[1845] Others centred on evaluating those options by reality testing all generated options.[1846]

(v) Negotiation

Some lawyers and mediators stated the mediator's role includes managing negotiations.[1847] Whilst no magistrate expressly described this as part of the mediator's role, the inference to be drawn is that they do not distinguish this function from the two other functions: facilitating communication or generation and evaluation of options.

(vi) Disputant Decision-Making, Not Making Decisions for Disputants

Some Stakeholder descriptions of the mediator's role included reference to facilitating disputant decision-making.[1848] Descriptions centred on mediators assisting disputants generate options to narrow the issues *themselves*[1849] and negotiate mutually acceptable outcomes,[1850] if that is what *they* want.[1851] One mediator expressed their role includes ensuring the 'right people' are in the room with authority to settle and that disputants have access to the requisite information and advice required to make informed decisions.[1852] These descriptions are consistent with findings that some mediators considered mediation's purpose is to determine whether actions are 'able to be' resolved.[1853]

Some mediators described their role as assisting disputants identify potential outcomes *themselves* rather than telling them what the outcome should be, unlike in conciliation,[1854] or that particular

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1839 Mediator 1; Mediator 5; Mediator 6; Mediator 8; Mediator 15.
1840 Mediator 7.
1841 Magistrate 5.
1842 Mediator 5.
1843 Magistrate 1; Lawyer 1.
1844 Lawyer 3; Mediator 1; Mediator 3; Mediator 8; Mediator 10; Mediator 12.
1845 Magistrate 4.
1846 Lawyer 5 (Bar 3); Mediator 1; Mediator 3; Mediator 7; Mediator 10.
1847 Lawyer 1; Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2); Mediator 3; Mediator 4; Mediator 6; Mediator 9; Mediator 10; Mediator 11; Mediator 12; Mediator 15.
1848 See above Chapter II at 50 and Chapter IV at 115.
1849 Mediator 1; Mediator 3; Mediator 7; Mediator 8; Mediator 9.
1850 Magistrate 3; Magistrate 4; Magistrate 5; Mediator 10; Mediator 12; Mediator 13; Mediator 15.
1851 Lawyer 1.
1852 Mediator 10. See also *Ethical Guidelines for Mediators* (n 254) rr 1, 3. See also Chapter VI at 176.
1853 See also the discussion of the 'legal' and the 'other' dispute in nn 1033, 1343, 1409, 1833, 2428 and 3432.
1854 Mediator 2.

settlement terms are in their best interests.[1855] One expressed their role is not to: 'settle at all costs';[1856] be bullish; 'manipulate' settlement; or put disputants in a position where they must make concessions from a legal point of view that their lawyers would likely advise them against.[1857] These are some of the reasons why this mediator 'never' excludes lawyers from the room, even if they are being 'difficult' or hindering negotiations.[1858]

These descriptions suggest the mediator's role is to support disputant decision-making thus respecting mediation's *self-determination* value[1859] and accord more closely with facilitative than settlement and advisory/evaluative mediation. These findings are consistent with earlier findings that some Stakeholder descriptions of mediation's purpose included reference to assisting disputant decision-making.[1860]

However, a minority of mediators reported experiencing a frequent gap between the expectation of some disputants and lawyers, on the one hand, and that of mediators, on the other, regarding the mediator's role in making decisions *for* disputants.

One reported participants occasionally attend expecting the mediator to agree with them and influence their opponent to agree to their position. They display surprise on being informed that the mediator's role is solely to facilitate the process, with disputants responsible for reaching mutually acceptable outcomes.[1861] Another reported disputants, particularly where unrepresented in Minor Claims,[1862] usually request advice and so informs them that their role is *solely* to facilitate the process and not to 'dictate or dominate' nor act as a conciliator.[1863]

Some reported disputants, particularly where unrepresented, occasionally attend expecting a 'mini-trial', and having to explain that mediation is not a trial, they are not a judge nor tasked with taking evidence, and cannot make decisions for them.[1864] This is consistent with case law acknowledging disputants occasionally expect mediation 'should proceed as if it were a Court proceeding, with the evidence fully canvassed, and opportunities to respond to the competing allegations'.[1865]

One opined that whilst magistrates at the first directions hearing inform disputants about what the process entails,[1866] despite it not being part of their role to prepare them for mediation,[1867] these brief discussions do not adequately set disputant expectations. This mediator reported having to continue reinforcing that they cannot make decisions for disputants, despite having explained this during the Opening,[1868] as they are routinely asked 'just tell us who is right and who is wrong'.[1869] Some mediators consistently reported this finding.[1870] This mediator also reported some disputants attend being insufficiently informed that mediators expect them to operate within a 'negotiation

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1855 Mediator 4.
1856 See also Chapter IV at 126.
1857 Mediator 4. See below Chapter VI at 151. Cf Mediator 14 who described they 'roll their sleeves up' to 'get the job done': see above Chapter V at 165.
1858 Mediator 4. See also Chapter VI at 185.
1859 See above Chapter II at 34.
1860 See above Chapter IV at 115.
1861 Mediator 9.
1862 See above Chapter III at 85–6.
1863 Mediator 16.
1864 Mediator 4; Mediator 6; Mediator 7.
1865 *Collins* (n 717).
1866 Mediator 4.
1867 Mediator 4; Mediator 5.
1868 See below Chapter VI at 184.
1869 Mediator 4.
1870 Mediator 1; Mediator 2; Mediator 7; Mediator 12; Mediator 13.

mindset', rather than a 'litigation mindset'. This mediator asserted that some of these mistaken disputant expectations could be attributed to the Court's lack of Pre-Mediation procedure.[1871]

Another reported being continually faced by consistent misunderstandings, expectations, and preferences, from some lawyers that mediators will comment upon the merits of disputant positions, tell them 'who is right and who is wrong', and propose settlement terms:

> In other words, an evaluative process – that's not mediation, it's arbitration. That's become apparent when [during the Opening] I say 'I will not provide advice and you are to seek advice from your lawyers,' many people are taken by surprise and say 'aren't you the independent umpire here?' 'No, I'm here to help you reach a resolution of your issues through the options that you generate and your lawyers are here to advise you about those things.'[1872]

However, this is a curious finding given this was one of the two mediators who expressed undertaking conciliation with unrepresented disputants, despite stating their practice falls short of being 'evaluative'.[1873]

These findings are vivid examples of expectation gaps. They suggest significant gaps exist between those mediators who describe their role in 'purely' or largely facilitative terms, on the one hand, and some disputants and lawyers who expect mediators to have an advisory/evaluative – and perhaps quasi-determinative – role or use advisory/evaluative techniques, on the other. This expectation gap will become more apparent in the next part of the Chapter when exploring Stakeholder views regarding content interventions. Consistent with the inference drawn in the previous part of the Chapter,[1874] some disputants and lawyers understand, expect, and prefer mediation to encompass advisory/evaluative, rather than purely facilitative, practice as prescribed by the rules-based framework.

(c) 'Other' Mediator Roles and Functions

Some Stakeholders (predominantly lawyers, an outlier amongst the magistrates and amongst the mediators) described three 'other' mediator roles, which extend beyond the six mediator functions. Their descriptions accord closely with settlement and advisory/evaluative mediation, blur the facilitative-advisory distinction,[1875] and contradict the definition of mediation in the *Rules*.[1876] They are consistent with literature indicating settlement and advisory/evaluative practices are common in commercial disputes.[1877]

(i) Identification of Weaknesses, Litigation Risks and Likely Costs with or for Disputants?

Some lawyers described part of the mediator's role is to assist *disputants* to identify weaknesses in their positions and litigation risks. Conversely, others described the mediator's role as one in which they identify these *for* disputants.

The descriptions by the first group centred on probing and reality testing disputants about the extent to which they have considered 'risks' including the weight to be placed on evidence, what would happen if particular evidence is not accepted, and potential credibility findings at trial,[1878] without

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1871 Mediator 4. See below Chapter VI at 176. See also Chapter VII, recommendation 6.
1872 Mediator 1.
1873 See above Chapter V at 135. See below Chapter V at 164.
1874 See above Chapter V at Part A.
1875 See above Chapter II at 35 and 61.
1876 *Rules* (n 917) r 2 (definition of 'mediation'). See above Chapter III at 95.
1877 Boulle, *Mediation: Principles, Process, Practice* (n 71) 44–5.
1878 Lawyer 7.

providing legal advice.[1879] These views suggest some lawyers understand, expect, and experience, the content of mediations to focus on narrowly defined legal problems, reflective of one of the five characteristics that feature in court-connected mediation or are less prevalent in non-court-connected contexts.[1880]

The descriptions by the second group centred on mediators proffering 'an independent voice' to disputants about the strengths and weaknesses of their positions, the litigation risks and potential trial costs,[1881] and mediators, particularly experienced lawyer- or barrister-mediators, predicting how the action will likely be decided by the presiding magistrate.[1882]

Another stated that, unlike in non-court-connected contexts, mediators must adhere to the Court Rules and are bound, as officers of the Court, to 'delicately raise' concerns, whilst deferring to lawyers to provide legal advice.[1883] This is a curious finding for two reasons. First, being an officer of the Court[1884] is a further factor that differentiates mediation in the Court from mediations outside the court context. Secondly, this view sits uneasily with the mediator's 'purely' facilitative role, as specified in the rules-based framework.[1885] Furthermore, this lawyer's expressed preference for evaluative subject-matter experts to make proposals[1886] and settle actions *for* the lawyers,[1887] blurs the facilitative-advisory and conciliation-mediation distinctions. This reinforces the inference that some lawyers understand and expect mediation to encompass advisory/evaluative practices or may place little value upon the conciliation-mediation distinction.[1888]

Similarly, a magistrate stated the mediator's role includes to have 'frank conversations' with disputants in Private Sessions to 'point out' matters or risks that may be 'underestimated' or inadequately considered, such as weaknesses in their positions, and to emphasise how 'terrible' trial is by reminding them of the economic and non-economic costs that will be incurred.[1889]

These findings indicate there is a relationship between expectations of the mediator's role and expectations of the use and purposes of Private Sessions, which will become more apparent in the next Chapter.[1890]

(ii) To Obtain Settlement for Disputants?

Unlike most descriptions by magistrates and lawyers that centre on disputant decision-making,[1891] some lawyers described the mediator's role as being to obtain settlement *for* disputants. Their descriptions included facilitating agreements[1892] to efficiently end litigation[1893] by encouraging concessions[1894] and actively guiding disputants to 'nut out a deal' by 'butting heads together'.[1895]

1879 Lawyer 4 (Bar 2).
1880 See above Chapter II at 41.
1881 Lawyer 2 (Bar 1).
1882 Lawyer 7.
1883 Lawyer 6.
1884 See, eg, Spigelman (n 75) 20; Redfern, 'Mediation and the Legal Profession' (n 185).
1885 See above Chapter III at 95.
1886 See below Chapter V at 159–61.
1887 See above Chapter V at 139.
1888 See above Chapter V at 139 and 149. See below Chapter 5 at 156, 160, 162, 167–8.
1889 Magistrate 4. Cf Magistrate 3, above, who suggested mediation is not concerned with the merits of a dispute.
1890 See below Chapter VI at 194.
1891 See above Chapter V at 147.
1892 Lawyer 4 (Bar 2).
1893 Lawyer 2 (Bar 1); Lawyer 6.
1894 Lawyer 5 (Bar 3).
1895 Lawyer 2 (Bar 1). This is concisent with the findings that most lawyers prefer a more 'interventionist' and 'directive' approach: see below Chapter V at 163.

These descriptions extend further than those by most mediators who described their role as facilitating disputant decision-making,[1896] particularly one who reported not pressuring disputants to make concessions.[1897] These findings are consistent with earlier findings that no lawyers expressed mediation's purpose is to assist disputants make decisions *themselves*.[1898] Consistent with the inference drawn in the previous part of the Chapter,[1899] these findings may be explained by the majority view that mediation's primary *purpose* is to achieve effective and efficient settlement.[1900]

An outlier amongst the mediators emphasised their role involves 'rolling up their sleeves', persuading disputants to stop 'wasting good money after bad', particularly in lower quantum disputes, and assist lawyers 'get the job done' for their clients.[1901] This includes doing the 'heavy lifting' *for* lawyers by having a 'heavy word' with disputants in Private Session about the time and cost consequences of not settling together with the trial risks, to shift them from their entrenched positions and enable settlement. [1902] This mediator's description indicates they understand their role to be moderately interventionist and including directing/urging settlement, reflective of advisory/evaluative mediation.[1903] This finding was unsurprising given this was one of the three mediators whose descriptions suggest the use of quasi-advisory/evaluative techniques.[1904]

(iii) What about Substantive 'Justice'?

No Stakeholder described the mediator's role as administering substantive justice. This is consistent with findings that no Stakeholder reported mediation's purpose is to achieve 'justice' or *just* outcomes in accordance with the law.[1905]

One mediator fervently expressed not being charged with administering 'the Law' or 'capital J Justice' but with giving disputants 'a fair go with natural justice'.[1906] This description of natural justice corresponds less with 'the natural sense of what is right and wrong'[1907] (a 'fair outcome')[1908] but closely with one limb of the contemporary notion of procedural fairness; namely, to adopt 'fair procedures which are appropriate and adapted to the circumstances of the particular case'[1909] (a 'fair hearing'). This accords with descriptions by some Stakeholders that the mediator's role involves ensuring procedural fairness.[1910]

(iv) What about Transformative Practice?

No Stakeholder described the mediator's role involves assisting disputants maintain or repair relationships[1911] nor extending to transformative practice.[1912] This is despite one mediator using

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1896 See above Chapter V at 147.
1897 Mediator 4. See above Chapter V at 148.
1898 See above Chapter IV at 115.
1899 See above Chapter V at 141.
1900 See above Chapter IV at 110–13.
1901 Mediator 14.
1902 See above Chapter VI at 190. Cf Magistrate 1 who reported that mediators ought assist disputants with the transformation of their conflict interaction and the educative experience that flows from that: see Chapter IV at 123–4.
1903 See above Chapter II at 64–5.
1904 See above Chapter V at 135–6 and 141.
1905 See above Chapter IV at 124.
1906 Mediator 6.
1907 *Vionet v Barrett* (1885) 55 LJQB 39, [41] (Lord Esher).
1908 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160 [25].
1909 *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).
1910 See above Chapter V at 143.
1911 See above Chapter II at 51.
1912 See the discussion of transformative mediation in Chapter II at 66.

skills and techniques from transformative and narrative models during the Joint Session[1913] and an outlier who reported mediation's secondary purpose is to assist disputants develop conflict management skills.[1914]

One mediator suggested the mediator's role in the Court centres on obtaining settlement rather than assisting disputants experience *empowerment* and *recognition* shifts,[1915] consistent with their suggestion in the previous Chapter that it is quite unlikely that *empowerment* and *recognition* are the primary purpose for mediating actions.[1916] This view coincides with the majority view that mediation's primary purpose is settlement.[1917]

These findings reinforce the notion that Stakeholders do not expect mediation to involve transformative practices.[1918] This is consistent with the finding that the rules-based framework does not state that mediators are tasked with assisting disputants maintain or repair relationships, address interpersonal/intrapersonal conflicts, or improve conflict management skills.[1919] This also bolsters my contention that the Court is tasked with settling 'actions' and not resolving purely interpersonal/intrapersonal conflict.[1920]

2 *Summary of Key Findings*

A divergence in understandings, expectations, and experiences exist between two Stakeholder camps. Descriptions of the mediator's role by the first camp, particularly most of the mediators, centre on the six mediator functions,[1921] reflective of facilitative mediation.[1922] These findings initially suggest most Stakeholders understand and expect mediators to engage in largely facilitative practice, as required by the rules-based framework.[1923]

However, some descriptions by the second camp of 'other' mediator roles, predominantly the lawyers, extend beyond the six mediator functions, suggesting they understand and expect mediators to depart from 'purely' facilitative practice and have an advisory or quasi-advisory role regarding content or use quasi-advisory/evaluative techniques. Their descriptions correspond closer with the definition of conciliation than mediation.[1924] This may be explained by the lawyer preferences for practices that reflect advisory/evaluative mediation.[1925] Their descriptions also suggest they place less importance on the mediator's role in facilitating mediation's *self-determination* value,[1926] as promoted in the NMAS,[1927] and prioritise mediators obtain settlement *for* disputants. This differs from most mediators who described their role as being to facilitate disputant decision-making so that disputants *themselves* can make their own decisions.[1928] This is consistent with the gap identified in the previous Chapter.[1929]

1913 Mediator 3. See above Chapter V at 124.
1914 See above Chapter IV at 123.
1915 See above Chapter II at 52.
1916 Mediator 15. See above Chapter IV at 124.
1917 See above Chapter IV at 110–13.
1918 See above Chapter IV at 124.
1919 See above Chapter III at 100.
1920 Ibid.
1921 See above Chapter II at 32 and 48.
1922 See above Chapter II at 66.
1923 See above Chapter III at 95.
1924 *Rules* (n 917) r 2 (definition of 'conciliation'). See above Chapter III at 100.
1925 See below Chapter V at 163.
1926 See above Chapter II at 34.
1927 *Practice Standards* (n 222) pt 1, Introduction, 2, ss 2.1, 2.2(f).
1928 See above Chapter V at 147.
1929 See above Chapter IV at 117.

These findings suggest a gap exists between most mediators who report adhering to purely facilitative mediation and some Stakeholders who understand and expect them to have an advisory or quasi-advisory role or use advisory/evaluative techniques. This is reinforced by the vivid expectation gaps reported between the purists in contrast to disputants and lawyers who expect mediators to have an advisory/evaluative role or use advisory/evaluative techniques. This gap may be explained by the Court's lack of Pre-Mediation procedure.[1930]

These findings show that a gap exists between the mediator's 'purely facilitative' role, as envisaged by NADRAC[1931] and reflected in the NMAS,[1932] and the occurrence of advisory/evaluative mediation, suggesting the development of practice beyond facilitative mediation theory.[1933] This gap will become more apparent in the next part of the Chapter when I explore Stakeholder descriptions of 'appropriate' levels of mediator intervention.[1934] These findings further indicate that gaps exist between facilitative mediation theory[1935] and the rules-based framework[1936] regarding the mediator's role, with what some Stakeholders expect to occur in practice.

C *Mediator's Intervention*

I now explore mediator intervention, which provides further insight and reinforces the relationship between the mediator's role and functions and Stakeholder understandings, expectations, and experiences of 'appropriate' levels of mediator intervention.

I identify two key findings.

First, Stakeholders have different understandings and expectations about the 'appropriate' levels of mediator intervention.

Secondly, gaps exist between what some Stakeholders expect regarding 'appropriate' levels of mediator intervention as opposed to what others report experiencing.

1 *Mixed Levels of 'Appropriate' Mediator Intervention*

As discussed in the literature review, the four practice models illustrate differences between many variables and assumptions regarding the mediator's role, functions, and 'appropriate' levels of intervention in the process and/or the content of disputes.[1937] Most embrace the process-content dichotomy,[1938] which features in the NMAS,[1939] and depict mediator interventions along a spectrum between the facilitative-advisory distinction[1940] or facilitative-evaluative dichotomy.[1941]

Despite the conciliation-mediation[1942] or facilitative-advisory distinctions[1943] in the rules-based framework, the findings in the previous two parts of the Chapter denote variation and mixed

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1930 See below Chapter VI at 176. See also Chapter VII, recommendation 6.
1931 See above Chapter II at 29 and 31.
1932 Unless utilising a blended process subject to specific requirements: see below Chapter II at 33 and 63. See also Chapter VII, recommendation 4.
1933 See above Chapter II at 70.
1934 See below Chapter V at Part C.
1935 See above Chapter II at 50–2 and 66.
1936 See above Chapter III at Part B.
1937 See above Chapter II at 63.
1938 See above Chapter II at 60.
1939 See above Chapter II at 28 and 31.
1940 See above Chapter II 35 and 61.
1941 The NMAS accommodates advisory/evaluative mediation or conciliation, subject to specific requirements: see above Chapter II at 33 and 63.
1942 See above Chapter II at 35.

practices between the purists and the pragmatists. This suggests mediation is not purely facilitative in *all* actions as participants may experience 'conciliation' or quasi-advisory/evaluative practices.

(a) 'It Depends'

Some Stakeholders initially answered the question about what constitutes an 'appropriate' level of mediator intervention by stating it 'depends' on several different factors. Descriptions included the: nature of the dispute;[1944] particular disputants[1945] and whether they are legally represented;[1946] dynamics of the mediation;[1947] level of dialogue occurring between camps;[1948] disputant behaviour, particularly the existence of power imbalances;[1949] progress being made towards settlement and what is required for the mediator to 'bridge the gap' between them.[1950]

This view that 'it depends' implies that varying levels of intervention may be appropriate in different circumstances, acknowledging the difficulty in suggesting that 'one size fits all' within the Court.[1951] These descriptions suggest Stakeholders both understand and expect mediators to exercise judgment in assessing these factors and exercise appropriate discretion. It also assumes there are no specific rules guiding *practice* in the Court, despite the rules-based framework maintaining the conciliation-mediation[1952] or facilitative-advisory distinctions.[1953] However, these descriptions alone offer little insight into whether Stakeholders have convergent or divergent views about whether process, content or *both* interventions are 'appropriate'.

(b) Process-Content Dichotomy

Most mediators made an express distinction between process and content interventions, which may be reflective of both their training and experience. It may also reflect their understanding and expectations of purely facilitative practice[1954] and the conciliation-mediation distinction within the rules-based framework.[1955] However, some blurred the process-content dichotomy when describing the interventions they considered 'appropriate'.[1956]

Unlike the mediators who are familiar with the process-content dichotomy,[1957] only one magistrate[1958] and some lawyers[1959] made an express distinction between process and content. Most magistrates and lawyers did not specify whether their descriptions of 'appropriate' interventions related to process *or* content or encompassed *both*. Accordingly, I have unpacked their descriptions to gauge whether they related predominantly to process, content, or both.

1943 See above Chapter II at 35 and 61.
1944 Magistrate 3; Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 6; Mediator 1; Mediator 6; Mediator 8; Mediator 14.
1945 Magistrate 4; Lawyer 5 (Bar 3); Mediator 8; Mediator 1; Mediator 14.
1946 Magistrate 4; Lawyer 5 (Bar 3); Mediator 1.
1947 Mediator 6; Mediator 8; Mediator 11; Mediator 14. However, Mediator 5 and Mediator 13 referred to process interventions *only*.
1948 Mediator 13.
1949 Lawyer 5 (Bar 3).
1950 Lawyer 6.
1951 See below Chapter VII at 218–9.
1952 See above Chapter III at 99.
1953 See above Chapter II at 35 and 61.
1954 See above Chapter V at 133.
1955 See above Chapter III at 99.
1956 See below Chapter V at 158.
1957 See above Chapter II at 60.
1958 Magistrate 1.
1959 Lawyer 1; Lawyer 5 (Bar 3); Lawyer 7.

Most descriptions of 'appropriate' interventions by magistrates and lawyers align closer with content than process. This finding suggests magistrates and lawyers are less familiar with the process-content dichotomy, consistent with them having less mediation education and training than mediators. This accords with the inference that they, particularly lawyers, understand and expect mediation to encompass advisory/evaluative techniques.[1960] It also accords with the inference that they consider the facilitative-advisory/evaluative dichotomy, process-content dichotomy, and conciliation-mediation distinction unimportant,[1961] and instead prioritise obtaining settlement *for* disputants.[1962]

Stakeholder descriptions of process and content interventions span the facilitative-advisory distinction[1963] and facilitative-evaluative dichotomy.[1964]

A divergence in understandings, expectations, and experiences exist between four Stakeholder camps. The first camp, comprising one magistrate, one lawyer and most mediators, reported mediators are restricted to intervening in the process *only* and not in the content. The descriptions by the second camp, comprising most magistrates and lawyers, indicate they understand and expect mediator interventions to *also* extend to content and involve advisory or quasi-advisory techniques, notwithstanding the earlier finding that most magistrates expected mediation is a largely facilitative practice.[1965] Similarly, the description by some mediators suggests they intervene in the content, directly or indirectly, and involve advisory or quasi-advisory techniques. The description by the third camp, comprising some magistrates and most lawyers, indicate they understand and expect interventions to involve evaluation or quasi-evaluative techniques. Similarly, the descriptions by a minority of mediators suggest they are actively involved with the content and their descriptions appear evaluative or quasi-evaluative in nature. The fourth camp, comprising one lawyer and two mediators, indicate they understand and expect 'appropriate' levels of intervention in process, content, or both depend upon disputant and lawyer choice.[1966]

I have placed Stakeholder descriptions that correspond most closely to process *or* content interventions below, despite overlap between many descriptions. I explore those descriptions that initially centred upon process interventions *only*,[1967] reflective of facilitative mediation.[1968] I then explore those descriptions of interventions that *also* extend to content (whether expressly advisory/evaluative or by implication), extending beyond the scope of facilitative mediation.

(c) Process Interventions Only

One magistrate, one lawyer and most mediators shared the convergent view that mediators are restricted *solely* to process interventions. These purists maintained the exclusivist view that mediation is purely facilitative and mediators do not provide direction, assessments, or proposals.[1969] Their descriptions of 'appropriate' intervention reflect Alexander's description of 'process' interventions comprising two elements: mediation *procedures* and mediation dynamics.[1970]

1960 See above Chapter V at 149–153. See below Chapter V at 158– 167 and Chapter VI at 187 and 199 and Chapter VII at 217 and 235.
1961 See above Chapter V at 139.
1962 See above Chapter IV at 111.
1963 See above Chapter II 35 and 61.
1964 See above Chapter II at 61.
1965 See aboveChapter V at 132–3.
1966 See above Chapter I at 11. See below Chapter V at 165 and 167 and Chapter VII at 226, 229–30 and 234.
1967 See above Chapter II at 32.
1968 See above Chapter II at 66.
1969 Ibid.
1970 See above Chapter II at 60.

One magistrate maintained the theoretical authenticity of mediation as 'pure facilitation', stating mediators *only* manage the process and their role is restricted to assisting disputants 'tease out' the problems without 'telling' them 'the answer'.[1971] Unlike conciliators, mediators do not advise upon content or outcomes, which coincides with this magistrate's expectation that mediators adhere to a 'strictly facilitative mediation', as required by the rules-based framework.[1972]

Some other magistrates initially provided brief descriptions of process interventions and expected that these related to 'managing' mediation.[1973] However, many of their descriptions reveal they do not share this purist view, as they expect mediator interventions are not restricted solely to process but *also* to content.[1974]

The lawyer within this group stated it is not the mediator's role to intervene in the 'merits' or make 'proposals', as they are restricted to guiding disputants through 'a thought process', not to think *for* them.[1975] Whilst acknowledging some mediators express views regarding the strength or weaknesses of disputant positions, upon quantum, what disputants should do, or what they should offer, this lawyer emphasised these practises are 'highly inappropriate' adding, mediators risk offering incomplete and erroneous advice.[1976] This description by the outlier amongst the lawyers is inconsistent with literature that suggests lawyers prefer advisory/evaluative practices, but rather accords more closely with purely facilitative mediation.[1977]

Most mediators reported that their facilitative role restricts them to *solely* intervening in the process.[1978] Descriptions of appropriate process interventions included keeping participants and the process 'on track',[1979] 'moving forward', productive and constructive[1980] and separating participants for Private Sessions.[1981] One reported reasonable involvement in the process[1982] and another suggested being 'quite interventionist' in the process to show participants the mediator is 'in control'.[1983]

These views accord with some lawyer reports that mediators in the Court are actively involved,[1984] and have a 'reasonable degree of control over the process' as disputants can be emotionally reactive, particularly where unrepresented.[1985] Another reported mediators usually 'take charge' of the process, but remaining grateful to those who invite lawyer input regarding *procedure*.[1986] This lawyer reported occasionally asking mediators what their opinion would be on certain disputed issues if they were the presiding magistrate, despite 'always' being informed by mediators that they cannot express views.[1987] This experience matches most mediator reports that they *only* engage in

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1971 Magistrate 1.
1972 Magistrate 1. See above Chapter III at 95. See above Chapter V at 131.
1973 Magistrate 2; Magistrate 3; Magistrate 4; Magistrate 5.
1974 See below Chapter V at 158.
1975 Lawyer 5 (Bar 3).
1976 Lawyer 5 (Bar 3). See also Chapter II at 61.
1977 See above Chapter II at 66. See below Chapter V at 163.
1978 Mediator 2; Mediator 3; Mediator 4; Mediator 5; Mediator 7; Mediator 10; Mediator 11; Mediator 13; Mediator 15; Mediator 16.
1979 Mediator 4; Mediator 5; Mediator 7.
1980 Mediator 10.
1981 Mediator 5; Mediator 7; Mediator 8.
1982 Mediator 2.
1983 Mediator 7.
1984 Lawyer 2 (Bar 1).
1985 Lawyer 4 (Bar 2).
1986 Lawyer 7. See below Chapter VI at 184 and 186.
1987 Lawyer 7.

process, not content, interventions and suggests they engage in facilitative, rather than advisory/evaluative mediation, despite lawyer preferences for mediators to express views.[1988]

Most mediators described content interventions as either outside their role or 'inappropriate',[1989] with descriptions matching those of the mediator's facilitative role in the previous part of the Chapter.[1990] One in particular objected to the label 'intervention' and suggested that this mistakenly implies that mediators will intervene in the content by indicating to disputants 'who is right and who is wrong', which falls outside their purely facilitative role.[1991]

Some expressed they do not provide opinions or advice regarding content nor make proposals.[1992] These views are consistent with literature that suggests facilitative mediators do not make assessments, suggestions, proposals, or advise upon content or outcomes.[1993] Of those mediators that did not express a view, as most described the mediator's role in facilitative terms and the mediator's level of intervention being restricted to process only, the inference to be drawn is that they too would have reported that they do not make proposals. Some also emphasised that mediators do not provide 'legal advice',[1994] or comment upon which disputant is 'right or wrong' or whether their case is 'strong or weak', which they considered inappropriate content interventions.[1995] However, two distinguished between the 'appropriate' provision of 'information' and the inappropriate provision of 'advice'.[1996]

Some descriptions are consistent with literature suggesting 'mediation' and 'conciliation' are two separate and distinct ADR processes.[1997] For example, two intimated that mediators are not permitted to be too 'hands on' by 'pushing' disputants to a position,[1998] or as 'directive' as the 'more conciliation-y and arbitration-y processes' existing outside the court context.[1999] Thus, they argue that mediators are not permitted to comment on the strengths or weaknesses of disputant positions or proffer views as to which disputant might be successful at trial.[2000] Another suggested that, unlike the 'aggressive Sir Laurence Street model of conciliation', which involves 'proactive' involvement with the disputed content and the provision of robust suggestions and advice, mediators in the Court are restricted to facilitating process *only*.[2001] This mediator stated mediators cannot be overly involved with the content. For example, they cannot comment upon issues they consider significant, proffer views on the strength or weaknesses of disputant positions, predict likely trial outcomes, or make settlement suggestions,[2002] to reduce any notion of using their knowledge to guide disputants in a particular direction, as unhappy disputants may later allege the mediator 'advised' them to go that way.[2003]

1988 See above Chapter II at 68.

1989 Mediator 3; Mediator 4; Mediator 5; Mediator 7; Mediator 9; Mediator 10; Mediator 11; Mediator 13; Mediator 15; Mediator 16.

1990 See above Chapter V at Part B.

1991 Mediator 2.

1992 Mediator 3; Mediator 5; Mediator 9; Mediator 10.

1993 See above Chapter II at 66.

1994 Mediator 5; Mediator 10; Mediator 11.

1995 Mediator 4; Mediator 7.

1996 Mediator 4 and Mediator 7. See below Chapter V at 162.

1997 See above Chapter II at 36.

1998 Mediator 8.

1999 Mediator 4.

2000 Mediator 4.

2001 Mediator 9. See above Chapter II at 32. Cf the three mediators who self-described 'conciliating' or whose descriptions suggest the use of quasi-advisory or quasi-evaluative techniques: see above Chapter V at 135–6 and below at 164.

2002 Mediator 9. Cf Chapter II at 62.

2003 Mediator 9. Cf this non-directive approach with the more 'interventionist' and 'directive' approach that most lawyers prefer: see below Chapter V at 163. See above Chapter II at 68–9.

These are some of the reasons why some emphasised mediators are not required to be subject-matter experts, but rather, experts in process facilitation.[2004] However, this view was not unanimous, with two mediators suggesting having subject-matter expertise as beneficial in framing questions and undertaking reality testing.[2005] Conversely, others suggested having subject-matter expertise can both help or hinder mediators.[2006] This lack of uniformity in views is consistent with debates within the literature concerning whether mediators must have subject-matter expertise in addition to being experts in process facilitation.[2007]

Consistent with the findings in the two previous parts of the Chapter,[2008] there is an expectation, understanding, and experience by some Stakeholders that mediators engage in purely facilitative mediation, as required by the rules-based framework.[2009] However, closer analysis of the descriptions of 'appropriate' interventions by most magistrates and a minority of mediators suggests blurring of the conciliation-mediation and facilitative-advisory distinctions.[2010]

(d) Content Interventions

The descriptions of 'appropriate' content interventions by most magistrates and lawyers, and some mediators, reflect Alexander's description of interventions involving the subject-matter and merits of disputes including the mediator providing 'information', advising/evaluating and suggesting options and proposing settlement terms.[2011] Such interventions are beyond the six mediator functions[2012] and accord closely with settlement and advisory/evaluative mediation.[2013]

Their descriptions also correspond closer with the definition of conciliation than mediation.[2014] They reveal an expectation, understanding, and experience by some Stakeholders, particularly lawyers, that interventions are not restricted solely to process but extend *also* to content. This reinforces the suggestion that some Stakeholders understand and expect mediators do not engage in purely facilitative mediation but also have an advisory/evaluative role or use quasi-advisory/evaluative techniques, which blur the conciliation-mediation distinction.[2015] Consistent with findings in the previous part of this Chapter, this exemplifies a gap between facilitative mediation theory and practice.[2016]

As discussed in the literature review, there is overlap between advisory and evaluative practices.[2017] Accordingly, I grouped them together as 'advisory/evaluative' mediation. However, the next two parts of the discussion show that some Stakeholders appear to differentiate between the provision of advice and evaluation, despite their overlap, which illustrates a spectrum of advisory/evaluative practices.

2004 Mediator 3; Mediator 4; Mediator 5; Mediator 6; Mediator 11; Mediator 13.
2005 Mediator 1; Mediator 12.
2006 Mediator 2; Mediator 8 and Mediator 5.
2007 See above Chapter II at 65–7.
2008 See above Chapter V at Part A and Part B.
2009 *Rules* (n 917) r 2. See above Chapter III at 95.
2010 See below Chapter V at 159–165.
2011 See above Chapter II 60.
2012 See above Chapter V at 144.
2013 See above Chapter II at 64–5.
2014 *Rules* (n 917) r 2. See above Chapter III at 100.
2015 See above Chapter III at 101.
2016 See above Chapter V at Part B.
2017 See above Chapter II at 63.

(i) Proposals, Opinions, 'Information': Advisory or Quasi-Advisory Interventions

Unlike the purists, who reported mediators do not provide proposals, most magistrates[2018] and lawyers[2019] described expecting and supporting the 'Mediator's Proposal'.[2020]

Two magistrates expect mediators assist disputants by suggesting possible outcomes[2021] or what they consider to be 'a reasonable style of settlement'.[2022] Another recommended mediators should make proposals because disputants are occasionally so entrenched in their positions that they need assistance to 'think outside the square',[2023] particularly when unrepresented or where non-monetary issues are at stake, though must be 'cautious' doing so in Joint Session.[2024] These descriptions indicate magistrates both understand and expect mediators to brainstorm settlement options *for* disputants, despite only one expressing mediators should not provide 'advice'.[2025]

Whilst most magistrates made no express reference to the term 'advice', some expected mediators to be reasonably 'interventionist', reinforcing, however, that the Court does not want disputants feeling 'pressured or bullied' into settlement.[2026] This view corresponds with the mediator who expressed their role is not to 'settle at all costs'[2027] and with a lawyer who dislikes it when mediators unduly pressure disputants to 'come to the table'.[2028] These views highlight tensions between satisfying *effectiveness* and *efficiency* objectives and satisfying *self-determination*, *non-adversarialism* and *responsiveness* values.[2029]

Two magistrates expected mediators to be 'reasonably forceful' in leading disputants towards settlement,[2030] given the time constraints,[2031] suggesting disputants occasionally need to be 'more directed' in contrast to a 'hands-off' or 'passive' facilitative mediation.[2032] For example, by providing 'direction'[2033] or 'information'[2034] about Court processes and likely outcomes if actions are not settled. On one view, the latter descriptions of 'direction' suggest the provision of 'legal information' regarding the subsequent procedural steps and what disputants may be required to do to prepare for trial, rather than the provision of 'advice' or 'opinion' regarding disputed content or outcomes.[2035] On another view, these descriptions, and the former description, reflect the 'more interventionist' roles and advisory/evaluative functions attributed to conciliators.[2036] Either way, they suggest these magistrates expect mediators engage in a more directive and 'hands-on' process indicative of conciliation than facilitative mediation.

2018 Magistrate 2; Magistrate 4; Magistrate 5. Cf Magistrate 1. See above Chapter V at 133 and 155.
2019 Lawyer 1; Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2); Lawyer 6; Lawyer 7. Cf Lawyer 5 (Bar 3).
2020 See above Chapter II at 64.
2021 Magistrate 5.
2022 Magistrate 2.
2023 See above Chapter V at 147.
2024 Magistrate 4.
2025 Magistrate 4.
2026 Magistrate 5. See also Chapter IV at 126.
2027 Mediator 4. See above Chapter V at 148.
2028 Lawyer 3. See below Chapter V at 159.
2029 See above Chapter II at 34–5 and 48 and Chapter IV at 113–15. See below Chapter V at 159 and Chapter VI at 170 and 204 and Chapter VII at 208 and Chapter VIII at 242.
2030 Magistrate 2.
2031 Magistrates 3. See also Lawyer 3; Lawyer 4 (Bar 2); Mediator 12. See nn 1008, 1412, 1671, 1739, 2270, 2303, 2439 and 2943. See also Appendix A: Qualitative Research Methodology.
2032 Magistrate 3. See above Chapter V at 137.
2033 Magistrate 3.
2034 Magistrate 5.
2035 See above Chapter II at 63.
2036 See above Chapter II at 36.

Two lawyers expressed that making 'proposals' is part of the mediator's role.[2037] This corresponds with the view by other lawyers that mediators should make settlement suggestions,[2038] express opinions on 'whether something would be workable from the other side's perspective based on what they've already been told',[2039] and bridge gaps between disputant positions by enquiring with them in Private Sessions whether they would endorse the mediator's recommendation.[2040] Others indicated that mediators can 'bring new ideas' and suggest settlement options that neither lawyers nor their clients have considered,[2041] because they are either 'too involved' in the dispute or have less experience than the mediator in settling actions.[2042]

However, only two lawyers, one of whom reported preferring mediators with subject-matter expertise,[2043] expressed that mediators must obtain the consent of lawyers in private before making proposals.[2044] This coincides with the NMAS requirements for blended processes[2045] and reflects the theme of lawyer control.[2046]

However, most lawyers expressed it is inappropriate and beyond the scope of their role for mediators to provide 'legal advice'.[2047] One stated that mediators cannot make suggestions or comments about the legality or enforceability of agreements[2048] and another acknowledged that mediators must be 'delicate' in making proposals to avoid providing legal advice.[2049] This is consistent with some mediator views.[2050]

These descriptions indicate most magistrates and lawyers understand, expect, and prefer mediators to make proposals, which accords closely with settlement and advisory/evaluative mediation.[2051] Making proposals, particularly regarding content, is beyond the scope of a purely facilitative role and blurs the facilitative-advisory[2052] and conciliation-mediation distinctions.[2053] Making content proposals also contradicts the definition of mediation in the *Rules*, which suggests disputants *themselves* develop options *with* the mediator's *assistance* rather than mediators developing options *for* them, particularly the prescription against mediators having an advisory role regarding content or outcome.[2054]

Most mediators reported utilising a facilitative model,[2055] that *only* process interventions are 'appropriate',[2056] and emphasised they do not provide opinions or advice regarding content nor make proposals.[2057] However, some of their descriptions suggest they, either directly or indirectly,

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2037 Lawyer 2 (Bar 1); Lawyer 7. See above Chapter V at 133 and 155.
2038 Lawyer 6.
2039 Lawyer 3.
2040 Lawyer 4 (Bar 2).
2041 Lawyer 7.
2042 Lawyer 2 (Bar 1).
2043 Lawyer 7. See also Lawyer 6 above at 138. These lawyers expressed a preference for subject-matter experts who would act beyond the scope of a purely facilitative role. See also Chapter VII at 219.
2044 Lawyer 1.
2045 See above Chapter II at 33 and 63.
2046 See above Chapter II at 42.
2047 Lawyer 3; Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 6.
2048 Lawyer 6.
2049 Lawyer 3.
2050 See above Chapter V at 157.
2051 See above Chapter II at 64–5.
2052 See above Chapter II at 35 and 61.
2053 See above Chapter II at 35.
2054 *Rules* (n 917) r 2 (definition of 'mediation'). See above Chapter III at 95.
2055 See above Chapter V at 133.
2056 See above Chapter V at 155.
2057 See above Chapter V 133 and 157.

intervene in the content, for example, by suggesting options and proposing settlement terms, which accords with settlement and advisory/evaluative practices.

Two mediators were most explicit in describing interventions that suggest direct involvement in content. One described emphasising to disputants that they do not give advice but may express a view for their consideration.[2058] Another described providing 'two or three options of what they should consider', if asked, but clarified that 'providing options' does not constitute 'advice' but merely a 'personal opinion'.[2059] Despite both mediators emphasising providing 'a view' or an 'opinion' does not constitute 'advice', their descriptions appear quasi-advisory in nature. Furthermore, despite the difficulty in distinguishing between 'opinion' and 'advice',[2060] making proposals goes beyond the scope of facilitative mediation.[2061] Their descriptions blur the conciliation-mediation distinction[2062] and the definition of mediation.[2063] These findings are unsurprising as they were provided by two of the three mediators who expressed undertaking conciliation or whose descriptions suggest the use of quasi-advisory/evaluative techniques.[2064]

One of the self-described conciliators expressed being 'very sensitive' in actions involving 'personal issues', familial relationships and 'matters of principle', to avoid further exacerbating the dispute and instead 'nursing' disputants to settlement.[2065] Conversely, this mediator is 'more strident' in commercial, contractual, building or leasing disputes and speaks 'stringently' regarding whether works conform to a building inspection report because 'you can't "half do" a contract'.[2066] Stridently exploring legal positions reflects advisory/evaluative mediation and reinforces that this mediator practises what they deem 'conciliation'.[2067]

Two other mediators were less explicit in describing interventions that also suggest direct involvement in the content. One stated if they hear a disputant during Private Sessions say something *they* consider might be useful, they comment on the merits of reporting this to the other side, though acknowledged the inherent 'danger' in excessively leading disputants towards settlement.[2068] Another expressed using Private Sessions to elicit offers and shares with disputants their view of what the action 'is worth' and what offer might get them 'across the line'.[2069] These descriptions extend beyond the mediator function of facilitating the generation and evaluation of options[2070] and suggest mediator appraisal, or at a minimum proposing settlement terms. They also suggest moderate levels of mediator influence on settlements, reflective of settlement and advisory/evaluative mediation.[2071] These findings also reinforce the proposition that variation and mixed practices exist, even amongst the purists, which can cause participants to experience quasi-advisory/evaluative practices.[2072]

Two other mediators were even less explicit in describing interventions that suggest indirect content involvement. They distinguished between the 'appropriate' provision of 'information' and the

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2058 Mediator 14.
2059 Mediator 6.
2060 See above Chapter II at 63 and Chapter V at 136.
2061 See above Chapter II at 66.
2062 See above Chapter II at 35.
2063 *Rules* (n 917) r 2 (definition of 'mediation'). See above Chapter III at 95.
2064 See above Chapter V at 135–6, 141, 151–4 and 158.
2065 Mediator 6.
2066 Mediator 6.
2067 See above Chapter V at 135.
2068 Mediator 8.
2069 Mediator 15.
2070 See above Chapter V at 147.
2071 Appendix G: Characteristics of the Four Mediation 'Models' by Reference to *Purpose*, *Practice* and *Procedure*.
2072 See above Chapter V at 135–6, 141, 151–4 and 158.

inappropriate provision of 'advice'. One expressed providing 'procedural information'[2073] about the Court process or legal 'information'[2074] about what might happen if the action does not settle, which they deemed appropriate. The latter, a lawyer-mediator, expressed that disputants, particularly first-timers in a legal dispute, occasionally ask for direction and information.[2075] This mediator described being amenable to using their legal knowledge to provide disputants legal 'information' about the Court process so they can undertake a cost-benefit analysis.[2076] This mediator stated providing disputants legal 'information' does not constitute 'giving advice'.

Though these latter descriptions of providing 'information' may not involve explicit or direct 'advice', providing information seems closer to advisory/evaluative practice than purely facilitative mediation.

The legitimate furnishing of 'information' and the illegitimate provision of 'advice' reflect the advice-versus-information debate,[2077] which become further complicated for lawyer-mediators as distinctions between 'legal information' and 'legal advice' are unclear in practice,[2078] which reinforces the proposition that variation and mixed practices exist in the Court.[2079] The discussion also reinforces the suggestion above that some Stakeholders understand and expect mediators not to engage in purely facilitative practice, as required by the rules-based framework, but also to have an advisory role or use quasi-advisory techniques.[2080]

(ii) Evaluative or Quasi-Evaluative Interventions

A convergence existed between one magistrate who expected and most lawyers who reported preferring evaluative intervention and a minority of mediators whose descriptions suggest the use of evaluative or quasi-evaluative techniques. Their descriptions extend beyond the scope of the definition of facilitative mediation[2081] and reflect the pragmatic acknowledgment that both facilitative and advisory/evaluative propensities exist in practice.[2082]

One magistrate expected mediators address the merits confidentially in Private Sessions, by commenting upon weaknesses in disputant positions or emphasising aspects of the action that are of greatest concern to the other disputants, especially where identified in Position Papers.[2083] This enables proper consideration of the merits and ensures disputants have made allowance for such concerns in their offers/counter-offers. However, this magistrate acknowledged mediators must be careful not to venture into an advice-giving role, which remains the responsibility of lawyers.[2084]

This magistrate's description suggests a distinction exists between 'appropriate' evaluative interventions, such as commenting upon the merits, and the 'inappropriate' provision of

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2073 Mediator 4.
2074 Mediator 7.
2075 Mediator 6. See above Chapter V at 135.
2076 Mediator 7.
2077 See above Chapter II at 63.
2078 Ibid.
2079 However, it is unclear from the above discussion the extent to which lawyer and non-lawyer mediators are providing disputants with legal information *or* advice, which reinforces my recommendation for future research: see below Chapter VII and VIII.
2080 See above Chapter V at 135–6, 141, 151–4 and 158.
2081 *Rules* (n 917) r 2. See above Chapter III at 95.
2082 See above Chapter II at 61.
2083 Magistrate 4. See also Stark, 'The Ethics of Mediation Evaluation' (n 504) 793. I explore the use of Position Papers and the like in Chapter VI at 178.
2084 Magistrate 4. See above Chapter V at 156 and 160–1. See below Chapter VI at 184.

'advice'.[2085] The suggestion that mediators have no advisory role reflects an understanding and expectation of facilitative mediation and appears to adhere to the rules-based framework.[2086] However, addressing the merits in Private Sessions such as by commenting upon weaknesses in disputant positions implies intervening in the content, which blurs the facilitative-evaluative dichotomy[2087] and is indicative of advisory/evaluative mediation. It also blurs the conciliation-mediation distinction, given the difficulties distinguishing between 'opinion', 'information' and 'advice'.[2088]

All lawyers, bar one,[2089] prefer 'active' and 'interventionist' mediators who intervene in and evaluate the content.[2090] For example, by having 'a hard word' to disputants about the merits of the dispute and 'how much they ought to wiggle on the numbers'.[2091] One lawyer stated 'I love it when a mediator tells each party in their private rooms that they're going to lose. It gets people thinking.'[2092] This view coincides with some case law where mediators in Private Session informed disputants that their cases were 'weak' and 'would not stand up at trial'.[2093]

One expressed the mediator's evaluative function is valuable and provided three examples of experiences of 'appropriate' evaluation.[2094] First, where mediators provide a view on the chances of settlement, based upon disputant positions, and comment on the likelihood of settlement offers being accepted or rejected. Secondly, where mediators test the lawyers' propositions, comment on litigation risks and costs, packaging them persuasively by saying "I'm sure your lawyer has told you these are the problems your case will have, these are the costs you are facing and what the consequences are if you don't succeed.'" Thirdly, maximising their independent role by acknowledging disputant concerns and 'feelings' about the dispute whilst simultaneously reinforcing that they must address 'the realities' of the situation, particularly where they appear unwilling to listen to their lawyer.

Many of these interventions, specifically mediators telling disputants they are likely or will 'lose', extend well beyond the scope of facilitative mediation. These findings coincide with lawyer preferences for practices that reflect advisory/evaluative mediation[2095] and are consistent with research suggesting lawyers prefer active intervention by 'case evaluators' who have 'courtroom experience', rather than solely negotiation facilitators.[2096]

However, whilst most lawyers reported experiencing, expecting, and preferring advisory/evaluative practices,[2097] one expressed a dislike for mediators who unduly pressure disputants to 'come to the table'.[2098] This lawyer reported an experience where a mediator 'forcefully' encouraged disputants to 'make some contribution' to enable them to simply 'wash their hands of it'. This experience was described as being 'at the extreme end of intervention' and that exerting such settlement pressure

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2085 This is view is largely consistent with the majority of lawyers who expressed it is inappropriate for mediators to provide 'legal advice': see above Chapter IV at 150 and Chapter V at 160.

2086 See above Chapter III at 95.

2087 See above Chapter II at 61.

2088 See above Chapter II at 63. This finding reinforces that there is no universal agreement regarding the scope of the facilitative-advisory/evaluative dichotomy or where facilitation ends and advice/evaluation begins: see above Chapter II at 62.

2089 Lawyer 5 (Bar 3). See above Chapter V at 156.

2090 Lawyer 1; Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2); Lawyer 6; Lawyer 7. See above Chapter V at 158.

2091 Lawyer 6.

2092 Lawyer 2 (Bar 1).

2093 *Collins* (n 717) [17] (Holmes CJ).

2094 Lawyer 3.

2095 See above Chapter II at 68.

2096 Gordon, 'Why Attorneys Support Mandatory Mediation' (n 324) 228.

2097 See above Chapter V at 139, 149, 156 and 158.

2098 Lawyer 3. See above Chapter V at 159.

upon disputants was 'unreasonable', adding 'sometimes you just have to stick your ground against the mediator'.[2099] This experience is consistent with views occasionally reported in the literature that mediators 'bully' clients into settlement.[2100] Such practices are inconsistent with the definition of mediation[2101] and conflict with mediation's *self-determination* value. This finding also highlights tensions between mediator control and lawyer dominance.[2102] Whilst this description suggests potential misalignment between Stakeholder expectations of mediator intervention and unreasonable settlement pressure,[2103] caution must be exercised in making generalisations from this outlier who reported experiencing such settlement pressure in the Court.[2104]

Three mediators self-described 'conciliating' or whose descriptions suggest the use of quasi-advisory/evaluative techniques.[2105] One described being 'fairly interventionist', 'highly proactive', getting their 'hands dirty' and 'really massaging' disputants, rather than being a 'passive facilitator' or a 'purely' facilitative mediator.[2106] This mediator reported informing participants that part of their role involves asking difficult and probing questions, playing devil's advocate and reality testing positions so that they can be 'realistic and practical' about the options or offers they advance for settlement.[2107]

This mediator reported using a 'more facilitative process' where disputants are legally represented and transitioning to a 'more interventionist role including providing information' where they are unrepresented.[2108] When undertaking facilitative mediation, this lawyer stated it is the role of lawyers, and not the mediator, to comment upon strengths or weaknesses of disputant positions during Private Sessions.[2109] Conversely, when undertaking 'conciliation', they stated it is appropriate to 'express a view' about the 'hurdles raised by the other side', the consequences of not settling and provide disputants 'information' regarding 'the issues' they have with their respective cases and what would need to be established to succeed at trial.[2110]

Similar to other mediators,[2111] this mediator considers providing 'information' to be appropriate and distinguishable from the inappropriate provision of 'advice'. However, the 'proactive' techniques described above appear quasi-advisory in nature and blurs the conciliation-mediation distinction,[2112] given the difficulties in distinguishing between 'opinion', 'information' and 'advice'.[2113] This mediator explained the way they mediate falls short of being an 'evaluative' process such as

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2099 Lawyer 3.

2100 See, eg, Howieson, 'What Is It About Me?' (n 38) 183; Tania Sourdin, 'Poor Quality Mediation: A Systemic Failure?' (Research Report, 15 February 2010) 11–12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553590>; Edna Sussman, 'User Preferences and Mediator Practices: Can They Be Reconciled Within the Parameters Set by Ethical Considerations' (2009) 3(1) *World Arbitration and Mediation Review* 1; Wolski, 'Mediator Settlement Strategies' (n 251) 251; Genn, 'The Central London County Court Pilot Mediation Scheme' (n 541) 151, 154. See above Chapter II at 69–70 and Chapter IV at 125–6.

2101 *Rules* (n 917) r 2. See above Chapter III at 95.

2102 See above Chapter II at 39 and 42–4 and 83 and Chapter IV at 122, 124 and 129. See below Chapter V at 142, 158 and 164. See below Chapter VI at 187, 192, 197 and 200–2 and Chapter VII at 210–11, 220, 227 and 232–4 and Chapter VIII at 240 and 248.

2103 See below Chapter VIII at 246.

2104 This reinforces my recommendation for future research: see below Chapter VII and Chapter VIII.

2105 See above Chapter V at 135–6.

2106 Mediator 1.

2107 Mediator 1.

2108 See above Chapter V at 135.

2109 Mediator 1.

2110 Mediator 1.

2111 See above Chapter V at 162.

2112 See above Chapter II at 35.

2113 See above Chapter II at 63. See above Chapter V at 161.

arbitration, which NADRAC categorised as a determinative process,[2114] or med-arb, which NADRAC categorised as an advisory and hybrid process.[2115] They stated not expressing a view on the merits nor provide a view of 'who's right and who's wrong', to avoid creating the perception of bias, 'taking sides' or assuming the lawyers' role.[2116] However, this view is contestable because though mediators may intend to solely 'facilitate', observers may interpret the impact of their behaviours or interventions as evaluative.[2117]

Another mediator was most explicit in describing interventions that extend beyond indirect evaluation, such as raising eyebrow to express doubt and stymie overconfidence.[2118] Unlike most mediators, this mediator made no reference to the conciliation-mediation distinction or the process-content dichotomy. This mediator utilises 'Street's technique' and stated 'a fair amount' of intervention' may be required 'to get the job done'.[2119] They commence mediation by intuitively choosing whether to converse collectively with lawyers, without their clients present, to clarify what the lawyers want from mediation. The lawyers are then invited to inform the mediator on what should happen during the process and let the mediator 'sort out the rest'.[2120] This is unsurprising given this lawyer-mediator's description of their role is to 'roll their sleeves up'.[2121] This description suggests the occurrence of settlement conferencing under the guise of 'mediation'.[2122]

In addition to providing 'a view',[2123] this mediator offers disputants two additional 'tools': the 'toss of the coin' and 'final offer arbitration', as 'merely floating the idea usually forces a settlement'.[2124] These two tools contradict the third element of mediation's *impartiality* value; namely, conducting the process in a *non-determinative* manner.[2125]

This mediator's descriptions correspond closely with advisory/evaluative mediation and hybrid med-arb processes. It is consistent with literature suggesting advisory/evaluative mediation is prevalent in the court-connected context.[2126] This mediator's descriptions extends well beyond the six mediator functions,[2127] which bolsters the contention that they do not engage in 'purely' facilitative practice, as required by the rules-based framework, but exercise quasi-advisory/evaluative functions. It further exemplifies the gap between facilitative mediation theory and practice.

(e) Disputant and Lawyer Choice

Unlike the majority of purists, who shared the convergent view that mediators are restricted *solely* to process interventions, and the pragmatists, who described expecting, and preferring content interventions, few Stakeholders explicitly stated it is ultimately for disputants and their lawyers to decide how interventionist they want mediators to be; whether in process *only* or in process *and* content.[2128]

2114 See above Chapter II at 28.
2115 See above Chapter II at 30.
2116 Mediator 1.
2117 See above Chapter II at 62.
2118 Ibid.
2119 Mediator 14.
2120 Mediator 14.
2121 See above Chapter V at 138 and 148.
2122 See above Chapter II at 70 and 81.
2123 See above Chapter V at 161.
2124 Mediator 14.
2125 See above Chapter II at 34.
2126 See above Chapter II at 67.
2127 See above Chapter II at 32 and 48.
2128 Lawyer 1; Mediator 1; Mediator 12.

One mediator took issue with using the labels 'appropriate' or 'inappropriate' to describe levels of mediator intervention and opined that these labels mistakenly suggest there is an objectively 'proper way' to mediate.[2129] This mediator emphasised 'nothing is appropriate or inappropriate' as long as the mediator acts in ways they communicated they would from the outset; deviating from that description would be 'inappropriate'.[2130] If disputants and their lawyers at the outset want the mediator to provide comments, that is 'appropriate' and if they call that process 'mediation', that too is 'appropriate'.[2131] This description coincides with this mediator's description of successful mediation[2132] and with this their proposition that practice models are not reflected in practice and what is most important is satisfying participant expectations of 'what they're getting in the box'.[2133]

This description assumes there are no specific rules guiding practice in the Court, despite the rules-based framework maintaining the conciliation-mediation[2134] or facilitative-advisory distinctions.[2135] This description coincides with literature that suggests introducing arbitrary classifications between mediation and conciliation, create confusion and inhibit the inherent flexibility of the process, encompassing disputant choice for both 'hands-off' and 'hands-on' approaches involving the provision of 'non-binding expressions of opinion or suggestions'.[2136]

These views, that 'appropriate' levels of intervention depend upon disputant – and lawyer[2137] – choice, denote 'fitting the forum to the fuss'[2138] to provide individualised services tailored to disputants and the notion of 'matching' actions and/or disputants with an appropriate ADR process to achieve a successful outcome.[2139] They also coincide with mediation's *responsiveness* value, denoting responsiveness to individual disputant needs, interests, and priorities in terms of flexibility and informality in process, content and outcomes.[2140]

The inference to be drawn from these findings is that mediators describe 'what they are going to do' at the commencement of mediation before 'doing' it, which is consistent with the description by one mediator who emphasised explaining to lawyers and disputants that they utilise a facilitative model, neither providing legal nor other opinions or advice.[2141] However, it is unclear when this explanation of facilitative practice might occur, whether before or at mediation's commencement.[2142]

The findings suggest the pragmatists place less value on the conciliation-mediation distinction in the rules-based framework,[2143] than the purists, and prioritise 'mediators' delivering whatever pre-agreed interventions disputants and lawyers want to meet participant expectations. They also reveal this minority are aware that an appetite exists amongst some disputants and lawyers for content

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2129 Mediator 12.
2130 Mediator 12.
2131 Mediator 12.
2132 See above Chapter IV at 126.
2133 See above Chapter V at 140–1. See also Chapter IV at 126 and Chapter VII at 213.
2134 See above Chapter III at 99.
2135 See above Chapter II at 35 and 61.
2136 See above Chapter II at 36.
2137 See above Chapter VII at 184.
2138 Sander and Goldberg (n 107) 53. See also Chapter VII at 218.
2139 Mack, *Criteria and Research* (n 80) ch 2.
2140 See above Chapter II at 35. See also the discussion of mediation's inherent flexibility reflecting the *responsiveness* value in Chapter VII at 214.
2141 Mediator 10. See above Chapter V at 140.
2142 This too highlights the importance of having Pre-Mediation in the Court: see also nn 2260, 2759, 2905 and below Chapter VII, recommendation 6.
2143 See above Chapter III at 99.

intervention,[2144] as seen in the two previous parts of the Chapter, which coincides closer with advisory/evaluative mediation, than facilitative mediation.[2145]

2 *Summary of Key Findings*

A divergence in understandings, expectations, and experiences exist between four camps. First, those that report mediators are restricted to intervening in the process *only* and not in the content. Secondly, those that expect mediator interventions to extend *also* to content, either directly or indirectly, and involve advisory or quasi-advisory techniques, despite some mediators reporting not providing 'advice' and others distinguishing between the 'appropriate' provision of 'information' and the inappropriate provision of 'advice'. Thirdly, those that expect interventions to involve evaluation or quasi-evaluative techniques, which is consistent with the minority of mediators who describe being actively involved with the content and their descriptions appear evaluative or quasi-evaluative in nature. Fourthly, those who expect the level of 'appropriate' interventions in process, content or both remain contingent on disputant and lawyer choice.

Consistent with findings in the previous parts of the Chapter,[2146] these findings reinforce the proposition that variation and mixed practices exist between the purists and the pragmatists.[2147] Evidently, mixed practices regarding interventions — whether purely facilitative process interventions *only* or advisory/evaluative content interventions — impact upon participant behaviours, mediation dynamics, outcomes reached and affect participant experiences.

These findings further reinforce the suggestion that mediation is not 'purely' facilitative in all actions as participants may experience 'conciliation' or quasi-advisory/evaluative practices, despite mediators deeming their practices neither advisory nor evaluative.[2148] These findings are consistent with literature suggesting lawyers prefer advisory/evaluative practices[2149] and *expect* mediators will utilise advisory/evaluative interventions to facilitate settlement.[2150] They are also consistent with findings in the previous part of the Chapter,[2151] where lawyer descriptions suggest they place less importance on mediators facilitating the process *only*,[2152] as promoted in the NMAS,[2153] and prioritise mediators obtain settlement *for* disputants through advisory/evaluative techniques.

These findings also further reinforce contentions that a gap exists between the mediator's 'purely facilitative' role, as envisaged by NADRAC,[2154] reflected in the NMAS,[2155] and required by the rules-based framework,[2156] and the occurrence of advisory/evaluative mediation, suggesting practice has grown beyond the theory.[2157]

D *Conclusion*

2144 See above Chapter VII at 218.
2145 See above Chapter II at 64–5.
2146 See above Chapter IV at 129, Chapter V at 131, 141 and 165.
2147 See above Chapter IV at 129, Chapter V at 131, 141 and 153. See below Chapter VII at 208 and Chapter VIII at 240 and 243.
2148 See above Chapter V at 141.
2149 See above Chapter II at 69.
2150 Ibid.
2151 See above Chapter V at Part C.
2152 See above Chapter V at 155.
2153 See above Chapter II at 32 and 60.
2154 See above Chapter II at 32.
2155 Ibid.
2156 See above Chapter III at 95.
2157 See above Chapter II at 70.

This Chapter has addressed the second research question by examining mediation *practice*. It has demonstrated gaps exist regarding various aspects of *practice*, though there is a relationship between Stakeholder understandings and expectations of practice models, the mediator's role, functions, and 'appropriate' levels of mediator intervention.

Gaps exist between each of the three sub-themes between the purists and the pragmatists. The purists describe mediation as a purely facilitative practice, with the mediator's predominantly facilitative role centred on facilitating the six mediator functions and intervening in process *only*. Conversely, the pragmatists understand, expect, and prefer advisory/evaluative mediation, describing 'other' mediator roles and functions that extend beyond the NMAS and encompassing advisory roles or advisory/evaluative techniques involving mediator intervention into content.

Consistent with the insights in the previous Chapter,[2158] the data suggests mediators are more attuned to their purely facilitative role and functions and most appear predominantly process-focussed, reflective of their understanding of facilitative mediation theory. Conversely, most magistrates and lawyers appear more outcome-focussed,[2159] with an emphasis on mediators achieving effective and efficient settlement, by intervening in the content and making settlement proposals, rather than facilitating a purely 'hands-off' process.[2160] These findings highlight tensions between the purists and pragmatists.[2161]

What most purists reported about the mediator's role and functions and 'appropriate' levels of intervention largely coincide with their descriptions of purely facilitative practice. Similarly, what most pragmatists reported, particularly about 'appropriate' levels of content intervention, largely coincide with their descriptions of advisory/evaluative mediation or quasi-advisory/evaluative techniques.

However, differences also exist between some purist mediators whose descriptions suggest the use of advisory or quasi-advisory techniques, thus blurring the facilitative-advisory and conciliation-mediation distinctions, despite deeming their practices non-advisory. Furthermore, gaps also exist between some pragmatist mediators whose descriptions suggest the use of evaluative or quasi-evaluative techniques, again blurring the facilitative-evaluative dichotomy and conciliation-mediation distinction.

The findings indicate some Stakeholder expectations regarding practice models, the mediator's role, functions, and 'appropriate' levels of intervention exist within a vacuum with divergent expectations not communicated between Stakeholder groups.[2162] These findings also suggest that gaps exist between the rules-based framework, which restrict mediators to purely facilitative practice,[2163] and what occurs in practice. They also reinforce my contention regarding the lack of *practice* predictability in the rules-based framework.[2164]

These findings are important for they illustrate diverse practices exist between pure facilitation and advice/evaluation. They also suggest variation and mixed practices, highlighting the potential for inconsistency, *practice* unpredictability and mixed approaches,[2165] which can impact upon

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2158 See above Chapter IV at 127 and 129.

2159 See above Chapter IV at 129.

2160 See above Chapter IV at 137, 138 and 159. See also Chapter VII, recommendation 4.

2161 See above Chapter II at 37 and 60–2. See above Chapter IV at 129, Chapter V at 131, 141, 153 and 165. See below Chapter VII at 208 and Chapter VIII at 240 and 243.

2162 See below Chapter VI at 204. See also Chapter VII, recommendation 10.

2163 See above Chapter II at 32.

2164 See above Chapter III at 101.

2165 See below Chapter VI at 170, 176, 180, 188, 201 and 204, Chapter VII at 205, 208, 213 and 220 and Chapter VIII at 238.

behaviours, mediator interventions, mediation dynamics, outcomes reached and effect participant experiences.

The findings in this Chapter reinforce that the three themes are interrelated and that *purpose* drives *practice* and *procedure*.[2166] This will become more evident in the next Chapter where I explore the third research question and examine mediation *procedure*.

[2166] See above Chapter I at 13, Chapter IV at 108 and 125–30. See below Chapter VI at 181, 192, 197 and 202, Chapter VII at 205 and Chapter VIII at 237 and 239.

CHAPTER VI: STAKEHOLDER PERSPECTIVES ON PROCEDURE

In the previous Chapter I addressed the second research question by examining mediation *practice*. It demonstrated gaps between Stakeholder understandings and expectations of practice models, the mediator's role, functions, and 'appropriate' levels of mediator intervention, indicative of variation and mixed practices. This highlighted tensions between the purists and the pragmatists.

In this Chapter I address the third and final research question by examining mediation *procedure*. I use this term to differentiate the stages of mediation[2167] from the four practice models,[2168] discussed in the previous Chapter. Part A explores how mediation is initiated through the referral process. Part B considers what occurs before mediation. Part C unpacks each stage of the procedure during mediation. Part D considers what occurs after mediation.

Consistent with the insights in the previous Chapter, gaps exist between Stakeholder understandings, expectations, and experiences at various stages of *procedure*. These findings also suggest that gaps exist between what mediation theory dictates 'should' occur at each stage[2169] as compared to what 'can' or 'does' occur in practice exist. These findings are important as they illustrate the potential for inconsistency, *procedural* unpredictability and mixed approaches. It can also impact upon practices, behaviours, mediator interventions, mediation dynamics, outcomes reached and affect participant experiences. It also highlights tensions between satisfying *effectiveness* and *efficiency* objectives and satisfying *self-determination*, *non-adversarialism* and *responsiveness* values.[2170]

A *Initiation and Referral Process*

In this part of the Chapter I explore two key findings concerning referral practices.

First, there was consensus amongst magistrates regarding the administrative steps the Court takes to arrange mediations[2171] and emphasised the first directions hearing as an opportunity to resolve actions or refer them to mediation.

Secondly, expectation gaps exist between some Stakeholders concerning whether referrals to mediation are predominantly party-driven, encouraged, or ordered by the Court.

1 *Referral 'On the Papers' or the First Directions Hearing 'Opportunity'*

Consistent with the exploration of the rules-based framework, actions are referred to mediation in two ways.[2172]

First, once a defence is filed, the action is referred to a magistrate to dispense it. In Minor Claims, after considering the file, the magistrate either directs the action be referred to mediation 'on the papers'[2173] or lists it for a directions hearing before the registrar or a magistrate, during which it can be referred to mediation.[2174] In the General Division, the registrar lists the action for a directions

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2167 See above Chapter II at 71–9.
2168 See above Chapter II at 63.
2169 See above Chapter II at Part D.
2170 See above Chapter II at 34–5 and 48 and Chapter IV at 113–15 and Chapter V at 159. See below Chapter VI at 170 and 204 and Chapter VII at 208 and Chapter VIII at 242.
2171 *Rules* (n 917) rr 72–5. See above Chapter III at 97.
2172 See above Chapter III at 89.
2173 Magistrate 4.
2174 *Rules* (n 917) rr 73(1)(2)(3).

hearing before a magistrate, who may thereafter refer it to mediation.[2175] These two processes introduce the possibility of variation between magistrates, which will become evident shortly, particularly in the absence of publicly accessible referral criteria or judicial guidelines for intake screening, diagnosis and referral of 'appropriate' actions to mediation.[2176]

There was no uniformity between magistrates regarding referrals of Minor Claims to the registrar or to a magistrate. Two magistrates list Minor Claims for a directions hearing before the registrar if the pleadings suggest the existence of a mere 'misunderstanding'[2177] or if it is apparent that a disputant wants to settle, such as where one has indicated they are prepared to compromise.[2178] One lists them for a directions hearing before a magistrate because it provides an opportunity for the Court to settle it.[2179] Another lists them before a magistrate as this enables the Court to inform disputants about the court process and the purpose of mediation, before encouraging them to mediate, which they stated likely increases the prospects of a 'more successful' mediation.[2180]

In contrast, most magistrates refer actions involving complex legal issues to a magistrate for case management with 'crash/bash claims' (property damage caused by motor vehicle accidents) for a directions hearing before a registrar, rather than directly to mediation.[2181] They explained disputants are usually legally represented in such actions, and, if lawyers cannot settle them cost-effectively (especially when insurers are involved as repeat players),[2182] they must be judicially determined.[2183] These views echo case law that suggests one factor in deciding not to order mediation against adamant objection is in actions involving sophisticated commercial litigants familiar with litigation, such as insurers.[2184]

The second way in which an action may be referred to mediation is when magistrates take turns managing the weekly 'Chambers List,' during which they oversee the first directions hearing for all new claims.[2185] Magistrates proffered five reasons for the importance of the 'first directions hearing opportunity'.[2186]

First, it may be the first occasion disputants have had the opportunity to converse and consider settlement options.[2187]

Secondly, it is the first occasion disputants appear before the Court and the first opportunity for magistrates to endeavour settling it before disputants expend significant time and costs and become acrimoniously entrenched in their positions.[2188] At the first directions hearing, mainly in Minor Claims, one magistrate explains to disputants: how the court process leads to trial; the expected time involved; the number of occasions they might need to re-attend for case management; the inconvenience and costs of pre-trial procedures; and risks of litigation including one party will be unsuccessful at trial.[2189] This magistrate then suggests that disputants exit the courtroom with a

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2175 Ibid r 74.

2176 See above Chapter III at 96. See also Chapter VII, recommendation 5.

2177 Magistrate 4.

2178 Magistrate 5.

2179 Magistrate 3. See below Chapter VI at 203.

2180 Magistrate 5.

2181 Magistrate 3; Magistrate 4; Magistrate 5.

2182 See above Chapter I at 16 and below Chapter VII at 231–3.

2183 Magistrate 3; Magistrate 4.

2184 See eg, *Morrow* (n 299) [45] (Barrett J), cited in *Yoseph* (n 257) [10] (Barrett J); *Singh* (n 402) [3] (Hamilton J); *Johnston* (n 399) [8] (Barrett J); *Azmin Firoz Daya* (n 402) [6] (Einstein J).

2185 Magistrate 1; Magistrate 2; Magistrate 3; Magistrate 4.

2186 Magistrate 3. I discuss the importance of the first directions hearing opportunity as part of my recommendations: see below Chapter VII at 214, 219, 222–4, 230 and 234.

2187 Magistrate 5.

2188 Magistrate 2; Magistrate 3.

2189 Magistrate 2. See also Chapter IV at 110.

tipstaff and find somewhere to talk to explore settlement. This magistrate described that this acts as an 'informal' and 'limited mediation' conducted by the Court.[2190]

Thirdly, it enables the Court to inform disputants about the mediation opportunity,[2191] as some disputants are unaware of this option as an alternative to trial.[2192]

Fourthly, in Minor Claims, it enables magistrates to refer actions to mediation where disputants have not gathered 'their documents together' as well as those that 'cry out for mediation'.[2193]

Fifthly, in General Division claims, it provides the Court an opportunity to gauge whether disputants might have 'an appetite for mediation'.[2194]

The use of the first directions hearing opportunity echoes practices in other Australian courts,[2195] where they explore with disputants, upon the first return date, the utility of mediation before taking further procedural steps.[2196] It also highlights that judges play a supervisory and managerial role over litigated proceedings through active case management including encouraging or ordering disputants to attempt settlement.[2197]

2 *Mixed Referral Practices and 'Strong' Judicial Encouragement*

As discussed in the exploration of the rules-based framework, the Court can refer actions to mediation without disputant consent,[2198] however, most magistrates reported 'rarely' doing this.[2199]

No magistrate reported ordering mediation in all actions, nor to any formal or informal Court policy that trial dates will not be allocated unless 'appropriate' actions have been mediated.[2200] This suggests referrals are consensual and neither routine nor 'presumptively mandatory'.[2201] It also suggests the Court does not use mediation as a mechanism to 'ration' disputants' access to pure merits-based adjudication,[2202] or refers actions indiscriminately, imposing 'unnecessary and wasted expenditure' on disputants.[2203] It is therefore difficult to infer that a presumption in favour of referral to mediation has developed in the Court.[2204] However, the Court's strong encouragement may influence disputants into consenting to mediation, impacting upon 'authentic' voluntary participation.[2205]

Magistrates reported referrals are generally not party-driven but 'strongly encouraged' by the Court in 'appropriate' cases. Whilst none provided concrete criteria for appropriate referrals, they identified three factors that impact upon both the decision to refer actions to mediation and the level

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2190 See also Appendix C: Interviewee Demographic Information and Actions Mediated in the Court at 296.

2191 Magistrate 5. See also n 2220.

2192 Magistrate 1 and Magistrate 3. See also nn 992, 2207, 2890, 2891, 2909, 3309, 3468 and 3317.

2193 Magistrate 3. See above Chapter II at 45.

2194 Magistrate 3.

2195 Black (n 305) 139.

2196 *Dorrian* (n 269) [2] (Lindsay FM).

2197 See, eg, Black (n 305) 146; Judith Resnik, 'Managerial Judges' (1982) 96(2) *Harvard Law Review* 374, 376; Steven Baicker-McKee, 'Reconceptualizing Managerial Judges' (2015) 65(2) *American University Law Review* 353. See also Chapter I at 14.

2198 See above Chapter III at 96.

2199 Magistrate 2; Magistrate 3; Magistrate 4; Magistrate 5.

2200 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) 188.

2201 Cf ibid 286.

2202 Cf McAdoo and Welsh (n 366) 426.

2203 DeGaris (n 1283) 224.

2204 This reinforces my recommendation for future research: see below Chapter VII and Chapter VIII.

2205 See, eg, Spencer and Altobelli (n 304) 147–9, citing Tania Sourdin, 'Making People Mediate: Mandatory Mediations in Court-Connected Programmes' (Unpublished Paper, October 1993). See also Mack, *Criteria and Research* (n 80) ch 6.

of judicial encouragement to mediate: whether actions fall within the Minor Claims or General Division;[2206] the presence of legal representation; and the attitude of disputants at the first directions hearing.

One reported that disputants are usually unrepresented in Minor Claims and either unaware of the Court's mediation service or are reluctant to inform the magistrate they wish to mediate.[2207] This magistrate suggested many unrepresented litigants in Minor Claims appear grateful the Court can provide the mediation 'alternative', despite some insist the Court determine the action, in which case the action is listed for trial. Another 'strongly encourages' mediation in Minor Claims but deferring to lawyers in the General Division.[2208]

Another strongly encourages mediation in General Division claims where, at the first directions hearing, it appears: only one disputant is legally represented; the unrepresented disputant(s) appears disadvantaged and is 'floundering'; the pleadings are deficient or the unrepresented disputant(s) is having difficulty complying with the rules regarding pleadings;[2209] and trial may be calamitous.[2210] Similarly, another recommends 'more strongly' that unrepresented disputants within the General Division mediate if it appears that they are not receiving any legal or other assistance.[2211] Another prefers referring unrepresented litigants to mediation than to a conciliation conference because they usually require assistance communicating to shift them from entrenched positions.[2212]

Where disputants are legally represented, one encourages mediation nevertheless but defers to lawyers[2213] to decide whether to mediate or proceed to the routine conciliation conference before a magistrate.[2214]

Only one reported referring a small percentage of actions in the General Division to mediation at the request of counsel.[2215] This finding is inconsistent with literature suggesting 'cultural' resistance by lawyers to mediation.[2216]

Two magistrates 'strongly' encourage disputants, at the first directions hearing, to mediate but do not order mediation against adamant refusal[2217] or apparent unwillingness.[2218] After explaining the limits of the Court's power, one magistrate reiterates to disputants that their rights to access justice entitles them to have their action determined, and how, unlike structuring a settlement, which may better address their needs, having 'their day in Court' may not produce the 'best' outcomes for them:

> 'It's unpleasant, it's stressful and your evidence might not be accepted. Judgment might be entered against you. I have the power to order mediation but I won't do it unless you are prepared to go.' I explain the benefits of mediation. Parties generally report a more favourable outcome and they like it

2206 Magistrate 3; Magistrate 4; Magistrate 5.
2207 Magistrate 3. See also nn 129, 2891, 3215, 3467 and 3497.
2208 Magistrate 5.
2209 *Rules* (n 917) r 24(1)(b) referred to the former *Supreme Court Rules 2006* (SA). See above Chapter III at 96–7.
2210 Magistrate 3.
2211 Magistrate 5.
2212 Magistrate 4. See also Chapter V at 144–6.
2213 Magistrate 5.
2214 See above Chapter III at 94.
2215 Magistrate 2.
2216 See above Chapter III at 90.
2217 Magistrate 5.
2218 Magistrate 3; Magistrate 4.

better.[2219] It's timelier. They'll get a mediation date before they'll get a trial date. But most parties just don't know that mediation is an option available to them.[2220]

These mixed responses by magistrates suggest variation between them and mixed referral practices, which is exacerbated by the absence of publicly accessible referral criteria.[2221]

These findings highlight the magistrates' power to direct disputants to mediation, reinforcing their gatekeeper role.[2222] They also highlight that the first directions hearing provides an opportunity for the Court to educate disputants about the different processes within its ADR suite that might best suit their needs, which acts as a quasi-Pre-Mediation procedure.[2223]

Whilst only magistrates were asked to provide a view, some mediators and lawyers volunteered their opinions about referral practices.

A minority of mediators expect referrals are not only driven by the Bench, but that magistrates order *all* actions to mediation, subject to those that are 'not suitable'.[2224] These views suggest some mediators trust that magistrates undertake a level of 'pre-mediation assessment'[2225] for suitability before making referrals. These views are inconsistent with the magistrates' position that suggests referrals to mediation are consensual and neither routine or 'presumptively mandatory'. Though the Bench strongly encourages mediation, magistrates report not typically compelling mediation against adamant objection.

No mediator provided explanations for why they expected referrals to be routine or 'presumptively mandatory', rather than consensual, or described what criteria make actions suitable for mediation. It is thus difficult to infer whether they assume the Court orders all disputants to mediate at some stage before trial or that trial dates are not allocated unless 'appropriate' actions have first been mediated.[2226]

Conversely, one mediator understood mediation is not mandated and disputants must be willing to participate because if they are forced, the process can become disastrous.[2227] Another was unsure whether a particular process exists for actions to be referred to mediation and whether disputants must first indicate willingness to attend but presumed they are given the option at some stage.[2228]

Four lawyers commented on their experiences of referral practices and reported a mixture of occasions where: disputants sought referral by consent;[2229] the lawyers had suggested mediation;[2230] the Court had encouraged disputant consent to mediate;[2231] and others where the Court ordered

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2219 See, eg, Courts Administration Authority, *1999 Magistrates Court User Survey Results* (March 1999) 7. (Copy on file with author).

2220 Magistrate 4. This view is consistent with the purported lack of lawyer and disputant awareness of the mediation 'opportunity': see also nn 992, 2809, 2891, 2909, 3309, 3468 and 3317.

2221 See above Chapter III at 96.

2222 See above Chapter I at 14.

2223 But see below Chapter VII at 224.

2224 Mediator 5; Mediator 7; Mediator 10; Mediator 15; Mediator 16. See below Chapter VII, recommendation 5.

2225 Mediator 5.

2226 This expectation may be either a misunderstanding on their part or may reflect their preference for all actions to be referred to mediation, consistent with the suggestion by some mediators that there should be a presumption of mediation within the Court: Mediator 2; Mediator 4; Mediator 7; Mediator 10; Mediator 11; Mediator 13; Mediator 16. But see the brief discussion of the presumption of mediation in Appendix A: Qualitative Research Methodology. See also Chapter VII at 207.

2227 Mediator 4.

2228 Mediator 8.

2229 Lawyer 3; Lawyer 6.

2230 Lawyer 3.

2231 Lawyer 7.

mediation.[2232] It is thus difficult to generalise whether referrals are predominantly party-driven, encouraged, or ordered.[2233] Furthermore, none of the lawyers suggested: the Court obtains disputant consent in all actions before ordering mediation; the Court exercises its power in the absence of disputant consent; mediation is typically ordered against objection; or that trial dates are not allocated unless actions are mediated.

One lawyer suggested, unlike in private mediations outside the Court, where disputants voluntarily agree, they are usually reluctant to attend and participate and occasionally hostile where the Court is forcing them to, given they have not 'fully' consented.[2234] This coincides with this lawyer's opinion that some referrals are driven by the Court's desire to minimise the caseload of 'overloaded' magistrates.[2235] The purported judicial compulsion to mediation is a factor that differentiates court-connected mediation from mediations outside the court context,[2236] and may result in participants not being committed to the cooperative opportunity mediation provides.[2237]

Another expressed magistrates do not raise the mediation option at the first directions hearing as a matter of course but routinely enquire whether the action can be listed for a conciliation conference, with lawyers agreeing.[2238] If instead, magistrates queried whether disputants wished to mediate, this lawyer suggested most would agree, particularly as some lawyers do not realise how inexpensive it is compared to private mediation outside the Court.[2239] This suggests that the first directions hearing may be a missed opportunity for the Court to strongly encourage mediation, particularly where lawyers and disputants might not have considered this option.[2240]

3 *Summary of Key Findings*

A divergence in understandings, expectations, and experiences exist between three camps regarding referral practices.

First, most magistrates reported that referrals are generally not party-driven but 'strongly encouraged' by the Court. Magistrates reported rarely ordering mediation without disputant consent. The inference to be drawn is that the Court entrusts the responsibility for deciding whether to have actions referred to mediation largely upon disputants and their lawyers, despite strong encouragement where disputants appear receptive to the mediation opportunity. These views reflect mediation's *self-determination* value[2241] and respect lawyer autonomy, particularly in General Division claims. They are also consistent with case law that recognises courts should encourage mediation 'in the strongest terms',[2242] but be 'slow' to compel it against considered and adamant opposition.[2243]

Secondly, a minority of mediators expect magistrates order all actions to mediation, subject to those that are not suitable. This illustrates a presumption on their part that the Bench not only drives referrals, but that mediation is a compulsory part of the civil litigation process.

2232 Lawyer 3; Lawyer 5 (Bar 3); Lawyer 7.

2233 This reinforces my recommendation for future research. See below Chapter VII and Chapter VIII.

2234 Lawyer 5 (Bar 3). Similarly, one mediator suggested that disputants occasionally do not appear 'genuinely committed' to mediation, but attend solely because they have been ordered to: Mediator 2. See also Chapter II at 45–6.

2235 See also Chapter IV at 111.

2236 See above Chapter II at 46.

2237 Rundle, 'Court-Connected Mediation Practice' (n 38) 436.

2238 Lawyer 2 (Bar 1).

2239 Lawyer 2 (Bar 1). See also *Evans* (n 481) [147] (Campbell JA).

2240 This view reinforces my recommendation for promoting Stakeholder education regarding the mediation opportunity within the Court: see also n 2909.

2241 See above Chapter II at 34.

2242 *Halsey* (n 419) [9]–[11].

2243 See above Chapter II at 46.

Thirdly, the lawyer views fall between the two other Stakeholder camps, given they had experienced a mixture of occasions ranging from party-driven to Court-ordered mediation. However, unlike mediators, no lawyer reported magistrates order all actions to mediation, which suggests that mediation is not a compulsory part of the litigation process.[2244]

These findings illustrate there is no uniform practice for referring actions to mediation. This is consistent with literature suggesting that Australian courts do not have uniform methods for screening, diagnosis and referral of 'appropriate' actions and an absence of criteria for making or declining referral orders.[2245] Mixed referral practices highlight the potential for inconsistency and mixed approaches, which can generate *procedural* unpredictability.[2246]

B *Before Mediation*

I now explore what occurs before mediation and identify two key findings.

First, Stakeholders indicated that there is no Pre-Mediation procedure.[2247]

Secondly, expectation gaps exist regarding the level of pre-mediation information exchange.

1 *No Pre-Mediation Procedure*

As discussed in the literature review, some authors argue that Pre-mediation is the most important stage and the principal contributor to 'successful' mediations.[2248] However, most Stakeholders reported that there is no Pre-Mediation procedure and no mediator involvement with disputants before mediation.[2249] Some mediators described the absence of Pre-Mediation as a shortcoming[2250] that can impact upon 'settlement rates',[2251] given the lost opportunity to address important substantive and procedural matters,[2252] including disputant authority to settle.[2253] This is consistent with the findings that most Stakeholders perceive settlement to be mediation's primary *purpose*.[2254]

It is unclear from the data at which stage of the procedure Stakeholders understand, expect, or experience mediators to confirm authority to settle. No lawyer commented on authority to settle. One magistrate emphasised that mediators should confirm authority to settle with disputants privately before commencement.[2255] This view is consistent with one mediator who reports confirming this in private before commencing, to avoid being informed by any disputants during the Opening in Joint Session that they do not have authority to settle, which can derail the process.[2256] Another reported confirming authority to settle without specifying which stage in the procedure they do so.[2257] No other mediator commented upon authority to settle. This gap may be explained

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2244 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) 191.

2245 See above Chapter II at 47.

2246 See below Chapter VI at 181, 192, 197 and 202, Chapter VII at 205, 208, 210 and 234 and Chapter VIII at 238.

2247 I use this term to describe the various labels Stakeholders interchangeably used, including Pre-Mediation 'conferences', 'intake', 'meetings' and 'Preliminary Conferences'. See also Chapter II at 73.

2248 See above Chapter II at 74.

2249 Mediator 1; Mediator 2; Mediator 3; Mediator 4; Mediator 5; Mediator 7; Mediator 8; Mediator 9; Mediator 11; Mediator 12; Mediator 13; Mediator 14; Mediator 15; Mediator 16.

2250 Mediator 2; Mediator 4; Mediator 5; Mediator 10.

2251 See above Chapter II at 53.

2252 See above Chapter II at 73–4.

2253 See above Chapter III at 96 and 105.

2254 See above Chapter IV at 110–13.

2255 Magistrate 4.

2256 Mediator 12. See also *Guidelines for Parties in Mediations* (n 40) 5.

2257 Mediator 10.

by the limited guidance in the rules-based framework regarding authority to settle,[2258] which is an important purpose of Pre-Mediation.[2259] The inference to be drawn is that the Court expects lawyers to advise their clients of the importance of attending mediation with authority to settle and entrusts the responsibility upon mediators to confirm that disputants have authority to settle before commencing mediation.[2260]

No Stakeholder reported disputants are required to sign an Agreement to Mediate before commencement, consistent with the finding that the rules-based framework does not mandate this.[2261]

Not signing an Agreement to Mediate is a further factor distinguishing mediation in the Court from mediation outside the court context.[2262]

A minority of Stakeholders had different expectations about minimum levels of Pre-Mediation undertaken by the Court, mediators, or the Mediation Unit.

One magistrate suggested the first directions hearing before a registrar acts as a quasi Pre-Mediation procedure during which the registrar clarifies whether disputants have exchanged documents and information and orders are thereafter made for their exchange before referring the action to mediation.[2263] Another expected mediators to engage in 'brief Pre-Mediation discussions' privately with participants in larger claims before mediation,[2264] which coincides with a minority of mediators who reported occasionally meeting participants separately for a brief conversation before commencing.

One mediator explained the brief 'Pre-Mediation discussions' enables them to: confirm disputants are in attendance; 'check in' with and 'settle' anxious disputants; confirm disputants have all of their documents; and clarify whether they need to be made aware of any sensitive issues or disputant needs before commencing mediation.[2265] Another expressed their first task is to work out who will be in the room[2266] to ensure there are no unexpected attendances of support persons or other 'advisors' in addition to lawyers. The rules-based framework is silent regarding the role of support persons and whether they can attend,[2267] again reinforcing the importance of Pre-Mediation procedures.[2268]

Two mediators presumed some mediators undertake a 'mini' intake once in Joint Session.[2269] However, given the time constraints,[2270] one stated time is better spent completing the Opening and

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2258 See above Chapter III at 96 and 105. But see Appendix D.2: Form 78C Notice of Alternative Dispute Resolution Conference.

2259 See above Chapter II at 73. This gap has now been addressed in the *UCRs*: see above Chapter II at 105.

2260 This finding reinforces the importance of having a Pre-Mediation procedure: see nn 2142, 2759, 2905 and below Chapter VII, recommendation 6.

2261 See above Chapter III at 103. It is also consistent with *Raggio* (n 729) [39], where the District Court acknowledged that no Agreement to Mediate was placed in evidence.

2262 Mediator 5. See above Chapter II at 40.

2263 Magistrate 4.

2264 Magistrate 1.

2265 Mediator 10.

2266 Mediator 7.

2267 See above Chapter III at 105.

2268 See below Chapter VII, recommendation 6.

2269 Mediator 5; Mediator 15.

2270 See nn 1008, 1412, 1671, 1739, 2031, 2303, 2439 and 2943. See also Appendix A: Qualitative Research Methodology.

progressing through the stages of the procedure than undertaking a 'mini' Pre-mediation before commencement.[2271]

A minority expected the Mediation Unit undertakes a Pre-Mediation procedure when completing the administrative steps to arrange mediation.[2272] Two also envisaged that 'proactive' disputants might contact the Mediation Unit seeking information about mediation before its commencement.[2273]

2 *Mixed Practices and Minimal Pre-Mediation Information Exchange*

As discussed in the literature review, one purpose of Pre-mediation is to assist disputants prepare for mediation by gathering and exchanging information,[2274] such as Mediation Books, Issues Statements, Position Papers and the like.

Most magistrates expected disputants do not usually exchange Position Papers and the like before mediation.[2275] Only one magistrate reported expecting disputants to exchange Position Papers or Issue Statements before mediation.[2276] Another stated disputants in General Claims generally decide whether they will exchange Position Papers.[2277] One was uncertain whether Position Papers are exchanged and assumed the Court's internal mediator likely contacts disputants or their lawyers to arrange the exchange of documents after reviewing the Court file, but expressed uncertainty if this was standard practise.[2278]

There was no unanimous view amongst lawyers or mediators regarding the level of pre-mediation information exchange.

Three lawyers stated disputants do not usually exchange Position Papers, Issues Statements or agreed bundles of documents.[2279] One reported that bundles of agreed documents are occasionally voluntarily exchanged or ordered by the Court.[2280] Another reported the Court occasionally orders the exchange of Position Papers, in complex actions, and orders disputants prepare a book of documents.[2281]

Two stated disputants often exchange Position Papers before mediation.[2282] One explained preparing a Position Paper, even where not ordered by the Court, because it is a *without prejudice* opportunity to express matters not contained in the pleadings, which can be used to set either an aggressive or a conciliatory tone for mediation and can dispense with making an 'Opening Statement at all.'[2283] Another explained usually preparing a book of documents or a letter summarising their client's position and the 'true issues' in dispute, in complex actions where disputants are legally represented, which serves as a Position Paper.[2284]

2271 Mediator 5.
2272 Mediator 1; Mediator 6.
2273 Mediator 4; Mediator 12.
2274 See above Chapter II at 73.
2275 Magistrate 3, Magistrate 4; Magistrate 5.
2276 Magistrate 1.
2277 Magistrate 4.
2278 Magistrate 2.
2279 Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2).
2280 Lawyer 6 also stated the Court occasionally orders a 'mediation booklet' be prepared, despite any description of what its contents tend to contain.
2281 Lawyer 7.
2282 Lawyer 5 (Bar 3); Lawyer 6.
2283 Lawyer 5 (Bar 3).
2284 Lawyer 3.

Most mediators reported pre-mediation information exchange is usually minimal and restricted to the pleadings,[2285] though mediators can inspect the Court file before mediation to establish whether there is additional information contained therein that might assist and provide further background to the dispute.[2286]

Two stated occasionally there is copies of some discovered documents, which can be problematic when undiscovered documents emerge for the first time during mediation,[2287] in contrast to another who reported copies of key documents are usually discovered in the early stages of the litigation process.[2288] One mediator reported a large disparity between the level of discovery in claims where disputants are legally represented with those that are not, particularly between claims within the General Division, where disputants have undertaken thorough trial preparation, with Minor Claims which are usually fairly incomplete.[2289] Conversely, one reported disputants occasionally attend mediation armed with 'piles of documents', which can derail the process where disputants become fixated on particular points and further entrenched in their positions.[2290]

Some mediators commented on the pleadings, describing them as usually 'brief'.[2291] They stated that pleadings provide a rough indication about the disputes issues,[2292] which does little to advance settlement.[2293] Accordingly, mediators described going 'in cold' without knowing much about the dispute prior to mediation.[2294] These findings are consistent with literature suggesting the 'key to unlocking' disputes do not appear in the pleadings but emerge after the mediator has assisted disputants uncover their underlying interests and the hidden drivers of the dispute.[2295]

Unlike the lawyers, most mediators reported there is no exchange of Position Papers or Issues Statements.[2296] One reported that Position Papers or Scott Schedules are more common where disputants are legally represented in high quantum claims within the General Division, though occasionally exchanged in Minor Claims where disputants have received legal assistance.[2297]

3 *Summary of Key Findings*

The absence of formal Pre-Mediation procedure is consistent with literature suggesting there is a 'culture of no intake' or Pre-Mediation in some Australian court-connected mediation programs.[2298] It is also consistent with the absence of any reference to it in the rules-based framework.[2299]

The absence of *Pre-Mediation* is inconsistent with most industry models[2300] and the NMAS[2301] and indicative of a gap between theory and practice. It is a further factor that distinguishes mediation in

2285 Mediator 2; Mediator 3; Mediator 5; Mediator 6; Mediator 7; Mediator 8; Mediator 9; Mediator 10; Mediator 11; Mediator 15.
2286 Mediator 1; Mediator 2; Mediator 3; Mediator 5; Mediator 7; Mediator 10; Mediator 15.
2287 Mediator 3; Mediator 4.
2288 Mediator 1.
2289 Mediator 4.
2290 Mediator 7.
2291 Mediator 9; Mediator 10; Mediator 15. However, it is unrealistic to expect pleadings prepared by unrepresented litigants to be complex or long, noting also the jurisdictional limit of the Minor Claims Division is $12,000.00 and the General Claims Division is $100,000.00: see above Chapter III at 85.
2292 Mediator 15.
2293 Mediator 6.
2294 Mediator 5; Mediator 9.
2295 Rothfield (n 539) 244–5.
2296 Mediator 1; Mediator 2; Mediator 4; Mediator 5; Mediator 6; Mediator 7; Mediator 8; Mediator 9; Mediator 11; Mediator 12; Mediator 14; Mediator 15.
2297 Mediator 16.
2298 See above Chapter II at 79.
2299 See above Chapter III at 103.
2300 See above Chapter II at 73.
2301 *Practice Standards* (n 222) s 3.

the Court from mediation outside the court context.[2302] Some Stakeholders postulated the absence of Pre-Mediation procedure is a consequence of resource constraints and time pressures.[2303] However, not having a Pre-Mediation can impact upon *effectiveness* and *efficiency* objectives.[2304]

Stakeholders have divergent understandings, expectations, and experiences regarding the level of pre-mediation information exchange. The *ad hoc* minimalist approach to pre-mediation information exchange and mixed practices regarding the use of Position Papers and the like,[2305] illustrates mixed practices, which can generate a *practice* and *procedural* unpredictability. The inference to be drawn is that the Court entrusts the responsibility for pre-mediation preparation and information exchange upon disputants and their lawyers. This finding may be explained by the absence of any reference to Position Papers and the like in the rules-based framework.[2306]

C *During Mediation*

I now explore what occurs during mediation and identify two key findings.

First, Stakeholders have different understandings and expectations about the industry model mediators utilise or the 'typical' stages of mediation *procedure* that I discussed in the literature review.[2307]

Secondly, gaps exist between what some Stakeholders expect occurs during mediation in contrast to what others report experiencing.

1 *Mixed Practices Regarding Compliance with Industry Models*

As explained in the literature review, there are a variety of mediation *procedures*.[2308] However, the rules-based framework does not mandate mediators to adhere to a particular procedure with specific stages, which may give rise to variation and mixed practices.[2309]

I have summarised in table format the industry model/stages of the *procedure* that magistrates expect mediators utilise, that mediators report adhering to and what lawyers report experiencing,[2310] and discuss them below.

A divergence in understandings, expectations, and experiences exist between two Stakeholder camps. Most magistrates expect mediators adhere to an industry model and half the mediators express adhering to an industry model whereas most lawyers report experiencing a procedure comprising roughly four stages, which do not correspond with any of the industry models.

Three magistrates presumed that mediators adhere to either the RI[2311] or LEADR[2312] models,[2313] with two not referring to a particular model but describing a procedure comprising roughly seven stages.[2314]

2302 Lawyer 4 (Bar 2); Mediator 1; Mediator 2; Mediator 5; Mediator 9; Mediator 10. See above Chapter II at 40. See below Chapter VII, recommendation 6.

2303 Magistrate 4; Lawyer 1; Lawyer 4 (Bar 2); Lawyer 5; Lawyer 6; Mediator 7; Mediator 10; Mediator 11; Mediator 13. See nn 1008, 1412, 1671, 1739, 2031, 2270, 2439 and 2943. See also Appendix A: Qualitative Research Methodology.

2304 See above Chapter II at 49. See also Chapter VII, recommendation 6. This reinforces my recommendation for future research: see below Chapter VII and VIII.

2305 See above Chapter II at 80.

2306 See above Chapter III at 104. This gap has been addressed in the *UCRs*: see below Chapter VII at 207.

2307 See above Chapter II at 71.

2308 Ibid.

2309 See above Chapter III at 101.

2310 Appendix P: Summary of Stakeholder Understandings, Expectations and Experiences of Mediation *Procedure* within the Court.

Consistent earlier findings,[2315] the magistrates unanimously reported uncertainty about what precisely occurs during mediation given they take no part in it. Instead, they predominantly described what occurs before and after mediation.[2316] This uncertainty may be explained by two reasons. First, some magistrates had either not participated in a mediation within the Court whilst in private practice or did not practice within the Court's jurisdiction before their appointment to the Bench. Secondly, some reported never having observed a mediation within the Court after their appointment to the Bench.[2317] Instead, their views were based on presumptions of what they expected occurs or 'should' occur.

Mediators provided comprehensive descriptions of the various stages of mediation in contrast to the magistrates and lawyers, largely reflective of facilitative mediation literature.[2318] Mediators described how they conduct their own *procedure*, with some expressing being unaware how others conduct theirs,[2319] with only one expecting they all adhere to the RI model.[2320] I have summarised in table format the industry models mediators reported adhering to.[2321]

Mediators described a consistent procedure, excluding a Pre-Mediation stage,[2322] suggesting a level of compliance with industry models.[2323] Half expressed following the LEADR[2324] or IAMA model.[2325] The other half did not identify a specific industry model, despite most trained by either LEADR or IAMA.[2326] Others referred to the 'standard mediation process'[2327] or the 'diamond model'.[2328]

Consistent with earlier findings,[2329] two outliers utilise the LEADR model as a procedural 'guide' whilst using techniques from Eddy's High Conflict Model[2330] or the NVC process.[2331]

Eddy's four-stage[2332] model shares similar stages common within other procedures,[2333] including commencing with Pre-Mediation Coaching,[2334] though parts of the Parties' Opening Comments and Issue Exploration are abandoned. Disputants are invited to focus on problem solving, get 'straight

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2311 Magistrate 1.

2312 Magistrate 2; Magistrate 3 described the procedure as a 'modified' LEADR model with less Private Sessions and more direction by the mediator.

2313 See above Chapter I at 11.

2314 Magistrate 4 and Magistrate 5.

2315 See above Chapter V at 132.

2316 See Chapter VI at Part B and Part D.

2317 I have omitted pinpoint references to not identify any magistrates. See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court. See also Chapter VII, recommendation 9.

2318 See above Chapter II at 66.

2319 Mediator 9; Mediator 13. See also Chapter V at 137.

2320 Mediator 16.

2321 Appendix Q: Mediator Experiences of Mediation *Procedure* within the Court.

2322 See above Chapter VI at 176.

2323 Cf Chapter II at 79.

2324 Mediator 1; Mediator 4; Mediator 5; Mediator 11; Mediator 16.

2325 Mediator 8; Mediator 9; Mediator 15.

2326 Mediator 2; Mediator 3; Mediator 6; Mediator 7; Mediator 10; Mediator 12; Mediator 13; Mediator 14. See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

2327 Mediator 2; Mediator 8; Mediator 9; Mediator 15.

2328 Mediator 11; Mediator 15.

2329 See above Chapter V at 134.

2330 Mediator 4.

2331 Mediator 5.

2332 See Appendix Q: Mediator Experiences of Mediation *Procedure* within the Court.

2333 See Appendix H.1: Stages of Eight Mediation *Procedures* and Appendix H.2. Three Mediation Procedural Diagrams.

2334 Bill Eddy, 'Pre-Mediation Coaching: 4 Skills for Your Mediation Clients', *High Conflict Institute* (Web Page, 11 October 2012) <https://www.highconflictinstitute.com/hci-articles/pre-mediation-coaching-4-skills-for-your-mediation-clients>.

into negotiation' and invited to make and then refine 'proposals' until they become agreements.[2335] This mediator breaks for Private Sessions earlier than what is outlined in the LEADR model, specifying the procedure comprises a mix of Joint and Private Sessions, but 'is not Shuttle Negotiation'.[2336]

NVC involves a structured four-part[2337] back-and-forth process of disputant A speaking and the mediator guiding the other disputant B to reflect back their understanding of A's message through reframing, before A confirms they were understood or clarifies and *vice versa*.[2338] Like Eddy's model, after observing and reflecting back expressed feelings and identified needs, disputants are invited to make 'requests', which are further refined until they become agreements.

One mediator expressed there is no mandated procedure and described part of mediation's 'beauty' is mediators do not have to follow a specific procedure because 'there are no rules'.[2339] Another stated, though the mediator's role is to guide the process, mediators must remain flexible and not rigidly adhere to a particular process for mediations 'go where they need to'.[2340]

Despite the purported 'no-rules' and flexible approaches reflecting mediation's *responsiveness* value, they also introduce the possibility of variation between mediators, which can cause lawyers and disputants to experience inconsistency in *procedure* and *procedural* unpredictability.

Lawyers provided more comprehensive descriptions of *procedure* than the magistrates but less than the mediators. I have summarised the stages they reported experiencing in table format.[2341]

Most lawyers did not refer to any particular industry model nor to mediation parlance identified in the literature describing different stages of the procedure.

They described a consistent *procedure* comprising four stages: an Opening (in Joint Session), Opening Statements (in Joint Session), Private Sessions with Shuttle Negotiations followed by Recording the Agreement. Most descriptions bypassed the Reflection and Summary, Agenda Setting and Issue Exploration stages. The only difference between lawyer experiences relates to what they reported occurs during the third stage, with only two identifying the Reflection and Summary stage or 'general comments' by the mediator, whereas most reported mediators break for Private Sessions shortly after the 'Opening Statements'.

Four inferences can be drawn from their descriptions.

First, as most did not refer to any industry model or mediation parlance to describe different procedural stages, this suggests many are unfamiliar with industry models comprising different stages. This coincides with the data that most lawyers had not undergone mediation training.[2342]

Secondly, the procedures they described corresponds closer to the four stages implicit in unfacilitated negotiations – opening, positioning, bargaining and resolution[2343] – than the linear

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2335 Mediator 4.

2336 Mediator 4.

2337 Marshall B Rosenberg, 'The 4-Part Nonviolent Communication (NVC) Process', *PuddleDancer Press* (Web Page, 2021) <https://www.nonviolentcommunication.com/learn-nonviolent-communication/4-part-nvc/>. See also Appendix Q: Mediator Experiences of Mediation *Procedure* within the Court.

2338 Mediator 5.

2339 Meditator 11. See also Chapter II at 35.

2340 Mediator 5. See also the discussion of mediation's inherent flexibility reflecting the *responsiveness* value in Chapter VII at 214 and 216.

2341 Appendix R: Lawyer Experiences of Mediation *Procedure* within the Court.

2342 Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

2343 Boulle and Field, *Mediation in Australia* (n 27) 181.

structure featured in most industry models.[2344] However, consistent with earlier findings,[2345] the divergences between the industry models the mediators express adhering to and the procedure the lawyers report experiencing may be explained by the limitations of self-regulation.[2346]

Despite mediators reporting strict compliance with industry models, the lawyer data suggests they may not be doing so. Alternatively, lawyers, being unfamiliar with industry models, do not notice that are unaware of mediators transitioning to the other through stages or do not think they are important. The lawyer reports may have also encompassed their experiences of mediations in general practice outside the Court, rather than restricting them to mediation solely within the Court. This again highlights the limitations of self-regulation.

Thirdly, the descriptions by lawyers regarding the use of Private Sessions shortly after the Party Opening Comments and Shuttle Negotiations is consistent with literature suggesting procedures within court-connected contexts usually entail Shuttle Negotiation with less demarcated stages than in industry models.[2347] It also reflects lawyer preferences for structures common within legal culture, which mimic settlement conferences, where they exercise control over process, negotiations and outcomes.[2348]

Fourthly, mediators may be yielding to lawyers who 'hijack'[2349] the procedure and insist on discussion of immediate solutions or positional bargaining, rather than relying on mediators to guide them through a structured procedure to explore the issues before generating options. This inference is consistent with literature identifying the 'Private Session itch' and skipping Issue Exploration altogether for the 'instant' Private Session, where mediators conduct the remaining procedure by Shuttle Negotiation.[2350]

2 *What are the 'Typical' Stages of the Procedure?*

I summarise below what magistrates expect, what lawyers report experiencing and what mediators report undertaking during each of the stages of the *procedure*, using the same headings from the literature review.[2351]

It is difficult to infer whether Stakeholder views regarding the Reflection and Summary, Agenda Setting, Issue Exploration and Option Generation and Negotiation stages were convergent or divergent given no magistrate or lawyer reported expecting or experiencing mediators assist disputants transition through these stages. Similarly, none provided comprehensive explanations of these stages or to their various purposes.[2352] For the magistrates, this may be explained by their expectation that mediators adhere to an industry model or utilise a seven-stage procedure, as discussed above. Additionally, both the magistrates and lawyers may not be as familiar as the mediators with the purposes of each of the stages, conceivably explained by having undergone less mediation education and training.[2353]

2344 See Appendix H.1: Stages of Eight Mediation *Procedures* and Appendix H.2. Three Mediation Procedural Diagrams.

2345 See above Chapter V at 141.

2346 See Appendix A: Qualitative Research Methodology.

2347 See above Chapter II at 79.

2348 See above Chapter II at 70 and 82.

2349 See above Chapter II at 44. See also Sourdin and Balvin (n 361) 146.

2350 See above Chapter II at 76.

2351 See above Chapter II at 72.

2352 See above Chapter II at 75–8.

2353 See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court. See also Chapter IV at 110 and Chapter V at 155.

(a) Opening

Stakeholder views regarding the Opening were largely convergent.

Magistrates unanimously expected mediations commence in Joint Session and most lawyers reported they usually do.[2354] One lawyer intimated an exception where disputants have expressed a desire not to see each other from the outset, though considered it best that mediation commence in Joint Session despite disputant animosity.[2355]

Mediators unanimously reported commencing in Joint Session, unless 'good reasons' exist to commence in Private Session,[2356] such as medical or safety concerns,[2357] or intervention orders are in place.[2358] These findings accord with industry models[2359] and the NMAS.[2360]

Whilst explanations vary from mediator to mediator,[2361] lawyers reported mediators introduce themselves, provide a summary of what mediation 'is',[2362] its benefits[2363] and what to expect from the process.[2364] One reported being grateful to those who invite lawyer input regarding how the lawyers wish the process to proceed before transitioning into the next stage.[2365] Such a preference adheres to disputant self-determination while respecting lawyer autonomy and their role within mediation.[2366]

Mediators reported greeting participants and inviting them into the conference room[2367] before introducing what mediation 'is' and what to expect.[2368] They describe their role[2369] including reinforcing they are independent/neutral/impartial[2370] and not permitted to 'give legal advice'.[2371] They re-emphasise confidentiality,[2372] identify any time constraints,[2373] establish 'ground rules' regarding respectful communication[2374] and commence opening the communication channels.[2375] These findings accord with industry models[2376] and the NMAS.[2377]

The Opening enables mediators to 'calm and disarm' participants so they can 'negotiate from a position of calm strength, not fear' and feel empowered by emphasising two things.[2378] First,

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2354 Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 6.
2355 Lawyer 7.
2356 Mediator 11; Mediator 14.
2357 Mediator 1; Mediator 10.
2358 Mediator 1; Mediator 16. See above Chapter III at 95.
2359 See above Chapter II at 74.
2360 *Practice Standards* (n 222) s 4.
2361 Lawyer 7.
2362 Lawyer 3; Lawyer 7.
2363 Lawyer 3; Lawyer 6.
2364 Lawyer 3; Lawyer 5 (Bar 3); Lawyer 6; Lawyer 7.
2365 Lawyer 7.
2366 See above Chapter V at 155, 165 and 167 and Chapter VII at 225, 228–9 and 231.
2367 Mediator 3; Mediator 5; Mediator 9.
2368 Mediator 7; Mediator 8; Mediator 9; Mediator 13.
2369 Mediator 5; Mediator 6; Mediator 7; Mediator 9. But see the different descriptions of mediation practices in Chapter V. For example, Mediator 10 emphasised explaining to participants that they utilise a facilitative model and do not provide opinions or advice whereas Mediator 6 reported forewarning disputants that they may provide a personal opinion.
2370 See above Chapter V at 143. See also Chapter II at 34.
2371 Mediator 7. See above Chapter V at 157, 160 and 162.
2372 Mediator 6; Mediator 7; Mediator 12.
2373 Mediator 6; Meditator 11; Magistrate 4.
2374 Mediator 6; Mediator 7; Mediator 12; Mediator 14.
2375 Mediator 9.
2376 See above Chapter III at 102.
2377 *Practice Standards* (n 222) s 4.
2378 Mediator 6. See also Chapter IV at 115.

mediation is voluntary and disputants can leave at any time without it adversely reflecting on them and secondly, the mediator cannot make them 'do anything'. This view suggests participation is 'authentically' voluntary and echoes mediation's non-determinative nature. However, it fails to consider those disputants who have been ordered to mediate against objection. Despite being able to leave at any time, this view also fails to consider the introduction of a listing fee and the requirement for mediators to certify disputants have made an 'attempt to settle',[2379] including cost consequences for leaving without making 'genuine' attempts to settle, discussed below.[2380]

(b) Parties' Opening Comments (in Joint Session)

Stakeholder views regarding the Parties' Opening Comments were largely convergent despite differences in expectations and experiences regarding direct disputant participation.

Magistrates unanimously expected disputants are provided the opportunity to address their issues during the Parties' Opening Comments in Joint Session.

Whilst mediators invite disputants or their lawyers to 'say their piece,'[2381] most lawyers reported making 'Opening Statements' on behalf of their clients,[2382] despite one reporting they decide whether to allow their client to make the Opening Statement.[2383] These findings are consistent with literature suggesting lawyers in Australian court-connected mediation programs deliver the Parties' Opening Comments.[2384] Limiting direct disputant participation and communication is contrary to industry models and the NMAS[2385] and gives rise to concerns regarding disputant self-determination.[2386] However, it is unsurprising that lawyers might limit direct disputant participation in the way mediation theorists would idealise, out of caution of the dangers that information revealed could benefit an opponent, and potentially become admissible, in ensuing litigation.[2387]

An outlier amongst the lawyers reported an occasion where a mediator stated they prefer lawyers not to be actively involved, causing this lawyer to take a passive role, which may have been a consequence of the 'other side' being unrepresented.[2388] This finding suggest some mediators may be unwavering in their adherence to direct disputant participation. It also highlights tensions between mediator control and lawyer dominance.[2389]

Three lawyers reported the Parties' Opening Comments are usually 'short' and without legal argument, which is not conducive to settlement.[2390] One tailors the content and tone of their 'Opening Statement' to the type of action, issues in dispute, the 'vibe' they get from disputants and whether disputants wish to maintain an ongoing relationship.[2391] This lawyer often makes an 'aggressive' Opening Statement in commercial litigation where the relationship between disputants has ended and they will never work together in the future. Conversely, making an aggressive Opening Statement in inter-family disputes will not assist disputants reach outcomes to assist them

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2379 See above Chapter III at 88–9. See below Chapter VI at 200–1.

2380 These two factors are consistent with Boulle and Field's argument that *voluntary participation* has lost its contemporary relevance: see above n 414.

2381 Lawyer 2 (Bar 1); Lawyer 3; Lawyer 7.

2382 Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2).

2383 Lawyer 5 (Bar 3).

2384 See above Chapter II at 80.

2385 *Practice Standards* (n 222) s 4.

2386 See above Chapter II at 34.

2387 McCarthy (n 387) 42–3, 46.

2388 Lawyer 7.

2389 See above Chapter II at 39 and 42–4 and 82 and Chapter IV at 121, 124 and 129, Chapter V at 142, 158 and 164. See below Chapter VI at 185, 187, 193, and 201–2 and Chapter VII at 211, 220, 220, 229 and 233–5 and Chapter VIII at 240 and 245.

2390 Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2).

2391 Lawyer 5 (Bar 3). See also Chapter IV at 122.

'move on as a family' or at least 'have Christmas lunch together'.[2392] This view is consistent with one of mediation's qualitative purposes: maintaining or repairing relationships.[2393]

It is difficult to generalise from these mixed responses whether lawyers engage in collaborative interest-based problem-solving approaches, reflecting mediation's *non-adversarialism* value,[2394] or in adversarial and competitive approaches to persuade the mediator and their opponent's client of the merits of their client's legal position.[2395]

One lawyer, who stressed the importance of flexibility and prefers active lawyer input regarding *procedure*, reported occasionally intervening at this stage and, rather than providing Parties' Opening Comments, saving time by 'cutting to the chase' about the: central issues; obstacles to settlement; matters that will have to be addressed at trial; and areas of common ground, to facilitate the quick exchange of settlement offers.[2396] This lawyer reported some mediators, after the exchange of the Parties' Opening Comments, again invite lawyer input into how they wish to proceed. This typically involves considering whether: disputants have 'anything to say' or want to commence exchanging offers; the lawyers want to meet with the mediator privately; or break for Private Sessions. This view suggests some mediators may be yielding to lawyer insistence on early positional bargaining over fixed positions, rather than guiding them through a structured procedure to explore issues and thereafter generate options.

This lawyer also reported occasionally suggesting that the mediator 'get the lawyers out of the room' and converse with disputants *only*, if they consider their opponent is not sufficiently aiding settlement.[2397] Another lawyer also reported occasions where mediators had discussions solely with the lawyers and others where only counsel converse.[2398] Unlike what was reported by this minority of lawyers, one mediator emphasised 'never' excluding lawyers from the room, even if they are being 'difficult' or hindering negotiations due to what they referred to as the 'openness' of mediation. Namely, mediation must remain an 'open' process for disputants and lawyers alike, particularly to avoid putting disputants in a position where they would feel they had to make concessions from a legal point of view that their lawyers would likely advise them against.[2399] Another also emphasised 'always' having lawyers present, particularly where disputants reach an impasse and break for Private Sessions, citing their experience that lawyers 'always' add value to mediation by playing an active role and contributing to discussions.[2400]

Mediators reported inviting disputants to 'have their say'[2401] and summarise their positions[2402] to elicit as much information as possible.[2403] This also provides disputants the opportunity to learn more about each other's concerns and understand each other's positions,[2404] thus shifting from the 'battle of warring messages' to a 'learning conversation'.[2405] Disputants are encouraged to be brief and focus on three points: what has brought them to mediation? How they have been affected? What do they hope to achieve?[2406] The answers to these questions assist uncovering issues,

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2392 Lawyer 5 (Bar 3).
2393 See above Chapter IV at 122.
2394 See above Chapter II at 35.
2395 See above Chapter II at 44 and 71.
2396 Lawyer 7. See below Chapter VI at 193.
2397 Lawyer 7.
2398 Lawyer 3.
2399 Mediator 4. See also Chapter V at 148.
2400 Mediator 6.
2401 Mediator 8; Mediator 12.
2402 Mediator 5; Mediator 9.
2403 Mediator 16.
2404 Mediator 8.
2405 Stone, Patton and Heen (n 844) xxx, xxxiii, 18–19, 16–17, 240.
2406 Mediator 5; Mediator 10; Mediator 13.

underlying interests, needs, and impact, which provide the foundation for identifying potential outcomes in the latter stages. These findings accord with industry models[2407] and the NMAS.[2408]

Some mediators make disputants the central focus by having them converse,[2409] while also allowing their 'lawyers to interject'.[2410] One suggested actively involving disputants assists them in understanding each other's positions to commence the decision-making process from the outset, rather than deferring to their lawyers to negotiate and make decisions for them.[2411]

These findings suggest mediators are more attuned to mediation's varying purposes,[2412] and appear predominantly process-focussed,[2413] in contrast to lawyers who appear more outcome-focussed, emphasising achieving settlement. They also suggest some mediators may be strongly adhering to direct disputant participation, which creates the potential for an obvious expectation gap with the lawyers. It also highlights tensions between mediator process control and lawyer dominance of this stage.[2414]

(c) Reflection and Summary

Lawyers did not provide comprehensive explanations of this stage. However, two reported that, after the Parties' Opening Comments, mediators occasionally reframe what disputants have said before informing them what they consider are 'the real' issues in dispute[2415] or make general comments about the issues or litigation risks before breaking for Private Sessions for documents or offers to be exchanged.[2416] These minority views accord with advisory/evaluative and settlement rather than facilitative mediation.[2417] The inference to be drawn is that lawyers do not notice this stage or consider it unimportant.

Conversely, mediators reported summarising what disputants stated during the Parties' Opening Comments. This enables the mediator to firstly check with disputants that they have correctly heard what they said and secondly to enable the other participants to hear it twice, once from their opponent and once from the mediator, to ensure they both 'hear' and 'are heard'.[2418] These findings accord with industry models[2419] and the NMAS.[2420]

(d) Agenda Setting

Magistrates did not report expecting mediators to use visual aids and lawyers did not report experiencing mediators doing so.

Less than half the mediators reported utilising a whiteboard to generate a visual agenda of 'issues'.[2421] Some use an agenda to ensure all listed issues are properly discussed[2422] to prevent

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2407 See above Chapter II at 74.
2408 *Practice Standards* (n 222) s 4.
2409 Mediator 4; Mediator 8; Mediator 9.
2410 Mediator 4.
2411 Mediator 4.
2412 See above Chapter II at 49. See also Chapter IV at 127 and 129 and Chapter V at 144 and 168.
2413 See above Chapter IV at 129.
2414 See above Chapter VI at 124 and 129 and Chapter V at 142, 158 and 164. See below Chapter VI at 201–2 and Chapter VII at 233–5. See also Chapter VIII at 240 and 245.
2415 Lawyer 2 (Bar 1). See below Chapter VI at 188–9.
2416 Lawyer 3; Lawyer 7.
2417 See above Chapter II at 64–5.
2418 Mediator 5; Mediator 7; Mediator 8; Mediator 10; Meditator 11; Mediator 16.
2419 See above Chapter II at 75.
2420 *Practice Standards* (n 222) s 4.
2421 Mediator 4; Mediator 5; Mediator 7; Mediator 8; Mediator 10; Mediator 12; Mediator 16.
2422 Mediator 8; Mediator 16.

Issue Exploration becoming unstructured.[2423] One elects not to set a formal agenda in simple single-issue disputes, but referred to there always being an 'agenda setting of sorts', even if it involves merely reflecting back to disputants issues raised so far or clarifying which issues require their immediate attention.[2424]

This finding is consistent with research suggesting the minimal use of Agenda Setting and visual aids in court-connected mediation, despite industry models and mediation literature emphasising the importance of this stage.[2425]

(e) Issue Exploration

Magistrates did not provide comprehensive explanations of this stage despite one magistrate's fleeting comment that the mediator's role is to assist 'tease out what the problems are',[2426] presumably during this stage.

Similarly, lawyers did not provide comprehensive explanations of this stage. However, one reported that, after the Parties' Opening Comments, mediators decide whether it would be more beneficial to remain in Joint Session to discuss 'the issues' or break for Private Sessions.[2427] It is difficult to generalise from this data whether most lawyers during this stage engage in adversarial, competitive approaches focussed on narrowly defined legal problems rather than in broader discussions of legally 'irrelevant' non-legal elements, as touted in mediation literature.[2428]

Mediator descriptions accord with facilitative mediation literature.[2429] They described assisting disputants present their perspectives, explore agenda items, elicit 'what the main issues *really* are', whilst actively listening to identify underlying disputant needs and interests.[2430]

One mediator stated disputants usually want to 'jump to' Option Generation and Negotiation citing their discomfort being within the Court and keenness to settle as quickly as possible.[2431] Consequently, mediators have 'to hold' them in Issue Exploration as long as possible to deter early positional bargaining.[2432] Another mediator stated, one of mediation's benefits is the mediator's ability to take disputants through a process of working 'around the problem', rather than going straight to it.[2433]

(f) Private Sessions

Stakeholders did not share unanimous understandings, expectations, or experiences regarding the purpose, timing and use of Private Sessions and a prominent expectation gap existed concerning the use and duration of Shuttle Negotiation.

2423 Mediator 12.

2424 Mediator 5.

2425 See above Chapter II at 81.

2426 Magistrate 1.

2427 Lawyer 2 (Bar 1).

2428 See the discussion of non-legal elements in Chapter II at 41. But see the discussion regarding the exploration of broader 'non-legal' interests and the by-products of a successful mediation in Chapter IV.

2429 See above Chapter II at 66.

2430 Mediator 5; Mediator 7; Mediator 10; Mediator 12; Mediator 16. This is consistent with judicial commentary that the mediator's role is to assist disputants identify the 'real issues' in dispute: see, eg, *Bar Chambers* [2020] (n 893) [16] (Judge Gilchrist); *AWA 18/03/1992* (n 353) [6] (Rolfe J). See above Chapter III at 93, Chapter IV at 118–20 and Chapter V at 146. See below Chapter VII at 210.

2431 Mediator 12. See below Chapter VI at 195.

2432 Mediator 12.

2433 Mediator 8.

(i) Magistrates and Mediators: Private Sessions on a 'Needs Basis' after Issue Exploration

Most magistrates did not identify the most appropriate time to break into Private Sessions. One suggested that as participants might be unwilling to put all their 'cards are on the table' in Joint Session, but willing to tell the mediator in Private Session, the most appropriate time is following a proper explanation of their positions during Issue Exploration.[2434]

Most magistrates expected mediators break into Private Sessions on a needs basis, for example, for disputants to have private discussions with their advisers or to converse among themselves.[2435] One expected mediators break for Private Sessions after the Parties' Opening Comments to 'chip away' at issues before returning to discuss them in Joint Session.[2436]

Some magistrates expected mediators utilise a mix of Joint and Private Sessions rather than Shuttle Negotiation. One expected, and reported preferring, mediators spend most time in Joint Session and not engage in Shuttle Negotiation, but was unsure how mediators conduct mediations.[2437] One stated it would be 'surprising' if mediators left participants in Private Sessions for the entire mediation[2438] and another advised of insufficient time and conference room space on Level 2 in the Adelaide Magistrates Court for 'lots' of Private Sessions.[2439] These expectations are consistent with industry models that stress the importance of spending most time in Joint Session.[2440] It also highlights that magistrates understand mediation to be different to Shuttle Negotiations, which occur during settlement conferences and conciliation conferences.[2441]

Mediators provided comprehensive descriptions of this stage, reflective of facilitative mediation literature.[2442] Private Sessions enable them to 'check in' with disputants[2443] and enquire whether they have ascertained new information, background or perspective during the process[2444] to assist limiting the disputed issues.[2445] They provide disputants an opportunity to express concerns or issues not mentioned in the Joint Session,[2446] and identify what disputants 'really' want, need or value.[2447] They also enable them to shift disputants from a past- to a future-focus, to generate settlement options when they return to the Joint Session.[2448]

Private Sessions provide mediators the opportunity to 'reality test'[2449] and explore their 'Best Alternative to a Negotiated Agreement' (BATNA), being the 'walk away alternative'[2450] or 'Plan

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2434 Magistrate 1.

2435 Magistrate 1, Magistrate 3; Magistrate 4; Magistrate 4; Magistrate 5.

2436 Magistrate 4.

2437 Magistrate 1. See also Chapter V at 132 and Chapter VI at 181.

2438 Magistrate 2.

2439 Magistrate 3. Limitations regarding time and conference room space were a common theme identified by some Stakeholders: see nn 1008, 1412, 1671, 1739, 2031, 2270, 2303 and 2943. See also Appendix A: Qualitative Research Methodology. Cf the opposing views of lawyers who reported that mediators break immediately or soon after Parties' Opening Comments and remain in *Private Sessions* for the remainder of mediation: see Chapter VI below at 220.

2440 See above Chapter II at 75.

2441 See above Chapter III at 94.

2442 See above Chapter II at 66.

2443 Mediator 6; Mediator 7; Mediator 10; Mediator 16.

2444 Mediator 11.

2445 Mediator 9.

2446 Mediator 7; Mediator 10.

2447 Mediator 5; Mediator 10; Mediator 15. See above Chapter II at 35 and 51, Chapter IV at 118–9 and Chapter V at 146.

2448 Mediator 6; Mediator 9; Mediator 10; Mediator 15; Mediator 12.

2449 Mediator 1; Mediator 3; Mediator 4; Mediator 10; Mediator 11; Mediator 12; Mediator 13; Mediator 14; Mediator 15; Mediator 16.

2450 See, eg, Fisher and Ury (n 9) ch 6; Ury, *Getting Past No* (n 647) 21–2; Fisher and Ertel (n 844) ch 4, 5; Fisher, Kopelman and Schneider (n 473) 75.

B'[2451] if no agreement is reached, reflecting interest-based negotiation literature.[2452] One stated it enables them to question disputants about any 'bold assertions' made,[2453] including to clarify they have received written legal advice guaranteeing their chances of success at trial or whether they have conversed with mates who told them they have a strong case.[2454] This mediator intimated doing so assists disputants reflect upon both their position and the reasonableness of potential settlement proposals. Another described Private Sessions enables them to do the 'heavy lifting' for lawyers.[2455] This mediator reported frequently being informed by lawyers, without their clients present, that they do not 'understand the risks' and invite the mediator to have a 'heavy word' with them, highlighting the risks of proceeding further. This description, which suggests this mediator deems their role to be moderately interventionist, is unsurprising given this was one of the three mediators who expressed undertaking conciliation or otherwise utilising advisory/evaluative techniques.[2456]

Some described Private Sessions as a crucial part of mediation,[2457] which are 'always' required in the Court,[2458] despite most lawyers, and a minority of mediators, reporting they are occasionally not used at all.[2459] Others reported no 'golden rule' stating Private Sessions depend on the circumstances, mediation dynamics and participants involved.[2460]

Mediator views differed as to the most appropriate time to break into Private Sessions. Less than half reported breaking for Private Sessions after Issue Exploration,[2461] two only 'deep' into Issue Exploration[2462] and another later in the procedure after having established participant rapport and trust.[2463] One expressed the importance of flexibility and acknowledged that occasionally the dynamics dictate it might be useful to separate disputants earlier.[2464]

Minority views included breaking immediately after the Parties' Openings Comments[2465] or after the agenda of issues needing discussion being jointly developed during Agenda Setting.[2466] One stated the most appropriate time for Private Session is occasionally at mediation's commencement so they can develop an early understanding of disputant positions, which could be considered to be an early Private Session or Pre-Mediation.[2467] As lawyers are cognisant of the likely 'range' of options, this mediator expressed they occasionally negotiate without requiring Joint Sessions at all despite the RI's model advising against 'Shuttle Mediation'.[2468]

The majority also described other appropriate times for Private Sessions including where disputants: are entrenched in their positions[2469] and have reached an impasse;[2470] display

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2451 Ury, *The Power of a Positive No* (n 647) 58–60.
2452 See above Chapter II at 51 and 64.
2453 Mediator 11.
2454 Mediator 11.
2455 Mediator 14.
2456 See above Chapter V at 135–6.
2457 Mediator 11.
2458 Mediator 9; Mediator 14; Mediator 15; Mediator 16.
2459 Mediator 1; Mediator 5; Mediator 8.
2460 Mediator 5; Mediator 7; Mediator 8; Mediator 10; Mediator 11; Mediator 13; Mediator 14; Mediator 15; Mediator 16.
2461 Mediator 5; Mediator 7; Mediator 10; Mediator 11; Mediator 12; Mediator 16.
2462 Mediator 5; Mediator 7.
2463 Mediator 11.
2464 Mediator 10.
2465 Mediator 2; Mediator 14.
2466 Mediator 1.
2467 Mediator 11.
2468 Mediator 11.
2469 Mediator 15.
2470 Mediator 5; Mediator 9; Mediator 14.

inappropriate behaviour or language;[2471] appear overwhelmed,[2472] upset,[2473] emotionally reactive,[2474] or tired;[2475] getting 'off track';[2476] require reality testing of BATNAs;[2477] are having difficulty bridging the 'last gap'.[2478] One breaks where disputants appear to be 'on the same page' to highlight points of agreement reached so far, so they can contemplate how to 'put a number on the underlying problem' and to discuss making what each considers to be a 'fair' settlement offer.[2479]

Unlike the lawyers, one mediator expressed not breaking for Private Sessions early to manage intense emotional dynamics citing that this is often where 'the magic happens' as disputants expose what is 'really' important to them.[2480]

Unlike the lawyer preferences for Shuttle Negotiation, which will be explored below, five mediators conduct mediation in Joint sessions 'as much as possible', breaking for Private Sessions as required.[2481] The reasons for this included the following: mediation is a joint process;[2482] keeping disputants together enables them to witness the 'important cue markers' of successful mediation such as witnessing disputant dynamics, discourse and compromises made;[2483] it can be a 'therapeutic opportunity' for disputants which often assists facilitating settlement;[2484] disputants appear unsatisfied with Shuttle Negotiation, as some expect they will be together at all times;[2485] and a belief that Joint Sessions are 'more effective'.[2486]

Similar to the magistrates' expectations, three mediators expect all mediators utilise a mix of Joint and Private Sessions,[2487] rather than Shuttle Mediation, which involves mediator 'shuttling' between disputants remaining separated throughout.[2488] Two suggested Shuttle Mediation is more common in the Family Law jurisdictions.[2489] One also considered there to be a higher chance of receiving complaints in Shuttle Mediation, not because of the mediator's facilitation skills, but if disputants do not 'get their own way'.[2490] For example, alleging the mediator was partial and should have brought them together to enable responses to allegations made against each other.[2491]

A minority opined that lawyers prefer Shuttle Negotiation citing fear of yielding 'control' of the *procedure* to mediators and 'letting their client loose'.[2492] One opined lawyers dislike having their clients converse and prefer keeping them 'hidden' and 'protected' to prevent them from saying or doing anything that may damage their case. Conversely, if they let their client loose, the other side will form a view about the kind of witness they would be. This lawyer-mediator opined that this

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2471 Mediator 3; Mediator 15.
2472 Mediator 3.
2473 Mediator 7.
2474 Mediator 2.
2475 Mediator 3; Mediator 5; Mediator 7; Mediator 16.
2476 Mediator 2; Mediator 7.
2477 Mediator 3; Mediator 14; Mediator 15.
2478 Mediator 14.
2479 Mediator 13; Mediator 15.
2480 Mediator 5.
2481 Mediator 1; Mediator 3; Mediator 7; Mediator 10; Mediator 16.
2482 Mediator 10.
2483 Mediator 1.
2484 Mediator 7.
2485 Mediator 7.
2486 Mediator 10. But see the opposing lawyer views below at 193 and 195.
2487 Mediator 4; Mediator 10; Mediator 16.
2488 See above Chapter II at 77.
2489 Mediator 10; Mediator 16.
2490 Mediator 16.
2491 See, eg, *Collins* (n 717) [28]–[29].
2492 Mediator 7; Mediator 13. See above Chapter V at 185. See also Chapter II at 42–3 and 83.

makes lawyers feel more 'in control', which is what they are 'used to' doing and feel it is their role to do so.[2493] Another opined lawyers exclude disputants from Joint Session preferring Shuttle Negotiation out of fear their client might make a concession and because lawyers are 'frightened' of emotions as they are not trained to deal with them.[2494] These views suggest some lawyers disallow their clients to speak freely or at length, which is indicative of limited direct disputant participation and the dominance of lawyer control.[2495] This will become more evident in the next part of the discussion.

The descriptions and expectations of some mediators are consistent with industry models that stress the importance of spending most time in Joint Session.[2496] Endeavouring to minimise Shuttle Negotiation is also characteristic of facilitative practice, which reinforces mediation's *self-determination* and *responsiveness* values.[2497]

(ii) Lawyers: Private Sessions after Parties' Opening Comments and Shuttle Negotiation

In contrast to the magistrates and mediators, most lawyers reported experiencing, expecting, and preferring mediators break for Private Sessions shortly after Parties' Opening Comments.[2498] This is consistent with literature suggesting Joint Sessions are abandoned or marginalised in court-connected mediation with a prevalence of Private Sessions and Shuttle Negotiations after a short Joint Session.[2499]

They provided three principal reasons why this is most appropriate.[2500] First, Private Sessions allow disputants to speak 'freely'[2501] and 'privately'[2502] with the mediator and *vice versa*. For example, one stated it could be counterproductive for a mediator to suggest in Joint Session that a disputant should make an offer 'because your case is terrible'. In doing do, the mediator could 'lose faith' form participants.[2503] If the mediator made such a suggestion during Private Session, even if the lawyer did not agree with it, the mediator is 'not stepping on anybody's toes'. This description illustrates the relationship between this barrister's expectations of the mediator's role and the purpose of Private Sessions; namely, for mediators to comment on the strengths and weaknesses of disputant positions during Private Sessions.[2504] It also reinforces the finding that some lawyers expect and prefer advisory/evaluative practices rather than facilitative mediation.[2505]

Secondly, it provides the opportunity to manage both emotional dynamics early and clients in private. Some reported it 'breaks the tension in the room'[2506] and mediators should break where disputants are 'getting really angry' to ensure they do not 'lose the session' and the settlement

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2493 Mediator 7.

2494 Mediator 13. Mediator 7 also opined that lawyers tend to focus less on the relational aspects involved in disputes and that they place less value on the 'human experience'.

2495 See above Chapter II at 42.

2496 See above Chapter II at 76.

2497 See above Chapter II at 34–5.

2498 Lawyer 3; Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 6; Lawyer 7. Cf Lawyer 2 (Bar 1) reported there tends not to be Shuttle Negotiation in the Court: see below Chapter VI at 194.

2499 See above Chapter II at 81.

2500 Lawyer 3; Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 6; Lawyer 7.

2501 Lawyer 6.

2502 Lawyer 2 (Bar 1); Lawyer 4 (Bar 2).

2503 Lawyer 4 (Bar 2).

2504 See above Chapter V at 150. See below Chapter VI at 194 and Chapter VIII at 240.

2505 See above Chapter V at 138–9, 149–50, 156, 160 and 163, 167–8.

2506 Lawyer 6.

opportunity.[2507] Unlike the mediators discussed above, one lawyer suggested most mediators break if disputant emotions surface, for most are not trained to embrace emotions.[2508]

Whilst lawyers can control their opening position, one stated they cannot control the other side's 'Opening' when made in Joint Session, which some clients find confronting.[2509] It thus provides an opportunity for lawyers to touch base with their clients, evaluate their mindset and calm them, before the trading of offers commence.[2510] Another described it as an opportunity to 'hose down' their client without the other participants present.[2511] Another stated it enables the mediator to have a private, respectful conversation with disputants where they have reached an impasse, are being 'unrealistic' to reconsider their position, or where there is inappropriate pressure or emotion applied by one of them.[2512]

Thirdly, a view that Private Sessions and Shuttle Negotiation produce settlement in the most efficient and effective manner.[2513] Some lawyers suggested Private Sessions facilitate the exchange of offers/counter-offers[2514] for 'salami-slicing' to commence. One suggested that as the exchanges start, the lawyers do not require disputants to return to Joint Session unless there are obstacles to settlement.[2515]

Some suggested it is more efficient and effective for the mediator to be the communication conduit, rather than communicating between disputants,[2516] especially when facilitating the exchange of offers.[2517] The practice of communications 'through the mediator' during Private Sessions has also received mention in case law.[2518]

Another suggested disputants are less likely to settle if they are kept in Joint Session for the entire mediation because having them in the same room increases 'the friction' and stifles settlement opportunities.[2519] This lawyer described the process as like an informal settlement conference where the mediator 'splits the airtime' and 'shuttles' between separate camps. These findings reflect lawyer dominated settlement conferences and reinforces a lawyer-, rather than disputant-centric, procedure.[2520]

Most lawyer descriptions are also consistent with literature suggesting Issue Exploration is skipped altogether with the remaining procedure being conducted by Shuttle Negotiation.[2521] These descriptions of the regular use of Private Sessions and Shuttle Negotiation are more consistent with positional bargaining common in settlement conferences, rather than facilitative mediation.[2522] They are also more consistent with descriptions of advisory/evaluative mediation, during which direct

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2507 Lawyer 3.
2508 Lawyer 1.
2509 Lawyer 5 (Bar 3).
2510 Lawyer 3.
2511 Lawyer 5 (Bar 3).
2512 Lawyer 1.
2513 Cf above Chapter II at 76.
2514 Lawyer 2 (Bar 1); Lawyer 4 (Bar 2).
2515 Lawyer 7.
2516 Lawyer 3.
2517 Lawyer 7.
2518 See, eg, *Bar Chambers* [2020] (n 893) [16] (Judge Gilchrist); *Koller* (n 884) [6] (Daly AsJ); *Pittorino* (n 729) [127] (Scott J). Cf *Ku-ring-gai Council* (n 184) [34] (McDougall J).
2519 Lawyer 6.
2520 See above Chapter II at 44.
2521 See above Chapter II at 77 and 81–2.
2522 See above Chapter II at 70 and 82.

disputant communication is characteristically restricted or controlled and more time is spent in Private Sessions than Joint Session.[2523]

The inference to be drawn is that lawyers are more comfortable with Private Sessions, which mimic settlement conferences, where they exercise control over process, negotiations and outcomes. This is evident from some lawyers who exhibited discomfort with the predominant use of Joint Sessions, which reflects literature suggesting lawyers justify bypassing the Joint Session to avoid, rather than constructively address, emotional outbursts and underlying disputant interests.[2524] The inference is also consistent with literature suggesting lawyers are cautious of the 'dangers' of direct disputant participation[2525] and are more 'comfortable' with Shuttle Negotiation.[2526] This inference is reinforced by the minority of mediators who reported lawyers prefer being in greater control of their clients to 'protect' them from making concessions and out of 'fear' of losing control over them and of addressing emotions.[2527] This reinforces tensions between mediators who invite, rather than suppress, emotion, with lawyers who actively avoid it.

These findings are consistent with lawyer-dominated rather than disputant-centric mediation.[2528] They also illustrate a relationship between lawyer expectations regarding the mediator's role, whether being communication facilitator, commenting on the strengths and weaknesses of disputant positions, or 'water carrier between rooms',[2529] and their understandings and expectations of the use and purposes of Private Sessions.[2530]

These findings are inconsistent with the expectation of magistrates and what some mediators reported about spending most of the time in Joint Session. This finding highlights a gap between facilitative mediation theory, that suggests Issue Exploration is the most time-consuming stage and that mediators should remain at this stage as long as possible,[2531] and practice.

However, the following views make it difficult to conclude that disputants are in Private Sessions for the majority of time, which suggests Joint Sessions are not categorically abandoned or marginalised in all actions or that there is a prevalence of Private Sessions and Shuttle Negotiations.[2532] For example, an outlier among the lawyers stated participants usually spend more time in Joint Session discussing the issues in contrast to private mediations outside the Court where 'after the Opening Statements you don't see the other side again for the rest of the day'.[2533] Whilst there is usually a need for Private Sessions, another lawyer stated there is occasionally no Private Sessions at all, as the process of disputants being in the same room listening to the lawyers deliver their 'Opening Statements', can sometimes provide the impetus for settlement.[2534]

A minority of lawyers prefer a more 'flexible'[2535] procedure whereby the mediator tailors the use of Joint and Private Sessions according to disputant preferences, lawyer preferences, disputed issues

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2523 See above Chapter II at 81.

2524 Ibid.

2525 See above Chapter II at 42.

2526 See above Chapter II at 77 and 81.

2527 See above Chapter II at 64–5 and Chapter VI at 185 and 191.

2528 See, eg, Debra Berman and James Alfini, 'Lawyer Colonization of Family Mediation: Consequences and Implications' (2012) 95(3) *Marquette Law Review* 887, 901, 922; Hensler, 'A Research Agenda' (n 80) 17.

2529 See above Chapter II at 76.

2530 See above Chapter V at 150. See below Chapter VII at 240.

2531 See above Chapter II at 76.

2532 Cf Chapter II at 76. This too reinforces my recommendation for future research: see below Chapter VII and VIII.

2533 Lawyer 2 (Bar 1).

2534 Lawyer 3. But see the earlier discussion regarding lawyer control of direct disputant communication in Chapter IV at 117 and 120–1.

2535 Lawyer 3; Lawyer 6; Lawyer 7. See also the discussion of mediation's inherent flexibility reflecting the *responsiveness* value in Chapter VII at 214.

and mediation dynamics. One stated neither liking nor encouraging mediators to keep participants in Joint Session for the duration of mediation, favouring a mix of Joint and Private Sessions.[2536] This lawyer suggested Joint Sessions are more important in some mediations than Private Sessions and *vice versa* and that their use should be discussed before mediation, which reinforces the importance of Pre-Mediation procedures.[2537]

Others stated there is no set script for the 'twists and turns' of mediation and ultimately the mediator decides how to best manage the combination of Joint and Private Sessions.[2538] They are guided by whether mediators want them to make an 'Opening Statement', or want disputants to identify the disputed issues, before breaking for Private Sessions and inviting one side 'to open the bidding'.[2539] This description suggests lawyers expect a level of mediator control over process,[2540] nevertheless, the procedure remains consistent with lawyer preferences for structures common within legal culture, which mimic settlement conferences.[2541]

(g) Option Generation and Negotiation

Neither magistrates nor lawyers provided comprehensive explanations of this stage. Two magistrates expected mediators assist disputants discuss possible 'solutions' to address their issues,[2542] but provided no further explanation, making it difficult to infer whether they expect it occurs during this stage or in Private Sessions. Furthermore, lawyer preferences for Shuttle Negotiation suggest mediators may be yielding to lawyer preferences for negotiation and skipping Issue Exploration altogether.[2543]

Mediator descriptions of this stage are consistent with facilitative mediation literature.[2544] Most summarise the progress made prior to breaking for Private Sessions before inviting disputants to make comments,[2545] and brainstorm a range of possible settlement options.[2546]

One reported resisting requests to shuttle messages between camps at this stage, suggesting it is more efficient to facilitate direct disputant communication.[2547] Another described disputants typically enter Option Generation insisting on their fixed positions and having to shift them from notions that there is 'only one way' to settle.[2548] Mediators also have to 'hold' disputants from rushing to 'crunch the numbers' as long as possible.[2549] One suggested, unlike in non-court-connected mediation where there tend to be more interests and options to explore and more interplay with 'other issues', it is more difficult to hold disputants back from 'jumping into the first options', particularly in debt collection actions, which involve distributive bargaining over a single-issue in dispute. This mediator opined that the perceived limited scope for option generation explains why mediators usually swiftly focus participants on generating options largely regarding 'who pays whom what, how much and when'.[2550]

2536 Lawyer 5 (Bar 3).
2537 See below Chapter VII, recommendation 6.
2538 Lawyer 2 (Bar 1); Lawyer 7.
2539 Lawyer 7.
2540 As stipulated in the *Rules* (n 917) r 2. See above Chapter II at 32.
2541 See above Chapter VI at 183 and 194.
2542 Magistrate 4; Magistrate 5.
2543 See above Chapter VI at 183.
2544 See above Chapter II at 66.
2545 Mediator 10.
2546 Mediator 5; Mediator 6; Mediator 9; Mediator 10.
2547 Mediator 10.
2548 Mediator 12.
2549 Mediator 12. Mediator 13.
2550 Mediator 12.

(h) Agreement and Closure

Stakeholder views were largely convergent regarding the administrative parts of mediation's final stage,[2551] stating they are required to complete the Record of Outcome.[2552] If settlement is reached, assuming disputants elect to use the Court's *pro forma* Settlement Agreement, they review its terms before signing it.[2553] Disputants are given a photocopy of the executed Settlement Agreement[2554] and the original is placed in a sealed envelope on the Court file. If settlement is not reached, mediation is terminated. Mediators return the completed forms and Court file to the Mediation Unit.[2555]

A minority of lawyers and mediators commented on the effectiveness of having disputants 'sign something' before leaving.[2556] These views are consistent with best practice that suggests agreements be reduced to writing before mediation ends.[2557] However, Stakeholders did not share unanimous views, expectations, or experiences as to 'who' records Settlement Agreements and the level of 'assistance' mediators provide in recording settlement terms. This is consistent with the absence of guidance in the rules-based framework regarding the level of 'assistance' mediators must provide and whether their role in recording settlement terms is restricted to one of scribe or dictator.[2558]

(i) Magistrates: Recording Settlement in the Court's Pro Forma

All magistrates expected mediators to record Settlement Agreements, though their expectations regarding levels of assistance provided in recording settlement terms were not unanimous. One expressed uncertainty regarding how involved mediators are in recording settlement terms,[2559] whereas another expected lawyers to be actively involved in drafting.[2560] Another indicated the mediator's role is not to advise disputants about their legal rights and obligations regarding settlement terms but that Settlement Agreements simply record their agreed terms so disputants have a clear understanding of what will happen if they are not complied with.[2561] One also stated disputants occasionally reach an *in-principle agreement* subject to a Deed of Settlement that lawyers draft post-mediation.[2562] Another stated disputants have on-site access to magistrates if they agree to consent orders.[2563]

As most mediators interviewed reported being practising lawyers,[2564] the Court likely assumes they possess skills to 'facilitate' recording of settlement terms.[2565] This inference coincides with one mediator's opinion that the Court presumes mediators 'know how to draft' Settlement Agreements by having undergone NMAS training.[2566]

2551 See above Chapter III at 102–3.
2552 Appendix D.3: Record of Outcome.
2553 Mediator 2; Mediator 5; Mediator 11; Mediator 12; Mediator 13; Mediator 14; Mediator 16. Appendix D.4: Settlement Agreement and Annexure.
2554 Lawyer 3; Lawyer 7.
2555 Mediator 2; Mediator 3; Mediator 5.
2556 Lawyer 3; Lawyer 5 (Bar 3); Mediator 1; Mediator 4; Mediator 5.
2557 See above Chapter II at 82.
2558 See above Chapter III at 105.
2559 Magistrate 3.
2560 Magistrate 1.
2561 Magistrate 4.
2562 Magistrate 5.
2563 Magistrate 4.
2564 See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.
2565 *Practice Standards* (n 222) s10.1(b)(ix). See above Chapter II at 82.
2566 Mediator 6.

However, two magistrates expressed concerns regarding some settlements reached, stating they occasionally become 'unstuck' post-mediation, particularly where Settlement Agreements contain insufficient details or clarity, resulting in compliance issues.[2567] Disputants then return to Court for further argument, necessitating the Court to discern 'what was intended', such as whether: judgment be entered for the initial action or for any outstanding balance, that the initial action be prosecuted or that the amount settled at mediation be prosecuted.[2568] Evidently, settlements that generate satellite litigation post-mediation impact upon *effectiveness* and *efficiency* objectives,[2569] which has received judicial disapproval.[2570]

(ii) Lawyers: Mixed Settlement Practices and Levels of Mediator 'Assistance'

Lawyers reported settlements are recorded in three principal ways. First, disputants sign a 'Heads of Agreement', recording key points of their *in-principle agreement*, prepared by either the mediator,[2571] one of the disputants or lawyers,[2572] on the understanding it is subject to a Deed of Settlement to be drafted by lawyers post-mediation.[2573] Secondly, they are recorded in the Court's Settlement Agreement.[2574] Thirdly, some lawyers prefer appearing before the magistrate for consent orders.[2575] Two suggested the decision to utilise the Settlement Agreement or reach an *in principle* agreement subject to a Deed or Settlement depends on the complexity of the action, the amount in dispute, the steps required to effect settlement and time imperatives, noting it is quicker to complete the former at mediation than prepare and execute the latter post-mediation.[2576]

Lawyer experiences regarding levels of mediator assistance in recording settlement terms were not unanimous. They ranged between three points on a spectrum: one described experiencing mediators with high level of involvement, most described mediators as 'scribes', and some described mediators with little or no involvement.

One reported experiencing mediations where the mediator drafted the Settlement Agreement, others where the mediator recorded the terms dictated by lawyers and others where lawyers drafted it.[2577] This lawyer suggested that levels of mediator input in recording settlement terms depends upon their subject-matter expertise, stating experienced lawyer-mediators usually have more input citing familiarity with the 'standard' terms.[2578]

Another reported mediators usually dot-point the *in-principle agreement* or Heads of Agreement but never experienced a mediator drafting an agreement.[2579] Another suggested many mediators

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2567 Magistrate 4; Magistrate 5. See above Chapter IV at 113. See below Chapter VI at 200 and Chapter VII at 232 and Chapter VIII at 246.

2568 Magistrate 5.

2569 See above Chapter II at 49. See also Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 154.

2570 See, eg, *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 476, [11]–[12] (Palmer J), cited in *Azzi v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140, 146 [19]. See also *Rothwell v Rothwell* [2008] EWCA Civ 1600, [8] (Thorpe LJ). For other examples of cases involving 'post-settlement blues' see, eg, *Boettcher* (n 522) [76] (Fitzgerald JA). See below Chapter VII, recommendation 3 and recommendation 10.

2571 Lawyer 2 (Bar 1).

2572 Lawyer 5 (Bar 3).

2573 Lawyer 2 (Bar 1); Lawyer 7.

2574 Lawyer 3; Lawyer 7.

2575 Lawyer 2 (Bar 1); Lawyer 5 (Bar 3); Lawyer 6. See *the Act* (n 322) s 27(5).

2576 Lawyer 3; Lawyer 7.

2577 Lawyer 7.

2578 Lawyer 7. This description is consistent with the role of conciliators discussed in the literature review: see above Chapter II at 36.

2579 Lawyer 2 (Bar 1). Cf *Tapoohi* (n 716) [30] (Habersberger J).

take a passive role by letting disputants record their terms and do *not* record Heads of Agreement, for they do not want to be drawn into a future dispute over what disputants intended.[2580]

Three described the mediator's role as a 'scribe'.[2581] One reported mediators record the exchange of offers throughout mediation, communicate those draft terms back to disputants for review, inviting lawyer input, before recording that understanding in the Settlement Agreement or otherwise offer it to one of the lawyers to draft, but mediators do not 'propose' settlement terms.[2582] Another expressed mediators act as more than mere scribe but also have input in settlement terms.[2583]

Two reported mediators have 'virtually no' involvement in the drafting of Settlement Agreements, not even acting as scribe, for it is always left to disputants or their lawyers.[2584]

One queried whether the level of mediator involvement in preparing and explaining draft settlement terms differs in mediations between unrepresented litigants, given lawyers are not present to provide advice and ensure they are *ad idem*.[2585] This lawyer described one of mediation's benefits is the ability to enlist the mediator's assistance in explaining the intended effect of proposed terms, particularly in mediations involving unrepresented litigants, which assists ensuring these terms are understood and is thus useful for the represented disputant's solicitor. However, this lawyer raised concerns about the limits upon the mediator's role during this stage, noting they cannot give advice.[2586] This concern is consistent with literature suggesting mediators have no realistic choice but to draft settlement terms for unrepresented disputants.[2587]

(iii) Mediators: the Court's Pro Forma and Mixed Levels of 'Assistance'

The almost unanimous view of mediators is that settlement terms are recorded in the Court's Settlement Agreement. Some reported they are often 'short and sharp' with the essential terms being one disputant agrees to pay the other a certain sum inclusive of costs and interest within a specified timeframe, with agreed consequences if payment is not made on time.[2588] A minority occasionally assist lawyers and disputants reach *in-principle* agreements subject to the signing of a Deed of Settlement.[2589] One reported assisting in the preparation of consent orders.[2590]

Mediators reported varying levels of assistance in recording settlement terms. Their views ranged between four points on a spectrum: an outlier's description suggests they 'dictate'; most act as a 'scribe';[2591] some defer to lawyers to draft;[2592] and three have disputants themselves, particularly unrepresented litigants, draft the Settlement Agreement.[2593]

The outlier described a process of proposing a sentence, seeking disputant agreement, and then recording in turn. The outlier also described specific matters needed and dictating certain terms that 'must' feature in Settlement Agreements:

2580 Lawyer 5 (Bar 3).
2581 Lawyer 3; Lawyer 6; Lawyer 7.
2582 Lawyer 3.
2583 Lawyer 7.
2584 Lawyer 4 (Bar 2); Lawyer 5 (Bar 3).
2585 Lawyer 3.
2586 Lawyer 3.
2587 See above Chapter II at 82. See also Chapter VII at 232 and 248.
2588 Mediator 6; Mediator 9; Mediator 12; Mediator 13; Mediator 14; Mediator 16.
2589 Mediator 1; Mediator 9; Mediator 10; Mediator 11.
2590 Mediator 10.
2591 Mediator 2; Mediator 3; Mediator 4; Mediator 5; Mediator 6; Mediator 8; Mediator 11; Mediator 13; Mediator 14; Mediator 15; Mediator 16.
2592 Mediator 1; Mediator 2; Mediator 5; Mediator 7; Mediator 10; Mediator 11.
2593 Mediator 5; Mediator 9; Mediator 12.

> I need to have a statement that says, 'no one accepts liability'. I never give any suggestion that somebody is at fault. I never state someone agrees they owe them. It's always 'agrees to reimburse the sum of $X.00 in weekly/monthly instalments commencing on date by EFT.' I am going to say that not only is it confidential but 'no party is to pass any [disparaging] comments about the other party.'[2594]

This lawyer-mediator's direct involvement in dictating certain terms blurs the scribe-dictator distinction and risks being construed as providing 'advice'.[2595] This is unsurprising given this was one of the three mediators who expressed undertaking conciliation or otherwise utilising advisory/evaluative techniques.[2596] This finding reinforces the suggestion that some mediators may not be adhering to a 'purely' facilitative practice, as required by the rules-based framework.[2597] It also illustrates variation between the two self-described conciliators regarding which terms 'must' feature in Settlement Agreements.

The majority who reported acting as 'scribe' described a collaborative effort whereby they actively involve the lawyers or disputants when discussing, clarifying, and then agreeing proposed terms, ensuring the wording is reflective of 'their agreement', before recording final terms in the Settlement Agreement.[2598]

The descriptions by two lawyer-mediators suggest their role is not restricted to being a 'mere' scribe as their own subject-matter expertise creeps in.[2599] For example, one expressed being unable to ignore legal training and stated if they identify 'problems' in what disputants want to agree or have concerns about the agreement's binding nature, they question disputants until their concerns are addressed. If their concerns are not resolved upon questioning or if they have 'serious' concerns about the agreement to be reached, they either ask whether disputants want, or suggest they obtain, independent legal advice before signing.[2600]

Similarly, the second lawyer-mediator described being actively involved in reality testing.[2601] Even in actions where disputants draft the Settlement Agreement themselves, this mediator reality tests it to ensure it is both workable and durable, to reduce the chances of it being breached, forcing disputants to return to Court. This description reflects mediation's *effectiveness* objective.[2602] These two views suggest lawyer-mediators have more involvement in drafting Settlement Agreements than their non-lawyer counterparts, which can impact upon outcomes reached.[2603]

Two mediators also acknowledged the difficulty faced where they have concerns about whether a disputant should agree to certain terms,[2604] particularly in mediations involving one or more unrepresented litigants who may not 'know their rights' and be 'vulnerable'.[2605] One mediator acknowledged that suggesting to disputants that they should obtain legal advice before agreeing, to

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2594 Mediator 6.
2595 See above Chapter II at 82.
2596 See above Chapter V at 135–6.
2597 See above Chapter V at 141.
2598 Mediator 2; Mediator 3; Mediator 7; Mediator 8; Mediator 10; Mediator 11; Mediator 16.
2599 Their descriptions also coincide more with the role of conciliators than with purely facilitative mediation: see above Chapter II at 36.
2600 Mediator 10.
2601 Mediator 11.
2602 See above Chapter II at 49.
2603 However, it is difficult to extrapolate from this data whether Settlement Agreements prepared by lawyer- or non-lawyer-mediators result in more 'enforceable' agreements or not, which reinforces my recommendation for future research: see below Chapter VII and Chapter VIII.
2604 Mediator 4.
2605 Mediator 11.

what appear to the mediator as being unfair, might be 'the wrong thing to do'.[2606] These views acknowledge that mediators possess power and influence over content and outcomes and therefore cannot be 'completely' impartial.[2607]

Three non-lawyer-mediators emphasised not 'telling' or 'dictating' terms but merely record what lawyers or disputants ask them to.[2608] One described their role as being 'mere' scribe, which does not involve the mediator 'putting words on the page' or deciding the parameters of the agreement, so if disputants 'want a loose agreement about payment date, they can have it'.[2609]

One non-lawyer-mediator expressed having little involvement in recording settlement terms and leaves this task to disputants citing they have 'more ownership' by 'putting their own words together'.[2610] Such accounts from mediators may explain the expressed concern by two magistrates that settlements occasionally become 'unstuck' post-mediation, where they contain insufficient details or clarity in terms.[2611]

Conversely, another lawyer-mediator reported that having disputants work out and draft 'their own words', rather than using the mediator's words, increases the chance of the agreement 'sticking'.[2612] This mediator acknowledged Settlement Agreements might be 'more legally enforceable' if drafted by the mediator especially as unrepresented litigants tend not to be 'lawyerly'. However, this mediator reported 'not accepting' the first draft without 'stress-testing' the wording prepared by disputants to ensure their agreement truly reflects what they have agreed, is legally enforceable, and enables disputants to monitor compliance with its terms.[2613]

(iv) 'Attempt to Settle'

As discussed in the exploration of the rules-based framework, the listing fee payable by disputants may be discounted by 50% where they 'attempt to settle', if certified by the mediator.[2614] No lawyer or mediator commented upon their understandings, expectations, and experiences regarding the mediators' role in certifying disputants have made an 'attempt to settle', which may be explained by the introduction of the listing fees part-way through the research.[2615]

Three magistrates provided brief commentary, despite differences between what an attempt would likely entail. One suggested this would involve disputants attending mediation before trial and making a 'genuine attempt'.[2616] Another queried whether the attempt needs to be 'genuine' and suggested disputants would merely need to attend, rather than having to spend a minimum amount of time 'attempting' mediation.[2617] Another considered the 'attempt' does not include considerations of 'genuineness', as this is absent from the *Act*,[2618] but requires disputants engage in a minimum level of dialogue. However, the 'attempt' does not mean penalising a disputant for not compromising their position.[2619] This last view is consistent with literature suggesting the sanctions

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2606 Mediator 4.
2607 See above Chapter II at 34.
2608 Mediator 4; Mediator 10; Mediator 16.
2609 Mediator 4.
2610 Mediator 9.
2611 See above Chapter VI at 197.
2612 Mediator 12.
2613 Mediator 12.
2614 See above Chapter III at 88–9.
2615 See above n 978 and Appendix A: Qualitative Research Methodology. See below Chapter VII at 227.
2616 Magistrate 2.
2617 Magistrate 5.
2618 See above Chapter III at 88–9.
2619 Magistrate 4.

imposed where disputants have not 'attempted to settle' compromise disputant self-determination, in particular the element of consensuality of outcomes.[2620]

It is thus unclear whether there is convergence or divergence between Stakeholders regarding what constitutes an 'attempt' and whether it requires disputants to make 'genuine' or 'reasonable' offers to compromise before mediators *may* certify they have made an attempt to settle.[2621]

The inference to be drawn is that Stakeholders likely have different understandings, expectations, and experiences of the mediator's role in certifying an attempt has been made, which creates the potential for an obvious expectation gap.[2622]

3 *Summary of Key Findings*

A divergence in understandings, expectations, and experiences exists between two camps regarding what happens during mediation. Most magistrates expect mediators to adhere to an industry model or to utilise a seven-stage procedure and half the mediators express adhering to an industry model. Conversely, most lawyers report experiencing a four-stage procedure, where mediators break for Private Sessions shortly after Parties' Opening Comments and the remaining procedure being Shuttle Negotiation.

The existence of mixed practices regarding compliance with industry models,[2623] suggests mixed *procedures* exist in the Court, which can generate *procedural* unpredictability. This finding accords with my contention regarding the absence of streamlined or systematised procedures for mediation in the rules-based framework.[2624]

The data suggests expectation gaps exist regarding what usually occurs during Reflection and Summary, Agenda Setting, Issue Exploration and Option Generation and Negotiation stages. Whilst most magistrates did not provide comprehensive descriptions of the various stages, they expect mediators adhere to an industry model or utilise a seven-stage procedure. Mediators provided comprehensive descriptions of the various stages, reflective of facilitative mediation literature. Conversely, the lawyer data suggests some of the abovementioned stages are bypassed altogether. This finding reinforces the contention that there are mixed *procedures*, which can generate *procedural* unpredictability. It suggests mediators pay more attention to the purposes of each stage of the *procedure* than the other two Stakeholder groups. Lawyers may not notice these stages or consider them unimportant. It also suggests mediators are more attuned to mediation's varying *purposes*,[2625] and the importance of direct disputant participation, whereas lawyers appear more focussed on achieving settlement rather than mediation's more qualitative purposes.[2626] This finding also highlights tensions between mediator process control and lawyer dominance.[2627]

Stakeholders did not share unanimous understandings, expectations, or experiences regarding Private Sessions or Shuttle Negotiation. Magistrates expect mediators utilise a mix of Joint and Private Sessions and break into Private Sessions on a needs basis, rather than engaging in Shuttle Negotiation. Less than half the mediators reported breaking for Private Sessions after Issue

2620 Boulle and Field, *Mediation in Australia* (n 27) 46; Jacqueline Nolan-Haley, 'Mediation Exceptionally' (2009) 78(3) *Fordham Law Review* 1247, 1256.

2621 See above Chapter III at 88–9. See also Chapter VII at 227.

2622 This further reinforces my recommendation for future research: see below Chapter VII Chapter VIII.

2623 See above Chapter VI at 180.

2624 See above Chapter III at 101.

2625 See above Chapter IV at 128–9.

2626 See above Chapter IV at 110–11.

2627 See above Chapter II at 39 and 42–4 and 83. See above Chapter IV at 121, 124 and 129, Chapter V at 142, 158 and 164 and Chapter VI at 185, 187, 193 and 197 and 201–2. See below Chapter VI at 202 and Chapter VII at 211, 220, 229 and 233–5 and Chapter VIII at 240 and 245.

Exploration and a minority reported conducting Joint sessions 'as much as possible' with minimal use of Shuttle Negotiation. Conversely, lawyers reported experiencing, expecting, and preferring mediators to break for Private Sessions shortly after Parties' Opening Comments and the remaining procedure being Shuttle Negotiation.

The reported early tendency to break for Private Sessions is inconsistent with some industry models that provide Private Sessions should be held later in the procedure following Issue Exploration in Joint Session.[2628] This finding is indicative of a gap between facilitative theory and practice and reinforces tensions between mediator process control and lawyer dominance.[2629]

Stakeholders did not share unanimous views, expectations, or experiences regarding who records Settlement Agreements, the levels of assistance mediators provide in recording settlement terms, and whether the mediator's role is scribe, dictator,[2630] or have little or no involvement during this stage, suggesting the existence of mixed *practices*. This variation highlights the potential for inconsistency and *practice* unpredictability, which can impact upon participant behaviours, outcomes reached and thus affect participant experiences.

The findings also suggest some mediators may not be adhering to the requirement to assist disputants record agreements, including agreed consequences upon default,[2631] by deferring to lawyers or abdicating responsibility for recording Settlement Agreements to unrepresented litigants. The inference to be drawn is that the *Rules* are not clear enough regarding the level of assistance mediators are required to provide in recording settlement terms.[2632] Ineffectively recorded terms reduce the potential for durable agreements generating satellite litigation post-mediation, which impact upon *effectiveness* and *efficiency* objectives. This may explain why two magistrates voiced concerns regarding Settlement Agreements, which occasionally become 'unstuck' post-settlement.[2633]

D *After Mediation*

I now explore what occurs after mediation and identify two key findings.

First, Stakeholders indicated that there is no Post-Mediation procedure.

Secondly, a minority of magistrates reported undertaking a post-mediation directions hearing.

1 *No Post-Mediation Procedure*

As discussed in the literature review, the final stage of the procedure in many industry models is Post-Mediation 'follow up'.[2634]

No Stakeholders reported that a Post-Mediation procedure exists. There is also no formal Post-mediation debriefing for mediators.[2635]

Where actions settle at mediation, they are adjourned to a 'mention only' hearing before a deputy registrar, a magistrate, or the Manager of the Mediation Unit. This hearing enables the Court to assist disputants comply with or address any problems with the implementation of their Settlement

2628 See above Chapter II at 76.
2629 See above Chapter II at 39 and 42–4 and 83.
2630 See above Chapter II at 82.
2631 *Rules* (n 917) r 72(4). See above Chapter III at 102.
2632 See below Chapter VII at 232 and 248.
2633 See above Chapter VI at 200.
2634 See above Chapter II at 79.
2635 Mediator 5; Mediator 6.

Agreement.[2636] This hearing has certain characteristics of a Post-Mediation procedure. If disputants do not attend the hearing, their action is dismissed.[2637]

2 *Post-Mediation Directions Hearing*

Where actions are not settled at mediation, the file returns to the presiding magistrate for case management.[2638]

Two magistrates reported typically listing such actions for a directions hearing to gauge disputants' appetite for settlement rather than automatically deciding to list them for trial. One suggested that the time between the 'unsuccessful' mediation and the first directions hearing, approximately four weeks, provides disputants time to 'cool down' and reflect upon what was discussed at mediation, which results in some having a 'change of heart' and settle before the directions hearing.[2639] This magistrate typically informs disputants at the directions hearing, particularly in Minor Claims, what needs to occur as part of trial preparation, which witnesses will need to be called and what must be proved for their claim or defence to succeed, causing some actions to settle before the Court.[2640] Another reported not listing claims within the General Division immediately for trial but also calling disputants for a further directions hearing during which they ask them to clarify why the action did not resolve.[2641] This provides an additional opportunity for the Court to determine what the particular issues are and to explore potential settlement options.

This post-mediation directions hearing is a further illustration of the many stages within the lifecycle of actions where the Court endeavours to achieve settlement.[2642]

3 *Summary of Key findings*

The absence of a Post-Mediation procedure is consistent with the absence of any reference to it in the rules-based framework.[2643] It appears the Court entrusts the responsibility to lawyers to review disputant adherence with and implementation of Settlement Agreements.

Failing to have a Post-Mediation is inconsistent with some industry models,[2644] despite the mention only hearing and two magistrates undertaking a post-mediation directions hearing.

E *Conclusion*

This Chapter has addressed the third research question by examining mediation *procedure*. Consistent with the insights in the previous Chapter, it has demonstrated gaps exist at various stages of the *procedure*.

Gaps exist regarding referral practices. Whilst magistrates strongly encourage mediation, acknowledging the benefits to disputants, they do not typically compel it against adamant objection.[2645] Conversely, some mediators expect referrals to be either routine or presumptively mandatory, subject to those that are unsuitable, whereas lawyers have experienced mixed referral practices.

2636 Lawyer 7; Mediator 16.
2637 Magistrate 4; Lawyer 3; Lawyer 7; Mediator 7; Mediator 14; Mediator 16.
2638 Magistrate 1; Magistrate 2; Magistrate 3; Mediator 4; Mediator 7; Mediator 16.
2639 Magistrate 5.
2640 Magistrate 5.
2641 Magistrate 3.
2642 *The Act* (n 322) s 27(2b). See above Chapter III at 85. See also Chapter IV at 110.
2643 See above Chapter III at 106
2644 See above Chapter II at 79.
2645 See also Chapter VII at 222.

Gaps also exist regarding the level of pre-mediation information exchange, which may be attributed to the absence of Pre-mediation procedure.

Gaps exist regarding the industry model mediators utilise or the 'typical' stages of the *procedure*. Whilst magistrates reported uncertainty about what precisely occurs during mediation, they expect mediators adhere with industry models or utilise a seven-stage procedure. Whilst half the mediators reported adhering to an industry model, they described a consistent *procedure*, which suggests compliance with industry models. Conversely, lawyers reported experiencing a four-stage procedure, where mediators break for Private Sessions shortly after Parties' Opening Comments and the remaining procedure being Shuttle Negotiation.

Gaps exist regarding what usually occurs during each stage of the *procedure*. In particular, whether mediators undertake Reflection and Summary, Agenda Setting and Issue Exploration stages, or whether they are bypassed altogether, with mediators breaking for Private Sessions shortly after the Parties' Opening Comments. Prominent gaps exist regarding the purpose, timing and use of Private Sessions and the use and duration of Shuttle Negotiation. Prominent gaps also exist regarding who records Settlement Agreements and the level of assistance mediators provide in recording settlement terms.

Consistent with the findings in the previous two Chapters,[2646] the data suggests mediators are more attuned to the purposes of each stage of the procedure, reflective of their understanding of facilitative mediation theory. Mediators are also more attuned to mediation's varying *purposes* and facilitating direct disputant participation.[2647] Conversely, lawyers appear more outcome-focussed, emphasising settlement than achieving more qualitative purposes.[2648] This may also explain why lawyers prefer maintaining control over the procedure, their clients, and outcomes.

Consistent with the insights in the previous Chapter, this Chapter reinforces my contention that some Stakeholder expectations regarding *procedure* exist within a vacuum.[2649] These findings also suggest gaps exist between facilitative theory,[2650] and what occurs in practice.[2651] They also reinforce my contention regarding the absence of a streamlined or systematised procedure in the rules-based framework.[2652]

These findings are important for they illustrate the potential for Stakeholders and mediation participants to experience mixed practices and inconsistency *procedural* unpredictability and impact upon practices, behaviours, mediator interventions, mediation dynamics, outcomes reached and affect participant experiences. It also highlights tensions between satisfying *effectiveness* and *efficiency* objectives and satisfying *self-determination*, *non-adversarialism* and *responsiveness* values.[2653]

This Chapter completes the presentation of the empirical data. In the next Chapter I examine the key findings and the significance of the identified expectation gaps between Stakeholder groups and between theory and practice. I thereafter make recommendations to address them.

2646 See above Chapter IV at 127 and 129 and Chapter V at 144 and 168.

2647 See above Chapter IV at 119–123 and Chapter V at 187 and 201.

2648 See above Chapter II at 50–2 and 54–7.

2649 See above Chapter V at 168. See also Chapter VII, recommendation 10.

2650 See above Chapter II at 50–2 and 66.

2651 See above Chapter IV, Chapter V and Chapter VI.

2652 See above Chapter III at 101.

2653 See above Chapter II at 34–5 and 48, Chapter IV at 113–15, Chapter V at 159 and Chapter VI at 170. See below Chapter VII at 208 and Chapter VIII at 242.

CHAPTER VIII: DISCUSSION AND RECOMMENDATIONS

Whilst legislation, court rules, practice directions, referral orders and case law purport to promote certainty, consistency, and accountability in court-connected mediation,[2654] the findings in the previous three Chapters demonstrate divergent understandings, expectations, and experiences regarding various aspects of the three themes, particularly *practice* and *procedure*. This suggests mediation in the Court is not as certain, consistent or predictable as it could be.

I have argued that expectation gaps are important because of the mischief they can cause and tensions they create between Stakeholder groups.[2655] In particular, expectation gaps illustrate the potential for Stakeholders and other participants to experience inconsistency, *practice* and *procedural* unpredictability and mixed approaches.[2656] They can also impact upon practices, behaviours, mediator interventions, mediation dynamics, outcomes reached,[2657] and affect participant experiences.

In this Chapter I examine the prominent expectation gaps identified in Chapters IV, V, and VI and other important findings regarding the three themes. I structure this Chapter according to the three themes. After identifying the prominent gaps for each, I illustrate why they are significant and make recommendations to address them.

Part A presents an important update since the commencement of this research: the introduction of the *UCRs*. Part B considers the key findings regarding *purpose*. Given the broad convergence between Stakeholders who described mediation's primary *purpose* quantitatively as to settle actions, though there was no uniform description of what 'settlement' meant,[2658] this discussion is briefer than the discussion regarding *practice* and *procedure*, which contained more expectation gaps. Part C considers three of the prominent expectation gaps regarding *practice*. Part D considers five of the prominent expectation gaps regarding *procedure*.

Just as the three themes are interrelated, as illustrated throughout this thesis, so too are my recommendations. Though the majority are targeted towards *practice* and *procedure*, they are linked with purpose, for, as indicated throughout this thesis, *purpose* drives *practice* and *procedure*.[2659]

My recommendations centre on four principles, as presented in the introduction to the thesis.[2660] First, promoting Stakeholder education regarding the three themes. Secondly, promoting rule clarity. Thirdly, promoting satisfaction of mediation's core values and objectives.[2661] Fourthly, promoting cultural change in the court-connected mediation context and the legal profession. Interdependency exists between each of the abovementioned principles. For example, promoting Stakeholder education and satisfaction of mediation's values and objectives is linked with rule clarity and fostering cultural change. These four principles promote consistency and predictability, will manage Stakeholder and disputant expectations better and change behaviours of those involved, either directly or indirectly, in mediation.

2654 See above Chapter II at 38.

2655 See above Chapter I at 17 and 25.

2656 See above Chapter I at 17.

2657 See above Chapter I at 15, Chapter II at 46, Chapter IV at 108 and 130, Chapter V at 132 and 167–9 and Chapter VII at 170, 199, 202 and 204. See below Chapter VII at 212 and Chapter VIII at 238.

2658 See above Chapter IV at 113.

2659 See above Chapter I at 13, Chapter II at 47, Chapter IV at 113 and 125, Chapter V at 131 and Chapter VI at 181, 192, 197 and 202. See below Chapter VII at 208, 210 and 234.

2660 See above Chapter I at 25.

2661 See above Chapter II at 33–5.

I contend that the Court can align and 'manage' Stakeholder expectations so that participants 'know what they will get in the box'.[2662] One mediator identified this theme by describing lawyers and mediators as 'functionaries'.[2663] The Court, as 'process-maker', and overseer of the program, is responsible for providing the parameters for how mediation should be conducted, by prescribing rules governing the three themes, and setting the expectations of mediators and lawyers as 'process-takers'.[2664] Magistrates can also reiterate to lawyers and disputants, at the first directions hearing, the Court's expectations regarding the three themes. Lawyers, therefore, as process-takers from the Court, can manage the expectations of their clients by informing them of the Court's expectations before mediation. Mediators too, as process-takers from the Court, can manage the expectations of lawyers and disputants, as process-takers, during the mediation.

My recommendations are interdependent, mutually reinforcing, and promote the abovementioned four principles. Stakeholders, the Court, and future mediation users would benefit from the implementation of these recommendations, which will also foster cultural change. My recommendations are consistent with best practice literature[2665] and are drafted to accommodate the *UCRs*.

A *Update Since Commencement of Research: Introduction of the Uniform Civil Rules 2020 (SA)*

I explored the rules-based framework in place during the years that I undertook interviewsn in Chapter III,[2666] which preceded the commencement of the *UCRs* on 18 May 2020.[2667] Despite not being the focus of my research, I have summarised in table format some features of the *Rules*, *Practice Directions*, and *UCRs* regarding mediation for ease of comparison.[2668]

The *UCRs* contain a stronger policy of encouraging mediation as a primary means of dispute resolution than in the *Rules* and the *Practice Directions*, as illustrated by the following five examples.

First, the introduction of separate objects sections to facilitate the just, efficient, effective and proportionate[2669] resolution of actions by, for example, mediation, or determination by the Court if litigation is unavoidable.[2670] These provisions are consistent with the introduction of the 'overarching obligations' of disputants and lawyers, including using reasonable endeavours to resolve or narrow the scope of actions by agreement.[2671]

Secondly, requirements for disputants to take *pre-action steps*[2672] and engage in a *pre-action meeting*,[2673] which may include mediation, before commencing litigation.

Thirdly, the Court's express power to order mediation 'at any stage'[2674] is more prominent than the case management principles in the *Rules*, which showed that actions are referred to mediation in two ways.[2675]

2662 Mediator 12.
2663 Mediator 12.
2664 Mediator 12.
2665 See above Chapter II.
2666 Namely, the *Rules* (n 917) and the *Practice Directions* (n 971) 5.
2667 See above Chapter III at 84. See also Chapter I at 24.
2668 Appendix J: Comparison between *the Act*, *Rules* and *Practice Directions* and the *UCRs* regarding *Purpose*, *Practice* and *Procedure*.
2669 See, eg, *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, 318 [39], discussing *Jameel v Dow Jones & Co Inc* [2005] QB 946; *PGF II SA* (n 523) [27], [56] (Briggs LJ).
2670 *UCRs* (n 917) rr 1.5, 61.1, 331.2(a)–(c).
2671 Ibid r 3.1(g).
2672 Ibid ch 7 div 1.
2673 Ibid rr 61.2, 61.12. See also at: r 332.3(f).

Fourthly, the requirement for the Court at a pre-trial directions hearing to consider whether all attempts at settlement, including mediation, have been exhausted.[2676]

Fifthly, the express power granted to taxation officers at taxation of costs hearings to refer disputed issues to mediation.[2677]

This stronger policy of encouraging mediation is consistent with developments in the United Kingdom. Despite court forms, pre-action protocols, and guidance documents containing significant prompts towards ADR processes, the Civil Justice Council recommended they should be reviewed to express a rebuttable presumption that ADR will be 'attempted' at an appropriate stage and that disputants have been adequately informed about the alternatives to litigation.[2678]

The *UCRs* also contain clearer provisions regarding pre-mediation information exchange.[2679] These new provisions will support streamlining *practices* and *procedures* regarding the exchange of Position Papers and the like, which could assist the facilitation of non-contentious administrative and discovery issues before mediation.[2680] They may also address the complaint by some mediators who reported the minimal information within the Court file occasionally results in them going 'in cold' to mediation.[2681]

Exploration of Stakeholder reports regarding the three themes in Chapters IV, V, and VI, reflect the rules-based framework in place before the commencement of the *UCRs*. Whilst it may initially appear to be a limitation of the research,[2682] the introduction of the *UCRs* in the latter parts of the research is not prejudicial to the data or to the generalisations made in this Chapter and the earlier Chapters for two reasons.

First, like the *Rules*, the *UCRs* are at times silent, terse, or insufficiently definitive on many factors relating to the three themes, particularly to *practice* and *procedure*.[2683] It is thus unlikely that their introduction would significantly alter or impact upon contemporary Stakeholder understandings, expectations, and experiences of the three themes.[2684]

Secondly, the *UCRs* have been in existence for three years and it is improbable that significant cultural changes have occurred to the Court's mediation program and mediation culture during this time.[2685] Accordingly, despite their introduction, the research is timely, relevant and valuable.

B *The Varying Purpose(s) of Mediation*

2674 Ibid r 131.3(1). See above Chapter III at 96. See also *the Act* (n 322) s 27(1).

2675 See above Chapter III at 89. See also Chapter VI at 170.

2676 *UCRs* (n 917) r 153.2(2)(r).

2677 Ibid r 195.9(2)(c).

2678 ADR Working Group, Civil Justice Council, *ADR and Civil Justice* (Final Report, November 2018) 2.6, 4.20, 8.23, 9.20, recommendation 20(a) <https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf>.

2679 *UCRs* (n 917) rr 131.1(6), 131.3(2)(d)–(g). See above Chapter III at 104.

2680 See above Chapter II at 74.

2681 See above Chapter VI at 179. See below Chapter VII at 224 and 226.

2682 In the introduction to this thesis I introduced the research methodology and limitations: see above Chapter I at 24. See also Chapter IV at 108. I discuss the appropriateness of the research methodology and sample size, potential limitations as well as factors that support the reliability, validity and credibility of the data in Appendix A: Qualitative Research Methodology.

2683 See above Chapter II and III. As mentioned in Chapter III, the *UCRs* do not specify the fees that external mediators can charge and nor are they published on the CAA website. See also Appendix J: Comparison between the *Act*, *Rules*, *Practice Directions* and *UCRs* regarding *Purpose*, *Practice* and *Procedure*.

2684 See below Chapter VIII at 248.

2685 See above Chapter III and below Chapter VIII.

Whilst mediation's *purpose* and 'success' in mediation are interrelated concepts, Stakeholders did not share unanimous views about them.[2686] Despite not being as prominent as the expectation gaps regarding *practice* and *procedure*, explored in Part C and Part D, the lack of unanimity about either concepts is significant. For example, Stakeholders and disputants may not share the same purposes *for* mediating, whether it be to achieve settlement or lesser-reported purposes secondary to settlement,[2687] which then increases the potential for expectation gaps between them.

Expectation gaps regarding *purpose* illustrate the potential for inconsistency, *practice* and *procedural* unpredictability, and mixed approaches, which reinforces my contention that *purpose* drives *practice* and *procedure*.[2688] Different understandings and expectations of mediation's *purpose(s)* underpin each of the four practice models discussed in the literature review.[2689] Choice of model impacts upon lawyer and disputant experiences of the mediator's role, functions, and interventions, which can affect participant behaviours and impact upon satisfaction as to process and outcomes. It can affect perceptions of fairness if disputants enter mediation with particular expectations and leave without them being met. Choice of model also highlights the tension between facilitative mediation's inability to guarantee outcomes in contrast to the purported efficiency and effectiveness of advisory/evaluative mediation in increasing the likelihood of outcomes.[2690] It also highlights tensions between purists and pragmatists,[2691] which can generate participant disappointment regarding *practice*, *procedure* and outcomes.

Gaps regarding *purpose* also affect mediation's *self-determination*, *non-adversarialism* and *responsiveness* values.[2692] This is supported by the gap between mediators who prioritise mediation's *self-determination* value more than some magistrates and lawyers.[2693] It is also supported by the gap between a minority of magistrates and some mediators in contrast to a minority of lawyers regarding direct disputant communication.[2694] It also highlights tensions between satisfying *effectiveness* and *efficiency* objectives and achieving more qualitative purposes.[2695]

Addressing these gaps will provide Stakeholders and participants clarity regarding mediation's primary *purpose*. It will promote a level of consistency and predictability in *practice* and *procedure*. It will also assist setting participant expectations before mediation and mitigating the chances of lawyer and disputant disappointment regarding the mediator's role, functions, interventions and stages of the *procedure*. If lawyers and disputants expect mediation's sole *purpose* is to achieve settlement, they might be disappointed if mediators engage in facilitative or transformative mediation and actively promote direct disputant participation. Similarly, if they expect the purpose is to promote satisfaction of disputant needs and interests, communication and disputant understanding or to maintain or repair relationships, they will be disappointed if mediators engage in settlement or advisory/evaluative mediation without direct disputant participation.

2686 See above Chapter IV at 108.

2687 Namely, disputant decision-making, communication and understanding, maintaining or repairing relationships, or transformation of individual and societal relations: see above Chapter IV at 115–123.

2688 See above Chapter I Chapter I at 13, Chapter II at 48, Chapter IV at 108, 113 and 125–30, Chapter V at 131 and Chapter VI at 181, 192, 197 and 202. See below Chapter VII at 208 and 234.

2689 See above Chapter II at 63.

2690 Boulle and Field, *Mediation in Australia* (n 27) 168. But see Wade, 'Evaluative Mediation' (n 57) 15.

2691 See above Chapter IV at 129, Chapter V at 131, 141, 153 and 165–8, Chapter VII at 208. See below Chapter VIII at 240 and 243.

2692 See above Chapter II at 34–5.

2693 See above Chapter IV at 116 and Chapter V at 166.

2694 See above Chapter IV at 119–122 and 129 and Chapter V at 144–5 and Chapter VI at 193–4.

2695 See above Chapter II at 48 and Chapter IV at 110–13. See also Appendix E: Varying *Purposes* of Mediation According to Four Archetypical 'Models'.

Providing clarity will assist lawyers, as one of the gatekeepers to the Court's mediation program, to better advise their clients about mediation's varying *purposes*. Their advice impacts upon disputant understandings, expectations, and experiences regarding the three themes,[2696] which can impact upon direct disputant participation.[2697] However, given most lawyers reported not having undergone mediation training,[2698] they would benefit from more education about mediation's varying *purposes*, how they impact upon *practices* and *procedures*. Lawyers would also benefit from contemporary scholarship regarding their roles during mediation and the differences between traditional lawyer roles of positional, adversarial advocacy and mediation advocacy.[2699] For example, Lande argues that lawyers should inform their clients about the range of roles they can take during mediation rather than assuming that all clients want or need them to act as the primary spokesperson.[2700] Educating lawyers about mediation's varying *purposes*, and the benefits of direct disputant participation, will expand the information base on which disputants make decisions. Increased disputant choice promotes informed decision-making, thus increasing the potential of satisfying *self-determination* and *responsiveness* values.[2701] It also increases potential for satisfaction as to process and outcomes. This is consistent with Riskin's recommendation that both the bar and the bench are made aware that there are 'different kinds of mediation' and that mediation can achieve more than simply settling actions.[2702]

Providing clarity will also assist lawyers to better advise their clients about whether mediation will satisfy *their* intended purposes. For example, if assisting disputants resolve interpersonal/intrapersonal 'conflict' or satisfying the lesser-reported qualitative purposes are *not* the drivers for mediating,[2703] lawyers will be able to direct their clients to other fora that might better serve those purposes.

Recommendation 1: the Court to Define Mediation's Primary Purpose and Program Goals

The Court has not clearly defined the institutional purposes of its mediation program.[2704] Whilst the settlement purpose is more obvious in the *UCRs* than in the *Rules* and the *Practice Directions*,[2705] no reference is made to the lesser-reported qualitative purposes.[2706] For example, 'alternative dispute resolution process' is broadly defined as a process in which disputants 'attempt to resolve, narrow or make a more efficient determination' of actions or potential actions with or without the involvement of a 'neutral party'.[2707] Furthermore, disputants are expected to 'participate appropriately' and 'negotiate in good faith with a view to resolving the dispute'.[2708] But is it sufficient to suggest that mediation's sole purpose is to simply settle actions or do varying purposes

2696 See above Chapter I at 15. See also Chapter VIII at 244.
2697 Rundle, 'Court-Connected Mediation Practice' (n 38) 439. See below Chapter VIII at 247.
2698 Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.
2699 See, eg, Julie MacFarlane, *The New Lawyer: How Clients are Transforming the Practice of Law* (UBC Press, 2nd ed, 2017); Field and Roy (n 35); Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 1st ed, 2008).
2700 Lande, 'How Will Lawyering and Mediation Transform Each Other?' (n 204). See above Chapter I at 14–5. See also Chapter VII, recommendation 10 and 11.
2701 See above Chapter II at 34–5.
2702 Leonard Riskin in James Alfini et al, 'What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions' (1994) 9(2) *Ohio State Journal on Dispute Resolution* 307, 325.
2703 See above Chapter IV at 113–127.
2704 See above Chapter III at 98.
2705 Ibid 98–9.
2706 See above Chapter IV at 115–123.
2707 *UCRs* (n 917) r 2.1. See also Appendix J: Comparison between *the Act*, *Rules*, *Practice Directions* and the *UCRs* regarding *Purpose*, *Practice* and *Procedure*.
2708 *UCRs* (n 917) r 131.3(3). However, it is unclear from the *UCRs* whether this obligation also applies to conciliation.

co-exist?[2709] Furthermore, does the Court prioritise quantitative efficiencies[2710] over more qualitative factors as suggested in the literature?[2711]

One way to address the potential for expectation gaps is for the Court to clarify what objectives its mediation program seeks to achieve.[2712] That way, mediation can be tailored to satisfy both program goals at the macro level[2713] and satisfy Stakeholder expectations and needs at the micro level, noting, however, the potential tensions between the public and private purposes and benefits of mediation.[2714] Articulating the Court's program goals would assist managing the diversity between participant aims, properly manage participant expectations, and minimise potential for dissatisfaction regarding the process.[2715] Furthermore, given many possible goals may exist for court-connected mediation programs, they should be clearly identified to enable narrowly focussed evaluation 'against clearly articulated goals, in light of local context'.[2716]

This requires the Court, as process-maker, to clearly identify the primary *purpose* of its mediation program; namely, whether it is to satisfy *effectiveness* and *efficiency* objectives, achieve substantive justice, procedural justice, or any of the other purposes reported by Stakeholders.[2717] This statement should be publicly accessible and feature on the Court's website[2718] and in a new practice direction.[2719]

A decree from the Court, as process-maker, clarifying mediation's primary *purpose* will assist setting the expectations of Stakeholders and participants, as process-takers,[2720] before mediation to facilitate easier expectation management during the process. The educative effect of aligning expectations will affect behaviours before and during mediation, which can impact upon satisfaction as to process and outcomes.

It would also impact upon the other two themes and thus reinforce that *purpose* drives *practice* and *procedure*. For example, if the Court pronounces the primary *purpose* of its mediation program is to satisfy *effectiveness* and *efficiency* objectives, this will increase the likelihood of settlement and advisory/evaluative practices and high levels of 'hands-on' content intervention. It will also increase the likelihood of 'Opening Statements' delivered by lawyers before rushing to 'crunch the numbers', adversarial and competitive approaches, distributive bargaining via Shuttle Negotiation, and the Joint Session demise.[2721] These factors can reinforce a focus on narrowly defined legal issues, increased lawyer dominance and control, limited direct disputant participation, further entrenchment of positions, missed opportunity for communication and exploration of the 'real issues' in dispute,[2722] which can reinforce lawyer-centric processes. This is not to say that a settlement-focus will cause the above, but it is more likely than not.

2709 See above Chapter III at 98 and Chapter IV at 126 and 129.

2710 See above Chapter II at 53–4.

2711 See above Chapter II at 50–2.

2712 See, eg, McAdoo and Welsh (n 366) 425–8. See also Rundle, 'Court-Connected Mediation Practice' (n 38) 446, 469, 475.

2713 See above Chapter I at 23. See also Chapter VIII at 248

2714 See above Chapter II at 49 and 53. See also Appendix E: Varying *Purposes* of Mediation According to Four Archetypical 'Models'.

2715 Rundle, 'Barking Dogs' (n 373) 88–9.

2716 Mack, *Criteria and Research* (n 80) 2, 8, 19, 83, 87, recommendation 9.3.3.

2717 See above Chapter IV. See also Rundle, 'Court-Connected Mediation Practice' (n 38) 446.

2718 See above Chapter III at 92 and 101.

2719 See also Chapter VII, recommendation 7 and 8.

2720 See above Chapter VII at 206.

2721 See above Chapter II at 76. See also Appendix G: Characteristics of the Four Mediation 'Models' by Reference to *Purpose*, *Practice* and *Procedure*.

2722 Appendix G: Characteristics of the Four Mediation 'Models' by Reference to *Purpose*, *Practice* and *Procedure*.

Conversely, if the Court pronounces the primary *purpose* is to satisfy mediation's core values, this will increase the likelihood of facilitative mediation, 'hands-off' practices and process intervention *only*. It will also increase the likelihood of Opening Comments made by lawyers and disputants together, cooperation, collaboration, and integrative bargaining predominantly undertaken in Joint Session. These factors can reinforce a focus on broadly defined non-legal issues, minimise lawyer dominance and control, promote direct disputant participation,[2723] achieve individualised treatment,[2724] enable exploration of underlying non-legal needs and interests and the 'real issues' in dispute, which reinforce a more responsive and disputant-centric process.

Either way, both lawyers and mediators, through their interrelated relationship and having obligations towards the Court, are likely to be influenced by the institutional goals of the Court's mediation program.[2725] Indeed, mediators will remain largely influenced by 'the legal institution's preoccupation with settlement'.[2726]

Pronouncing the primary purpose of the Court's mediation program does not mean that the Court will restrict *purpose*, *practice* and *procedure*. It may increase the promotion of mediation's core values and objectives by acknowledging that although the primary *purpose*, from the Court's perspective, is to satisfy *effectiveness* and *efficiency* objectives, mediation also provides the opportunity to satisfy other values and objectives.[2727] This is consistent with most Stakeholders who described success not solely in quantitative terms but by reference to more qualitative factors secondary to settlement.[2728]

However, risks exist in over-emphasising *efficiency* and *effectiveness* objectives. If success is measured solely by settlement – consistent with the literature review regarding mediation's primary *purpose* within the court-connected context – the Court risks prioritising settlements over more ideological purposes.[2729] This simply reinforces the opinions of authors who view mediation not as an opportunity for disputants to reach a fair and equitable (*just*) resolution, but for disputants to 'just settle'.[2730] Consequently, this could lead Stakeholders to view mediation less as an *alternative to* litigation and more as a 'mere costs savings tool'.

Whilst the data does not suggest Stakeholders view mediation as 'a fallback to a failed system of litigation',[2731] or as an alternative to 'the perceived deficiencies of the judicial system by promising to restore *voice and choice*' to those involved in 'conflict',[2732] it does suggest that they view it as a tool for disputants to settle their actions,[2733] avoid trial thereby reducing costs and legal fees, while reducing stress. Such views can undermine mediation's potential to satisfy a diverse range of *purposes*, which may lead lawyers and disputants to deem mediation as 'a cheaper but a less satisfying form of justice'.[2734] To mitigate risks of Stakeholders forming or maintaining the view that mediation is *solely* a 'cost-reduction method',[2735] settlement should not be the sole criterion by

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2723 See, eg, Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iv, recommendation 5 and vii, recommendation 12.

2724 Rundle, 'Barking Dogs' (n 373) 87.

2725 Ibid 88.

2726 Rundle, 'The Purpose of Court-Connected Mediation from the Legal Perspective' (n 507) 28, 29. See also Chapter II at 53.

2727 See above Chapter II at 33–5.

2728 See above Chapter IV at 109.

2729 See above Chapter II at Part B.

2730 See above Chapter II at 56.

2731 Meyerson (n 529).

2732 See, eg, Della Noce, Folger and Antes, 'Assimilative, Autonomous, or Synergistic Visions' (n 312).

2733 See above Chapter IV at 128.

2734 Gerard Brennan, 'Key Issues in Judicial Administration' (1997) 6(3) *Journal of Judicial Administration* 138, 141. See above Chapter II at 55.

2735 Mediator 4. See above Chapter IV.

which 'success' is measured.[2736] Rather, the Court should promote 'success' as the opportunity to achieve participant satisfaction and early resolution, which are important reasons for referring actions to mediation.[2737] Furthermore, concentrating solely on the single criterion of 'settlement rates' fails to take into account more qualitative *purposes*.[2738] Court-connected mediation does not need to be so modest in its aims, particularly as emphasising settlement rates discourages appreciation of other societal values that ADR programs can promote.[2739]

Whilst the Court has not made it explicit in the *Act*, the *Rules*, the *Practice Direction* or the *UCRs* whether or not mediators are tasked with addressing, managing, or resolving disputants' interpersonal/intrapersonal conflicts, I maintain my contention, as supported by most Stakeholder views,[2740] that the resolution of underlying interpersonal/intrapersonal 'conflict' is *not* the primary *purpose* of mediation in the Court.[2741] If the Court takes a different view, this reinforces my recommendation that it clarify what objectives its mediation program seeks to achieve.

However, a risk exists that participants might operate according to their own understandings and expectations despite the Court's decree. This will likely depend upon whether they are purists, pragmatists, prefer advisory/evaluative mediation, are critical of the existence of practice models[2742] or unfamiliar with mediation's varying *purposes*, *practices*, and *procedures*. The Court and future mediation users would benefit from the implementation of this recommendation and others made in this Chapter, centred on satisfying the four principles, which will assist changing behaviours of those involved in mediation.[2743]

C *Diversity in Practices: Mediation Models, Mediator Roles, Functions, and Interventions*

Three prominent expectation gaps exist between Stakeholders regarding *practice*. First, between the practice model some Stakeholders expect is being utilised in contrast to what others report experiencing. [2744] Secondly, gaps between Stakeholder understandings, expectations, and experiences regarding the mediator's role and functions.[2745] Thirdly, regarding 'appropriate' levels of intervention.[2746] As discussed above, choice of practice model is linked with understandings and expectations of the mediator's role, functions, and interventions.[2747]

These expectation gaps are significant as they illustrate variation and mixed practices, highlighting the potential for inconsistency and *practice* unpredictability regarding the mediator's role, functions, and levels of intervention. This can impact upon behaviours, mediation dynamics, outcomes reached and affect participant experiences. It can also affect perceptions of both fairness and purported efficiency and effectiveness in increasing the likelihood of outcomes.[2748] For

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2736 Monica Del-Villar and Mallesons Stephen Jaques, 'Mediation in Australia' (2005) 105 (November/December) *Australian Construction Law Newsletter* 34, 36.

2737 Spigelman (n 75) 63–4. See also below Chapter VII, recommendation 5.

2738 See above Chapter II at 53. See also Boulle and Alexander, *Skills and Techniques* (n 17) 16–17; Raymond A Whiting, 'Family Disputes, Nonfamily Disputes, and Mediation Success' (1994) 11(3) *Mediation Quarterly* 247, 251; Sander, 'The Obsession with Settlement Rates' (n 516) 331.

2739 See above Chapter II at 54.

2740 See above Chapter IV at 114, 120 and 123–4.

2741 See above Chapter II at 40–1 and Chapter III at 96–7.

2742 See above Chapter II at 68.

2743 See below Chapter VII at 242.

2744 See above Chapter V at 132.

2745 See above Chapter V at 142.

2746 See above Chapter V at 153.

2747 See above Chapter II at 58 and 64. Furthermore, there is relationship between lawyer expectations regarding the mediator's role, functions, and 'appropriate' levels of intervention — and their preferences for advisory/evaluative mediation — and their understandings and expectations of the use and purposes of Private Sessions: see above Chapter V at 150 and Chapter VI at 194. See below Chapter III at 240.

2748 See above Chapter VII at 208.

example, whether participants will experience: largely facilitative or 'highly evaluative' mediation;[2749] 'hands-on' or 'hands-off' practices; varying levels of settlement pressure from mediators; and the provision of 'information', a 'personal opinion' or 'advice' from 'mediators'.[2750] This depends upon whether the mediator and lawyers are purists, pragmatists, or prefer advisory/evaluative mediation, are critical of the existence of practice models,[2751] or are unfamiliar with mediation's varying *purposes*, *practices,* and *procedures*.

Expectation gaps highlight tensions between lawyers and mediators regarding *practice* and *procedure*. For example, most lawyers expect and prefer advisory/evaluative mediation with the provision of mediator proposals than purely facilitative mediation.[2752] Conversely, most mediators reported engaging in a 'purely facilitative' practice.[2753] These tensions can generate participant disappointment as to *practice*, *procedure*, and outcomes.

Gaps regarding *practice* suggest that some mediators may not be adhering to 'purely facilitative' practice, as required by the rules-based framework,[2754] and acting beyond the scope of their role.[2755] In particular, the descriptions of 'other' mediator roles by some Stakeholders (predominantly lawyers, an outlier amongst the magistrates and amongst the mediators), which extend beyond the six mediator functions specified in the NMAS and accord more closely with settlement or advisory/evaluative mediation.[2756] Departure from the NMAS is not a problem in and of itself, assuming that participants 'know what they are getting in the box'[2757] before mediation commences. However, the absence of a Pre-Mediation procedure is a missed opportunity for mediators to meet with lawyers and disputants to set expectations regarding the three themes before mediation,[2758] which I discuss below.[2759] If participant expectations are not adequately clarified, mediators miss the opportunity of tailoring mediation to meet participant aims.[2760]

Gaps regarding *practice* can also affect mediation's *self-determination*, *non-adversarialism* and *responsiveness* values[2761] and influence behaviours during mediation. For example, a minority of mediators reported experiencing a frequent gap between the expectation of some disputants and lawyers who expect their role is to make decisions *for* disputants in contrast to those who describe supporting disputants make decisions *themselves*.[2762] By way of further example, the expectation, and preferences, by some lawyers for advisory/evaluative mediation is not only an attempt by them to 'hijack' mediation,[2763] but reflects their understandings and expectations of settlement being mediation's primary *purpose*.[2764] This has a flow on effect of limiting direct disputant participation, which can impact upon disputant satisfaction as to process and outcomes[2765] thus failing to satisfy *self-determination* and *responsiveness* values. [2766] Furthermore, if lawyers expect

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2749 See above Chapter V at 133 and 136.
2750 See above Chapter V at 161.
2751 See above Chapter V at 139.
2752 See above Chapter V at 135–6, 147–51 and 158–65. Most magistrates also reported supporting mediator proposals: see above Chapter V at 159.
2753 See above Chapter V at 133.
2754 See above Chapter III at 95.
2755 See above Chapter V at 155–6, 160–165.
2756 See above Chapter V at 158.
2757 Mediator 12 emphasised the importance of process certainty and managing expectations at the outset: see above Chapter V at 126, 140, 166 and 206.
2758 See above Chapter VI at 176.
2759 See also nn 2142, 2260, 2905 and Chapter 7, recommendation 6.
2760 Rundle, 'Barking Dogs' (n 373) 89.
2761 See above Chapter II at 34–5.
2762 See above Chapter IV at 115 and Chapter V at 147.
2763 See above Chapter II at 44.
2764 See above Chapter IV at 110–13.
2765 See above Chapter II at 42.
2766 See above Chapter II at 34–5.

advisory/evaluative mediation they may be less comfortable moving away from the spokesperson role, which mitigates the chances of encountering 'client control problems'.[2767] Conversely, if they expect a purely facilitative process they may be more willing to promote direct disputant participation and move instead into an expert contributor or supportive professional participant role.[2768]

Addressing these gaps is important, as *practice* needs to be sufficiently prescriptive to provide a level of consistency and predictability in *practice* and *procedure*.

Providing Stakeholders and mediation users clarity regarding what mediation 'is', its *purpose(s)*, what *practices* fall within its purview, the scope of the mediator's role and functions and what its *procedure* entails will assist setting participant expectations before mediation and mitigating the chances of lawyer and disputant disappointment. If lawyers and disputants attend mediation expecting mediators will undertake facilitative 'hands-off' mediation, they will be surprised if the mediator employs advisory/evaluative practices with intervention in the content.[2769] Conversely, if lawyers and disputants attend expecting 'hands-on' advisory/evaluative practices with content interventions, they will be disappointed if mediators undertake purely facilitative mediation. If lawyers experience disappointment because mediation was either too 'hands-off' or too 'hands-on', in contrast to their expectations, this might cause them to caution their clients against having actions referred to mediation at all.

Providing clarity will assist lawyers to better advise their clients about what to expect regarding *practice*.[2770] It will also assist them to explain how mediation is different to the advisory/evaluative and determinative processes within the Court's ADR suite, what to expect from these different processes and which process will better serve the purposes disputants seek to achieve. This is particularly important given many lawyers were unacquainted with different practice models, despite most preferring advisory/evaluative practices.[2771] If, for example, disputants do not want to engage in facilitative mediation, they could apply to the Court for an order that their action be referred to conciliation instead.[2772] This will also increase the potential of satisfying *self-determination* and *responsiveness* values and cater to lawyers who prefer conciliation. Providing further clarity would also enable magistrates to better inform future mediation users about the different processes within the Court's ADR suite at the first directions hearing. This can assist lawyers and their clients make informed decisions regarding which ADR process will serve the purposes disputants seek to achieve and address their needs.[2773] Providing further clarity would also address the complaints by a minority of mediators who reported participants occasionally attend with expectations of engaging in a 'mini-trial'.[2774]

Providing more clarity will also address gaps in the *UCRs* about key factors regarding *practice*.[2775] For example, unlike in the *Rules*,[2776] 'mediation' is not defined in the *UCRs* and neither are many of the advisory,[2777] determinative,[2778] and hybrid[2779] processes that fall within the Court's ADR suite.

2767 Hardy and Rundle (n 39) 153–4.

2768 See above Chapter I at 15.

2769 They will also not have prepared for it nor consented to it: see Riskin, 'Rethinking the Grid of Mediator Orientations' (n 354) 22.

2770 See below Chapter VII at 219, 226–7, 231–2.

2771 See above Chapter V at 139 and 158.

2772 See below Chapter VII at 218–9.

2773 Sander and Goldberg (n 107) 53. See above Chapter II at 34 and 50.

2774 See above Chapter V at 133 and 148.

2775 See generally above Chapter II and Chapter III at 100–1.

2776 See above Chapter III at 95.

2777 The advisory processes include expert appraisal (*UCRs* (n 917) rr 337.1(b), 337.2(4)(a)), expert referee (*UCRs* (n 917) rr 11.4(2)(c), 151.4), assessor (*UCRs* (n 917) rr 11.4(2)(a), 151.2(3)) and judicial intimation (*UCRs* (n

The conciliation-mediation distinction is less pronounced in the *UCRs* than in *the Rules* and the *Practice Directions*. Accordingly, it is difficult to glean what the mediator's role and functions are, what are 'appropriate' levels of intervention, whether mediation includes advisory/evaluative practices, and the differences between mediators and conciliators. Unlike the *Rules*, the *UCRs* are silent regarding NMAS accreditation requirements,[2780] making it difficult to predict whether mediators are restricted to engage in a 'purely' facilitative role or whether the trend of advisory/evaluative practices within the court-connected context will continue.[2781] This increases the potential for expectation gaps and inconsistent practices, particularly if some Stakeholders and participants expect mediators to 'purely' facilitate in contrast to others expecting advisory/evaluative practices.[2782]

Recommendation 2: the Court to Define Important ADR Related Terms in the UCRs

The difficulties in defining/describing mediation reveal the potential for uncertainty and expectation gaps. They also reinforce the benefits in utilising 'common terminology' to promote consistency, clarity and certainty in ADR processes,[2783] which would assist the Court to differentiate between each of the other processes within its ADR suite.[2784]

The Court, as process-maker, can address the gaps regarding *practice* by explicitly defining/describing what mediation 'is', what is its *purpose(s)*, what *practices* fall within its purview, the scope of the mediator's role and functions and what its *procedure* entails. For example, no reference is made in the *UCRs* to whether mediators are restricted to undertaking facilitative mediation.[2785] Accordingly, are mediators restricted to some of the six mediator functions like in the *Rules*?[2786] Or does the Court expect their role[2787] to extend to: advisory/evaluative practices including advising on the facts, law, evidence and possible outcomes,[2788] restricting dialogue to narrowly defined legal issues,[2789] providing 'information' short of 'advice',[2790] administering substantive[2791] or procedural justice,[2792] and dictating settlement terms?[2793]

The Court could balance the need for clarity and guidance regarding practice predictability and consistency with reducing risks of over-prescription, by defining 'mediation' broadly to encompass

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917) r 131.3(4)). Power also exists for an 'on-site inspection' by a magistrate, judicial registrar, mediator or court expert for Minor Civil Actions: *UCRs* (n 917) r 337.2(4)(j).

2778 The determinative processes include arbitration: *UCRs* (n 917) rr 11.4(2)(b); ch 14 pt 4, ch 19 pt 3, sch 5.

2779 'Conciliation' is not defined despite being referred to in the definition of 'alternative dispute resolution process': *UCRs* (n 917) r 2.1.

2780 See above Chapter III at 88.

2781 See above Chapter II at 68. This reinforces my recommendation for future research: see below Chapter VII and VIII.

2782 See above Chapter V at 139, 141, 152, 156, 161 and 167.

2783 See above Chapter II at 28.

2784 *UCRs* (n 917) r 2.1. See also Chapter VII, recommendation 6, 7, 8 and 11.

2785 See above Chapter II at 66. See also Chapter III at 99.

2786 See above Chapter III at 99.

2787 See Appendix G: Characteristics of the Four Mediation 'Models' by Reference to *Purpose*, *Practice* and *Procedure*.

2788 See above Chapter II at 29. See also Chapter III at 95.

2789 See above Chapter II at 41.

2790 See above Chapter V at 157 and 161.

2791 See above Chapter IV at 124 and Chapter V at 143 and 151.

2792 Cf Chapter IV at 126 and Chapter V at 143–4 and 151.

2793 See above Chapter VI at 196–200.

varying *practices*.[2794] This would acknowledge mediation's inherent flexibility thus respecting mediation's *responsiveness* value.[2795]

The Court can specify the mediation *practice* it expects by distinguishing mediation from conciliation in the *UCRs*.[2796] This would be less complicated than distinguishing between the purposes and characteristics of each of the four practice models.[2797] Utilising specific terminology might increase Stakeholder awareness of the different practice models.[2798] However, utilising overly narrow labels to describe different *practices* would cause confusion and further expectation gaps. In particular, no Stakeholder referred to narrow descriptions such as 'expert advisory' or 'wise counsel' mediation, existing in Alexander's metamodel,[2799] and most lawyers were unacquainted with different practice models.[2800]

There is no single settled definition/description of 'mediation'[2801] or 'conciliation',[2802] nor is there universal agreement regarding the scope of the facilitative-advisory/evaluative dichotomy.[2803] However, the inference to be drawn from the continued, though less pronounced, existence of the conciliation-mediation distinction is a general recognition from the Court's perspective that mediation and conciliation are two separate and distinct processes. The Court should clarify the differences between these two processes to delineate where mediation ends and conciliation begins.[2804]

The easiest way to provide rule clarity is for the Court to either adopt ADRAC's proposed definition of conciliation[2805] or transplant the definition of 'mediation' and 'conciliation' from the *Rules*, to demarcate the conciliation-mediation distinction.[2806]

However, this transplant alone may be insufficient in and of itself. Specifically, the conciliation-mediation distinction in the *Rules*, clearly pronounced, should have made it obvious to Stakeholders that they are two separate and distinct processes. Whilst the purists emphasised the importance of the conciliation-mediation or facilitative-advisory distinctions,[2807] some blurred both when describing content interventions. For example, most magistrates and lawyers support mediator 'proposals',[2808] and expect/prefer mediators to be reasonably 'interventionist' and 'directive', indicative of conciliation.[2809] A minority of mediators also self-described 'conciliating' and their descriptions suggest the use quasi-advisory/evaluative techniques.[2810] Furthermore, the expressed importance of the conciliation-mediation distinction by the purists in contrast to most lawyers who prefer advisory/evaluative practices,[2811] suggests the debates surrounding the conciliation-mediation distinction and the facilitative-evaluative dichotomy are alive and well.[2812] Such debates may

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2794 See above Chapter II at Part C.
2795 See above Chapter II at 35.
2796 See above Chapter III at 100. See above Chapter VII, recommendation 2.
2797 See above Chapter II at 63.
2798 Rundle, 'Barking Dogs' (n 373) 90.
2799 See above Chapter II at 64.
2800 See above Chapter V at 133 and 137.
2801 See above Chapter II at 31.
2802 See above Chapter II at 36.
2803 See above Chapter II at 35 and 61.
2804 See above Chapter II at 37.
2805 See Appendix S: ADRAC Proposals Regarding Description and Definition of Conciliation. See also *Connecting the Dots* (n 278) xi, 11.
2806 See above Chapter III at 99.
2807 See above Chapter V at 153–4.
2808 See above Chapter V at 133 and 159.
2809 See above Chapter V at 159–60.
2810 See above Chapter V at 135–6 and 162.
2811 See above Chapter V at 139, 149, 156, 158 and 165.
2812 See above Chapter II at 35. See also Chapter I at 12.

continue irrespective of whether the conciliation-mediation distinction is made more pronounced in the *UCRs*.

Evidently, some Stakeholders operate according to their own understandings and expectations despite rule clarity. This will likely depend upon whether they are purists, pragmatists, prefer advisory/evaluative mediation or consider practice models are 'purely academic'.[2813] This may particularly be so for those who place little value upon, or consider the facilitative-advisory/evaluative dichotomy,[2814] process-content dichotomy,[2815] and conciliation-mediation distinction,[2816] unimportant.

Accordingly, a question that requires further investigation is whether rule-compliance is more important to the Court, and to Stakeholders, than flexibility and fluidity of processes and satisfying *efficiency* and *effectiveness* objectives. Furthermore, the Court will have difficulty monitoring mediator compliance with the conciliation-mediation distinction, given that mediations remain private and confidential and outside the Court's purview.[2817] The only way that the Court could monitor compliance would be through self-reporting by mediators and feedback obtained by lawyers and disputants.[2818]

If the Court takes a different view and considers there to be little utility in making the conciliation-mediation distinction more pronounced, the Court could transplant an even broader definition of 'mediation' than in the *Rules* and which expressly blurs the conciliation-mediation distinction. For example, defining 'mediation' to encompass 'conciliation'.[2819] Engineering the blurring of the conciliation-mediation distinction into the *UCRs* would enable third party interveners loosely referred to as 'mediators' to evaluate and have an advisory role by suggesting possible bases for agreement to assist settlement.

Recommendation 3: the CAA to Publish Detailed Quantitative Data Regarding Mediation and Other ADR Processes in the Annual Reports

In the exploration of the Court's legislative framework, I identified five significant gaps in the CAA Reports regarding mediation.[2820] These gaps should be addressed by the publication of richer quantitative data in future CAA Reports. This will enable the CAA to evaluate the take-up rate of mediation in comparison with referrals to the other processes within the ADR suite,[2821] identify obstacles that prevent Stakeholder or disputant engagement with the Court's program,[2822] and assess whether mediation is satisfying *effectiveness* and *efficiency* objectives,[2823] or whether it is more beneficial for disputants to engage in one of the Court's other ADR processes.

The data could separate mediations conducted by the Court's internal mediator from those by the Panel or pre-lodgment mediations. The data could also identify the time at which actions are referred and at which most settle during their lifecycle,[2824] and quantify 'settlement rates' according

2813 See nn 265, 704, 1719, 1729 and 2833.
2814 See above Chapter II at 35 and 61.
2815 See above Chapter II at 60.
2816 See above Chapter II at 35.
2817 See Appendix A: Qualitative Research Methodology.
2818 But see the discussion of self-regulation in Appendix A: Qualitative Research Methodology.
2819 See, eg, *District Court Civil Rules 2006* (SA) r 4; *Supreme Court Civil Rules 2006* (SA) r 4.
2820 See above Chapter III at 91.
2821 See below Chapter VIII at 247.
2822 See above Chapter I at 23 and Chapter VIII at 247.
2823 See above Chapter II at 49. See also Chapter VIII at 247.
2824 See above Chapter VI at 170.

to the Court's separate Divisions, types of actions and proportion of actions settled post-mediation.[2825] Furthermore, as mediators are not required to record the stage at which mediation is conducted, such as 'very early', 'pleadings closed', or 'set down for hearing',[2826] it is difficult to say whether mediations occur early in the litigation process or later towards trial.[2827] Accordingly, the Record of Outcome form should be amended so that mediators can accurately record the stage at which mediation is conducted. This will enable the CAA to gather more accurate data and identify trends, which will assist further exploration of whether *efficiency* and *effectiveness* objectives are being satisfied.

Published data would also enable the CAA to assess whether the introduction of the listing fees (and the 50% reduction in same) has increased the uptake of mediation[2828] and the extent to which satellite litigation is occurring post-mediation.[2829]

Recommendation 4: the Court to Trial a Conciliation Pilot

Whilst the *Rules* and the *UCRs* provide for conciliation, the CAA Reports[2830] make no reference to the number of conciliations conducted to date, making it difficult to differentiate the number of actions referred to conciliation compared to mediation.[2831] Three inferences can be drawn from this gap in the CAA reports. First, actions have not been referred to conciliation because of barriers that prevent its uptake. Secondly, lawyers and disputants have not requested referral to conciliation because they are unaware of this option. Alternatively, they consider these two processes synonymous[2832] and adhere to the *status quo* of having actions referred to mediation. This is consistent with the findings that some Stakeholders consider conciliation and mediation are synonymous and that labels to differentiate them are purely 'academic'.[2833] Thirdly, actions may have been referred to conciliation and not recorded in the CAA reports, which reinforces the importance of publishing detailed data in the CAA Reports.[2834]

As appetite exists amongst some Stakeholders for conciliation,[2835] the Court can address this by undertaking a specific conciliation pilot, that would provide lawyers and disputants with a more obvious choice about which process within the ADR suite would better serve the purposes disputants seek to achieve.[2836] This would enable the Court to refer appropriate actions to conciliation rather than the *status quo*, which appears to be a case of 'one size fits all'.[2837] This reflects 'fitting the forum to the fuss'[2838] and the notion of 'matching' actions and/or disputants with an appropriate ADR process to achieve a successful outcome.[2839]

2825 See above Chapter III at 91. See also Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

2826 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) 192.

2827 See above Chapter III at 92.

2828 See above Chapter III at 88. See also Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

2829 See above Chapter III at 92. See also Chapter VI at 197 and 202.

2830 See above Chapter III at 91.

2831 This reinforces my recommendation for future research. See above Chapter VII and below Chapter VIII. See also *Connecting the Dots* (n 278) xi, 33.

2832 See also Chapter II at 37.

2833 See nn 265, 704, 1719, 1729 and 2813.

2834 See above Chapter VII, recommendation 3.

2835 See above Chapter IV at 166 and Chapter V at Part B and Part C.

2836 See below Chapter VIII at 247.

2837 See above Chapter V at 170. See below Chapter VII, recommendation 5.

2838 Sander and Goldberg (n 107) 53.

2839 Mack, *Criteria and Research* (n 80) ch 2.

Introducing a separate conciliation stream would cater to the needs of the pragmatists,[2840] those who prefer advisory/evaluative interventions from a subject-matter expert,[2841] and those who value the flexibility between 'hands-off' and 'hands-on' processes.[2842] It would also provide those disputants who desire advisory/evaluative mediation a choice in accessing it.[2843] To respect the preferences of the purists, the Court would continue referring actions to the current mediation stream, rather than referring all actions to conciliation as part of the pilot.

The Court will satisfy the prescription in the NMAS regarding the use of 'blended' processes by ensuring conciliators hold appropriate qualifications, professional knowledge, and experience to provide advice.[2844] Some disputants may feel their interests will be better served by conciliation undertaken by a subject-matter expert, thus promoting disputant choice and their ability to make informed decisions.[2845]

The Court, after defining what conciliation 'is',[2846] should publish material describing conciliation's *purpose*, the conciliator's role and functions, and what its procedure entails.[2847] It should introduce a set of overarching standards to guide conciliation *practice*[2848] and publish material about each conciliator on the Court's Panel to increase disputant choice selection. This coincides with one lawyer's suggestion that the qualifications of Panel mediators be publicly available,[2849] which is absent from the Court's website.[2850] The Court could also make the qualifications for inclusion on the proposed conciliation list, and the list of Panel Mediators publicly available[2851] on the Court's website.

The pilot should be introduced to lawyers and disputants at the first directions hearing by magistrates, who would ask whether they prefer undertaking conciliation *or* mediation. Following the pilot, the Court could introduce a new rule addressing the three themes in the *UCRs* specifically for conciliation.

The proposed pilot would also provide data for future research.[2852] It would enable the Court to investigate whether conciliation is better suited to particular types of actions[2853] or disputants, whether it results in higher settlement rates than mediation and whether it provides other benefits to Stakeholders, the Court, and disputants, such as satisfaction as to process and outcomes.[2854]

D *Variety of Mediation Procedures*

2840 See above Chapter V at 131 and 141. See also the minority of mediators who self-described 'conciliating' or whose descriptions suggest the use of quasi-advisory/evaluative techniques: see above Chapter V at 135–6 and 162.

2841 See above Chapter V at 139, 150, 156, 158, 160, 167–8.

2842 See above Chapter V at 166.

2843 Levin (n 617) 296.

2844 *Practice Standards* (n 222) s 10.2. See above Chapter II at 33 and 63.

2845 See above Chapter II at 36, 61 and 65–6.

2846 See above Chapter VII, recommendation 2.

2847 *Connecting the Dots* (n 278) xi, 33.

2848 See, eg, ibid xii, 3, 34; 'Conciliation' (n 232) xiv–xv, 12–14, 40, 48.

2849 Lawyer 6.

2850 See above Chapter III at 88. This is consistent with the Law Council's guidelines that suggest disputants should be provided with information regarding mediators' training, education, and experience: see *Ethical Guidelines for Mediators* (n 254) rr 4, 5.

2851 *Ethical Guidelines for Mediators* (n 254) rr 4, 5.

2852 See below Chapter VII and Chapter VIII.

2853 Wade, 'Evaluative Mediation' (n 57) 15.

2854 See below Chapter VIII at 244–7.

Several expectation gaps exist between Stakeholders regarding *procedure*, particularly what occurs before and during mediation.[2855]

The five prominent gaps related to: referral practices;[2856] Pre-Mediation procedure; *ad hoc* minimalist approach to pre-mediation information exchange including the use of Position Papers;[2857] the industry model mediators utilise or 'typical' stages of the *procedure*;[2858] and what some Stakeholders expect occurs during mediation in contrast to what others report experiencing.[2859] In particular, regarding Private Sessions and Shuttle Negotiation, 'who' records Settlement Agreements and the level of assistance mediators provide in recording settlement terms.

These gaps are significant as they illustrate variation and mixed *procedures*, highlighting the potential for inconsistency and *procedural* unpredictability.[2860] This can impact upon lawyer and disputant experiences, affect participant behaviours and impact upon satisfaction as to process and outcomes. For example, different levels of 'encouragement' by the Court likely impact upon disputant decision-making in having their action referred to mediation.[2861] Furthermore, different approaches to the use and duration of Joint Sessions in contrast to Private Sessions and Shuttle Negotiation also affect the limits of encouraging or controlling direct disputant participation and communication.

Expectation gaps highlight tensions between lawyers and mediators regarding their understandings, expectations, experiences, and preferences, of *procedure*; namely, whether mediators adhere to an industry model,[2862] or utilise a seven[2863] or four stage procedure.[2864] It also highlights tensions between mediator process control and lawyer dominance.[2865] Both tensions can generate participant disappointment regarding *practice*, *procedure,* and outcomes.[2866]

Expectation gaps regarding *procedure* can affect mediation's *self-determination*, *non-adversarialism* and *responsiveness* values[2867] and influence behaviours during mediation. The expectation, and preferences, by lawyers for mediators to break for Private Sessions immediately after Parties' Opening Comments and the remaining procedure being Shuttle Negotiation is a further example of an attempt by them to 'hijack' mediation,[2868] and reflects their understandings and expectations of settlement being mediation's primary *purpose*.[2869] This too has a flow on effect of limiting direct disputant participation, which can further impact upon disputant satisfaction as to process and outcomes. Furthermore, the absence of a formal Pre-Mediation procedure,[2870] and

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2855 See above Chapter VI at Part B and Part C.
2856 See above Chapter VI at 170.
2857 See above Chapter VI at 178.
2858 See above Chapter VI at 180.
2859 See above Chapter VI at Part B and Part C.
2860 Ibid.
2861 See above Chapter II at 45–7. In particular, noting the different approaches between the Minor Civil and General divisions; namely, that magistrates make a preliminary dispute diagnosis and refer appropriate cases to mediation in the Minor Division whereas they defer more to the lawyers in the General Division: see above Chapter VI at 171–4.
2862 See above Chapter VI at 180.
2863 See above Chapter VI at 183 and 201.
2864 See above Chapter VI at 180 and 182.
2865 See above Chapter VI at 118, 120 and 129, Chapter V at 142, 158 and 164 and Chapter VI at 187, 192, 197 and 201–2. See below Chapter VII at 227 and 232–4 and Chapter VIII at 240 and 248.
2866 See above Chapter I at 17–8.
2867 See above Chapter II at 34–5.
2868 See above Chapter II at 44.
2869 See above Chapter IV at 110–13.
2870 See above Chapter VI at 176.

expectation gaps between Stakeholders regarding levels of pre-mediation information exchange, [2871] can impact upon mediator, lawyer, and disputant preparation for mediation.

Addressing these gaps is important because *procedure* needs to be sufficiently prescriptive to provide a level of consistency and procedural predictability. Providing Stakeholders and mediation users with clarity about what its *procedure* entails will assist setting expectations before mediation and mitigating the chances of lawyer and disputant disappointment. If lawyers and disputants expect mediators to oversee an initial rights-based interchange centred upon the pleadings, break shortly after the Parties' Opening Comments, with the remaining procedure being conducted in Private Sessions with Shuttle Negotiation,[2872] they will be surprised if mediators strictly adhere to a procedure with explicit stages predominantly conducted in Joint session.[2873] Similarly, if lawyers expect a settlement-focussed conciliator to make settlement proposals and act as mere 'water carrier' of offers/counter-offers between rooms,[2874] they will be disappointed if mediators utilise a facilitative model centred upon exploration of underlying disputant needs and non-legal interests and interest-based negotiation.

Providing clarity will assist lawyers to better advise their clients about what to expect regarding *procedure*[2875] and to explain how mediation is different to the other processes within the ADR suite.[2876] It will also promote more effective preparation for mediation,[2877] which will address a concern in the literature regarding irritations with lack of lawyer and mediator preparation.[2878]

Providing more clarity will also address some of the gaps I identified in the *UCRs* about key factors regarding *procedure*.[2879] Like the *Act* and the *Rules*, the *UCRs* provide no guidance regarding what factors the Court should consider when deciding to refer actions to mediation, whether circumstances must be 'appropriate' to order it, nor to the scope and requirements of mediation referral orders.[2880] Unlike the *Practice Directions*, the *UCRs* provide no guidance regarding the stages of the *procedure* and no guidelines or practice directions have been introduced to govern them.[2881] This increases the scope for expectation gaps and inconsistent procedures, particularly if some Stakeholders and participants expect mediators to adhere to a 'purely' facilitative process in Joint Session in contrast to those expecting advisory/evaluative practices in Private Sessions and Shuttle Negotiation.[2882]

Recommendation 5: the Court to Develop Criteria for Referrals of Actions to Mediation

The Court can address the gap regarding referral practices by establishing publicly accessible referral criteria or judicial guidelines for intake screening, diagnosis and referral of 'appropriate'

2871 See above Chapter VI at 178.
2872 See above Chapter VI at 183.
2873 See above Chapter VI at 189 and 191.
2874 See above Chapter II at 76.
2875 See above Chapter VII at 205 and 214. See below Chapter VII at 229–34.
2876 See, eg, Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iv, 48.
2877 See above Chapter I at 15 and Chapter VI at 180. See below Chapter VII at 225–8, 231 and 233.
2878 Trueman (n 381) 214, 226–7; Hazel Genn et al (n 1009) 124–5; Macfarlane and Keet (n 323) 696.
2879 See generally above Chapter II and Chapter III at 103–6. See above Chapter VIII at 248.
2880 See above Chapter III at 96.
2881 Like the one I assisted drafting in the South Australian Employment Tribunal: see South Australian Employment Tribunal, *Mediation Guidelines* (at 13 July 2022), referred to in the South Australian Employment Tribunal, *Practice Direction No 29*: *Practice Directions 2022*, 13 July 2022, cl 29. See also Chapter III at 101–106.
2882 See above Chapter V at 180, 189 and 190.

actions to mediation at an early stage.[2883] Actions might be appropriate for referral where: disputants are of limited means; the costs and time of a trial would be disproportionately high compared to the quantum in dispute; or it is in the interests of justice to do so.[2884] Establishing a policy to identify actions suitable for early referral increases the likelihood of settling actions that might otherwise proceed to trial as a consequence of the expenditure of legal costs.[2885] This proposition is consistent with the views of many Stakeholders who recommended disputants should be actively encouraged to mediate early, particularly at the first directions hearing, when some actions are 'ripe' for mediation.[2886]

Referral criteria could be engineered into the *UCRs* or a new practice direction, providing more practice and procedural predictability for Stakeholders. It would enable the Court to provide more guidance to Stakeholders and disputants regarding the Court's attitude towards referring actions to mediation against objection.[2887] It would also inform lawyers and disputants about the Court's attitude towards 'screening out' actions considered unsuitable for mediation.[2888] This would further reinforce the importance of the first directions hearing, not only as an opportunity to resolve actions or refer them to mediation,[2889] but to increase lawyer and disputant awareness of the mediation 'opportunity'.[2890] This is consistent with the finding that suggests some disputants, particularly unrepresented litigants, remain unaware of this opportunity,[2891] which is echoed by some Stakeholders who commented upon the perceived lack of disputant awareness of the mediation option within the Court.[2892]

By promoting lawyer and disputant education, mediation can become more accessible and engender 'better' and timelier outcomes,[2893] which will assist addressing accessibility concerns.[2894] This is consistent with the Productivity Commission's recommendation that courts and tribunals increase the uptake of ADR processes, where they have been demonstrated to be efficient and effective.[2895]

Establishing referral criteria would also enable the Court to continue its culture of 'strongly encouraging' mediation,[2896] which is a further factor that will assist the advancement of mediation and the consequent expansion of its mediation culture.[2897] This will further assist promoting the

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2883 See, eg, Tyler and Bornstein (n 80) 54; Black (n 305) 144. See also Chapter III at 96. See also Appendix J: Comparison between *the Act*, *Rules*, *Practice Directions* and the *UCRs* regarding *Purpose*, *Practice* and *Procedure*.

2884 See, eg, Supreme Court of Victoria, *Practice Note SC Gen 6: Judicial Mediation Guidelines*, 1 January 2020, para 4.5; 'Alternative Dispute Resolution (ADR) Guidelines', *Administrative Appeals Tribunal* (Web Page, June 2006) <https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/alternative-dispute-resolution-guidelines>; Boulle and Field, *Mediation in Australia* (n 27) 288–9. See also Chapter VIII at 248.

2885 Black (n 305) 144.

2886 Magistrate 1; Magistrate 2; Magistrate 3; Magistrate 4; Magistrate 5; Lawyer 1; Lawyer 2 (Bar 1); Lawyer 3; Lawyer 4 (Bar 2); Lawyer 5 (Bar 3); Lawyer 7; Mediator 4; Mediator 5; Mediator 6; Mediator 7; Mediator 8; Mediator 9; Mediator 10; Mediator 11; Mediator 13; Mediator 15; Mediator 16. See also Chapter II at 45.

2887 Mack, *Criteria and Research* (n 80) 77–8.

2888 Ibid 71–2.

2889 See above Chapter VI at 171. See also *UCRs* (n 917) r 337.1(a)(b).

2890 Many Stakeholders recommended increasing awareness of the Court's mediation program to increase the uptake of mediation within the Court: Magistrate 1; Magistrate 2; Magistrate 3; Lawyer 2 (Bar 1); Lawyer 5 (Bar 3); Mediator 1; Mediator 2; Mediator 4; Mediator 5; Mediator 7; Mediator 8; Mediator 13; Mediator 14; Mediator 15; Mediator 16. See also Black (n 305) 143.

2891 See nn 992, 2809, 2909, 3309, 3468 and 3317.

2892 See Chapter VI at 172 and Chapter VIII at 244.

2893 See above Chapter VI at 174.

2894 See above Chapter II at 50.

2895 *Access to Justice Arrangements* (n 340) ch 8, recommendation 8.1.

2896 See above Chapter VI at 172.

2897 See above Chapter III at 86 and below Chapter VIII at 248.

acceptance of ADR as a means of settling actions,[2898] and progress cultural and institutional changes within legal practice.[2899] It will also address concerns regarding educating lawyers and disputants about ADR rather than 'punishing' them for not resorting to it.[2900]

Establishing referral criteria could also create a feedback loop whereby specific information about the Court's mediation program would be provided to Stakeholders and feedback obtained about the outcomes of referrals to track referrals against outcomes reached.[2901] For example, are particular types of actions more amendable to earlier referral than others, such as those where disputants have or have had some form of relationship (family, business or other)?[2902] If so, the Court could make targeted referrals earlier,[2903] to mitigate risks of further entrenchment of disputant positions and significant expenditure of costs[2904] – which can outweigh the potential benefits of attempting mediation for some disputants[2905] – and assist satisfying *efficiency* and *effectiveness* objectives.[2906]

Referral criteria may also assist lawyers to satisfy their obligations under the *UCRs* and their ethical obligations to inform their clients about the alternatives to adjudication and the availability of ADR options throughout proceedings.[2907] Additionally, the *UCRs* could be amended to contain a direction for lawyers to provide their clients with a copy of Rule 131.3[2908] before commencing litigation, which will increase disputant awareness of the mediation opportunity[2909] before the first directions hearing.

Recommendation 6: the Court to Trial a Pre-Mediation Pilot

The Court can address gaps regarding the three themes by introducing a Pre-Mediation pilot. Enabling mediators to meet with lawyers and disputants before mediation would assist discussing and setting participant expectations.[2910] It would also provide lawyers and disputants a clearer opportunity to decide whether they prefer undertaking mediation or conciliation.[2911]

The Pre-Mediation pilot will address the expressed appetite amongst some Stakeholders for Pre-Mediation,[2912] consistent with recommendations in other research.[2913] This could be undertaken by Panel Mediators[2914] or by members of the Court's Mediation Unit, specifically, a dedicated 'intake

2898 See, eg, Black (n 305) 145.
2899 See above Chapter I at 19.
2900 Doyle (n 34) 8. But see above Chapter III at 89.
2901 See, eg, Mack, *Criteria and Research* (n 80) 86; Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) recommendation 17, ix–x. See also below Chapter VII, recommendation 10 and 11.
2902 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) vi, recommendation 11 and viii, recommendation 13.
2903 Ibid iii, recommendation 1.
2904 See generally Ury, *Getting Past No* (n 647) 78–80; Andrew M Colman, *Game Theory and Its Applications: In the Social and Biological Sciences* (Psychology Press, 2nd ed, 1995) 197; Christopher Mitchell, 'The Right Moment: Notes on Four Models of "Ripeness"' (1995) 9(2) *Paradigms* 38, 45–6.
2905 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) viii, recommendation 13. See also nn 2142, 2260 and Chapter VII, recommendation 6.
2906 See generally Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) recommendation 9, v–ix, 136, 143, 146–7, 160, 171, 176.
2907 See above Chapter II at 14. See also Chapter III at 94.
2908 Similar to the *Rules* (n 917) r 27.
2909 See nn 992, 2809, 2891, 3309, 3468 and 3317.
2910 See Chapter VII at 206, 208, 210 and 213–4.
2911 See also Chapter VII, recommendation 4 and 7.
2912 See below Chapter VI at 176.
2913 See, eg, Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) v, recommendation 5; Rundle, 'Court-Connected Mediation Practice' (n 38) 459–60.
2914 Mediator 2; Mediator 3; Mediator 10.

officer' or case assessment professionals tasked with 'triage', screening actions for suitability or recommending other ADR options.[2915] This recommendation coincides with the multi-door courthouse concept.[2916]

Whilst the first directions hearing might act as a quasi-Pre-Mediation,[2917] this is not as effective as conducting a dedicated Pre-Mediation procedure, as supported by two Stakeholders who reported some disputants attend mediation being 'undercooked'.[2918] Furthermore, a minority of mediators expressed it is not the role of magistrates to conduct Pre-Mediation intake and assessment.[2919] Additionally, magistrates remain time-poor to conduct adequate Pre-Mediation during the first directions hearing.[2920] Furthermore, the first directions hearing does little to prepare mediators for mediation, which is consistent with the complaint by some mediators who reported the minimal information within the Court file occasionally results in them going 'in cold' to mediation.[2921]

The pilot will enable mediators to adhere with best practice theory.[2922] For example, to provide information to participants regarding what mediation 'is',[2923] 'screen' actions for suitability,[2924] determine who should attend such as insurers or other 'interested' parties,[2925] clarify what disputants seek to achieve,[2926] regulate 'emotional clients' and make them 'more comfortable' attending,[2927] particularly in light of sensitive or underlying issues not contained within the pleadings.[2928]

It will also enable mediators to discuss lawyer and participant roles and what the Court expects regarding their conduct,[2929] disarm expectations of the 'mini-trial',[2930] and de-emphasise the 'win-win myth', as it is unlikely that all participants will achieve their preferred outcome given a level of compromise is expected.[2931] It will also enable participants to contemplate the benefits of the Joint Session, despite lawyers being more comfortable with the predominant use of Private Sessions,[2932] to maximise opportunities for mediation advocacy[2933] and explore how lawyers can tailor their Opening Comments to best serves their clients' needs and interests. Moreover, it will enable participants to agree upon the content and purpose of Private Sessions and Shuttle Negotiations, potentially reversing the trend of the Joint Session demise.[2934] This would assist satisfying *self-*

2915 Lawyer 1. See, eg, Dawson (n 392) 177. See also the notion of 'matching' actions and/or disputants with an appropriate ADR process: see above Chapter V at 166 and Chapter VII at 218.

2916 See above Chapter II at 30.

2917 Magistrate 4. See above Chapter VI at 179.

2918 Mediator 12; Lawyer 3.

2919 Mediator 4; Mediator 5.

2920 Magistrate 3. Cf some mediators trust that magistrates undertake a level of 'pre-mediation assessment' for suitability before making referrals: see above Chapter VI at 174.

2921 See above Chapter VI at 179. See above Chapter VII at 226.

2922 See above Chapter II at 73.

2923 Lawyer 7; Lawyer 6.

2924 Mediator 2; Mediator 5; Mediator 10; Mediator 13. See also *Practice Standards* (n 222) s 10.1; Hardy and Rundle (n 39) ch 2.

2925 Mediator 10. See also Chapter III at 96 and 104–5.

2926 See, eg, Boulle and Alexander, *Skills and Techniques* (n 17) 95–104.

2927 Lawyer 5 (Bar 3).

2928 Lawyer 5 (Bar 3). See also Chapter IV at 115–8 and Chapter VI at 171 and 178–9.

2929 See below Chapter VII at 227.

2930 See above Chapter V at 133 and 148.

2931 Charlton, Dewdney and Charlton (n 382) 193, 194, 283, 293. See also Chapter IV at 118.

2932 See above Chapter VI at 194.

2933 See, eg, Andrew Goodman, *Effective Mediation Advocacy: A Guide for Practitioners* (XPL Law, 3rd ed, 2016); Walker, *Representing Clients in Mediation* (n 620) 274; Ian Davidson, 'The Art of Advocacy in Mediation' [2020] (Autumn) *Bar News* 34. See above Chapter I at 15 and Chapter VII at 209.

2934 Galton and Allen (n 820). See above Chapter II at 76.

determination and *responsiveness* values[2935] and increase the chances of Stakeholder and disputant satisfaction as to process and outcomes.

The pilot would address the missed opportunity for 'front-ending' actions and enable mediators to manage pre-mediation preparation and information exchange,[2936] include the use of Position Papers and the like. Enhancing pre-mediation information exchange will enable mediators to better assist participants (and themselves) prepare and may shorten the duration of mediation.[2937] This will also place disputants in a better position to make informed decisions during mediation[2938] incorporating their broader interests,[2939] thus satisfying mediation's *self-determination* and *responsiveness* values.

If members of the Court's Mediation Unit undertake the pilot, additional resourcing will need to be considered.[2940] Conversely, if the pilot is undertaken by Panel Mediators, the obvious consequences include increasing disputant expenditure of costs, for both engaging in Pre-Mediation and attending to payment of additional mediator fees. Some disputants, particularly in lower quantum actions within the General Division, may be unwilling to incur such additional costs. This is consistent with the three reasons expressed by some Stakeholders regarding why a mandatory Pre-Mediation procedure is unwarranted.[2941]

First, averting the disproportionate expenditure of costs,[2942] particularly in low quantum actions. Secondly, time restrictions to undertake mediation.[2943] Thirdly, legal representation and lawyer control, particularly in actions within the General Division because lawyers presumably explain to their clients mediation's purpose and how best to prepare.[2944] These three reasons are consistent with the reasons provided by respondents in Sourdin's study who reported that undertaking a pre-mediation session in the Supreme and County Courts of Victoria was unnecessary.[2945]

However, concerns regarding costs expenditure by 'front-ending' actions are not restricted solely to mediation. Similar concerns regarding significant costs being 'front-loaded' have been raised regarding Pre-Action requirements.[2946] Concerns regarding 'front-ending' actions are illustrative of a trade-off between the expenditure of costs and the thoroughness of information exchange. They also highlight competing policy interests between the private and public expenditure of costs.

The private and public benefits of introducing the pilot outweigh the initial cost expenditure. Front-ending actions by promoting pre-mediation preparation and information exchange will increase the chances of some actions settling, which most Stakeholders described as being mediation's primary

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2935 See above Chapter II at 34–5.

2936 Lawyer 5 (Bar 3); Mediator 2; Mediator 10.

2937 Lawyer 7.

2938 Mediator 1; Mediator 3; Mediator 4. See also Chapter III at 104.

2939 See above Chapter II at 41.

2940 Mediator 12.

2941 Three mediators provided no reasons why introducing a Pre-Mediation procedure is not warranted: Mediator 9; Mediator 14; Mediator 16. No magistrate reported there should be a Pre-Mediation procedure.

2942 Mediator 8; Mediator 13; Magistrate 4.

2943 Mediator 7; Mediator 9. Limitations regarding time and conference room space were a common theme identified by some Stakeholders: see nn 1008, 1412, 1671, 1739, 2031, 2270, 2303 and 2439. See also Appendix A: Qualitative Research Methodology.

2944 Lawyer 7. However, disputants can be unrepresented: see above Chapter I at 23, Chapter VI at 173 and Chapter VII at 222. See also Chapter VIII at 245.

2945 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) 52.

2946 Tania Sourdin, Madeline Muddle and Margaret Castles, 'The Evaluation of Specific Pre-Action Processes in South Australia' (Research Paper, University of Adelaide, University of Newcastle, October 2018) ix; Tania Sourdin, 'Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts' (Research Paper, Australian Centre for Justice Innovation, Monash University, 2012) 2. See also *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC), [1].

purpose.[2947] Increasing the chances of actions settling earlier within the litigation process increases the chances of satisfying *efficiency* and *effectiveness* objectives resulting in the efficient use of public and private resources, greater economic and non-economic cost savings, promoting systemic efficiency, private satisfaction and earlier access to justice for the community.[2948] Front-ending actions will also encourage more targeted litigation for those actions that do not settle at mediation.

The Court can mitigate concerns of over-prescription and disproportionate costs expenditure by providing lawyers and disputants a choice to participate in the pilot. This would assist satisfying *self-determination* and *responsiveness* values by ensuring flexibility while respecting disputant and lawyer choices. For example, mediators could undertake brief Pre-Mediation with lawyers via telephone, which can mitigate them going into mediation 'totally cold'.[2949] In any event, the Court retains a discretion to award costs and I contend this extends to the costs of Pre-Mediation.[2950]

Following the pilot, the Court could establish standardised procedures regarding Pre-mediation to address any gaps identified with screening for suitability issues, lawyer and disputant preparation before mediation and the levels of appropriate pre-mediation information exchange.

The pilot would also provide data for future research.[2951] It would enable the Court to investigate whether having a Pre-Mediation procedure results in higher settlement rates and whether it provides other benefits to Stakeholders – as well as disputants and the Court – such as satisfaction as to process and outcomes.

Recommendation 7: the Court to Introduce a New Practice Direction

A further way to address gaps and align Stakeholder expectations is by making information more centralised by introducing a new practice direction, encompassing content that featured in the *Practice Directions*[2952] and transplanting more detailed provisions from practice directions in other Australian court and tribunals, which include reference to some of the matters discussed below.[2953] Whilst the *Practice Directions* contained a general description of the 'process',[2954] one mediator described it as a 'cursory information sheet' that does not adequately prepare disputants for mediation.[2955]

A new practice direction could reference key matters specified in the NMAS,[2956] various industry models,[2957] mediation rules[2958] and guidelines, to serve as an ethical and practical framework for mediators, provide guidance to lawyers and disputants and promote public confidence in mediation.[2959] It could also reference information on the Court's website[2960] and key findings from

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2947 See above Chapter IV at 110–13.

2948 See above Chapter II at 49 and 53. See also Appendix E: Varying *Purposes* of Mediation According to Four Archetypical 'Models'.

2949 Lawyer 7. See above Chapter VI at 179.

2950 See generally *UCRs* (n 917) rr 194.1, 194.4 and 194.5(1). See also *District Court Rules 2005* (WA) s 35(5); *Rules of the Supreme Court 1971* (WA) ord 4A, div 1, r 4(c). See also *ADR and Civil Justice* (n 2678) 4.31.

2951 See Chapter VII and Chapter VIII.

2952 See above Chapter III at Part B.

2953 See, eg, Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution*, 19 December 2018.

2954 See above Chapter III at 102.

2955 Mediator 12. See above Chapter VI at 179.

2956 See above Chapter II at 32 and Chapter III at 95.

2957 See above Chapter II at Part D.

2958 See, eg, *Mediation Rules* (n 183).

2959 See above Chapter II at 34, 47 and 49–50.

2960 See above Chapter III at 92 and 101.

this thesis.[2961] This would ensure it is consistent with industry use, reflects contemporary best practice methods in other court-connected contexts whilst being tailored for local context.[2962]

Content that should feature in the practice direction include a definition/description of what mediation 'is', its *purpose(s),* with an acknowledgment of its benefits and markers of success. For example, it can assist disputants reach non-legal remedies that satisfy their non-legal needs, which the Court cannot order[2963] and can extend to lesser-reported *purposes* secondary to settlement.[2964] It should also explain the differences between mediation and the other ADR processes and associated costs.[2965]

In terms of *practice*, the practice direction should detail the mediator's role and functions,[2966] the role of lawyers,[2967] disputants, and support persons[2968] and conduct guidelines for all,[2969] to foster supportive negotiation and mediation cultures.[2970] If mediators continue to be required to be NMAS accredited,[2971] guidelines for their conduct may not be required given the *Practice Standards* contain detailed provisions regarding procedural fairness, impartiality, ethical conduct and confidentiality.[2972] Though the *UCRs* have introduced conduct standards, namely, an expectation that disputants 'participate appropriately' and 'negotiate in good faith' to resolve their action,[2973] Stakeholders and participants would benefit from clarification regarding the Court's expectations regarding these two provisions. The practice direction could state that disputants 'will be encouraged to participate directly', even if legally represented,[2974] to satisfy mediation's *self-determination* value and any concerns regarding lack of disputant participation.[2975] Whilst it has been suggested that 'good faith reporting' enables mediators to indicate where lawyers or disputants have engaged in an obstructive or uncooperative manner,[2976] and the *UCRs* state the Court *expects* mediators to report when they consider a disputant 'did not participate appropriately',[2977] this provision may cause controversy. As suggested by the Law Council of Australia, any reporting requiring the mediator's subjective judgment regarding disputant conduct 'is likely to destroy the integrity' of mediation.[2978]

The practice direction should also include a description of each stage of the *procedure*[2979] and would enable the Court to address the gaps identified in the legislative framework,[2980] in particular

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2961 See above Chapter IV, Chapter V and Chapter VI.
2962 Mack, *Criteria and Research* (n 80) 2, 8, 37.
2963 See above Chapter IV at 117.
2964 See above Chapter IV at 109.
2965 See above Chapter III at 93–4.
2966 See above Chapter V at Part B.
2967 See above Chapter I at 14–5.
2968 See above Chapter II at 73. See also Chapter III at 105.
2969 See above Chapter II at 34, 47 and 49–50.
2970 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iv, recommendation 4 and viii, recommendation 15. See also below Chapter VIII at 248.
2971 See above Chapter VII at 248.
2972 *Practice Standards* (n 222) pt III. See above Chapter II at 50.
2973 *UCRs* (n 917) r 131.3(3).
2974 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution*, 19 December 2018, para 35.
2975 See above Chapter II at 42.
2976 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) ix, recommendation 16.
2977 *UCRs* (n 917) r 131.3(3). See below Chapter VII at 231.
2978 *Ethical Guidelines for Mediators* (n 254) 5–6, r 5(f).
2979 See above Chapter VI at Part C. See also Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iv, recommendation 3.
2980 See above Chapter III at 103–6.

by guidance regarding what constitutes an 'attempt' to settle – and whether this includes notions of genuineness or reasonableness.[2981]

At the micro level, the provision of more comprehensive information regarding the above in a new practice direction would be beneficial for six reasons.

First, it will provide further clarity and address gaps in the *UCRs* regarding key factors relating to the three themes.[2982] For example, like the *Rules*, the *UCRs* offer no guidance regarding the level of 'assistance' mediators must provide disputants in recording settlement terms. Introducing a new practice direction would enable the Court to address the terseness in the *UCRs*[2983] by offering more guidance to Stakeholders and disputants, without requiring amendment, which could cause an overly prescriptive approach. This may address expectation gaps regarding 'who' records Settlement Agreements and levels of assistance mediators provide in recording settlement terms.[2984] This would increase practice predictability and ensure Settlement Agreements are prepared in a uniform rather than *ad hoc* manner incorporating 'standard' settlement terms.[2985]

Secondly, it will assist disputants make informed decisions about whether their action is suitable for mediation, whether the purposes they seek to achieve can be better served by a different ADR process or by litigation. The Court should introduce separate practice directions for mediation and conciliation, which would further reiterate the conciliation-mediation distinction expressed in the *UCRs* and provide further guidance to Stakeholders and disputants regarding what the Court expects during these two different processes.[2986]

Thirdly, it will assist setting and managing Stakeholder and participant expectations before and during mediation, thus increase the chances of facilitating a productive process and maximising the potential for satisfactory outcomes.[2987] It would also enable the Court to acknowledge some characteristics that feature in court-connected mediation that are less prevalent in non-court-connected contexts.[2988]

Fourthly, it will assist in better preparing lawyers and disputants about what to expect during the process. It would assist lawyers better prepare their clients by providing them with information about the appropriate division of roles between them and how to best prepare,[2989] including to consider what further information should be exchanged to assist disputants make fully informed decisions. Increasing client preparation increases the chances of them having a positive mediation experience they deem 'fair'.[2990]

Fifthly, it will promote practice and procedural predictability by ensuring participants experience consistency in *practice* and *procedure*. This is on the assumption that mediators adhere to the Court's proposed *practice* and *procedure*.

2981 *UCRs* (n 917) r 131.3(8). See above Chapter III at 88–9. See also Chapter VI at 200–1.

2982 See above Chapter III at 98–106.

2983 *UCRs* (n 917) r 131.3(4).

2984 See above Chapter V at 196.

2985 See, eg, David Bailey, 'Negotiating and Drafting Settlement Agreements: Principles and Content' (Seminar Paper, Victorian Bar, 15 March 2012) 15–16.

2986 See also Chapter VII, recommendation 4.

2987 *Guidelines for Parties in Mediations* (n 40) 2.

2988 See above Chapter II at 40–7 and 79–83, Chapter III at 96–7, Chapter IV at 114, Chapter V at 150 and Chapter VI at 172, 176, 178, 184, 187–8 and 194.

2989 See, eg, Macfarlane and Keet (n 323) 693.

2990 See generally Delaney and Wright (n 360) 66; Wissler, 'Court-Connected Mediation in General Civil Cases' (n 363) 687; McAdoo and Welsh (n 366) 424.

Sixthly, it will act as a learning resource for trainee and experienced mediators on the Court's Panel.[2991]

At the macro level, the provision of more comprehensive information in the practice direction would inform best practice and assist promoting public confidence in the Court's mediation program.

The flexibility inherent in rules of court and practice directions assists balancing the need for clarity and guidance regarding the three themes as well as consistency and predictability whilst mitigating risks of over-prescription. To mitigate such concerns, the Court could also make the practice direction apply on an opt-out basis like provisions in other courts.[2992] By maintaining flexibility in *practice* and *procedure*, mediation can be catered to disputants' needs while respecting disputant and lawyer choices. This would assist satisfying mediation's *self-determination* and *responsiveness* values and respect lawyer autonomy.

Maintaining flexibility also mitigates risks of creating further expectation gaps and tensions between Stakeholders. For example, an overactive attempt by the Court or mediators to encourage extensive direct disputant participation will encroach upon lawyer-client relationships and lawyer control, risking damage to relationships between the legal profession, mediators, and courts.[2993] Lawyers would resist extensive encroachments citing protection of their clients' interests and their expressed need to 'control' their clients.[2994] It also illustrates tensions between lawyer control within the adversarial system and mediation's *self-determination* and *non-adversarialism* values, highlighting the 'dilemma of court-connection'.[2995]

Maintaining flexibility mitigates the risk of mediators pressuring lawyers and disputants to confirm with their 'models of behaviour', for example, if some mediators prefer advisory/evaluative practices, rather than working on a disputant-centred philosophy,[2996] in contrast to those lawyers and disputants who prefer facilitative mediation. It also mitigates creating expectation gaps and tensions between those lawyers who dominate and control in contrast to those clients who want direct participation.[2997]

Recommendation 8: the Court to Display Mediation and Conciliation Procedures on its Website

A further way to address gaps is by diagrammatically displaying the *procedure* on the Court's website,[2998] like the mediation and conciliation 'Process Models' on the AAT's website, which includes separate definitions for mediation and conciliation.[2999] It also provides more comprehensive descriptions of the *purpose* of each stage of mediation and conciliation *procedures*, providing guidance to lawyers and disputants about what to expect, including that stages 1–4 and 6–7 of mediation are usually conducted in Joint Session.[3000]

2991 Wade, 'Terminological Debate' (n 208) 209.
2992 See, eg, *Supreme Court Rules 2000* (Tas) r 519(3).
2993 Rundle, 'Court-Connected Mediation Practice' (n 38) 445, 474.
2994 See above Chapter VI at 185, 190 and 192.
2995 See above Chapter II at 34, 39 and 42.
2996 Wade, 'Terminological Debate' (n 208) 207.
2997 See above Chapter II at 42–4. See also Chapter VIII at 244.
2998 See also Chapter VII, recommendation 9.
2999 'Conciliation Process Model' (n 285); 'Mediation Process Model' (n 877). See also Chapter II at 31 and 35.
3000 Ibid. See also Appendix T: Summary of the Administrative Appeal Tribunal Mediation and Conciliation 'Processes'.

Displaying *procedures* on the Court's website is a further way to centralise information regarding mediation. This will assist in addressing the miscellany of information about *procedure* in the *Act*, the *UCRs* and the basic description on the Court's website.[3001] This assortment of information may account for expectation gaps between mediators and lawyers regarding *practice* and *procedure*.

Including a brief description of the purpose of each stage of the *procedure* would provide potential mediation users with an overview of what its *procedure* entails. This is a further way of aligning Stakeholder and disputant expectations before mediation, which would assist promoting procedural predictability and tackling inconsistency. The diagrams would also assist promoting *practice* predictability by informing potential mediation users of the differences between mediation and conciliation and further reiterating the existing, though less pronounced, distinction in the *UCRs* and any future practice directions.[3002] This would further bridge gaps between theory[3003] and practice.

The Court could mitigate concerns of over-prescription by specifying that the diagrams and summary of each stage are 'guides' of what *procedure* entails, which can further mitigate dangers of codifying informal *procedures* and *practices*.[3004] The Court could also reiterate that mediators control a flexible *procedure* so that participants are aware that mediators can tailor both *practice* and *procedure* to their needs while respecting disputant and lawyer choices. Ensuring flexibility would assist satisfying mediation's *self-determination* and *responsiveness* values.

Recommendation 9: the Court to Display a Mediation Observation/Video Recording on its Website

Magistrates reported uncertainty regarding what precisely occurs during mediation.[3005] This gap can be addressed by having them observe what *practice* and *procedure* entails. Having done so, they may be better equipped to reiterate to lawyers and disputants at the first directions hearing the Court's expectations regarding the three themes. However, observing mediation gives rise to concerns regarding privacy, confidentiality and the effects of non-participant observation, as discussed in the research methodology.[3006]

An easier way to address such concerns, would be for the Court to provide a video recording of a simulated mediation on its website, like that on the Federal Court of Australia's website,[3007] but tailored to subject matter within the Court's different Divisions.[3008] It would act as a learning resource for current and future Stakeholders – as well as potential future mediation users who might otherwise be unaware of the 'mediation opportunity' as an alternative to trial – before the first directions hearing, and reflect contemporary best practice methods.[3009] This would also provide the opportunity for the Court to afford Stakeholders and future mediation users further clarity about the differences between mediation and the other processes within the ADR suite, how they differ from

3001 See above Chapter III at 92 and 101.
3002 See above Chapter VII at 215 and 223.
3003 See above Chapter II at Part D. See also Chapter IV, Chapter V and Chapter VI.
3004 John S Murray, 'Lawyers and Alternative Dispute Resolution Success' (1987) 14(4) *Pepperdine Law Review* 781, 784.
3005 See above Chapter VI at 181 and 189.
3006 See, eg, Appendix A: Qualitative Research Methodology.
3007 Federal Court of Australia, 'Mediation in the Federal Court of Australia' (YouTube, 9 October 2014) <https://www.youtube.com/watch?v=6r05qpdSkUo>.
3008 See above Chapter III at 85.
3009 See also above Chapter VII, recommendation 7 and 8.

litigation, together with the 'shortcomings' of litigation,[3010] which will promote informed decision-making.

It would also be a further opportunity for the Court to remind lawyers and disputants of the express provisions in the *UCRs* regarding conduct during mediation including a 'duty to participate appropriately' and 'negotiate in good faith'.[3011]

Recommendation 10: the CAA to Coordiate an Annual Mediation Forum for Stakeholders

Stakeholder expectations exist within several vacuums,[3012] which suggests they are not interacting to their greatest potential. Each group appears uninformed of the expectations of the others,[3013] suggesting little dialogue between them regarding the three themes and differences in *ideology* and *practice*. For example, one magistrate stated there is no ongoing dialogue between magistrates and Panel Mediators with no ongoing learning or education.[3014] Some Panel Mediators expressed no communication between them,[3015] consistent with Sourdin's finding of little dialogue between the Supreme and County Courts of Victoria and external mediators and amongst mediators about the processes they use.[3016]

A further way to address gaps and align expectations[3017] is to foster communication between Stakeholders, particularly between mediators.[3018] The CAA should arrange an Annual Mediation Forum, which would not merely act a professional development or continuing education opportunity, but enable Stakeholders as repeat players[3019] to promote constructive dialogue and group learning.

The Forum would provide the opportunity for Stakeholders to discuss many of the expectation gaps and tensions identified in this thesis. For example, they could explore levels of pre-mediation preparation and information exchange and whether a more prescriptive approach is required.[3020] They could discuss the practice model mediators do or should utilise[3021] and ways to increase lawyer awareness of different practices within the Court.[3022] They could discuss referral practices[3023] including when most actions are referred to mediation, and developing criteria for referrals, to facilitate 'wise referral decisions'.[3024] They could explore the tension between lawyers and mediators regarding Private Sessions and Shuttle Negotiations[3025] and direct disputant participation.[3026] If Stakeholders articulated sound reasons for their preference for Shuttle Negotiation over Joint Session mediation, supported by statistics that one or other results in higher rates of settlement or satisfaction as to process or outcomes, this could assist changing the

3010 Lawyer 1, citing Doyle (n 34) 6.
3011 *UCRs* (n 917) r 131.3(3).
3012 See above Chapter V at 168 and Chapter VI at 204.
3013 See above Chapter IV, Chapter V and Chatper VI.
3014 Magistrate 5.
3015 See above Chapter V at 137.
3016 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) x.
3017 Mediator 12. See also Chapter VIII at 232–3.
3018 Mediator 1; Mediator 7; Mediator 12.
3019 See above Chapter I at 16.
3020 See above Chapter V at 176 and Chapter VII at 220, 225–6, 228.
3021 Mediator 10. See also Chapter V at Part A.
3022 See also Rundle, 'Court-Connected Mediation Practice' (n 38) 216, 466–7.
3023 See above Chapter VI at 171.
3024 Mack, *Criteria and Research* (n 80) 88.
3025 See above Chapter VI at 192.
3026 See above Chapter II at 42, 70, 75, 79 and 82, Chapter V at 139 and 145 and Chapter VI at 185–7, 192–5 and 204.

procedure and the Court's mediation culture.[3027] If the Court determined there should be no or minimal Shuttle Negotiation, it should indicate to Stakeholders and disputants its preferred *procedure*.[3028]

Stakeholders could consider the level of 'assistance' the Court expects mediators will provide disputants in recording settlement terms, which would address the concerns raised by two magistrates who reported settlements occasionally become 'unstuck' post-mediation.[3029] These magistrates suggested disputants, especially unrepresented litigants, require particular assistance and mediators should invest more time 'front-ending' Settlement Agreements, particularising terms and agreed consequences upon default.[3030] This would also enable the Court to assess whether it would be beneficial to provide training to mediators regarding recording settlement terms.[3031] Stakeholders could also consider whether amendments are required to the Court's *pro forma* Settlement Agreement to ensure they are completed to the Court's satisfaction. This is consistent with two magistrates who recommended the Settlement Agreement be re-modelled as a 'tick and flick' document that prompts disputants to particularise their settlement terms to mitigate ambiguity of insufficient details,[3032] thus satisfying mediation's *effectiveness* objective.[3033] The Court can invite lawyer input into this review to address concerns[3034] or compliance issues from the disputant perspective thus satisfying mediation's *self-determination* and *responsiveness* values.

The Forum would enable the CAA to maintain and explore statistics to identify trends regarding settlement rates, to be used for both ongoing monitoring and reporting, and to ensure that more complex criteria are assessed relating to cost, compliance and access.[3035] It may also include monitoring post-mediation compliance with Settlement Agreements and the occurrence of satellite litigation from agreements becoming 'unstuck' post-settlement.

The Forum would also enable the Court to promote effective quality assurance and standards monitoring, including complaints handling mechanisms to enhance the quality of the program.[3036] Obstacles regarding privacy, confidentiality, and privilege[3037] could be addressed by Forum participants sharing their understandings, expectations, and experiences in general terms or anonymously.

Recommendation 11: the Court to Establish a Court Users' Group

A further way to address gaps and align Stakeholder expectations is to establish a Court Users' Group, like the Commercial Court Users' Committee in the United Kingdom.[3038] This would provide an avenue for the Court to chair meetings involving disputants – whether repeat players on

3027 See above Chapter III and below Chapter VIII.
3028 See above Chapter VII at 210.
3029 See above Chapter VI at 197.
3030 Magistrate 4; Magistrate 5.
3031 Mediator 6; Mediator 7. See also Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) viii, recommendation 15.
3032 Magistrate 4; Magistrate 5. Cf those mediators who leave drafting Settlement Agreements to disputants and those who merely scribe: see above Chapter VI at 198.
3033 See above Chapter II at 49.
3034 Lawyer 3.
3035 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) x, recommendation 18.
3036 McAdoo and Welsh (n 366) 427; Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) iv, recommendation 3 and xi, recommendation 19.
3037 See above Chapter III at 103.
3038 See, eg, 'The Latest London Circuit Commercial Court Users' Committee Meeting Minutes', *Courts and Tribunals Judiciary* (Web Page, 2023) <https://www.judiciary.uk/the-latest-london-circuit-commercial-court-users-committee-meeting-minutes/>.

a regular basis or 'one-shotters' – to promote constructive dialogue and group learning regarding the three themes.

This Group could provide collaborative feedback to the Court regarding levels of engagement and attitudes towards the Court's mediation program, such as whether challenges exist in the way lawyers and disputants approach and engage in mediation and whether any cultural changes regarding the three themes are warranted. In particular, whether mediators are experiencing difficulties before or during mediation.[3039] This would enable the Group to identify further gaps in the *UCRs* regarding the three themes and promote ways to address them. The Group could advise the Court on how to respond to existing and emerging issues and to develop best practice methods in line with national and international developments in other court-connected mediation programs. Furthermore, the Group could make continual contributions for program improvement,[3040] encompassing disputant input.[3041] This will further assist the Court and disputants satisfy mediation's *self-determination* and *responsiveness* values and *effectiveness* and *efficiency* objectives.

Value also exists in implementing this recommendation as a means of monitoring the implementation of the other recommendations made in this Chapter. For example, whether further clarity is required in the *UCRs*, the proposed practice directions, and the mediation and conciliation procedures on the Court's website. Moreover, whether further changes are required to promote additional Stakeholder education and cultural change in the court-connected mediation context and in the legal profession.

E *Conclusion*

In this Chapter I have examined the prominent expectation gaps identified in Chapters IV, V, and VI and other important findings regarding the three themes. I illustrated why they are significant and have argued that these gaps should be addressed for four reasons.

First, providing Stakeholders and mediation users clarity regarding the three themes will promote clarity regarding what mediation 'is', its *purpose(s)*, what *practices* fall within its purview, the scope of the mediator's role and functions and what its *procedure* entails. This will assist setting participant expectations regarding the three themes before mediation, preventing potential mischief expectation gaps can cause,[3042] and mitigating the chances of lawyer and disputant disappointment.

Secondly, it will promote consistency and both practice and procedural predictability. It will also assist addressing tensions between lawyers and mediators regarding *practice* and *procedure*,[3043] which can generate participant disappointment.[3044] It will also promote more effective preparation for mediation.

Thirdly, providing clarity will assist lawyers to better advise their clients about what to expect regarding the three themes. It will also assist them to explain how mediation is different to the other processes within the ADR suite,[3045] what to expect from these different processes and which process will better serve the purposes disputants seek to achieve. Promoting Stakeholder education will expand the information base on which disputants make decisions. Increased disputant choice promotes informed decision-making, thus increasing the potential of satisfying mediation's core

3039 Mediator 7.
3040 Mediator 1.
3041 Mediator 12. See also Chapter VIII at 244.
3042 See above Chapter I at 17 and 25. See also Chapter VIII at 238.
3043 See above Chapter II at 44 and 83, Chapter III at 101, Chapter V at 164 and Chapter VI at 185, 187, 194, 201–2 and 204.
3044 See above Chapter I at 25 and Chapter VII at 208, 213 and 220. See below Chapter VIII at 238.
3045 See above Chapter III at 93.

values[3046] by ensuring mediation is disputant-centric,[3047] hence increasing potential for satisfaction as to process and outcomes.

Fourthly, it will address gaps in the *UCRs* about key factors regarding the three themes,[3048] for, like the *Rules*, the *UCRs* are at times silent, terse, or insufficiently definitive on many factors relating to the three themes, particularly to *practice* and *procedure*.[3049]

I have argued that my recommendations to address the expectation gaps must be sufficiently prescriptive to ensure consistency and both *practice* and *procedural* predictability whilst ensuring sufficient flexibility, to satisfy mediation's core values[3050] to cater to disputants' needs while respecting disputant and lawyer choices.[3051]

I have illustrated why my recommendations will better align Stakeholder expectations, address expectation gaps and reflect contemporary best practice methods. I have also illustrated that my recommendations will assist in bridging gaps between theory and practice.[3052] They are also key opportunities to further educate mediation users about what to expect from mediation. Moreover, they will inform potential future mediation users about the Court's mediation program before the first directions hearing.[3053]

Just as the three themes are interrelated, as has been illustrated throughout this thesis, so too are my recommendations. Though the majority are targeted towards *practice* and *procedure*, they are linked with purpose, for, as I contend throughout this thesis, *purpose* drives *practice* and *procedure*.[3054] My recommendations centre on promoting four principles: Stakeholder education regarding the three themes; rule clarity; satisfaction of mediation's core values and objectives; and cultural change in the court-connected mediation context and the legal profession.

However, the effectiveness of any change in rules or policy depends upon them being 'accepted by the players in the system' and 'cultural changes' can be more important than rule changes.[3055] Consistency, in terms of compliance, also depends upon the need for accessible information and greater education for Stakeholders, and disputants, as well as court supervision and support.[3056] Some of my recommendations require cultural changes to be accepted by Stakeholders, which will be easier to implement than others. Some require 'buy-in' by Stakeholders as gatekeepers to the Court's mediation program, particularly lawyers.[3057] Like one magistrate emphasised, the only way to increase the uptake of mediation in the General Division is for the Court to make its program 'more attractive' to lawyers.[3058] Despite the 'anti-lawyer bias' that some authors argue exists in the 'ADR movement', the legitimacy and success of ADR processes depend upon the acceptance of lawyer dominance, as more than any other group, lawyers control the way disputants resolve actions.[3059] Court-connected mediation's potential is constrained by the interests and practices of

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3046 See above Chapter II at 33–5.
3047 See above Chapter II at 34.
3048 See above Chapter II and Chapter III at 98–106.
3049 See above Chapter II and III.
3050 See above Chapter II at 33–5.
3051 See above Chapter I at 22, Chapter V at 155, 165 and 167 and Chapter VII at 226 and 229–30 and 234.
3052 See above Chapter VII at 230 and 235 and Chapter VIII at 243 and 248.
3053 See above Chapter III at 104 and Chapter IV at 117 and Chapter V at 133 and 148 and Chapter VI at 170 and 171 and Chapter VII at 214 and 230.
3054 See above Chapter I at 13, Chapter II at 47, Chapter IV at 113 and 125, Chapter V at 131, Chapter VI at 181, 192, 197 and 202 and Chapter VII at 208, 210 and 234.
3055 Cannon, 'An Evaluation' (n 96) 53.
3056 Sourdin, Muddle and Castles (n 2946) xiii–iv, 16, chs 6, 7.
3057 See above Chapter I at 14.
3058 Magistrate 4. See also Appendix C: Interviewee Demographic Information and Actions Mediated in the Court. See also nn 2890 and 2909.
3059 Murray (n 3004) 782.

the legal profession,[3060] without whose support, the Court's program – and each of the processes within the ADR suite – risk becoming stagnant or underutilised.

Furthermore, the distinction between process-makers and process-takers, introduced earlier in the Chapter, highlights tensions that may exist between the Court's expectations, on the one hand, and mediators, in their capacity as both process-takers from the Court *and* facilitators of mediation, on the other. This tension is illustrated by two examples. First, whilst the purists emphasised the importance of the conciliation-mediation distinction, some Stakeholders blurred it when describing content interventions such as supporting mediator 'proposals',[3061] and both expect and prefer mediators to be reasonably 'interventionist' and 'directive', indicative of conciliation.[3062] Secondly, a minority of mediators self-described 'conciliating' and their descriptions suggest the use quasi-advisory/evaluative techniques.[3063] It also highlights the limits to monitoring mediator compliance, for example, with the conciliation-mediation distinction.[3064]

Moreover, the distinction between process-makers and process-takers also reinforces tensions between mediator control and lawyer dominance.[3065] In particular, the tension between mediators, as process facilitators, with power to 'advise on or determine the process,'[3066] and lawyers, who may be uncomfortable being in a 'purely' process-taker role, with direct disputant participation, and abdicating total process control to mediators.

The distinction also highlights the gap between theory and practice.[3067] For example, a minority of mediators expressed undertaking conciliation or otherwise utilise advisory/evaluative techniques despite the prescription in the *Rules* that mediators have no advisory or determinative role regarding content or outcome.[3068]

On one hand, these findings suggest the pragmatists[3069] place less importance on the prescription in the *Rules* against advisory or determinative roles[3070] than the purists. They also suggest that the minority of mediators prefer being process-makers rather than process-takers from the Court.

The inference to be drawn is that prescribing rules governing the three themes is futile, as lawyers and mediators will operate according to their own 'philosophical maps' or differences in value systems.[3071] For example, one mediator opined that as 'there are no rules', the Court cannot control how mediators conduct their procedure.[3072] Similarly, another warned against making mediation 'a structured, formal exercise'.[3073] According to these views, my recommendations will not change the understandings, expectations, and behaviours of the pragmatists.

3060 Gordon, 'Why Attorneys Support Mandatory Mediation' (n 324).

3061 See above Chapter V at 138 and 608.

3062 See above Chapter VII at 216.

3063 See above Chapter V at 135–6 and 162.

3064 See above Chapter VII at 215. See also the discussion of self-regulation in Appendix A: Qualitative Research Methodology.

3065 See above Chapter II at 39 and 42–4 and 83. See above Chapter IV at 121, 124 and 129, Chapter V at 142, 158 and 164 and Chapter VI at 187, 192, 197 and 201–2, Chapter VII at 210–11, 220, 227 and 232–4. See below Chapter VIII at 240 and 248.

3066 *Rules* (n 917) r 2. See above Chapter III at 95.

3067 See above Chapter IV at 128, Chapter V at 140–1, 153, 158, 165, Chapter VI at 194 and 202, Chapter VII at 234–5 and Chapter VIII at 240, 243 and 248.

3068 *Rules* (n 917) r 2. See above Chapter III at 95.

3069 See above Chapter V at 141, 153, 165–8.

3070 *Rules* (n 917) r 2. See above Chapter III at 95.

3071 Riskin, 'Mediation and Lawyers' (n 52) 43.

3072 Meditator 11.

3073 Mediator 6.

On the other hand, these findings suggest that the Court has not properly set and managed the expectations of the other two Stakeholder groups and a more prescriptive approach is required to better align Stakeholder expectations and reflect contemporary best practice methods. My recommendations include measures to increase communication promote constructive dialogue, and group learning between the Court, as process-maker, and between Stakeholders, as process-takers, regarding the three themes. Stakeholders, the Court, and future mediation users would benefit from the implementation of the whole suite of recommendations, which will promote predictability and consistency, better managing Stakeholder and disputant expectations, change behaviours of those involved, either directly or indirectly, in mediation and thus foster cultural change. Implementing my recommendations will be a positive development to the Court's mediation culture and will further influence the progression of its mediation program.

In the next Chapter I summarise the key findings. I also explore how I satisfied the research aim, why the key findings are significant and how they contribute to knowledge. The Chapter also concludes with recommendations for future research.

CHAPTER VIII: CONCLUSION

Like other multi-door courthouses[3074] and tribunals in Australia, the Magistrates Court of South Australia ('the Court') provides disputants the 'mediation opportunity'[3075] as part of its ADR suite.[3076] It has an established mediation program[3077] and mediation culture[3078] and resolves more civil actions by mediation than judicial determination.[3079] Notwithstanding this, there was no identifiable research examining the understandings, expectations, and experiences of those involved, either directly or indirectly, in mediation until now.[3080]

In the previous Chapter I examined the prominent expectation gaps identified in the empirical data and other important findings regarding the three themes. I made recommendations to address them in addition to recommendations for future research.

In this final Chapter I demonstrate why it was important to do the research, how I have addressed the knowledge gap and contributed to knowledge. I also discuss the implications of my findings and conclude by making recommendations for future research.

A *Addressing the Gap in Knowledge: Understanding the Prominent Expectation Gaps between Stakeholders*

I addressed the dearth in scholarship by examining the understandings, expectations, and experiences of magistrates, lawyers, and mediators, who I referred to collectively as 'Stakeholders'.

Rather than commencing the research with a fixed hypothesis, I obtained a rich amount of data directly from Stakeholders.[3081] I developed three research questions to enable scholarly reflection:

1. What do Stakeholders report regarding mediation's *purpose*?

2. What do Stakeholders report regarding mediation *practice*?

3. What do Stakeholders report regarding mediation *procedure*?

I argued that the three themes are interrelated and overlap.[3082] My core contention, that *purpose* drives *practice* and *procedure*, [3083] was supported by the empirical data.[3084]

I contended that Stakeholders might have different understandings, expectations, and experiences, regarding the three themes, which illustrate the potential for expectation gaps.[3085] This contention was also supported by the findings. In particular, Stakeholder reports regarding mediation's *purpose* were largely convergent in contrast to the divergent reports regarding *practice* and *procedure*.

3074 See above Chapter II at 30 and Chapter III at 93.
3075 See nn 2809, 2891, 2909, 3309, 3468 and 3317.
3076 See above Chapter III at 93.
3077 See above Chapter III at 86.
3078 See above Chapter III and VII.
3079 See above Chapter III at 90.
3080 See above Chapter I at 12.
3081 See also nn 115, 123, 3329, 3339 and 3408.
3082 See Figure 1 above in Chapter I, Chapter IV at 108 and 130, Chapter V at 169 and Chapter VII at 205. See below Chapter VIII at 239.
3083 See above Chapter I at 13 and Chapter II at 48.
3084 See above Chapter IV at 108, 113 and 125–30, Chapter V at 131, 141-2– and 169, Chapter VI at 181, 192, 197 and 202 and Chapter VII at 208, 210 and 234.
3085 See above Chapter I at 17 and 24.

Expectation gaps are important because of the mischief they can cause and tensions they create between Stakeholders,[3086] which can generate participant disappointment regarding the three themes.[3087] They illustrate the potential for Stakeholders and participants to experience inconsistency, *practice* and *procedural* unpredictability and mixed approaches.[3088] They also impact upon practices, behaviours, mediator interventions, mediation dynamics, and outcomes reached.[3089] They can thus affect participant experiences and satisfaction as to process.[3090]

To satisfy the research aims, I examined qualitative data from semi-structured interviews with five magistrates, seven lawyers and 16 mediators.[3091]

The first research question showed broad convergence between most Stakeholders who described mediation's primary *purpose* quantitatively as to settle actions,[3092] consistent with literature suggesting settlement is the norm.[3093] This is not indicative of gaps between Stakeholder views and the description of mediation in the rules-based framework regarding *purpose*,[3094] which described mediation as a facilitative problem-solving and outcome-focussed process[3095] to settle legal dispute(s).[3096] The findings are consistent with literature that suggests court-connected mediation's primary *purpose* is settlement and satisfying *efficiency* and *effectiveness* objectives.[3097] However, there was no uniform description of what 'settlement' meant, with descriptions comprising both quantitative and qualitative elements, such as facilitating disputant understanding, satisfaction of needs and interests and satisfaction regarding both outcomes and process. The findings are consistent with mediation's varying *purposes* spanning the most practical to the most ideological.[3098] Furthermore, some Stakeholders expressed achieving qualitative purposes is simply a by-product of successful mediation and not the primary purpose *for* mediating.[3099] The findings also suggest Stakeholders are cognisant that actions do not need to be settled for mediation to be deemed successful, acknowledging the value in satisfying 'other' qualitative and non-settlement-driven factors.

The second research question showed Stakeholders had different understandings, expectations, and experiences regarding *practice*.[3100] The key findings suggest expectation gaps and mixed practices regarding practice models, mixed facilitative and 'other' mediator roles and functions and mixed levels of 'appropriate' mediator intervention. The findings reflect the diversity in facilitative and advisory/evaluative *practices* explored in the literature review.[3101]

The third research question showed Stakeholders had different understandings, expectations, and experiences regarding *procedure* and expectation gaps exist regarding what occurs before and

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3086 See above Chapter I at 17 and 25.
3087 See above Chapter I at 17–8 and 25 and Chapter VII at 208, 213–4, 220–1 and 233.
3088 See above Chapter I at 17, Chapter IV at 108, Chapter V at 132 and 168, Chapter VI at 170, 176, 180, 188, 201 and 204, Chapter VII at 205, 208, 213 and 220 and Chapter VIII at 238.
3089 See above Chapter I at 15, Chapter II at 48, Chapter IV at 108 and 130, Chapter V at 132 and 167–9, Chapter VII at 170, 199, 202 and 204, Chapter VII at 205–6 and 212.
3090 See above Chapter II at 17 and 23, Chapter IV at 108, and 128, Chapter V at 132 and 166–7, Chapter VI at 170, 202, 204, Chapter VII at 208–10 and Chapter VII at 213–2, 219–20, 225–6, 231 and 234.
3091 See above Chapter I at 23. See also Appendix A: Qualitative Research Methodology at 262.
3092 See above Chapter IV at 110–13.
3093 See above Chapter II at 56.
3094 See above Chapter IV at 128.
3095 *Rules* (n 917) r 2. See above Chapter III at 98.
3096 See above Chapter II at 31 and 38.
3097 See above Chapter II at 49.
3098 See above Chapter II at 31 and 48.
3099 See above Chapter IV at 129.
3100 See above Chapter V at 132, 142 and 153.
3101 See above Chapter II at 58.

during mediation.[3102] The findings showed mixed referral practices, mixed levels of pre-mediation information exchange, mixed compliance with industry models, and gaps regarding what occurs during each stage of the *procedure*. The findings also reflect the variety of *procedures* in the literature review.[3103]

The findings lead to six major conclusions.

First, as explored in the literature review, 'mediation' encompasses a spectrum of *purposes*, *practices* and *procedures* that fall along the ideology-practice continuum[3104] and embrace the process-content[3105] and facilitative-advisory/evaluative dichotomies.[3106] Furthermore, tensions exist in the varying *purposes*, diversity in *practices* and the variety of *procedures*. For example, tensions between satisfying *effectiveness* and *efficiency* objectives[3107] and satisfying *self-determination*, *non-adversarialism* and *responsiveness* values.[3108] Tensions also exist between the public and private purposes and benefits of mediation.[3109]

Secondly, Stakeholders are interrelated, overlap exists between their respective gatekeeper roles[3110] and their understandings, expectations and experiences impact upon each other. A disparity of views exists between and within Stakeholder groups.[3111] This may be explained by the debates, dichotomies, and distinctions regarding the three themes explored in the literature review.[3112] Furthermore, Stakeholder expectations exist within several vacuums, particularly regarding various aspects of *practice*[3113] and stages of *procedure*[3114] rather than *purpose*.[3115] This suggests little dialogue occurs between them regarding the three themes and differences in *ideology* and *practice*.[3116] This is evident from the findings that mediators are unaware how others conduct their own *procedure*[3117] and the magistrates are uncertain about what precisely occurs during mediation.[3118]

Thirdly, the three themes are interrelated and overlap,[3119] reinforcing my contention that *purpose* drives *practice* and *procedure*.[3120] Furthermore, Stakeholder understandings, expectations and experiences of *purpose*,[3121] and what constitutes success,[3122] are linked with their understandings and expectations of both *practice*[3123] and *procedure*.[3124] As most described settlement as the

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3102 See above Chapter VI at 180.
3103 See above Chapter II at 71.
3104 See above Chapter II at 31.
3105 See above Chapter II at 60.
3106 See above Chapter II 35 and 61.
3107 See above Chapter II at 48.
3108 See above Chapter V at 159 and Chapter VI at 170 and 204 and Chapter VII at 208.
3109 See above Chapter II at 49 and 53. See also Appendix E: Varying *Purposes* of Mediation According to Four Archetypical 'Models'.
3110 See above Chapter I at 14 and Chapter VII at 234.
3111 See above Chapter IV, Chapter V and Chapter VI.
3112 See above Chapter II at 14, 27 and 83.
3113 See above Chapters V at 168.
3114 See above Chapters VI at 204.
3115 See above Chapters IV at 238.
3116 See above Chapter VII at 231.
3117 See above Chapter VI at 181.
3118 Ibid.
3119 See above Chapter I at 13, Chapter IV at 108 and 130, Chapter V at 169, Chapter VII at 205 and Chapter VIII at 237.
3120 See above Chapter I at 13, Chapter II at 47, Chapter IV at 113 and 125, Chapter V at 131 and 141–2, Chapter VI at 181, 192, 197 and 202 and Chapter VII at 208, 210 and 234.
3121 See above Chapter IV at 108.
3122 See above Chapter IV at 108, 118–9, 129 and Chapter V at 136, 146, 157 and 166.
3123 See above Chapter IV at 113, 125–6 and 127 and Chapter V at 131, 141, 147–151, 158–165.
3124 See above Chapter VI at 185, 192–4 and 197–8.

primary *purpose*[3125] and prioritise satisfying *effectiveness* and *efficiency* objectives over other more qualitative purposes,[3126] it is unsurprising that some report experiencing practices that go beyond purely 'hands-off' facilitative mediation. This also explains the relationship between lawyer expectations regarding the mediator's role, functions, and 'appropriate' levels of intervention – and their preferences for advisory/evaluative mediation[3127] – and their understandings and expectations of the use and purposes of Private Sessions.[3128]

Fourthly, tensions exist between Stakeholders, particularly between mediators and lawyers regarding *practice* and *procedure*.[3129] For example, tensions between the purists and the pragmatists and between mediator process control and lawyer dominance.[3130] These tensions impact upon the extent to which mediation in the Court can be more responsive and disputant- rather than lawyer-centric. In particular, the levels to which mediators and lawyers actively promote direct disputant participation and decision-making.

Fifthly, different stakeholder groups are more attuned to different aspects of the three themes. Mediators are more attuned than magistrates and lawyers to various aspects of the three themes. Specifically, to: mediation's varying *purposes*, in particular, to facilitating disputant decision-making;[3131] the different aspects of their role and functions and most appear predominantly process-focussed by facilitating direct disputant participation;[3132] and to the various purposes of each stage of the *procedure*.[3133] Mediators are also more attuned to procedural fairness, by ensuring their processes foster disputants that satisfaction.[3134] Conversely, magistrates and lawyers are more outcome-focussed,[3135] emphasising settlement rather than achieving more qualitative purposes.[3136] The findings also suggest competing priorities between Stakeholders. For example, mediators prioritise mediation's *self-determination* value more than some magistrates and lawyers.[3137]

Sixthly, important gaps exist between the theory base[3138] and the rules-based framework,[3139] in contrast to what some Stakeholders report occur in practice.[3140] For example, despite Stakeholder assumptions, particularly by many mediators who assume that all mediators adhere to the same or largely similar *practice*[3141] and *procedure*,[3142] the findings indicate variation and mixed *practices* and *procedures*.

These major conclusions reinforce the significance of the research and its importance in addressing the dearth in scholarship.

3125 See above Chapter IV, Chapter V and Chapter VI.
3126 See above Chapter IV at 113–126. See also Chapter II at 50.
3127 See above Chapter II at 42, 62, 69 and 81.
3128 See below Chapter V at 150 and Chapter VI at 194.
3129 See above above Chapter II at 44 and 83, Chapter III at 101, Chapter V at 164 and Chapter VI at 187, 194, 201–2.
3130 For example, lawyer preferences for structures common within legal culture, which mimic settlement conferences, where they exercise control over process, negotiations and outcomes: see above Chapter VI at 195.
3131 See above Chapter IV at 115–6.
3132 See above Chapter IV, V and VI.
3133 See above Chapter VI at 183.
3134 See above Chapter IV at 126 and Chapter V at 143 and 151.
3135 See above Chapter IV at 129, Chapter V at 168 and Chapter VI at 187 and 204.
3136 See above Chapter IV at 110–11.
3137 See above Chapters IV at 116 and Chapter V at 167.
3138 See above Chapter II.
3139 See above Chapter III.
3140 See above Chapter IV, V and VI.
3141 See above Chapter V at 132.
3142 See above Chapter VI at 180.

B *Importance of the Research, Contribution to Knowledge and Implications of Findings*

This research is the first of its kind in South Australia. It provides contemporary insight into the understandings, expectations, and experiences of Stakeholders who are regularly involved in mediation regarding the three themes.[3143]

Obtaining qualitative data from Stakeholders within this local legal context[3144] during the periods 2016 to 2018[3145] has enabled the consideration of mediation 'in action' than just in theory.[3146] Gaining a better understanding of the three themes is timely, particularly with the introduction of the *Uniform Civil Court Rules 2020* (SA) ('*UCRs*') on 18 May 2020.[3147]

This thesis has addressed the knowledge gap in the literature[3148] and made five contributions to existing scholarship.

First, it has provided valuable insight into the various factors that have impacted, and will continue to influence, the evolution of the Court's mediation program and its mediation culture.[3149] These include: court-connection and the shadow of the law;[3150] the rules-based framework including costs incentives and disincentives;[3151] Stakeholders as 'gatekeepers' to the Court's mediation program[3152] encompassing their convergent or divergent understandings, expectations and experiences; and the 'strong' judicial encouragement of mediation.[3153] It has also provided valuable insight into contemporary *practice* and *procedure* specific to the Court's mediation program.

Secondly, it has provided valuable insight into the extent to which Stakeholder reports regarding the three themes converge as well as expectation gaps, particularly regarding *practice* and *procedure*.

Thirdly, it contributes to the current knowledge base relating to some of the tensions that exist when connecting mediation to the courts.[3154] For example, parts of the data[3155] supports the literature that suggests certain characteristics in court-connected mediation do not feature or are less prevalent in non-court-connected contexts.[3156] For example, mediating legally defined causes of action rather than interpersonal/intrapersonal 'conflict';[3157] narrowly defined legal problems centred on legalistic and rights-based discourse, rather than broader interests;[3158] limited direct disputant participation and dominance of lawyer control;[3159] and lack of creative potential in settlements.[3160]

Fourthly, it provides further insight into the debates, dichotomies, and distinctions regarding the three themes, viewed through the lens of the Magistrates Court, particularly during the discussion of

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3143 See above Chapter I at 21.
3144 See above Chapter I at 23.
3145 See above Chapter I at 23. See also Appendix A: Qualitative Research Methodology at 262.
3146 See above Chapter I at 22.
3147 See above Chapter III at 84.
3148 See above Chapter I at 21.
3149 See above Chapter III and Chapter VII.
3150 See above Chapter II at 38–48.
3151 See above Chapter III at 89.
3152 See above Chapter I at 14.
3153 See above Chapter VI at 172.
3154 See above Chapter II at 39.
3155 See above Chapters IV, Chapter V and Chapter VI.
3156 See above Chapter II at 40–7. See also Chapter VII at 228.
3157 See above Chapter II at 40, Chapter III at 96–7 and Chapter IV and Chapter V.
3158 See above Chapter II at 41, Chapter III at 96–7 and Chapter IV, Chapter V and Chapter VI.
3159 See above Chapter II at 42 and Chapter IV, Chapter V and Chapter VI.
3160 See above Chapter II at 47 and Chapter IV at 117.

the second and third research questions. For example, it adds to existing empirical studies and complements research relating to interstate courts.[3161]

Fifthly, the findings provide a strong foundation for recommendations that will assist promoting consistency and predictability, better managing Stakeholder and disputant expectations, and changing behaviours of those involved in mediation. Implementing my recommendations should lead to increased efficiency and effectiveness. In particular, my argument that actions be front-ended to increase the chances of settlement,[3162] reflective of the majority view that this is mediation's primary *purpose*.[3163]

The findings have implications for mediation within the Court and provide the foundation for promotion of constructive dialogue between Stakeholders. This will address Stakeholder expectations existing within several vacuums.[3164]

The valuable insight will assist promoting Stakeholder education regarding the three themes by aligning their expectations and create a flow-on effect upon disputants.[3165] For example, magistrates can use the insight at the first directions hearing when introducing disputants to, and reminding lawyers of, the 'mediation opportunity' and what to expect regarding the three themes. Lawyers can use the insights when informing their clients about mediation, about the attitudes of magistrates to strongly encouraging it and what clients can expect regarding the three themes; specifically, regarding mediation's qualitative *purposes*,[3166] the process-content dichotomy,[3167] industry models comprising different stages[3168] and the conciliation option.[3169] Mediators can use the insight when first meeting participants to explore and manage their expectations about the three themes and to manage lawyer preferences for advisory/evaluative, rather than facilitative, processes.

These findings will also be of interest to future disputants. For example, when considering which process within the ADR suite might best meet their needs, whether it be purely facilitative mediation or an advisory/evaluative process such as taking part in a conciliation pilot.[3170]

The findings also have implications for the Court regarding rule clarity as the *UCRs* are at times silent, terse, or insufficiently definitive on many factors relating to the three themes, particularly to *practice* and *procedure*.[3171] This reinforces the need for clarity and guidance regarding the three themes as well as consistency and predictability whilst ensuring sufficient flexibility,[3172] to satisfy *self-determination* and *responsiveness* values[3173] and mitigating risks of over-prescription.[3174]

The impact of my research is not restricted solely to the Court. The findings have implications for court-connected mediation practice and for future theorising about mediation within and outside the court context, which can guide policymakers and practitioners about the three themes. Whilst mediation is unlikely to be identical across all court- and tribunal-connected contexts, my research provides the foundation for lessons to be learnt in such contexts. For example, expectation gaps

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3161 See above Chapter I at 22 and Chapter II at Part C and D.

3162 See the discussion about Settlement Agreements becoming 'unstuck' post-settlement in Chapter VII at 200.

3163 See above Chapter IV at 110–13.

3164 See above Chapter VII, recommendation 10.

3165 See above Chapter VII at 205.

3166 See above Chapter IV at 113–127.

3167 See above Chapter V at 154.

3168 See above Chapter VI at 180. See also Chapter II at 71.

3169 See above Chapter III at 99–101.

3170 See above Chapter VII, recommendation 4.

3171 See above Chapter II and III. See also Chapter VII at 206–7. See also Appendix J: Comparison between *the Act*, *Rules* and *Practice Directions* and the *UCRs* regarding *Purpose*, *Practice* and *Procedure*.

3172 See the discussion about labels being 'purely academic' in Chapter V at 139.

3173 See above Chapter II at 34–5.

3174 See above Chapter VII at 215, 226, 229 and 230.

may exist between Stakeholders in other court- and tribunal-connected contexts regarding the three themes. Gaps may also exist between the theory base and the rules-based framework in other courts and tribunals in contrast to what Stakeholders within those courts and tribunals report occur in practice.[3175]

Some of the findings suggest that practice does not reflect best practice theory. For example, mediation's primary *purpose* is to achieve efficient and effective settlements to bring actions to an end,[3176] rather than to satisfy other qualitative purposes.[3177] Furthermore, variation and mixed practices between the purists and the pragmatists suggests mediation is not purely facilitative in all actions as participants may experience 'conciliation' or quasi-advisory/evaluative practices.[3178] Moreover, mixed practices regarding compliance with industry models suggests mixed *procedures* exist highlighting tensions between those mediators who comply with an industry model and lawyers who experience settlement conferences common within legal culture.[3179] On one view, these gaps between theory and practice suggest it is time to review whether practice has grown beyond the theory.[3180] On another view, it suggests that different theories need to be applied within the court-connected context.

On either view, further research may bridge gaps between theory and practice and assist the development of best practice guidelines within the Court.[3181] It could also be used to clarify what objectives the Court's mediation program seeks to achieve,[3182] for example, to promote the establishment of performance goals. It may also assist promoting good faith participation.[3183] This knowledge could provide the foundation for proposed improvements to the mediation program, for example, to promote satisfaction of mediation's core values,[3184] in addition to *effectiveness* and *efficiency* objectives.[3185] Such developments would foster cultural change in the court-connected mediation context and the legal profession.[3186] Such developments will benefit Stakeholders, the Court and deliver better outcomes for future mediation users, which will assist promoting public confidence in the Court's mediation program.[3187] I have already begun this work with recommendations in the previous Chapter.[3188]

Such developments are significant and timely. Though the *UCRs* provide more guidance on some matters[3189] than provided for in the *Rules* and the *Practice Directions*, they too are at times silent, terse, or insufficiently definitive on many factors relating to the three themes, particularly to *practice* and *procedure*. This increases the potential for further expectation gaps to a greater extent than in the *Rules* and the *Practice Directions*. They also increase the potential for mixed *practices*

3175 See the discussion of mediation observations in Appendix A: Qualitative Research Methodology.
3176 See above Chapter IV at 110–13.
3177 Namely, promoting disputant self-determination, satisfaction of disputant non-legal needs and interests, facilitating communication and disputant understanding, or facilitating the opportunity to maintain or repair relationships: see above Chapter II at 50–2.
3178 See above Chapter IV at 129, Chapter V at 135–6, 141, 151–4 and 168, Chapter VII at 209 and Chapter VIII at 240 and 243.
3179 See above Chapter VI at 195.
3180 See above Chapter II at 70. See also above Chapter V at 167.
3181 See above Chapter VII at 224, 227, 229–230, 233–4.
3182 See above Chapter VII at 209–10.
3183 See above Chapter VII at 209, 227 and 231.
3184 See above Chapter II at 33–5.
3185 See above Chapter II at 49 and Chapter VII at 210–11, 217 and 233.
3186 See above Chapter VII at 234.
3187 See above Chapter VII at 226 and 229.
3188 See above Chapter VII, recommendation 1–11.
3189 See above Chapter VII at 208–12.

and *procedures*, especially because the conciliation-mediation distinction is now less pronounced than in the Rules.[3190]

C *Recommendations for Future Research*

Mediation has become an integrated, and occasionally compulsory, feature of civil litigation procedures in many Australian courts and tribunals,[3191] and will likely remain a permanent component of legal professional practice in Australian.[3192] Accordingly, court-connected mediation theory and practice is ripe for continued research.

In this thesis I have focussed predominantly on the mediator's role,[3193] though I briefly explored the role of magistrates when discussing referral practices[3194] and the role of lawyers during mediation.[3195] My thesis invites future research to explore the roles of magistrates and lawyers regarding mediation from the perspective of other Stakeholders. This would enable comparisons to be made with research within other courts and tribunals.[3196]

Further to the recommendations made in the previous Chapter,[3197] I make four recommendations for future research, which contribute to the existing knowledge base and evolving mediation scholarship.

1 *Inclusion of 'Additional' Stakeholders*

I have explored the understandings, expectations, and experiences of three of the four principal actors involved, either directly or indirectly, in mediation,[3198] identified as blue circles in the diagram below. I recommend future research be undertaken incorporating three 'additional' Stakeholders who fell outside the sample size.[3199]

Despite mediation theory emphasising the significance of disputants as the 'primary' stakeholder,[3200] I explained why I did not include them as part of the sample earlier in the thesis.[3201] Unlike the other three Stakeholders, who likely have pre-existing views about mediation, disputant understandings, expectations, and experiences will be impacted upon by their interactions with the other three Stakeholders.[3202] Dialogue should occur between Stakeholders and disputants as the 'fourth Stakeholder', identified as the red circle in the diagram below, to ensure that they are provided accurate information to make informed decisions about the different processes within the ADR suite – thus 'fitting the forum to the fuss'[3203] – with expectations properly set at the outset.[3204]

Including disputants in future research would enable exploration of the extent to which their understandings, expectations, and experiences of the three themes converge or diverge with those of

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3190 See above Chapter VII at 215 and 230.
3191 See above Chapter I at 19 and Chapter II at 37.
3192 Boulle and Field, *Mediation in Australia* (n 27) 277.
3193 See above Chapter V and Chapter VI.
3194 See above Chapter VI at 170.
3195 See above Chapter VI at 184, 191 and 197.
3196 See above Chapter I at 20 and Chapter II at Part C and D. This is especially so given some data was culled from the research: See Appendix A: Qualitative Research Methodology.
3197 See above Chapter VII.
3198 See Figure 1 in Chapter I.
3199 See above Chapter I at 16. See also Appendix A: Qualitative Research Methodology.
3200 Mediator 12. For example, their autonomy, voice and responsibility for outcomes is particularly emphasised during discussions of mediation's *self-determination* value: see above Chapter II at 34.
3201 See above Chapter I at 23. See also Appendix A: Qualitative Research Methodology.
3202 See also Chapter I at 15.
3203 See above Chapter VII at 218.
3204 Mediator 12. See above Chapter IV at 126 and Chapter V at 166. See also Chapter VII at 208–9.

the other three Stakeholder groups.[3205] Would disputants describe the primary *purpose for* mediating is to settle actions,[3206] or to achieve qualitative purposes, rather than such purposes simply being a by-product of successful mediation?[3207] Would disputant goals for mediation differ from their lawyers?[3208] Similarly, would disputant reports regarding *practice* and *procedure* be substantially the same as most lawyers?[3209] Would disputants describe mediation as an advisory/evaluative process like a 'mini-trial'?[3210] Would they report experiencing an industry model with demarcated stages or a four-stage procedure, where mediators break for Private Sessions immediately after Parties' Opening Comments and the remainder of the procedure being Shuttle Negotiation?

Including disputants in future research may shed further light on the tensions between mediator control and lawyer dominance,[3211] which may also highlight any tensions between disputants and their lawyers. Would they describe valuing mediation for the opportunity it provides for direct disputant participation, as suggested in some literature?[3212] Or would they describe feeling 'controlled' by their lawyers because direct disputant participation could be 'dangerous' to their legal position, as suggested by some mediators?[3213]

Including disputants in future research would also assist mitigating the possibility of self-regulation, and act as a 'check' on the accuracy of the self-reports by lawyers and mediators.[3214]

I have focused upon mediations involving lawyers despite some Stakeholders reporting disputants can be unrepresented.[3215] Future research should examine mediations involving unrepresented litigants *only*. Such research is timely given literature suggesting both courts and lawyers in Australia are coping with increasing numbers of unrepresented litigants,[3216] who may require additional assistance both accessing mediation and during Pre-Mediation intake.[3217] Furthermore, the involvement of unrepresented litigants impact upon various aspects of the mediator's role, functions, and levels of intervention, particularly when recording settlement terms.[3218] Future research centred upon disputants will enable the Court to assess whether it should provide training for Panel Mediators or establish guidelines for mediating with unrepresented litigants and

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3205 See Figure 1 in Chapter I. See also the discussion of mediation observations in Appendix A: Qualitative Research Methodology.

3206 See above Chapter IV at 108.

3207 See above Chapter IV at 114, 118, 123–4, 126–8.

3208 See generally Relis (n 360) 11, 20, 194–5; Reich (n 33) 186–96; Sander and Goldberg (n 107) 58–9; John M Conley and William M O'Barr, 'Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure' (1988) 51(4) *Law and Contemporary Problems* 181, 182–4. See also Chapter II at 49 and 53 and Chapter VII at 209.

3209 See above Chapter V and Chapter VI.

3210 See above Chapter V at 133 and 148.

3211 See above Chapter IV at 122 and 129, Chapter V at 142, 158 and 164 and Chapter VI at 187, 192, 197, 201–2 and Chapter VII at 210–11, 220, 227 and 232–4 and Chapter VIII at 240.

3212 See above Chapter II at 42 and 68–71

3213 See above Chapter VI at 187.

3214 See Appendix A: Qualitative Research Methodology.

3215 See above Chapter I at 23, Chapter VI at 173, Chapter VII at 222 and Chapter VIII at 245.

3216 See, eg, Laurence Boulle and Rachael Field, 'Re-Appraising Mediation's Value of Self-Determination' (2020) 30(2) *Australasian Dispute Resolution Journal* 96, 99; Rachael Spencer, 'Ethical Issues for Lawyers Dealing with Unrepresented Litigants' (Seminar Paper, Law Society of South Australia, 11 February 2016) 3; Walton (n 81) 26; Peter Wulf, 'Court-Ordered Mediation in the Planning and Environment Court: Does it Assist Self-Represented Litigants?' (2007) 18(3) *Australasian Dispute Resolution Journal* 149, 151; Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (Final Report, June 2004) 181.

3217 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) v, recommendation 7.

3218 See above Chapter VI at 196. See also Chapter II at 82.

addressing potential ethical issues that may arise,[3219] like other guidelines produced to assist lawyers in their dealings with unrepresented litigants.[3220] This would assist averting satellite litigation from allegations that an unrepresented litigant did not understand the process, was not provided with the process as described from the outset,[3221] experienced 'improper' mediator pressure to settle[3222] or that settlement was procured by duress.[3223]

Future research ought to include potential future litigants. For example, would they report being aware of the 'mediation opportunity' as an alternative to trial? Would they be willing to file a claim in the Court if they knew they would have easy, direct, affordable, informal and understandable access to the Court's mediation services? Would this impact upon their perceptions of public access to the civil justice system and what insights could they provide regarding barriers to the Court's mediation program? Finally, what are their understandings and expectations regarding the *purpose*, *practice* and *procedure* of mediation within the Court?

I suggest there are two 'additional' Stakeholders: the Courts Administration Authority ('CAA') is the 'fifth' and the 'unnamed party in every lawsuit – the public',[3224] is the 'sixth', identified as the purple and green circles in the diagram below. The CAA and the public may have different views from the other Stakeholders regarding the three themes irrespective that the CAA describes success in mediation by 'settlement' rates.[3225] Furthermore, rather than being merely concerned with the settlement of individual actions, the public have an interest in the proper and efficient use by courts and tribunals of limited public resources.[3226]

Accordingly, these two additional Stakeholders should be included in future research, after the Court has defined the institutional purposes of its mediation program.[3227]

3219 See, eg, Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants: The Dark Side' (2014) 24(1) *Journal of Judicial Administration* 61; Bill Ericson, 'Costs and Procedural Issues That Arise in Respect of Self-Represented Litigants' (Seminar Paper, Law Society of South Australia, 6 February 2014) 4; John M Greacen, 'Self-Represented Litigants, the Courts, and the Legal Profession: Myths and Realities' (2014) 52(4) *Family Court Review* 662; Randall T Shepard, 'The Self-Represented Litigant: Implications for the Bench and Bar' (2010) 48(4) *Family Court Review* 607.

3220 See, eg, Law Society New South Wales, *Guidelines for Dealing with Self-Represented Parties in Civil Proceedings* (at December 2016); New South Wales Bar Association, *Guidelines for Barristers on Dealing with Self-Represented Litigants* (at 11 November 2011).

3221 See above Chapter IV at 126 and Chapter V at 166. See also Chapter VII at 208–9.

3222 See above Chapter II at 69.

3223 See, eg, *Raggio* (n 729) [42]–[43].

3224 *Bar Chambers Pty Ltd v Maxcon Constructions Pty Ltd* [2021] SAERDC 3, [23] (Judge Gilchrist), citing *Miller v Return to Work SA [No 2]* [2018] SAET 160, [8], quoting *United States v Reaves,* 636 F Supp 1575 (ED Ky, 1986).

3225 See above Chapter III at 90.

3226 See, eg, *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 188–92 [23]–[30]. Mediator 12 emphasised that many complex factors are involved in maintaining, and endeavouring to improve the Court's mediation program because policy decisions are ultimately governed by the use of finite State resources: see also Chapter VII at 180.

3227 See above Chapter VII, recommendation 1.

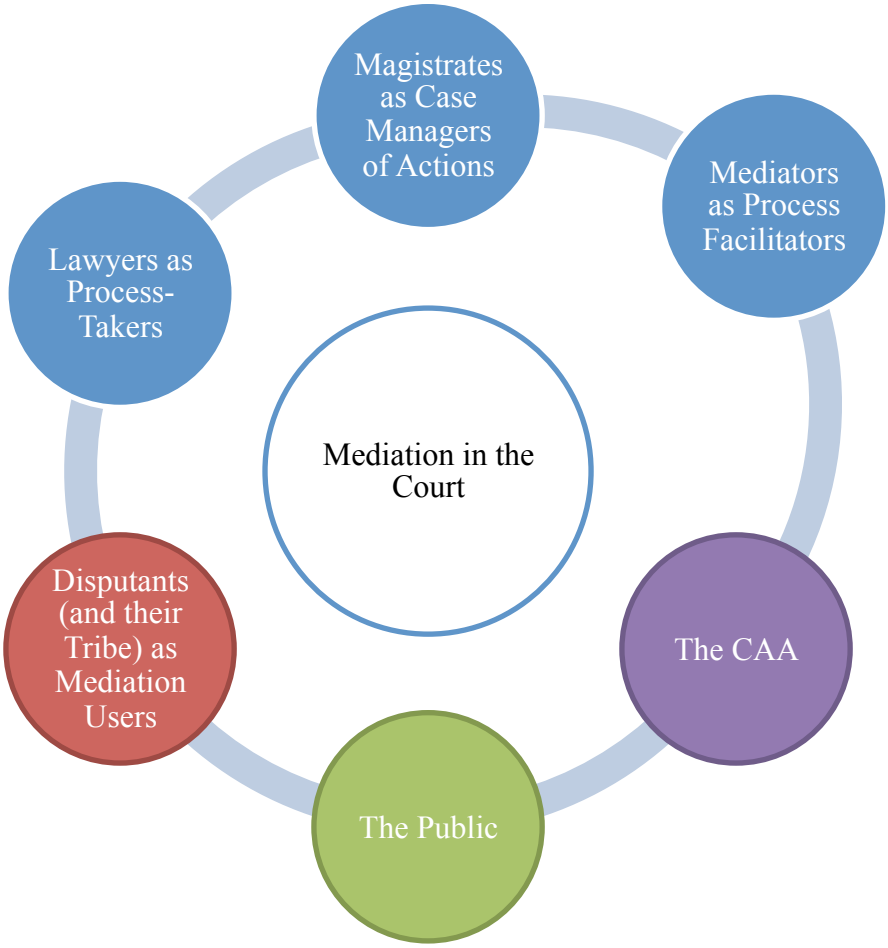

Figure 3: 'Additional' Actors in Mediation within the Court

2 *Evaluation of the Mediation Program*

Future research should evaluate the Court's mediation program,[3228] for example, the take-up rate of mediation,[3229] whether it is achieving its 'program goals',[3230] whether it reduces costs to the Court and disputants,[3231] whether it produces creative, non-monetary settlements,[3232] and identify any obstacles that prevent Stakeholder or disputant engagement with it. It should investigate levels of Stakeholder satisfaction and determine the extent to which mediation impacts upon disputant perceptions of fairness, participation and satisfaction.[3233] The last study exploring disputant satisfaction of mediation within the Court, to my knowledge, was the user survey in 1999.[3234]

Future research could involve obtaining feedback from Stakeholders encompassing complaints[3235] and suggestions for improvements to the program,[3236] including whether further quality control measures are required in addition to mediators being NMAS accredited.[3237]

3228 I chose not to investigate these matters as they were not directly relevant to the three research questions: see above Chapter I at 23.

3229 See also the discussion of whether Stakeholders predict the uptake of mediation in the Court will increase or decrease in Appendix A: Qualitative Research Methodology.

3230 See above Chapter I at 23. See also Chapter II at 53–4.

3231 See above Chapter VII at 217.

3232 See above Chapter II at 47. See also Chapter IV at 117.

3233 See, eg, Sourdin and Balvin (n 361) 142, 151–2.

3234 See above Chapter I at 21.

3235 See above Chapter VII. See also Appendix A: Qualitative Research Methodology.

3236 See also Appendix A: Qualitative Research Methodology.

3 *Gaps in the UCRs*

Future research should be undertaken to address some of the gaps I identified in the *UCRs* about key factors regarding *practice* and *procedure.*[3238] It should also assess the impact of the *UCRs* upon: Stakeholder understandings, expectations, and experiences of the three themes; the uptake of mediation; the timing of referrals to mediation and upon settlement rates; the mediation culture and progression of the Court's mediation program. In particular, the introduction of express provisions regarding conduct during mediation,[3239] pre-mediation preparation and information exchange,[3240] pre-action steps[3241] and the stronger policy of encouraging mediation as a primary means of dispute resolution than in the Rules.[3242] Given the introduction of the *UCRs*, their impact upon some of these factors will need further assessment.[3243]

4 *Review of Recommendations*

Should the recommendations that I made in the previous Chapter be adopted, further research could assess their impact upon the three themes. For example, the extent to which they: provide Stakeholders and mediation users with clarity regarding the three themes; bridge any gaps between theory[3244] and practice and promote rule clarity;[3245] promote satisfaction of mediation's core values and objectives; [3246] increase disputant choice and promote informed decision-making about mediation and encourage positive development to the Court's mediation culture.[3247]

D *Conclusion*

The mediation field is diverse and pluralistic.[3248] Many debates, dichotomies, and distinctions exist in the literature, and amongst ADR practitioners, regarding the diversity of *purposes*, *practices* and *procedures* that fall under the umbrella term 'mediation', which illustrate the potential for expectation gaps.

I examined Stakeholder understandings, expectations, and experiences of mediation in the Court by reference to the three themes of *purpose*, *practice* and *procedure*.

Exploration of the rules-based framework and the rules that were in place before the commencement of the *UCRs*,[3249] showed mediators are afforded considerable flexibility and discretion, though are restricted to engaging in a 'purely facilitative' *practice*. However, *the Rules,* and now the *UCRs*, are at times silent, terse, or insufficiently definitive on many factors relating to the three themes, particularly *practice* and *procedure*.[3250] The apparent flexibility and discretion afforded to mediators coupled with the gaps in the former, and current, rules-based framework increase the potential for Stakeholders to have divergent understandings, expectations and experiences regarding the three themes, which can impact upon practices, behaviours and mediator interventions and upon outcomes. They are also indicative of gaps between theory and practice.

3237 See above Chapter III at 88.
3238 See above Chapter III at 100–6 and Chapter VII at 206–7.
3239 See above Chapter VII at 227.
3240 See above Chapter VII at 207.
3241 See above Chapter VII at 206.
3242 Ibid.
3243 See above Chapter VII at 207.
3244 See above Chapter II.
3245 See above Chapter VII at 205.
3246 See above Chapter II at 33–5.
3247 See above Chapter III and VII.
3248 See above n 24.
3249 See above Chapter III at 84.
3250 See above Chapter II and Chapter III.

By examining the prominent expectation gaps and other important findings regarding the three themes, I have satisfied the research aims, and addressed the dearth in scholarship.

My contributions to scholarly knowledge complement the existing and evolving scholarship regarding court-connected mediation. My recommendations for addressing the prominent expectation gaps, if implemented, should promote Stakeholder education regarding the three themes, rule clarity, satisfaction of mediation's core values and objectives, and cultural change in the court-connected mediation context and the legal profession.[3251] This will assist setting participant expectations regarding the three themes before mediation, preventing mischief that expectation gaps can cause,[3252] and mitigating the chances of lawyer and disputant disappointment.

Implementing my recommendations will assist promoting consistency and predictability and ultimately assist disputants and potential future mediation users to make informed decisions about mediation, which increases the potential of satisfying *self-determination* and *responsiveness* values.[3253] They may also assist addressing the tension between mediators and lawyers and assist in ensuring that mediation in the Court remains a disputant rather than lawyer-driven process, satisfying *self-determination* and *responsiveness* value[3254] and, resulting in more positive participant experiences. In doing so, Stakeholders might more reasonably expect to engage in a process that is consistent, predictable, involves 'appropriate' levels of mediator intervention and results in outcomes considered 'successful'.

3251 See above Chapter VII at 205.
3252 See above Chapter I at 17 and 25. See also Chapter VIII at 233 and 238.
3253 See above Chapter II at 34–5.
3254 See above Chapter II at 34–5. See also Chapter IV, Chapter V and Chapter VI.

APPENDIX A: QUALITATIVE RESEARCH METHODOLOGY

I briefly introduced the research methodology and some of the limitations of the research in the introduction to this thesis.[3255] In this Appendix I provide a detailed explanation of the stages of the research methodology. I then discuss the appropriateness of the research methodology and sample size, before discussing some potential limitations of the research as well as factors that support the reliability, validity and credibility of the data.

A *Stages of the Research Methodology*

I chose to undertake qualitative research as part of this thesis to bring life to the debates, dichotomies, and distinctions pertaining to the three themes of *purpose*, *practice* and *procedure* identified in the literature review as well as to explore points of convergence or divergence between Stakeholder understandings, expectations and experiences of mediation in the Magistrates Court of South Australia ('the Court').

Webley identifies five basic aspects of designing a qualitative empirical research study; namely, the most appropriate research methodology, selection criteria and sample size, data analysis methods, ethical considerations ('first do no harm' to participants) and whether the researcher will be working alone or as part of a team.[3256] I remained the sole researcher for the duration of this research under the supervision of two research supervisors.

I adopted a socio-legal research methodology and used two of the three main data collection methods for qualitative research: literature review followed by semi-structured interviews for the primary data collection.[3257] The methodology comprised of six stages: literature review; development of interview questions; development of selection criteria, interview materials and recruitment of interviewees; semi-structured interviews; collation of data and analysis; and interviewee review.

The research is partly descriptive and partly exploratory in nature.[3258] My aim was not to obtain statistically representative quantitative data sets from which to draw flawless empirical generalisations. Rather, it was to obtain thematic information and gain insight about the three themes by asking Stakeholders questions tailored to these three themes. Accordingly, my sample selection was purposive[3259] or criterion-based,[3260] rather than random. Purposive sampling enabled me to recruit Stakeholders who were 'information rich' and with different attributes and levels of both experience and expertise. This yielded data of central importance to the research.

3255 See above Chapter I at 23–4. See also Chapter IV at 108.

3256 Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 932.

3257 Ibid 928; Keith Punch, *Introduction to Social Research: Quantitative & Qualitative Approaches* (Sage Publications, 3rd ed, 2014) 160; Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (Sage Publications, 3rd ed, 2002) 252, 437.

3258 Webley defines descriptive research as 'research designed to describe an issue, situation, problem or set of attitudes' compared to exploratory research ('research that is designed to examine whether an issue, situation, or problem exists and if so to define it') and explanatory research ('research designed to determine why or how an issue, situation, or problem is as it is'): Webley, 'Qualitative Approaches to Empirical Legal Research' (n 3256) 926, 928.

3259 See, eg, Matthew B Miles and A Michael Huberman, *An Expanded Sourcebook: Qualitative Data Analysis* (Sage Publications, 4th ed, 2018) 50–1; Anton Kuzel 'Sampling in Qualitative Inquiry' in Benjamin Crabtree and William Miller (eds), *Doing Qualitative Research* (Sage Publications, 2nd ed, 1992) ch 2; Patton (n 3257) 230.

3260 Patton (n 3257) 238; Jane Ritchie et al, 'Designing and Selecting Samples' in Jane Ritchie et al (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publications, 2nd ed, 2014) 129.

1 *Literature Review*

The first stage of the research commenced with a literature review to explore the general scholarship relating to the theory and practice of mediation before exploring literature that relates specifically to court-connected mediation.[3261]

I reviewed primary and secondary sources including legislation, case law, legal textbooks, published journal articles, conference papers, theses, Law Reform Commission Reports and legal databases accessible through the Adelaide University Law Library.

The literature review provides the theory base for the exploration of the Court's rules-based framework[3262] and for the exploration of the empirical data gathered from the semi-structured interviews with Stakeholders.[3263]

2 *Development and Evolution of the Semi-Structured Interview Questions*

The literature review provided the theory base against which to develop the questions for the semi-structured interviews.[3264]

The introductory questions are quantitative in nature. They examine the demographics of the interviewees such as their gender, age, occupation, predominant role and decade of Admission to the Supreme Court of South Australia, commencement of other Professional Practice or decade of first practice as a magistrate. I have summarised quantitative data regarding each Stakeholder group in table format to provide contextual background to the sample size.[3265]

Whilst not being essential to answering the three research questions, I asked questions regarding the level of Stakeholder mediation education and training. The magistrates were specifically asked whether: they had had any experience of mediation before their appointment to the bench; mediation featured as part of their judicial induction and/or ongoing judicial education; and mediation training and practice had an impact on their practice as a magistrate. These questions were used as a baseline indicator of mediation education, training and experience that could account for any gaps that may have existed between their understandings, expectations and experiences.

I provide commentary on some of the other introductory questions that are quantitative in nature in further detail below when discussing the potential limitations of the data.

The remainder of the interview questions are qualitative in nature and I arranged them according to the three themes. The interview questions incorporate some of the debates, dichotomies and distinctions existing in the literature regarding the three themes,[3266] but without making express reference to them. For example, those relating to practice models include reference to the mediator's role, functions and levels of 'appropriate' intervention in the process and/or the content of disputes. Those relating to procedures include reference to Pre-Mediation, Private Sessions and who 'writes-up' the Settlement Agreement.

3261 See above Chapter II.
3262 See above Chapter III.
3263 See above Chapter IV, Chapter V and Chapter VI.
3264 See Appendix B.5: Interview Questions.
3265 See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.
3266 See above Chapter II.

Chui argues that 'qualitative research is influenced by the researcher's personal values and biases',[3267] and this limitation is inherent in all qualitative research. To mitigate the chances of researcher bias, rather than posing closed questions that may have been interpreted by interviewees as 'leading', I framed the questions in general terms and as 'open questions' so that they would not feel pressured or 'tested' if they believed that there was a 'correct' answer.

I purposely created a large number of interview questions to act as a guide for the semi-structured interviews and to enable me to obtain a rich amount of data. I also posed questions that I anticipated could be answered by all interviewees despite their specific Stakeholder role.

Rather than assuming that Stakeholders, particularly the magistrates and lawyers, may have had limited, if any, mediation education and training, I commenced the research with an open mind and posed the same questions to all interviewees.

In the introduction to the thesis I explained that the existing Australian literature that explores court-connected mediation is distinguishable from this research because they use interstate courts as case studies and use different research methodologies.[3268] For example, in her thesis, Rundle asked the mediators questions relating to 'styles of mediation' and practice models they utilised, as she was aware that all of them had undertaken formal mediation training. She did not ask lawyers questions about styles of mediation and practice models as she predicted that very few of them had undertaken formal mediation training, which was confirmed during her interviews.[3269] In its place, Rundle described lawyer experiences of 'mediation styles' from the other interview questions asked, which did not require an understanding of the labels used to describe the different practice models.[3270]

Conversely, I chose to ask all three Stakeholders questions relating to the most common mediation practice models utilised in the Court. This was not to test their level of understanding of the existence of different practice models, but rather to examine whether they considered one practice model was predominantly used in the Court. Rundle's prediction that few lawyers would be aware of the different practice models was also supported in my research, which I discuss in further detail below.

Posing the same or substantially the same questions enabled me to obtain as much data as possible regarding the three themes. It also provided the opportunity for data comparison, as well as the significant opportunity in identifying potential expectation gaps between Stakeholders. However, I also asked additional questions tailored to the magistrates, which I discuss in further detail below as part of the potential limitations of the data.

3 *Selection Criteria, Interview Materials and Recruitment of Interviewees*

The second stage of the research involved obtaining the requisite ethics approval from the University of Adelaide's Human Research Ethics Committee ('HREC').

Participant selection criteria for the 'target population' were limited to Stakeholders 'currently practicing' in the Court in 2016-2018.

3267 Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017) 48, 50, citing Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (Sage Publishing, 5th ed, 2017).

3268 See above Chapter I at 21–2.

3269 Only 14% (6 of 42) of interviewees had undertaken formal mediation training: Rundle, 'Court-Connected Mediation Practice' (n 38) 157.

3270 Ibid 158.

In the introduction to the thesis I explained that I chose not to include disputants as part of the sample because exploration of the disputant perspective was not central to the three research questions.[3271] I noted the importance of the 'missing' Stakeholder group in the Conclusion and recommended that future research include disputants as the 'fourth Stakeholder'.[3272]

At the time of applying for approval from the HREC, I anticipated that I would require a sample size of 10 to 15 magistrates, lawyers and mediators respectively. HREC granted ethics approval for Project No. H-2015-262 on 19 November 2015 and categorised the research as being 'low risk'.

The third stage of the research involved identifying and then recruiting interviewees. I identified interviewees by accessing publicly available contact information via internet searches such as Google, lawyers', barristers' and mediators' personal websites, the Court's website and the Law Society of South Australia.

I emailed potential interviewees a Letter of Invitation together with a Participant Information Sheet. I then emailed those who expressed an interest in participating in the research a Participant Consent Form, Contacts for Information on Project and Independent Complaints Procedure, and Interview Questions. This provided them with sufficient time to consider whether to give their consent to an interview that would be approximately 45 minutes in duration. Thereafter I scheduled appointments for interview with those who able to participate in the research.

In November 2017 I wrote a letter to the then Chief Magistrate to request the Court's permission to grant me access to the magistracy to participate in an interview. I attached a copy of the Participant Information Sheet and Interview Questions to the email. Shortly thereafter I was contacted by one of the magistrates by email and was informed that the Court had granted me approval to interview five magistrates who sit in the central Court in Adelaide, whom I thereafter interviewed.

Engaging lawyers to take part in research has been identified as being challenging and evidenced by low response rates. For example, 52 lawyers and 34 clients participated in Howieson's survey in the Local Court of Western Australia and the response rate for return of the completed questionnaire was 53% for the lawyers and 37% for the clients.[3273] Similarly, Sourdin mailed 1,341 surveys to disputants and 151 surveys to mediators and only 98 disputant surveys and 34 mediator surveys were returned.[3274]

Rundle identified some of the challenges in engaging lawyers in empirical research and suggest that lawyers: remain apathetic toward being involved in legal research; consider research as being unimportant or offering no 'real-world' value to their legal practice; and share a common view that being involved in legal research does not advance their client's matters and is therefore not a priority for them in their already time-poor schedule. She suggests further factors include general forgetfulness or good intention to participate in such studies but without follow up action on the part of lawyers as well as that participation in legal research is not compulsory.[3275]

I similarly experienced some challenges in recruiting lawyer interviewees. For example, I sent invitations to participate in interviews to 15 barristers' chambers via email. Clerks from two chambers responded indicating that none of the barristers at their particular chambers practiced in the Court. No other chambers clerks responded. From those invitations only one barrister responded indicating a willingness to take part in the research. I also emailed individual invitations directly to

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3271 See above Chapter I at 12.

3272 See above Chapter VIII at 244.

3273 Howieson, 'Perceptions of Procedural Justice' (n 549) [47], [49]–[50].

3274 Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) ii, 38–41, 51, 162, 212. See also Ojelabi and Boyle (n 17) 23–4.

3275 Rundle, 'Court-Connected Mediation Practice' (n 38) 146–7, 484–7.

21 barristers and lawyers collectively, two of which remain unanswered. The apparent lack of interest of lawyers to participate in the research made me question whether the uninterested lawyers might be even more uninterested in mediation in the Court? Without answering this question conclusively, particular as it is not central to the thesis, it reinforces the benefits in undertaking such research, rather than being a mere limitation of the research.

A number of lawyers were slow to respond to my invitations to take part in the research. I had to send follow-up emails to some of them. This caused some delay in obtaining the data and I expected this to be the case before commencing the data gathering process given that potential interviewees were engaged in private practice and likely not readily available to engage in a 45 minute interview. Being 'time-poor' also impacted upon the amount of time some interviewees allocated for the interview. For example, at the commencement of the interview, one lawyer apologised for being 'short of time' and would be rushing through the answers because this lawyer had a mediation scheduled immediately after the interview.[3276] Accordingly, much briefer answers were provided than I anticipate would have been provided if this interviewee had allocated further time for the interview.

Rather than relying solely on contacting potential lawyers on an individual basis I considered casting the sampling net wider by putting an advertisement in the Law Society of South Australia's electronic newsletter called 'the Bulletin'. Accordingly, I applied to HREC to amend my original application for ethics approval. After HREC granted the amendment to my original ethics approval, I placed an advertisement in the Bulletin. This proved to be positive as it enabled me to reach out to a larger population sample of potential interviewees in the shortest timeframe possible. I sent those lawyers who expressed an interest in participating in the research the same interview materials via email.

In contrast to the lawyers, I experienced minimal difficulties when seeking to recruit mediator interviewees. All of the 24 mediators responded to my invitation to take part in the research, bar eight. The high response rate amongst the mediators might be explained by my personal professional history of being an 'insider-researcher' and my professional roles outside of the research. As I explained in the introduction to the thesis, I became a member of the Court's Panel of Private Qualified Mediators in 2015 and have been a lawyer in private practice with a keen interest in ADR.[3277] I explain why being an insider-researcher was not detrimental to the research and how in fact, it was advantageous in further detail below.

Some individuals who responded to my invitation did not satisfy the selection criteria. For example, two mediators informed me that they had no experience mediating in the Court and another reported no longer being a member of the Court's Panel of Private Qualified Mediators. Similarly, one barrister and four lawyers informed me that they had no experience of mediation within the Court.

By oversight, most likely due to my excitement in undertaking the mediator interviews, I ended up interviewing 16 mediators, though HREC had granted approval for me to only interview 15 mediators. The additional mediator provided rich data that complimented the data provided by the other 15 mediators. In September 2020 I contacted HREC to inform them of this additional interview and queried whether I needed to make a further application for approval or amend my existing approval. HREC advised me that there was no need to apply for amendment.

3276 Lawyer 4.

3277 See above Chapter I at 11.

4 *Conduct of Semi-Structured Interviews*

I conducted 28 interviews between December 2017 to May 2018. I interviewed five magistrates, seven lawyers and 16 mediators face-to-face either at their workplace or at the University of Adelaide.

Before commencing each interview I explained the topic of my research to each interviewee and outlined interviewee rights to confidentiality and anonymity. I summarised the contents of the Contacts for Information on Project and Independent Complaints Procedure documents. I explained that the interviews were voluntary and that prior to submission of any research output relying on the interview data, they had the opportunity to consider or review any direct quotes provided by them at interview as well as their rights to withdraw from the project prior to publication. I then asked each interviewee to sign a Participant Consent Form. Interview data was not used unless the interviewee had provided written consent. Following the granting of express consent, I electronically audio recorded interviews using a Dictaphone. Two interviewees did not consent to being audio recorded. I sought the express consent of the first objector to take handwritten notes before asking any interview questions. I sought the express consent of the second objector to take notes on my laptop before asking any interview questions.

The interviews lasted between 40 to 60 minutes. Two took less than 30 minutes and a minority took more than one hour. Discussions were exploratory in nature. This provided a contemporary overview or 'snapshot' of Stakeholder understanding, expectations and experiences of court-connected mediation in the Court from 2016 to 2018.

The semi-structured nature of the process combined 'structure with flexibility.'[3278] I endeavoured to ask each interviewee as many questions as I could, in a conversational open-ended style, rather than rigidly following each of the questions in turn. This enabled me to 'follow' each interviewee as they provided views on their understandings, expectations and experiences of mediation within the Court. It also enabled some interviewees to provide more detailed answers to some of the questions posed. This resulted in the identification of rich descriptive data.

Most questions were answered in the majority of interviews and on the few occasions that they were not, time constraints were identified as the cause for this. I also took hand-written notes during the interviews, which assisted me in displaying and analysing the data.

Providing interviewees with the draft interview questions in advance of the interview proved beneficial. Many interviewees indicated at the commencement of the interview that they had reflected on the interview questions before the interview. Some had taken handwritten notes along the margins of the draft interview questions that they explored in further depth during the interview.

Some interviewees stated that they were unsure as to the exact answer to some questions. For example, the questions relating to mediation practice models were problematic for a number of interviewees, particularly some of the lawyers, who asked for an explanation of the different practice models.[3279] Some lawyers stated that they could not answer the questions 'properly' as they were unfamiliar with the existence of different practice models or unaware whether a particular model is predominantly utilised,[3280] and suggested that I put this question to the mediators instead. Some lawyers also conflated their descriptions of the 'typical' stages of mediation *procedure* with

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3278 Alice Yeo et al, 'In-depth Interviews' in Jane Ritchie et al (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publications, 2nd ed, 2014) 183.

3279 See above Chapter II at Part C.

3280 See above Chapter V at 138.

their description of practice models.[3281] These findings coincide with the data that most lawyers had not undergone mediation education and training.[3282]

A minority of interviewees suggested that some questions that I asked were unclear or were mere repetitions of earlier questions that they had already answered. Accordingly, I reframed some of the questions so that they were clearer for interviewees to answer, which highlights the flexibility in undertaking semi-structured interviews.

One mediator took issue with using the labels 'appropriate' or 'inappropriate' to describe levels of mediator intervention in the process and/or the content:

> "Appropriate" suggests there's some sort of objective reality out there that deals with this process. All these things are a construct. I don't think there is anything that is appropriate or inappropriate as long as you [the mediator] communicate to parties what it is you're doing… I don't think there is one objective 'proper way' to mediate because, as I say, mediation is just a construct of human beings – it doesn't actually exist. So therefore it is whatever you want to define it to be. So I think the word "appropriate" in that question is "inappropriate".[3283]

Rather than being a limitation of this particular interview question, this response provided rich data that could only be obtained from a semi-structured interview. This view also highlights there is no singularly accepted mediation *practice* and no singularly accepted mediation *procedure*, which reinforce the potential for uncertainty and expectation gaps as well as the potential for gaps between theory and practice.[3284]

At the conclusion of each interview I reiterated interviewee rights to confidentiality and anonymity and that I would be providing them the opportunity to consider or review any direct quotes provided by them as well as their rights to withdraw from the project.

I encountered an unintended 'snowball sampling'[3285] effect after concluding the initial interviews that resulted in 'friendly referrals' by some interviewees. A number of early interviewees voluntarily suggested that I interview particular named individuals who practised in the Court whom they considered might be willing to be interviewed. Some interviewees also recommended that I contact individuals who practised in other jurisdictions whom they also suggested would be worth interviewing for the research. Given that the research was restricted solely to the views of Stakeholders practising within the Court, I restricted interviews solely to those whose satisfied the participant selection criteria. Sampling became more targeted as the interviews progressed. I contacted some of the individuals whom previous interviewees suggested would be willing to be interviewed.

I refined the interview questions as the interviews progressed in light of queries and uncertainties raised by some interviewees regarding some questions I asked. These queries and uncertainties did not cause me to alter or shift the focus from the three themes and so the core focus of the research remained the same. Instead, I rephrased some questions to enable a clearer understanding by the interviewees.

Towards the latter part of the interviews with the lawyers and mediators it appeared that I had reached a level of 'saturation' as further interviews were not yielding new or significantly different insights.

3281 Ibid.

3282 Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

3283 Mediator 12. See above Chapter V at 166.

3284 See above Chapter II at 58 and 71.

3285 See, eg, Webley, 'Qualitative Approaches to Empirical Legal Research' (n 3256) 934; Ritchie et al, 'Designing and Selecting Samples' (n 3260) 129.

I encountered no ethical issues whilst conducting the interviews.

5 *Recording, Displaying and Analysing the Data*

The next stage of the methodology involved three stages: recording the data; displaying the data; and drawing conclusions and verifications.[3286]

Soon after each interview was completed, I typed a verbatim transcript of those interviews that had been audio recorded. Typing the transcripts, rather than having them professionally typed, enabled me to become very familiar with the data provided by each interviewee.

I then arranged the interviews into three data sets, one for each Stakeholder group. Interviewees remained anonymous and their identifying details were omitted. Instead, I assigned each interviewee a number according to their identified predominant Stakeholder role.[3287] For example, 'magistrate' 1 to 5, 'lawyer' 1 to 7 and 'mediator' 1 to 16. I simultaneously collated the transcripts of interview with my hand-written notes taken during the interviews. These notes included my initial observations regarding identification of developing themes relating to *purpose*, *practice* and *procedure*. They also included my initial observations regarding potential points of convergence or divergence with data identified from earlier interviews. Reflecting on the content of each transcribed interview provided the foundation for the development of codes that I utilised in the second stage of the process to organised and compare the three data sets.

Once I had completed the majority of interviews, I used NVivo software to 'code' the data according to themes that I had identified during the earlier stages of the methodology and based on my preliminary literature review. This enabled me to categorise data according to the three themes. Coding was an iterative process. I initially used general codes such as 'purpose', '[*names of*] industry model' and 'practice models'. I revised some of the codes as the coding process progressed. I also started using more specific codes such as 'settlement', 'Pre-Mediation' and 'facilitative' or 'evaluative'.

Coding enabled me to search and display the data easily. I also recorded data manually in table format using data matrices. I used two different sets of data matrices; one summarising data between each of the Stakeholder groups and another summarising the main key findings across each of the Stakeholder groups. These acted as a visual display of the data as well as a data analysis tool.

I then analysed the data using a combination of manual and computer assisted techniques. These included utilising the coding using NVivo software and the manual use of data matrices. I used a thematic approach to analysis as it enabled me to identify emerging themes and patterns in the data. It also enabled me to identify points of convergence and divergence between each of the Stakeholder groups and across each of the Stakeholder groups, which could be discussed in greater detail in the exploration of the empirical data.[3288] It also enabled me to identify outliers among the data.

Coding and the manual use of data matrices enabled me to identify themes and patterns and ultimately draw conclusions from each of the data sets. They also enabled me to reflect on the expectation gaps that I identified between Stakeholder groups and to link these findings back to the aim of the research. I revised the transcripts at various points during the data analysis to verify some of the key findings I developed in the exploration of the empirical data.[3289]

3286 Miles and Huberman refer to this as three 'flows of activity': Miles and Huberman (n 3259) 33.

3287 See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

3288 See above Chapter IV, Chapter V and Chapter VI.

3289 See above Chapter IV, Chapter V and Chapter VI.

I used direct quotations, where possible, throughout the thesis to retain the voices of the interviewees. I edited some quotations to remove the hesitations and repetitions of normal speech.

The large number of questions that I asked during the semi-structured interviews provided me with a tremendous amount of rich qualitative data. However, during the data analysis stage I realised that some of the questions I asked provided data that was not central to the exploration of the three research questions. For example, much of the data relating to Stakeholder experiences of mediation in general practice and how Stakeholder experiences of mediation within the Court compare to those mediations that occurred outside the court setting and in other court-connected settings was not directly relevant to the three research questions. Accordingly, apart from the small amounts of data that I was able to extract from these questions that were at least indirectly relevant to the three research questions, I chose not to explore much of this data at all.

There was overlap between the answers to some questions that were not directly relevant to the three research questions. For example, the data relating to how Stakeholders define 'mediation' and how mediation in the Court differs from unassisted lawyer negotiations overlapped with answers to the question relating to the mediator's role and functions. So too was some of the data relating to both the purpose of mediation and the mediator's role within and outside of the Court. I was able to extract some data from these questions that was relevant to the three research questions. Similarly, some of the data relating to whether the magistrates' attitudes of mediation have changed since their appointment to the Bench overlapped with their experiences of mediation in general practice before their appointment to the Bench. I was able to extract some data from this question when summarising some of the Stakeholder quantitative data.[3290]

Conversely, data from some of the other questions went beyond the scope of the three research questions. For example, the answers to those questions comparing Stakeholder understandings, expectations and experiences of mediation outside of the court-connected context and mediations in other court-connected contexts, on the one hand, with their experiences of mediation within the Court, on the other hand. In addition, those questions that invited Stakeholders to comment on the perspective of other Stakeholders, such as which practice model they consider the mediators or the lawyers prefer to use and the question regarding interviewee preferences for lawyer-mediators over non-lawyer mediators and *vice versa*. Similarly, the question exploring the extent to which a mediator's professional background impacts upon or influences their role and dictates what behaviours or interventions mediators consider are 'appropriate'.

The answers to some questions in particular provided insight on a broad range of complex topics that highlighted much debate. In particular, the question relating to when is the most 'appropriate' time to mediate and whether there should be a 'presumption of mediation' in the Court.

I chose not to explore these two topics because they were not central to addressing the three research questions. Furthermore, exploration of these two topics would have instigated two additional research projects. These two questions are especially worthy of their own research given the debates regarding satisfying *effectiveness* and *efficiency* objectives[3291] and the debates regarding the meaning and achievability of voluntary participation in court-connected mediation.[3292] My thesis thus invites future research to investigate whether mediation ought to be presumed as a 'first port of call' rather than being an 'option' available to disputants, with trial being a forum of last resort.[3293]

3290 Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

3291 See above Chapter II at 49.

3292 See above Chapter II at 47.

3293 See above Chapter II at 30, 45–7 and 54 and Chapter VI at 172. See also Chapter VII at 209.

I also chose not to explore the answers to some of the questions that required Stakeholders to speculate and provide their future predictions. For example, whether the use of court-connected mediation will increase or decrease, what impact such an increase or decrease would have upon Stakeholder roles. For example, a minority of magistrates suggested that the introduction of the listing fees, which I briefly discussed during the exploration of the rules-based framework, will likely increase the uptake of mediation.[3294]

Furthermore, Stakeholders made many suggestions for how the Court's mediation program could be improved, many of which centred upon allocating increased resources to provide purpose-built mediation rooms,[3295] with facilities for 'break-out' rooms.[3296] Such proposals have existed in other court-connected mediation contexts since 1996.[3297] For example, one mediator stated that discussions between disputants and their lawyers have to be conducted in the public waiting areas in and around the various courtrooms where conference rooms are not available.[3298] Similarly, a lawyer stated that conference rooms, which are utilised as 'break-out' rooms for Private Sessions, are occasionally unavailable for use:

> As a lawyer, I have had to wander up to level 2 to try and find rooms. Sometimes you just end up huddling into a corner. That can become a problem if you're managing sensitive issues or managing a client who is emotionally overborne. I have had guys crying, siting out just at the top of the stairs on level 1. It's not ideal.[3299]

Some Stakeholders also made suggestions for decreasing 'delay' between the date upon which actions are referred to mediation and the actual mediation date in addition to increasing the earlier availability of dates to mediate,[3300] for example, by increasing the number of the Court's full-time internal mediators to boost efficiencies in the Court.[3301] However, only two Stakeholders volunteered views about the usual time between referrals and the actual mediation – one magistrate reported that mediations typically occur six[3302] to eight weeks after the referral order is made.[3303] Similarly, some Stakeholders volunteered views about the timing of referrals during the lifecycle of litigation. For example, one magistrate expressed not typically referring General Division Claims to mediation, where disputants are represented, until after discovery and any interlocutory preliminary issues are dealt with.[3304] Another suggested there is little point in having mediation without expert reports being discovered.[3305] These views coincide with two lawyers who stated that the Court typically orders mediation after pleadings are filed and served and orders for discovery made.[3306] No lawyer intimated they determine the timing of referrals to mediation.[3307] It is difficult to generalise from this part of the data the typical time between referral of actions to mediation and the actual mediation date as well as the timing of referrals during the lifecycle of litigation.[3308]

3294 Magistrate 2; Magistrate 4; Magistrate 5.
3295 Lawyer 4; Mediator 1.
3296 See above Chapter VI at 189.
3297 Black (n 305) 144.
3298 Mediator 3.
3299 Lawyer 3.
3300 Magistrate 5.
3301 Magistrate 2; Magistrate 3; Magistrate 4; Magistrate 5.
3302 Magistrate 4.
3303 Mediator 3.
3304 Magistrate 4.
3305 Magistrate 5.
3306 Lawyer 3; Lawyer 6.
3307 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) 191.
3308 See also Chapter III at 91.

Some Stakeholders accentuated that there has been insufficient publicity to raise awareness of the Court's mediation program,[3309] and many suggested ways to increase the uptake of mediation within the Court, including the need to promote its 'achievements'.[3310]

The answers to these questions were not central to addressing the three research questions, particularly as I chose not to evaluate the take-up rate of mediation or identify obstacles that prevent Stakeholder or disputant engagement with the Court's mediation program.[3311] The general consensus amongst Stakeholders was that the referral of actions to mediation will likely increase into the future, particularly because mediation has become an integrated, and occasionally compulsory, feature of civil litigation procedures in many Australian court and tribunal contexts.[3312] However, there were many different and detailed explanations for this prediction that also included consideration of broader public policy, not just consideration of the impact upon Stakeholder roles. Furthermore, whether intended or not, some of the answers to these questions involved a level of bias and self-interest. For example, most mediators suggested that active steps be put into place to increase the uptake of mediation, with the likely result being an increase in their workload.

Whilst exploration of the data obtained from the abovementioned questions was not central to the three research questions, many of these questions are worthy of further research.[3313]

Finally, a minority of Stakeholders – predominantly magistrates and mediators – volunteered views about the Mediation Information Service ('MIS') introduced to the Court in 2016.[3314] The MIS is a free service available to disputants within the Minor Claims Division and operates in conjunction with the Magistrates Court Legal Advice Service and the Court's Mediation Unit.[3315] It occurs during the first directions hearings on Monday and Tuesday mornings.[3316] The duty magistrate informs disputants that volunteer mediators are available to provide them with information about the 'mediation opportunity'.[3317] Willing disputants are invited to exit the courtroom and converse with a MIS volunteer.[3318] When their action is called back on, disputants agreeable to mediation request their action be referred to the Mediation Unit.[3319] Some MIS volunteers expressed providing litigants with information *only* about the mediation process [3320] whereas others undertake mini-speed mediations 'on the spot', many which settle.[3321] Despite being a further example of an additional development to mediation within the Court and its established mediation culture,[3322] the MIS was not a central part of this thesis, as lawyers are not regularly involved. This too is a further example of a development requiring further research.

6 *Interviewee Review*

Prior to submission of any research output relying on the interview data, participants were provided with the opportunity to consider their direct quotes, as required by my ethics approval. They were also provided with the opportunity to withdraw from the project.

3309 See also nn 992, 2809, 2891, 2909, 3468 and 3317.

3310 See also nn 936.

3311 See above Chapter I at 23. See also Chapter VIII at 274.

3312 See above Chapter I at 19.

3313 See above Chapter VIII.

3314 Margaret Castles and Ruth Beach, 'Pro Bono Mediation Information Service Making a Difference in the Magistrates Court' (2018) 40(3) *Bulletin (Law Society of South Australia)* 20.

3315 Margaret Castles, 'Mediation? What's That All About?' (Blog Post, 25 October 2017) <https://margaretcastles.wordpress.com/2017/10/25/mediation-whats-that-all-about>.

3316 'Mediation Information Service Policy' (n 992) 1, 2.

3317 See also nn 992, 2809, 2891, 2909, 3309 and 3468.

3318 Magistrate 1; Magistrate 2; Magistrate 5.

3319 'Mediation Information Service Policy' (n 992) 1.

3320 Mediator 2; Mediator 5; Mediator 6.

3321 Magistrate 1; Magistrate 2; Magistrate 3; Mediator 13.

3322 See above Chapter III, Chapter VII and Chapter VIII.

Most interviewees responded well to this final part of the process. Some did not respond and no interviewees objected to the use of their direct quotes. One interviewee asked for minor changes to their wording and I informed them of the changes made prior to submission. These minor changes did not affect any key findings or my recommendations in Chapter VII.

I did not encounter any ethical issues regarding the review of direct quotes or withdrawals from the project.

B *Appropriateness of Research Methodology and Sample Size and Factors that Support Reliability, Validity and Credibility of Data*

In the introduction to the thesis I acknowledged that like all qualitative research, the data in this thesis and the discussion is limited by time (data obtained between 2016 to 2018), scope of the case study, methodology, sample and bias.[3323] In this part of the discussion I explain why both the methodology I utilised in this research and the sample size was appropriate. I also briefly discuss some of the factors that support the reliability, validity and credibility of the data.

Undertaking semi-structured interviews as the primary data collection method enabled me to gather data directly from individual Stakeholders about their understandings, expectations and experiences regarding the three themes. This enabled me to record what Stakeholders reported as their understanding, expectations and experiences in mediations in the Court. Examining the views of Stakeholders collectively resulted in a richer sample size than examining the views of only one Stakeholder group. It also enabled me to capture points of both convergence between Stakeholders as well expectation gaps at various points between Stakeholder groups as a whole and within each Stakeholder group.

The semi-structured interviews provided Stakeholders with the opportunity to provide a range of in-depth responses to the research questions posed rather than being limited to 'yes/no' answers or short answer questions, for example, by providing written responses to a written survey. It also enabled me to ask follow-up questions so that the issues could be explored in greater depth. This resulted in the identification of rich descriptive data.

The coding, sorting, displaying and analysis of the data enabled themes to emerge, which I compared against the theory base.[3324] This has resulted in significant findings that contribute to theoretical knowledge and practical use.[3325] This also enabled me to extrapolate theory from the data.[3326] Exploration of the data, particularly identification of the predominant expectation gaps, formed the basis for my recommendations,[3327] which contribute to scholarly knowledge and the ongoing development of scholarship regarding court-connected mediation.[3328]

However, as indicated above, the aim of the research was not to obtain statistically representative data sets from which to draw flawless empirical generalisations but to yield 'information rich' data of central importance to the research. The sample size (n = 28)[3329] was therefore appropriate for the research. The sample is sufficiently large enough to reflect accurate and reliable results, however, the efficacy of the research did not depend on a substantial sample size.

3323 See above Chapter I at 24.

3324 See above Chapter II.

3325 See, eg, Muhammad Faisol Chowdhury, 'Coding, Sorting and Sifting of Qualitative Data Analysis: Debates and Discussion' (2015) 49 (3) *Quality and Quantity* 1135, 1136 (citations omitted).

3326 See, eg, Webley, 'Qualitative Approaches to Empirical Legal Research' (n 3256) 926, 931, 944.

3327 See above Chapter VII.

3328 See above Chapter VIII.

3329 See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court. See also nn 115, 123, 3081, 3339 and 3408.

At the time of undertaking the interviews there were thirty-five magistrates in South Australia, some of whom sit in the central Court in Adelaide and others in metropolitan and country courts. I was permitted by the Court to interview five magistrates who sit in the central Court in Adelaide, representing 14.2% of magistrates appointed to the Court at the time of undertaking the interviews. I interviewed the magistrates between 8 December 2017 and 23 March 2018. There are currently forty-six magistrates in South Australia.[3330]

My research did not include the view of magistrates from the metropolitan and country courts. Magistrates in the Adelaide Magistrates Court have a sole focus on either civil or criminal actions, whereas magistrates in the metropolitan and country courts preside over both civil and criminal actions.[3331] At the date of being interviewed, four out of these five magistrates had a predominant or sole focus on civil actions. One magistrate reported spending approximately 15 years in the civil jurisdiction and focussing predominantly in the last 10 years on criminal actions. This magistrate reported occasionally presiding over civil cases 'when requested' in addition to being a warden of the Warden's Court.[3332] As my research focused only on mediation of civil disputes in the central Court in Adelaide the sample size was small but sufficient.

I interviewed seven lawyers between 23 March 2017 and 11 May 2018. Without investigating and analysing court records, I am unable to confirm the number of lawyers who practice in the Court's civil jurisdiction and participate in the court's mediation program.[3333] This is a potential limitation of the research. I discuss quantitative limitations of the research in further detail below.

Nonetheless, the lawyers that I interviewed provided insight into the three themes, which added significant value to the data obtained from the other two Stakeholders interviewed. In any event, the intention of the research was to explore Stakeholder understandings, expectations and experiences regarding the three themes rather than, for example, accurately predicting the behaviour of each Stakeholder group. Accordingly, the suggested sample size is sufficient.

At the time of undertaking the interviews 30 individuals were listed on the Court's website as being on the Panel of Private Qualified Mediators, 12 female and 18 male. I interviewed 16 mediators including the former Manager of the Mediation Unit, representing 53% of the total members of the Panel during 2016 to 2018. I interviewed the mediators between 7 April 2016 and 22 May 2018.[3334]

Interviewing more than half of those mediators listed on the Court's website as being currently on the Panel provided me with substantial data. This large sample of such a high proportion of mediators was sufficient for this research and has enabled me to make accurate generalisations about various aspects of mediation within the Court.

At least six factors support the reliability, validity and credibility of the data.

First, as indicated above, both the research methodology and the sample size were appropriate.

3330 See above Chapter III at 84.

3331 Magistrate 2.

3332 A warden is a magistrate nominated by the Attorney-General to exercise the jurisdiction and powers related to mining claims: *Mining Act 1971* (SA) s 6; *Warden's Court Rules 2016* (SA) r 3. See also Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

3333 Cf Rundle was able to confirm from a list of practitioners identified by the then registrar that there were approximately 146 lawyers who participate in the court's mediation program at the time of her interviews, 42 of whom she interviewed, representing approximately 29% of practitioners practiced in the civil jurisdiction of the Supreme Court of Tasmania: Rundle, 'Court-Connected Mediation Practice' (n 38) 127, 145, 224.

3334 See also Chapter III at 88.

Secondly, providing interviewees with detailed information about the nature of my research together with the draft interview questions in advance of each interview gave interviewees ample time to consider the questions prior to interview.

Thirdly, I explained to interviewees that the interviews were voluntary, that they would remain anonymous and their identifying details would be omitted, that they had the opportunity to consider or review any direct quotes provided by them prior to submission and that they had the right to withdraw from the project. All of this fostered candour and frankness during interviews.

Fourthly, undertaking semi-structured interviews with individual Stakeholders involved, either directly or indirectly, in mediation yielded information that would otherwise have been inaccessible. Stakeholders were asked to comment upon their understandings, expectations and experiences regarding the three themes rather than having their performance reviewed or being asked to comment upon the performance of other Stakeholders, which may have given rise to 'self-regulation'. I discuss this potential limitation in further detail below.

Fifthly, interviewees willingly shared their understandings, expectations and experiences of mediation in the Court openly and honestly without any pressure to answer the questions asked.

Sixthly, interviewees appeared comfortable during interviews providing views on their understanding, expectations and experiences of mediation within the Court, and were prepared to offer both positive and negative feedback.

C *Limitations of Research*

I highlighted some limitations of the research in both the discussion regarding the prominent expectation gaps that were identified in the empirical data[3335] and in the conclusion.[3336]

In this part I discuss six additional limitations and explain why they were not prejudicial to the research.

1 *Being a Lawyer-Researcher*

I first encountered the term 'mediation' in my final year of law school.[3337] I have been a lawyer in private practice with a keen interest in ADR for the duration of most of this research. At first blush, the reader might wonder whether being a lawyer-researcher, particularly my legal training, gives rise to a potential limitation in the research.

Manderson and Mohr suggest an inherent tension exists between legal practice and legal scholarship; lawyers are trained as outcome-oriented advocates who serve one interest (or client), not as academics.[3338] This gives rise to the following question: can legal training, as advocates of a foregone conclusion, be reconciled with the scholarly reflection required of the legal scholar?

Without answering that question conclusively, I provide three reasons as to how I have overcome any limitations arising from the purported tension between legal advocacy and legal research.

3335 See above Chapter I at 24, Chapter IV at 108, Chapter V at 136, 138, 141 and 145 and Chapter VI at 172, 174–5, 183, 186, 188 and 194–5. See also Chapter III at 92.

3336 See above Chapter VIII at 244–8.

3337 See above Chapter I at 11.

3338 Desmond Manderson and Richard Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research' (2002) 6(1) *Law Text Culture* 159, 160–1, 166–8.

First, whilst undertaking my law degree, I completed an Arts degree and completed social science subjects including anthropology and psychology, which provided me with a sound foundation for undertaking qualitative research. This assisted me in particular with the preparation of the research methodology summarised in this Appendix as well as in conducting the various stages of the research.

Secondly, I commenced the research with an open mind, rather than with a foregone conclusion or a fixed position. Moreover, rather than commencing the research with a fixed hypothesis, I chose to obtain and explore a rich amount of data[3339] from those involved, either directly or indirectly, in mediation. This provided me with the data required to undertake scholarly reflection and it was only after commencing the research that my core contention that *purpose* drives *practice* and *procedure* started gaining traction.[3340]

Thirdly, I undertook a wide literature review relating to the theory and practice of mediation before exploring literature that relates specifically to court-connected mediation.[3341] This enabled me to 'cover the field' regarding the theory and practice of court-connected mediation. It also enabled me to uncover many of the dichotomies, distinctions and debates regarding the three themes, which provided a sound theory base for the remainder of the thesis.

2 *Being an 'Insider Researcher'*

A further potential limitation of the research may appear to exist because of my being a member of the Court's Panel of Private Qualified Mediators from 2015 to September 2021.[3342] The reader will likely wonder whether my personal professional history of being an 'insider-researcher' may give rise to the appearance of a potential conflict of interest or 'researcher bias',[3343] and thus be a potential limitation of the research.

Being an insider-researcher has many advantages including having a greater understanding of the culture being studied, how to best approach interviewees and having an 'established intimacy which promotes both the telling and the judging of truth.'[3344] However, being an insider also has its disadvantages including a risk that greater familiarity with the subject matter and interviewees can cause the researcher to 'lose objectivity' or unconsciously make 'wrong assumptions about the research process' based on their own prior knowledge.

I was cognisant of the potential risks of being an insider-researcher at the outset of the research and so made all potential interviewees aware that I was undertaking the research in my capacity as researcher, rather than in my capacity as a member of the Court's Panel of Private Qualified Mediators, by providing the following warning in the Participant Information Sheet:

> **I am a lawyer-mediator and am undertaking this research as part of my PhD project. I am conducting this research as a student and not in my mediator role.**

Notwithstanding the above disclosure, being an insider-researcher may have had an impact upon interviewees and the information that they provided me during interviews. For example, some

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3339 See also nn 115, 123, 3081, 3329 and 3408.

3340 See above Chapter I at 13, Chapter II at 48, Chapter IV at 113 and 125, Chapter V at 131 and 141–2, Chapter VI at 181, 192, 197 and 202 and Chapter VII at 205, 208, 210 and 234.

3341 See above Chapter II.

3342 See above Chapter I and Chapter III.

3343 See above Chapter I at 24.

3344 Sema Unluer, 'Being an Insider Researcher While Conducting Case Study Research' (2012) 17(29) *Qualitative Report* 1, 1–14 (citations omitted).

interviewees may have tailored their answers to the questions that I asked given their awareness of my professional roles outside of the research, by both being a Panel Mediator as well as being a lawyer in private practice with a keen interest in ADR.

However, rather than being prejudicial to the research, my own understanding, expectations and experiences gained from professional roles outside of the research assisted me in transitioning from reviewing the theory base to developing and testing the research methodology and the semi-structured interview questions. It assisted me when recruiting interviewees. It also assisted me when exploring the Stakeholder data and comparing mediation practice in the Court against the theory base.

Being an insider-researcher is less likely to prejudice the data because the data reflects Stakeholder understandings, expectations and experiences regarding the *purpose*, *practice* and *procedure* of mediation within this local legal context.[3345] As I explained in the introduction, I chose not to investigate levels of Stakeholder satisfaction with the Court's mediation program nor review the performance of Stakeholders during mediation.[3346] In addition, I chose not to examine whether Stakeholders consider that the Court's mediation program is achieving its 'program goals', nor investigate whether mediation efficiently and effectively reduces costs to both the Court and disputants. For these reasons, it is unlikely that being an insider-researcher would have had any significant impact upon interviewees and the information that they provided me during interviews.

In short, whether I was an insider-researcher or not, the data could only be obtained by interviewing Stakeholders involved in mediations.[3347]

3 *Voluntary Responses and Self-Regulation*

The recruitment process attracted interviewees who satisfied the participant selection criteria; namely, Stakeholders practicing in the Court in 2016-2018.

The research methodology relied upon voluntary participation in semi-structured interviews. A voluntary response sample introduces the potential for volunteer or 'selection' bias,[3348] where the sample contains only those participants who are willing to participate in the research. Self-selection may lead to biased data as volunteers may have strong opinions on topics that interest them.

The research may have attracted interviewees who had an interest in mediation, higher than those in the general population. The research may have also attracted interviewees who had strong views about mediation generally and in particular in the Court. For example, one mediator reported being pro-mediation and having a preference for disputants to attempt the least invasive and least costly forms of dispute resolution.[3349] Another suggested mediation is usually 'better' for disputants than proceeding down the litigation path and reported that most 'need a big nudge' to divert them to mediation instead of litigation.[3350] One lawyer stated having a pro-mediation bias[3351] and another described being a 'big advocate' for mediation and always recommending it where actions have not settled at a settlement conference.[3352] Conversely, another was generally critical of mediating with

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3345 Mack, *Criteria and Research* (n 80) 2, 8, 37, 87.

3346 See above Chapter I at 23. See also Chapter VIII at 247.

3347 See above Chapter I at 23. See also Chapter VIII at 256.

3348 See, eg, Lee Epstein and Andrew Martin, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 901, 910.

3349 Mediator 13.

3350 Mediator 7.

3351 Lawyer 1.

3352 Lawyer 5 (Bar 3).

members of the Court's Panel Mediators and reported a preference for Judicial ADR[3353] or evaluative subject-matter experts.[3354] This lawyer opined that the chances of settlement are much higher in mediations before a magistrate because it is a 'scarier process', judicial mediators 'know what they're talking about' and there is a higher chance of enforceability because magistrates can make orders/determinations whereas mediators lack the powers to enforce settlements reached.[3355] This self-selection by interviewees suggests that their views may have favoured a specific outcome.

Some interviewees may have portrayed a positive picture of their understandings of the *purpose*, *practice* and *procedure* of mediation and their respective role within it. This may have resulted in certain expected responses. Furthermore, some interviewees may have provided responses in favour of a specific outcome or answered in a way that they considered that I wished to hear as a researcher, all of which may have compromised the quality of the data. Accordingly, their views may not be universal and may be more biased than data obtained from a truly random sample. Stakeholders who were not attracted to the research may likely hold different views.

However, I do not consider this potential bias prejudices the data given the appropriateness of the sample size.[3356] For example, I interviewed all five of the magistrates who I was permitted by the Court to interview. I also interviewed 16 mediators representing 53% of the total members of the Panel during 2016 to 2018.

Qualitative research involving interviews always involves the possibility of 'self-regulation', where interviewees might present their answers in a way that accords with professional ethical standards, their own self-image, or they anticipate that the interviewer wants to hear.[3357]

Self-regulation may exist in this research. Some of the answers provided by Stakeholders may have been coloured by their own considerations of professional and ethical standards, their own self-image or best practice. This may even account for some expectation gaps between mediators and lawyers regarding various aspects of mediation practice and at various stages of the procedure.

For example, some mediators reported: engaging in 'purely facilitative' mediation;[3358] acting in accordance with the National Mediator Accreditation System (NMAS);[3359] and adhering to a particular industry model.[3360] Conversely, the responses from a minority of pragmatists who self-described 'conciliating' or reported experiencing a 'highly evaluative model', suggests that the mediators may not in fact be engaging in purely facilitative mediation.[3361] In addition, some Stakeholders understand and expect mediators to have an advisory or quasi-advisory role or use advisory or evaluative techniques.[3362] Furthermore, the lawyers reported experiencing a four-stage procedure, where mediators break for Private Sessions more or less, immediately after the Parties' Opening Comments and the remainder of the procedure being Shuttle Negotiation.[3363]

Most of the lawyers reported not having undertaken formal mediation education and training. Accordingly, their responses are likely to be based on their personal experiences of mediation in

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3353 Judicial ADR is not central to this thesis: see above Chapter III at 94.

3354 Lawyer 6. See above Chapter V at 139.

3355 Lawyer 6.

3356 See above: Appendix A: Qualitative Research Methodology at 261.

3357 See, eg, Nigel Fielding and Hilary Thomas, 'Qualitative Interviewing' in Nigel Gilbert (ed), *Researching Social Life* (Sage Publications, 3rd ed, 2008) 249. See also Ojelabi and Boyle (n 17) 16–18 and 23.

3358 See above Chapter V at 133.

3359 See above Chapter II at 29.

3360 See above Chapter VI at Part C.

3361 See above Chapter V at 135–6, 153, 183 and 199.

3362 See above Chapter V at 266.

3363 See above Chapter VI at 192 and 201–4.

practice rather than what they considered to be the most 'proper' picture of mediation or their own self-image.

Similarly, as magistrates take no part in the mediations,[3364] it is less likely that their views may have been coloured by their own self-image. However, three of the magistrates reported having undergone mediation training, two of whom reported being accredited mediators,[3365] which may have had an impact upon what they considered to be best practice in mediation within the Court.

Despite the possibility of self-regulation, the data obtained from the lawyer interviews served as a 'check' on the accuracy of the mediator self-reports and *vice versa*.[3366] Accordingly, the possibility of self-regulation is not prejudicial to the data.

4 *Quantitative Limitations*

In this thesis I undertook qualitative research, however, as indicated above, some of the introductory questions are quantitative in nature. For example, I asked the lawyers and mediators about the number of mediations they had participated in in the past 12 months.[3367] I asked this question to obtain contemporary, rather than dated, data that would act as a baseline indicator of the number of mediations of civil disputes interviewees reported being involved in within the Court. This proved insightful and provided data that showed the Court's internal mediator undertakes the lion's share of mediations within the Court as compared to the majority of Panel mediators.[3368]

Moreover I asked the magistrates about the approximate number of actions, or percentage thereof, that had been referred to mediation in the past 12 months and whether the referral was primarily party-driven, encouraged by, or ordered by the Court. This also proved insightful and provided data that showed an expectation gap between most magistrates who reported 'strongly' encouraging but 'rarely' ordering mediation without disputant consent, on the one hand, and some of the mediators who expected that magistrates order all actions to mediation as a matter of course, subject to those that are 'not suitable' for mediation, on the other hand.[3369] It also showed the referral trends for the years that I undertook the interviews.

I also asked interviewees an open-ended question relating to what were the most common types of actions that had been referred to mediation and whether they were two-party or multi-party disputes. This provided a rich pool of information that showed building/construction and commercial disputes to be the most commonly mediated types of action within the Court, with the general consensus among interviewees being that the bulk of actions mediated are two-party disputes.

It is difficult to confirm the statistical accuracy of the quantitative data referred to above without comparing what Stakeholders reported against court records. Whilst this is a limitation of the research, my aim was not to obtain statistically accurate quantitative data. Such an exercise is further complicated by the fact that three of the magistrates reported referring actions within their case list to mediation in percentage terms and one magistrate reported actual number of actions. It is also complicated by the fact that some interviewees provided more specificity with their descriptions than others when describing types of actions mediated. For example, the magistrates did not use the label 'civil' but preferred to specify the predominant types of civil actions referred to

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3364 See above Chapter V at 132 and Chapter VI at 181 and 189.

3365 Magistrate 1 and Magistrate 3 whereas Magistrate 2 completed LEADR training but was not an accredited mediator. Judicial mediation is not central to this thesis: See above Chapter I at 14.

3366 Alfini, 'Is This the End of "Good Mediation"?' (n 315) 60.

3367 See Appendix C: Interviewee Demographic Information and Actions Mediated in the Court.

3368 Ibid.

3369 See above Chapter VI at 174–5.

mediation within the Court. Conversely, the lawyers and mediators preferred using broad labels such as 'commercial disputes' and 'civil' rather than describing their particular types within those two categories.

Furthermore, I did not undertake any follow-up interviews to assess how many actions magistrates referred to mediation and how many mediations lawyers and mediators had been involved in since the time of being interviewed. Accordingly the data must be treated as a contemporary snapshot of those periods of time. The number of referrals to mediation may well have increased since the date of the interviews. For example, most of the data was gathered before the introduction of the listing fee and reduction where mediators certify disputants have attempted mediation.[3370] It remains unclear the extent to which some interviewees might provide different answers to some of the interview questions if follow-up interviews were undertaken in light of these latest developments.

Unlike some of the Australian literature that explores court-connected mediation in interstate courts,[3371] I chose not to analyse various sources of court records such as file-based collection from hard copy court files, existing computerised databases and the 'forms' completed by mediators at the conclusion of each mediation. Such records would not have provided the abundant qualitative data that I wished to obtain directly from individual Stakeholders during semi-structured interviews about their understandings, expectations and experiences regarding the three themes. Furthermore, I considered that exploration of the information in the two forms that mediators are required to complete at the conclusion of mediation – the Record of Outcome and, assuming that settlement has been reached, the Settlement Agreement[3372] – would have been more relevant if the research was predominantly quantitative rather than qualitative.[3373]

Analysing court records would act as an additional source of data that could have supplemented and validate the qualitative data derived from the semi-structured interviews. However, these potential limitations in the quantitative data are not prejudicial to the research as the aim of the study was not to obtain statistically representative data sets from which to draw flawless empirical generalisations, but to obtain rich and descriptive data.

My thesis encourages future research to be conducted that involves investigating and analysing court records. Such research would provide valuable quantitative data on matters such as the: number of mediations of civil disputes conducted within the Court; the types of actions being mediated; the timing of referrals to mediation; the average duration of mediation; the average stages of litigation at which mediations are held; mediation outcomes; and average settlement rates. This would provide further insight into the way actions are finalised during mediations within the Court. This would also address the gaps in the Courts Administration Authority ('CAA') Reports[3374] and thus links with my recommendation for the CAA to collect and publish more quantitative data.[3375]

5 *Validation of Qualitative Data by Mediation Observations*

Mediation is typically conducted under veils of confidentiality and privacy and opportunities to gain access to them as a non-participant observer are limited.[3376] Some mediation guidelines suggest that

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3370 See above Chapter III at 88–9 and 102.

3371 See above Chapter I at 20 and Chapter II at Part C and D.

3372 See above Chapter III at 102. See also Appendix D.3: Record of Outcome and Appendix D.4: Settlement Agreement and Annexure.

3373 Cf Rundle, 'Court-Connected Mediation Practice' (n 38) 139–42.

3374 See above Chapter III at 91.

3375 See above Chapter VII, recommendation 3.

3376 See, eg, Boulle and Field, *Mediation in Australia* (n 27)) 4; Boulle, *Mediation: Principles, Process, Practice* (n 71) 13. See also Chapter III at 103. See also *Report of the Task Force on Research on Mediator Techniques* (n 457) 59.

the presence of observers is not desirable nor should be invited.[3377] Similarly, courts have been reluctant to permit requests for non-party attendance, noting that mediation 'is not a spectator sport'.[3378] Charlton, Dewdney and Charlton argue that mediators have an obligation to ensure that individuals not personally or professionally connected with the dispute, such as researchers, not be permitted access to mediations for academic or training purposes whatsoever.[3379]

As a result of such restrictions, those not professionally engaged in mediation on a regular basis are required to learn about and refine their skills through private study, discussion with other mediation practitioners or professional development forums. Furthermore, the inability to observe mediations as a non-participant, I believe, is a missed opportunity for professional development.

If researchers maintain strict adherence to this limited view, such that they are not permitted to undertake observational research to see what 'actually happens' in practice, rich data will remain inaccessible. This thus increases the risk that discussions about mediation will likely be shaped more by theory and anecdote than by actual practice.

Rather than adhering to the stricter view, at the outset of the research I intended to undertake mediation observations as a secondary data collection method. I considered this proposed research methodology appropriate for it would have yielded data that would otherwise have been inaccessible. It would have also provided an additional source of data that could have supplemented and validate the qualitative data derived from the semi-structured interviews.[3380] Using multiple data collection methods – 'triangulation' – provides richer data sets and more in-depth results which enables more rounded conclusions.[3381]

To that end I prepared a draft application for ethics approval. I had planned for this proposed secondary data collection method to be undertaken in accordance with the NMAS[3382] and the Law Council's *Ethical Guidelines for Mediators* regarding confidentiality; namely, observing mediation only after first obtaining the express consent of all participants and rendering anonymous all identifying information from material emanating from mediation for legitimate research purposes.[3383]

As the research was not focused on disputants themselves, nor on the substantive nature of their disputes, but rather on Stakeholder understandings, expectations and experiences regarding the *purpose*, *practice* and *procedure* of mediation in the Court, I considered that Stakeholder and disputant concerns regarding privacy and confidentiality could be allayed. I had planned on obtaining the Court's permission to undertake the observations first. If the Court approved, I then planned on obtaining the express consent of the mediators, lawyers, their clients and any other participants in order for me to be able to observe each mediation. I had decided not to interview any mediation participants before, during or after each of the observed mediations for I wished to gather data regarding mediation via observations only.

In addition to the practical difficulties with observing mediations, a further complicating factor, which is theoretically inherent to all ethnographic research, pertains to what is often described in the social sciences as the 'researcher/observer effect' [3384] or 'Hawthorne effect',[3385] which suggests

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3377 *NSW Information Kit* (n 408) 7, 14, 21.

3378 *State Central Authority v Brume* [2010] FamCA 268, [15] (Brown J).

3379 Charlton, Dewdney and Charlton (n 382) 196.

3380 See, eg, Rundle, 'Court-Connected Mediation Practice' (n 38) 158–9.

3381 Webley, Qualitative Approaches to Empirical Legal Research' (n 3256) 926, 940, 946.

3382 *Practice Standards* (n 222) s 9.1(b).

3383 *Ethical Guidelines for Mediators* (n 254) r 5.

3384 Satnam Choongh, 'Doing Ethnographic Research: Lessons from a Case Study' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017) 72, 83.

that an 'awareness of being observed', such as by the presence of a researcher, may affect the behaviour of those who are being observed. Such an effect seems feasible, particularly as the mere 'presence' of a mediator (both actual presence and the personal qualities that their physical presence brings into the mediation room), influence participants and *vice versa*.[3386] Similarly, the mere presence of a researcher in the mediation room may impact upon practices, behaviours, discourse mediator interventions exhibited during mediation, mediation dynamics, and consequently upon potential outcomes reached.[3387]

To address the potential impact my presence may have had on the mediation dynamics – with the principle of 'first do no harm' to participants[3388] firmly in mind – I had intended on being a 'distant non-participant observer' by sitting in a corner of the room thus maintaining distance from the participants, after briefly introducing myself, or otherwise being introduced by the mediator. I was not going to take any notes during the mediations for confidentiality reasons and also to minimise the risk of impact on subject participation due to their awareness of being observed but was going to record notes of my observations after each mediation.

Despite careful consideration, I chose not to undertake observations of mediations as a secondary data collection method shortly after completing the first round of semi-structured interviews with the mediators. The qualitative data reflects more perceptions of experience rather than objective facts. This may not be a fair representation of what actually occurs in practice, which is a potential limitation of the research. Similar to my earlier contention,[3389] there is no objective way of validating what Stakeholders reported as occurring in practice against what 'actually happens' in practice without undertaking observations of mediations. For example, there is no objective way of assessing: the extent to which mediators in the Court: engage in purely facilitative mediation or engage in advisory/evaluative mediation or at least use quasi-advisory/evaluative techniques; the level of mediator intervention in the process and/or the content; what each stage of the mediation *procedure* typically entails; whether mediators comply with industry models or engage in a four-stage procedure, where mediators break for Private Sessions more or less, immediately after Parties' Opening Comments and the remainder of the procedure being Shuttle Negotiation; and mediators' roles as either scribe or dictator of settlement terms.

Despite this potential limitation, this does not adversely prejudice the research, as it does not affect the reliability, validity or credibility of the data obtained from the semi-structured interviews. During a meeting with my supervisors, it was agreed that undertaking observations were not central to exploration of the three research questions. Notwithstanding this, undertaking mediation observations would likely have instigated a different research project worthy of its own specific research. Accordingly, we decided that my efforts focus solely on obtaining data from Stakeholders by undertaking the semi-structured interviews. Further, given time constraints and the word limit of the thesis, we considered that undertaking observations of mediations was potentially excessive in the circumstances and would be too time consuming.

My thesis strongly invites future research to be conducted that involves mediation observations. Such research will enable exploration of whether what Stakeholders report as occurring in practice actually occurs in practice. If such research shows gaps between practice and best practice theory, it

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3385 See, eg, Webley, Qualitative Approaches to Empirical Legal Research' (n 3256) 926, 937; Bowling and Hoffman, 'Bringing Peace into the Room' (n 570) 10–11; Gustav Wickström and Tom Bendix, 'The "Hawthorne Effect": What Did the Original Hawthorne Studies Actually Show?'(2000) 26 (4) *Scandinavian Journal of Work, Environment and Health* 363.

3386 Bowling and Hoffman, 'Bringing Peace into the Room' (n 570) 10.

3387 See above Chapter VIII at 238.

3388 Webley, Qualitative Approaches to Empirical Legal Research' (n 3256) 926, 932.

3389 See above A: Qualitative Research Methodology at 269.

will also enable future research to explore whether practice has grown beyond the theory or whether different theories might best apply within the court-connected context.[3390]

6 *Scope of Research and Generalisability of Findings*

Various mediation contexts exist.[3391] Context likely has an impact upon the expectations and understandings of mediation users regarding purposes, practices and procedures, all of which may differ from court-connected mediation, which involves mediating 'within the shadow of the law.'[3392]

In this thesis I have examined the three themes through the collective lens of Stakeholders in one particular court-connected context.[3393] The data obtained from interviewees as part of this case study is therefore Court-centric. This potential limitation is not prejudicial to the research, nor does it apply solely to this research. For example, researchers have acknowledged the importance of 'local context' and local culture, which make research findings difficult to generalise more widely across other jurisdictions and other court-connected mediation programs.[3394]

Whilst Stakeholders may not have unanimous understandings, expectations and experiences across all court-connected contexts, the data is partly generalisable in other court- and tribunal-connected contexts. For example, potential exists for expectation gaps between Stakeholders in other court- and tribunal-connected contexts regarding the three themes. Potential also exists for gaps between the theory base and the rules-based framework in other courts and tribunals, on the one hand, and what Stakeholders within those courts and tribunals report occur in practice, on the other hand.[3395]

Though the data is partly generalisable, it may not be completely generalisable to Stakeholders in certain specialised court- and tribunal-connected contexts, particularly at the Federal level. For example, mediation of children's disputes in the Family Court and Federal Circuit Court, and statutory conciliation contexts, such as human rights complaints through the Australian Human Rights Commission or employment disputes in the Fair Work Commission. Furthermore, the data may not be completely generalisable to mediation in general practice outside of the court-connected context that does not involve mediating 'in the shadow of the law.'[3396]

The rich qualitative data obtained from the semi-structured interviews provides the foundation for future research to be conducted in mediation programs within other Australian court and tribunal contexts. This would enable comparisons to be made with features specific to court-connected mediation programs in other Australian jurisdictions.[3397] It would also enable comparisons to be made with the understandings, expectations and experiences of stakeholders in other court- and tribunal-connected contexts.[3398]

Moreover, the sample size of lawyers interviewed in this research is too small to facilitate a comprehensive and representative selection of all lawyers practising across South Australia. Whilst the Court handles the main proportion of litigation, which includes approximately 80% of all civil disputes filed within the State,[3399] it is unlikely that all of the lawyers admitted to practice in South Australia have regular experience of mediation within the Court. My thesis encourages future

3390 See above Chapter VIII at 243.
3391 See above Chapter II at 38.
3392 See above Chapter II at 38–47.
3393 I refer to several legislative schemes in other court-connected contexts for comparison: see above Chapter III.
3394 See, eg, Mack, *Criteria and Research* (n 80) 83 (citations omitted).
3395 See above Chapter VIII at 244.
3396 See above Chapter II at 38–47.
3397 See above Chapter I at 22 and Chapter VIII at 244.
3398 See above Chapter I at 22 and Chapter VIII at 243.
3399 See above n 920.

research to be conducted that involves a larger sample size of lawyers, which I contend will assist increasing the generalisability of the data and provide further valuable insight into the understandings, expectations and experiences of this particular Stakeholder group.

APPENDIX B: HREC DOCUMENTATION

1. Letter of Invitation

14 December 2017

BY EMAIL ONLY:

Attention:

Dear

PhD Research Study: **Mediation in the Magistrates Court of South Australia – Perspectives from the Bar, the Bench and the Mediation Table**

I am writing to invite you to participate in an interview for the purposes of my PhD research.

I am a PhD Candidate in the Law School at the University of Adelaide. My supervisors are Dr Suzanne Le Mire and Dr Anna Olijnyk.

I am currently undertaking a research study into how 'stakeholders' (that is, lawyers, mediators and Magistrates) engage in court-connected mediation, using the Magistrates Court of South Australia as a case study.

The purpose of the study is to expand on current understandings of court-connected mediation, both on a theoretical level and in relation to practice within South Australia.

I am wondering whether you or any of your colleagues would be willing to be interviewed for this study (for approximately 45 minutes).

I have attached the following brief documents for your consideration:

1. Participant Information Sheet;
2. Complaints Procedure;
3. Participant Consent Form;
4. General Interview Questions.

Should you or any of your colleagues be interested in finding out more about the study or being interviewed they can contact me via email: peter.kassapidis@adelaide.edu.au or alternatively via mobile: 0424 342 322.

Yours sincerely,

Peter Kassapidis
Law School
University of Adelaide
North Terrace
Adelaide SA 5005

2. Information Sheet

PARTICIPANT INFORMATION SHEET

Court-Connected Mediation in the Magistrates Court of South Australia – Perspectives from the Bar, the Bench and the Mediation Table: H-2015-21191

Dear Participant,

I am contacting you to invite you to be interviewed as part of a research study that aims to identify and examine how "stakeholders" (lawyers, mediators and Magistrates) engage in court-connected mediation, using the Magistrates Court of South Australia as a case study.

I am a lawyer-mediator and am undertaking this research as part of my PhD project. I am conducting this research as a student and not in my mediator role.

What is the study about?
The study will examine whether there is an interplay or convergence between, on the one hand, the understanding and expectations of stakeholders and, on the other hand, their experiences and practices regarding court-connected mediation in the Magistrates Court of South Australia.

In short, the research aims to expand on current understandings of court-connected mediation, both on a theoretical level and in relation to its application to practice within South Australia.

You have been invited as a possible participant in this study because you are a lawyer, mediator or Magistrate who has engaged or engages in court-connected mediation within the Magistrates Court of South Australia.

What will I be asked to do?
Should you agree to participate, you will be asked to engage in a single semi-structured individual interview that will be completed within approximately forty-five (45) minutes at a time and place that is convenient to you.

During the interview I will ask you questions about the purpose of court-connected mediation; the roles of each stakeholder in the process; and which mediation model is most commonly used in practice in the Magistrates Court.

Please be advised that I do not expect you to be specific about particular cases, nor to divulge confidential information about particular matters.

With your permission, the interview will be digitally recorded so that I can ensure I make an accurate record of what you say. If you do not want me to record the interview, I can take notes of what you say in the interview instead.

Will my confidentiality be protected and what will happen to my information?
I will protect your anonymity and the confidentiality of your responses to the fullest possible extent, within the limits of the law. I will not record your name on interview transcripts so that all information you provide will remain anonymous. Instead I will refer to you by a case number. Your name and case number will be kept in a locked filing cabinet at the University of Adelaide Law School separate to your interview transcripts. Your name will only be able to be linked to your transcript of interview by me, for example, in order to be able to get in contact with you to check any details of your interview.

I will not report your name in any publications and I will not attribute any extracts of interview or information to you in any published works.

I will also remove any references to information that might allow someone to guess your identity. You should, however, also note that because of the limited pool of potential participants and the nature of events discussed in the interviews, it is possible that someone may still be able to identify you.

The audio-file (or notes) of your interview will be transcribed. The anonymised transcripts of interviews and your name and contact details will be kept separately and securely at the University of Adelaide Law School for at least five (5) years, before being destroyed.

How will I receive feedback?
Prior to submitting the thesis for examination, I will provide you with a copy of any direct quotes from the interview I wish to use.

Should you wish to receive feedback, I will provide you with a copy of my thesis, once it has been examined.

What if I change my mind about participating in the study?
Your participation in this study is completely voluntary. Should you wish to withdraw at any stage, or to withdraw any unpublished data you have supplied, you are free to do so.

Where can I get further information?
Should you require any further information, or have any concerns, please do not hesitate to contact any member of the research group using the contact details listed below:

Mr Peter Kassapidis PhD Candidate University of Adelaide North Terrace Adelaide SA 5005 Mobile: 0424 342 322 Email: peter.kassapidis@adelaide.edu.au	Dr Suzanne Le Mire Senior Lecturer and Associate Dean (Learning and Teaching) University of Adelaide North Terrace Adelaide SA 5000 Telephone: (08) 8313 0102 Email: suzanne.lemire@adelaide.edu.au	Dr Anna Olijnyk Lecturer University of Adelaide North Terrace Adelaide SA 5000 Telephone: (08) 8313 7166 Email: anna.olijnyk@adelaide.edu.au

Should you have any concerns or complaints about the conduct of the project, please see the **attached** Contacts for Information on Project and Independent Complaints Procedure form.

How do I agree to participate?
I will be contacting you in due course by email to ask whether you would like to participate in the research study.

Should you wish to participate, we can thereafter arrange a mutually agreeable interview time.

Researcher:
Peter Kassapidis
University of Adelaide Law School

Human Research Ethics Committee (HREC)

PARTICIPANT CONSENT FORM

1. I have read the attached Information Sheet and agree to take part in the following research project:

Title:	**Court-Connected Mediation in the Magistrates Court of South Australia – Perspectives from the Bar, the Bench and the Mediation Table.**
Ethics Approval Number:	**H-2015-21191**

2. I have had the project, so far as it affects me, fully explained to my satisfaction by the researcher. My consent is given freely.

3. Although I understand the purpose of the research project it has also been explained that involvement may not be of any benefit to me.

4. I have been informed that, while information gained during the study may be published, I will not be identified and my personal views will not be divulged unless I expressly request for such views to be so published.

5. I understand that I am free to withdraw from the project prior to publication.

6. I agree to the interview being audio recorded. Yes ☐ No ☐

7. I am aware that I should keep a copy of this Consent Form, when completed, and the attached Information Sheet.

Participant to complete:

Name: _____ Signature: _____ Date:_____

Researcher/Witness to complete:

I have described the nature of the research to _____
(print name of participant)

and in my opinion she/he understood the explanation.

Signature: _____ Position: _____ Date:_____

4. Contacts for Information on Project and Independent Complaints Procedure

The University of Adelaide
Human Research Ethics Committee (HREC)

CONTACTS FOR INFORMATION ON PROJECT AND INDEPENDENT COMPLAINTS PROCEDURE

The following study has been reviewed and approved by the University of Adelaide Human Research Ethics Committee:

Project Title:	**Court-Connected Mediation in the Magistrates Court of South Australia – Perspectives from the Bar, the Bench and the Mediation Table.**
Approval Number:	**H-2015-21191**

The Human Research Ethics Committee monitors all the research projects which it has approved. The committee considers it important that people participating in approved projects have an independent and confidential reporting mechanism which they can use if they have any worries or complaints about that research.

This research project will be conducted according to the NHMRC National Statement on Ethical Conduct in Human Research (see http://www.nhmrc.gov.au/publications/synopses/e72syn.htm)

1. If you have questions or problems associated with the practical aspects of your participation in the project, or wish to raise a concern or complaint about the project, then you should consult the project co-ordinator:

Name:	**Dr Suzanne Le Mire, Senior Lecturer and Associate Dean (Learning and Teaching) at the Adelaide Law School** **Peter Kassapidis, PhD Candidate**
Phone:	**(08) 8313 4344**

2. If you wish to discuss with an independent person matters related to:
   - making a complaint, or
   - raising concerns on the conduct of the project, or
   - the University policy on research involving human participants, or
   - your rights as a participant,

   contact the Human Research Ethics Committee's Secretariat on phone (08) 8313 6028 or by email to hrec@adelaide.edu.au

5. Interview Questions

ATTACHMENT E - Interview Questions version 1 (lawyers and mediators)

Gender: Male □ Female □ Other □ Prefer not to say □

Age: 22 to 34 □ 35 to 44 □ 45 to 54 □ 55 to 64 □ 65 to 74 □ 75 and over □

Occupation: Magistrate □ Barrister □ Solicitor □ Barrister and Solicitor □ Mediator □ Other □

Predominant Stakeholder Role: Magistrate □ Barrister □ Solicitor □ Mediator □ Other □

Decade of Admission to the Supreme Court of South Australia or commencement of other Professional Practice:

1950s □ 1960s □ 1970s □ 1980s □ 1990s □ 2000s □ 2010s □

Practiced or educated in another jurisdiction? If so, where?

Decade of first practice as a mediator

1960s □ 1970s □ 1980s □ 1990s □ 2000s □ 2010s □

Main practice areas:

Administrative □ Building/Construction □ Civil □ Commercial □ Criminal □ Employment/Industrial Relations □ Family □ Neighbourhood Disputes □ Personal Injuries □ Property/Real Estate □ Wills and Estates □ Other □

Mediation Education

1. Did you study mediation or other ADR processes at a tertiary or other education setting?

2. Have you had mediation training/are you an accredited mediator?

Mediation in the Magistrates Court

3. How many Magistrates Court mediations have you participated in in the past twelve (12) months?

   1-10 □ 11-20 □ 21-30 □ 31-40□ 41-50 □ 51-60 □ 61-70 □ 71-80□ 81-90 □ 91-100 □ 100+ □

4. What are the most common types of disputes you have been involved in which mediation was utilised for Magistrates Court civil disputes?

5. Were most of these disputes two-party or multi-party disputes?

Definition of Mediation (General and Court-connected)

6. In general terms, how do you define ‘mediation’?

7. To what extent, if any, does the definition of 'mediation' differ for mediations that occur outside the court setting to those that occur within the court setting?

Purpose of Mediation (General and Court-connected)

8. In general terms, what do you consider is the purpose of mediation (outside of the court-connected setting)?

9. What do you consider is the purpose of court-connected mediation within the Magistrates Court of SA?

General experiences of mediations

10. What have been your experiences of mediation in general practice? (that is, non-court-connected mediations)

Mediation in the Magistrates Court

11. How do your experiences of mediation that occurred outside of the court setting compare, if at all, to your experiences of Magistrates Court-connected mediations?

12. How do mediations within other court settings compare with mediations conducted within the Magistrates Court?

13. How does mediation within the Magistrates Court differ, if at all, from unassisted lawyer negotiations? (eg at ISCs or SCs?)

Mediation Process

14. What does the mediation process in the Magistrates Court entail? That is, before, during and after please provide a step-by-step account of the process.

A. Pre-Mediation

15. Do the parties usually attend a Preliminary Conference at which procedural matters are arranged? (what is discussed at the Preliminary Conference? Outline of the dispute; position papers; timetable for exchanging documents;)

16. Do the parties usually exchange position papers or issues statements (7-14 days) before the mediation? (and agreed bundle of documents)?

B. During Mediation

17. Does the mediator usually open in a joint session or does the mediator start with introductions to each party in their own private rooms?

18. When is it most appropriate to break into private sessions? (vs what happens in practice?)

C. Post-Mediation

19. Who "writes-up" the mediated agreement? (ie how much involvement does the mediator have in the agreement? Does the judge have a say regarding the terms of the agreement?)

Mediation **Models** in the Magistrates Court, **role** of the Mediator in Magistrates Court mediations and level of mediator **intervention**

20. What do you consider are the most common mediation practice models?

21. Which mediation practice model do you consider is most commonly used in practice in the Magistrates Court?

22. Which mediation model do you consider the mediators prefer to use? (does this have an impact on the results?)

23. Which mediation model do you consider lawyers prefer the mediator use? (does this have an impact on the results?)

24. What do you consider is the **role** of the mediator in mediations that occur outside of the court setting?

25. What do you consider is the **role** of the mediator during court-connected mediation in the Magistrates Court?

26. Do you prefer a lawyer-mediator or non-lawyer mediator?

27. What do you consider to be an appropriate level of mediator **intervention** in the mediation process and/or the problem?

28. To what extent, if any at all, does a mediator's professional background impact upon or influence their **role** as mediator?

29. To what extent, if any at all, does a mediator's professional background dictate what **behaviours or interventions** they consider are "appropriate" during mediation?

Timing of mediation

30. When is the most appropriate time to mediate Magistrates Court disputes and why? (eg before disclosure, after disclosure, after a listing conference, once Trial has commenced)

Successful Mediations

31. What do you consider constitutes "success" in mediation?

Future Predictions and Recommendations for Improvement

32. Do you consider that the use of court-connected mediation in the Magistrates Court will increase or decrease?

33. What effect, if any at all, will such an increase or decrease have on stakeholder roles?

34. Do you consider that there should be a "presumption of mediation"? That is, should mediation be presumed as a "first port of call" rather than an option available to disputants?

35. How can the current court-connected mediation program in the Magistrates Court be improved?

36. Are there any other comments that you would like to make?

ATTACHMENT E - Interview Questions version 2 (Magistrates)

Gender: Male □ Female □ Other □ Prefer not to say □

Age: 22 to 34 □ 35 to 44 □ 45 to 54 □ 55 to 64 □ 65 to 74 □ 75 and over □

Occupation: Magistrate □ Barrister □ Solicitor □ Barrister and Solicitor □ Mediator □ Other □

Predominant Stakeholder Role: Magistrate □ Barrister □ Solicitor □ Mediator □ Other □

Decade of Admission to the Supreme Court of South Australia or commencement of other Professional Practice:

1950s □ 1960s □ 1970s □ 1980s □ 1990s □ 2000s □ 2010s □

Practiced or educated in another jurisdiction? If so, where?

Decade of first practice as a Magistrate

1960s □ 1970s □ 1980s □ 1990s □ 2000s □ 2010s □

Main practice areas before your appointment to the Bench:

Administrative □ Building/Construction □ Civil □ Commercial □ Criminal □ Employment/Industrial Relations □ Family □ Neighbourhood Disputes □ Personal Injuries □ Property/Real Estate □ Wills and Estates □ Other □

In your role as Magistrate, do you have a particular focus on civil or criminal matters?

Mediation Education and Experiences

1. Did you study mediation or other ADR processes at a tertiary or other education setting?
2. Prior to your appointment to the Bench, had you had experience as a lawyer in mediations?
3. Prior to your appointment to the Bench, had you had experience as a mediator?
4. Have you had mediation training/are you an accredited mediator?
5. Decade of first practice as a mediator?

1960s □ 1970s □ 1980s □ 1990s □ 2000s □ 2010s □

   a. What impact, if any, did your mediation training and practice have on your practice as a Magistrate?

6. Did mediation feature as part of your Judicial induction and/or ongoing Judicial education process?
7. Has your attitude of mediation changed since your appointment to the Bench?

Mediation in the Magistrates Court

8. Approximately how many disputes (or percentage of disputes) within your case list have gone to mediation in the past twelve (12) months?

   1-10 □ 11-20 □ 21-30 □ 31-40□ 41-50 □ 51-60 □ 61-70 □ 71-80□ 81-90 □ 91-100 □ 100+ □

9. Of those disputes, do you consider the referral to mediation was primarily:
   a. party-driven;
   b. encouraged by the Court; or
   c. ordered by the Court?

10. In your experience, what are the most common types of disputes in which mediation is utilised for Magistrates Court civil disputes?

11. Do you consider most of these disputes would be two-party or multi-party disputes?

Definition of Mediation (General and Court-connected)

12. In general terms, how do you define 'mediation'?

13. To what extent, if any, does the definition of 'mediation' differ for mediations that occur outside the court setting to those that occur within the court setting?

Purpose of Mediation (General and Court-connected)

14. In general terms, what do you consider is the purpose of mediation (outside of the court-connected setting)?

15. What do you consider is the purpose of court-connected mediation within the Magistrates Court of SA?

General experiences of mediations

16. Prior to your appointment to the Bench, what had been your experiences of mediation in general practice? (that is, non-court-connected mediations)

Mediation in the Magistrates Court

17. Prior to your appointment to the Bench, how did your experiences of mediation that occurred outside of the court setting compare, if at all, to your experiences of Magistrates Court-connected mediations?

18. In your experience as a Magistrate, how do mediations within other court settings compare with mediations conducted within the Magistrates Court?

19. How does mediation within the Magistrates Court differ, if at all, from unassisted lawyer negotiations? (eg at ISCs or SCs?)

Mediation Process

20. What does the mediation process in the Magistrates Court entail? That is, before, during and after please provide a step-by-step account of the process.

A. Pre-Mediation

21. Do the parties usually attend a Preliminary Conference at which procedural matters are arranged? (what is discussed at the Preliminary Conference? Outline of the dispute; position papers; timetable for exchanging documents;)

22. Do the parties usually exchange position papers or issues statements (7-14 days) before the mediation? (and agreed bundle of documents)?

B. During Mediation

23. Does the mediator usually open in a joint session or does the mediator start with introductions to each party in their own private rooms?

24. When is it most appropriate to break into private sessions? (vs what happens in practice?)

C. Post-Mediation

25. Who "writes-up" the mediated agreement? (ie how much involvement does the mediator have in the agreement? Does the Magistrate have a say regarding the terms of the agreement?)

Mediation **Models** in the Magistrates Court, **role** of the Mediator in Magistrates Court mediations and level of mediator **intervention**

26. What do you consider are the most common mediation practice models?

27. Which mediation practice model do you consider is most commonly used in practice in the Magistrates Court?

28. Which mediation model do you consider the mediators prefer to use?

29. Which mediation model do you consider lawyers prefer the mediator use?

30. What do you consider is the **role** of the mediator in mediations that occur outside of the court setting?

31. What do you consider is the **role** of the mediator during court-connected mediation in the Magistrates Court?

32. Do you prefer a lawyer-mediator or non-lawyer mediator?

33. What do you consider to be an appropriate level of mediator **intervention** in the mediation process and/or the problem?

34. To what extent, if any at all, does a mediator's professional background impact upon or influence their **role** as mediator?

35. To what extent, if any at all, does a mediator's professional background dictate what **behaviours or interventions** they consider are "appropriate" during mediation?

Timing of mediation

36. When is the most appropriate time to mediate Magistrates Court disputes and why? (eg before disclosure, after disclosure, after a listing conference, once Trial has commenced)

Successful Mediations

37. What do you consider constitutes "success" in mediation?

Future Predictions and Recommendations for Improvement

38. Do you consider that the use of court-connected mediation in the Magistrates Court will increase or decrease?

39. What effect, if any at all, will such an increase or decrease have on stakeholder roles?

40. Do you consider that there should be a "presumption of mediation"? That is, should mediation be presumed as a "first port of call" rather than an option available to disputants?

41. How can the current court-connected mediation program in the Magistrates Court be improved?

42. Are there any other comments that you would like to make?

APPENDIX C: INTERVIEWEE DEMOGRAPHIC INFORMATION AND ACTIONS MEDIATED IN THE COURT

I provided a detailed explanation of the research methodology and discussed some potential limitations of the research in Appendix A.

In this Appendix I provide a summary of interviewee demographics to contextualise the sample size. I then provide a summary of the number and types of actions Stakeholders reported being involved in, either directly or indirectly, in mediations within the Court in the past 12 months prior to interview. I conducted interviews between December 2017 to May 2018.[3400] This discussion also provides background to the sample size and sheds further light on the scale of the Court's mediation program,[3401] and the types of actions that tend to be mediated.

The Court is divided into the following Divisions: Civil (General Claims), Civil (Consumer and Business), Civil (Minor Claims), Criminal and Petty Sessions.[3402] The jurisdictional limit of the Minor Claims Division is <$12,000.00 and the jurisdictional limit of the General Claims Division is >$12,0001.00 to $100,000.00.[3403] The Court's civil divisions impact upon the procedure for referring 'appropriate' actions to mediation,[3404] the involvement or otherwise of lawyers at mediation[3405] and 'who' writes up the Settlement Agreement during mediation.[3406] The divisions are also relevant to exploration of both interviewee demographics and the actions mediated in the Court that I discuss in this Chapter.

A *Interviewee Demographics*

Twenty-eight interviewees participated in the semi-structured interviews, which included five magistrates, seven lawyers and 16 mediators. Approximately 39% identified as being female and 61% identified as being male. All were over 18 and fell into different age brackets. The majority of interviewees (75%) reported being admitted to the Supreme Court of South Australia with 38.1% being admitted in the 1990s. This is unsurprising given the sample included five magistrates and seven lawyers.

Apart from the magistrates, many interviewees identified having more than one occupation, for example, barrister and solicitor, solicitor and mediator or mediator and 'other'. To differentiate between lawyers that practice solely as barristers as opposed to those that practice as solicitors I identified them as follows: 'Lawyer (Barrister)' for the barristers and 'Lawyer' for the solicitors (collectively referred to throughout the thesis as 'lawyers' 1 to 7).[3407]

I summarise in table format below quantitative data relating to each Stakeholder group's characteristics, main practice areas and levels of mediation education and training. The tables are descriptive in nature only and provide contextual background to the sample size. I have not undertaken statistical analyses to delineate the differences between any of the quantitative data sets, as this was not central to exploration of the three research questions. Any limitations in the quantitative data are not prejudicial to the research as the aim of the study was not to obtain

3400 See also Appendix A: Qualitative Research Methodology at 255.
3401 See Chapter III.
3402 Ibid 85.
3403 See nn 925 and 928.
3404 See above Chapter VI at Part A.
3405 See above n 929.
3406 See above Chapter VI at 196–200.
3407 See also Appendix A: Qualitative Research Methodology at 251–3.

statistically representative data sets from which to draw flawless empirical generalisations, but to obtain rich and descriptive data.[3408]

1 *Group Characteristics*

The magistrates were a largely homogenous group. The majority are more recently appointed to the Bench. Most magistrates reported not having experience as a mediator before their appointment to the Bench. However, one first practiced as a mediator (within their capacity as a magistrate) in the 1990s.[3409] Only one of the more recently appointed magistrates reported previously being employed as a conciliation officer at a South Australian Employment Tribunal as well as having undertaken a small number of *pro bono* mediations within private practice in the 2010s, before their appointment to the bench.[3410]

Magistrate Characteristics	**Number**	**Percentage**
Gender		
Female	3	60%
Male	2	40%
Age Bracket		
35 to 44	1	20%
45 to 54	1	20%
55 to 64	1	20%
65 to 74	2	40%
Occupation		
Magistrate	5	100%
Predominant Stakeholder Role		
Magistrate	5	100%
Decade of Admission to the Supreme Court of South Australia		
1970s	2	40%
1980s	1	20%
1990s	2	40%
Decade of First Practice as a Magistrate		
1970s	1	20%
1980s	0	0
1990s	0	0
2000s	1	20%
2010s	3	60%
Decade of First Practice as a Mediator		
1980s	0	0
1990s	1	20%
2000s	0	0
2010s	1	20%

Figure 4: Characteristics of Magistrates

The lawyers were also a largely homogenous group. Most lawyers identified as either barrister or solicitor. The proportion of barristers interviewed reflects the more junior members of the South Australian bar as no Senior Counsel took part in the research. Whilst the extent to which Senior Counsel are taking part in mediations within the General Division is unclear, I contend that their regular attendance would be unlikely given the potential costs involved in briefing them to appear in addition to junior counsel. Furthermore, it is unlikely that Senior Counsel appear in mediations within the Minor Claims Division as such actions are not intended to involve lawyers.[3411]

3408 See generally Ojelabi and Boyle (n 17) 20–1. See also nn 115, 123, 3081, 3329 and 3339.
3409 Magistrate 1.
3410 Magistrate 3.
3411 See Chapter I at 23 and Chapter III at 85.

Only one lawyer reported practising as a mediator in private mediations outside of the Court.[3412]

Lawyer Characteristics	Number	Percentage
Gender		
Female	1	14%
Male	6	86%
Age Bracket		
22 to 34	3	43%
35 to 44	2	28.5%
45 to 54	2	28.5%
Occupation		
Barrister	3	43%
Barrister and solicitor	1	14%
Solicitor	2	28.5%
Solicitor and mediator	1	14%
Predominant Stakeholder Role		
Barrister	3	43%
Barrister and solicitor	1	14%
Solicitor	3	43%
Decade of Admission to the Supreme Court of South Australia		
1990s	3	43%
2000s	4	57%
Decade of First Practice as a Mediator		
1990s	1	14%

Figure 5: Characteristics of Lawyers

The mediators were a more heterogeneous group than the magistrates and lawyers. This may be explained by the larger sample size of mediators than magistrates and lawyers. Similar to the magistrates, most mediators ranged in age brackets between 55 to 74, which suggests some may have transitioned from their traditional occupation into mediation practice in the later stages of their careers.

The mediators fell into two groups: the lawyer-mediators (56.25%) and the non-lawyer-mediators (43.75%). This finding coincides with some Australian literature that suggests most mediators in court-connected programs tend to be lawyer- or barrister-mediators.[3413] This is in contrast to some Canadian research that shows mediators in the Saskatchewan Queen's Bench program are generally non-lawyers.[3414]

Seven lawyer-mediators reported being either barristers or solicitors. Whilst three mediators reported solely being 'mediators', two of them reported being admitted to the Supreme Court of South Australia. None of the lawyer-mediators reported being former judicial officers and none of the barrister-mediators were Senior Counsel, though most reported having substantial civil litigation experience.[3415]

However, seven mediators reported not being lawyers. This non-lawyer sample included individuals working within the spheres of accounting, business advisory and consulting, engineering, contracts management, general dispute resolution services, employment within the Court and being members of various tribunals.

3412 Lawyer 1.

3413 See, eg, Rundle, 'Court-Connected Mediation Practice' (n 38) 217; Sourdin, *Mediation in the Supreme and County Courts of Victoria* (n 42) i, 10, 67.

3414 See, eg, Macfarlane and Keet (n 323) 693. But see 35% of mediators in the Ontario Court Mandatory Mediation Program are non-lawyer-mediators: Relis (n 360) 31.

3415 See also Wissler, 'Court-Connected Mediation in General Civil Cases' (n 363) 654–5.

Most mediators reported first practising as mediators in the 2000s and 2010s.

Mediator Characteristics	Number	Percentage
Gender		
Female	7	43.75%
Male	9	56.25%
Age Bracket		
35 to 44	2	12.5%
45 to 54	3	18.75%
55 to 64	7	43.75%
65 to 74	4	25%
Occupation		
Barrister	0	0
Barrister and solicitor	0	0
Barrister, solicitor and mediator	3	18.75%
Barrister and mediator	1	6.25%
Solicitor	0	0
Solicitor and mediator	2	12.5%
Solicitor and mediator and other	1	6.25%
Mediator	3	18.75%
Mediator and other	2	12.5%
'Other'	4	25%
Predominant Stakeholder Role		
Barrister	0	0
Barrister and solicitor	0	0
Solicitor	0	0
Solicitor and mediator*	2	12.5%
Mediator	14	87.5%
Decade of Admission to the Supreme Court of South Australia		
1960s	1	6.25%
1970s	1	6.25%
1980s	2	12.5%
1990s	3	18.75%
2000s	2	12.5%
Decade of Commencement of Other Professional Practice (Not being law)		
1960s	1	6.25%
1970s	1	6.25%
1980s	2	12.5%
1990s	0	0
2000s	1	6.25%
2010s	2	12.5%
Decade of First Practice as a Mediator		
1980s	1	6.25%
1990s	4	25%
2000s	6	37.5%
2010s	5	31.25%

Figure 6: Characteristics of Mediators

* These two interviewees reported having two predominant Stakeholder roles; namely, by being Panel Mediators and also acting as solicitors within this jurisdiction when not acting as mediators within the Court.

2 *Main Practice Areas*

Most Stakeholders reported that their main practice areas include civil and commercial disputes, in particular building/construction disputes.

The magistrates were a largely homogenous group. Prior to their appointment to the Bench, most of the magistrates reported practising predominantly within the criminal, civil and commercial (transactions and disputes) spheres.

Main Practice Areas	**Reported Number of Times**
Magistrates (prior to their appointment to the Bench)	
Criminal	3
Civil	2
Commercial (transactions and disputes)	2
Property/real estate	2
Building/construction	1
Wills and estates	1
Family	1
Personal injuries	1
Administrative	1
'Other'	Trade Practices (1) Licensing and gaming (1) Insurance and media (1) Health law (1) Governance (1) Crown Solicitor's Office (1)

Figure 6: Main Practice Areas of Magistrates

The magistrates reported having mixed experiences of mediation in general practice before their appointment to the Bench. One magistrate stated that 'formal' mediation 'did not exist' prior to their appointment to the Bench in the 1970s.[3416] However, an earlier iteration of contemporary mediation 'which is long forgotten' existed in the *Conciliation Act 1929* (SA),[3417] which empowered judicial officers to interrupt a proceeding and 'conciliate' at any time. Nonetheless, this magistrate described a paramount part of the lawyer's role is understanding that your client is best served by managing and resolving disputes without resort to litigation. This magistrate described one of the 'first lessons' taught by their then principal during their on-the-job training as a commercial solicitor was:

> 'if you give the file to the litigation section, you failed the client.' So implicit in that is that you 'mediate', but it wasn't called mediation in those days. It didn't have a name. You might run around waving sticks at each other but you were all the time trying to find a middle ground.[3418]

Another magistrate also reported not having any experience as a lawyer in mediations before being appointed to the Bench, however, had experience in informal settlement conferences and conciliation conferences 'aimed at trying to settle something' though these were not 'formal mediations' and no third party 'mediator' was involved in the process.[3419]

Two of the more recently appointed magistrates had experience as lawyers in mediations before their appointment to the Bench.[3420] Specifically, one had broad experience of mediations as a representative of commercial parties in a number of very large and complex commercial disputes including participants up to 50 people with Federal Court and Supreme Court Judges as mediators, often with support of Senior Counsel and a team of other lawyers. Another magistrate had a range of mediation experiences within the personal injury arena, the vast proportion of which were private mediations arranged between the parties, with only a small number of mediations within the District

3416 Magistrate 1.
3417 *Conciliation Act 1929* (SA), repealed by *Statutes Amendment (Mediation, Arbitration and Referral) Act 1996* (SA) s 12.
3418 Magistrate 1.
3419 Magistrate 2.
3420 Magistrate 3 and Magistrate 4.

Court. However, the three more recently appointed magistrates had not participated as lawyers in mediation within the Court whilst in private practice,[3421] and were thus not familiar with mediation specifically within the Court before their appointment to the Bench.

The lawyers were also a largely homogenous group and reported practising predominantly within the civil and commercial (transactions and disputes) spheres.

Main Practice Areas	Reported Number of Times
Lawyers	
Civil	6
Commercial (transactions and disputes)	6
Wills and estates	6
Building/construction	5
Employment/industrial relations	4
Property/real estate	4
Criminal	3
Family	3
Neighbourhood disputes	3
Personal injuries	3
Administrative	1
'Other'	Insolvency (2) Workers Compensation (2) Corporate Governance (1) Trade Practices (1) Superannuation (1) Sexual harassment claims (1) Guardianship/administration disputes (1)

Figure 7: Main Practice Areas of Lawyers

The mediators were a more heterogeneous group than the magistrates and lawyers and they reported practising predominantly within the commercial, building/construction, civil, and employment/industrial relations spheres. They also reported practising in an eclectic array of 'other' areas.

Main Practice Areas	Reported Number of Times
Mediators	
Commercial disputes	14
Building/construction	11
Civil	9
Employment/industrial relations	9
Neighbourhood disputes	8
Personal injuries	6
Property/real estate	5
Wills and estates	4
Family	4
Criminal	Intervention Order mediations under the *Intervention Orders (Prevention of Abuse Act) 2009* (SA) (2)
Administrative	1
'Other'	Commercial small business (2) Franchising (2) Residential Tenancies (1) Intellectual Property (1) Insurance (1) Partnership disputes (1) Workers compensation in tribunals (1) Australian Defence Force (1)

[3421] Magistrate 3, Magistrate 4 and Magistrate 5.

	Community Mediation: Fences, Dogs, Noise (1) Restorative Engagement (1)

Figure 8: Main Practices Areas of Mediators

These findings largely coincide with the general consensus amongst Stakeholders that the most common types of actions mediated within the Court are building/construction and commercial disputes, which I discuss below.

3 *Mediation Education and Training*

The mediators reported having undergone a higher level of mediation education at a tertiary level and training through various training providers than the magistrates and the lawyers. However, a minority of magistrates and one lawyer reported being NMAS accredited.

The magistrates had mixed levels of mediation education and training. Only one of the magistrates reported having studied mediation at a tertiary level as part of the LLB and the Graduate Certificate of Legal Practice.[3422] Two of the magistrates reported that mediation 'hadn't been invented' at the time they had completed their Bachelor of Law degrees.[3423] This view coincides with the fact that mediation only formally started being taught as part of the law school curriculum in Australia in more recent years.[3424] Three of the magistrates reported having undergone mediation training through LEADR, two of whom reported being accredited mediators.[3425]

Only one magistrate reported that mediation featured as part of the judicial training and reported having one session about mediation offered through the Court and meeting the Court's internal mediator.[3426] One magistrate reported that mediation did not feature as part of judicial training but it did feature as part of ongoing judicial education.[3427] This coincides with the mediation 'pilot-project' in the Adelaide Civil Registry in 1996,[3428] where a number of magistrates and registrars had completed mediator training offered by LEADR. Conversely, the other three magistrates reported that mediation did not feature as part of their judicial training or ongoing judicial education.[3429] One magistrate reported that mediation should have featured as part of the judicial training, stating that they had not sat through a mediation within the Court to experience what the mediator 'does' and it would be beneficial to know more about what the 'process' of mediation 'looks like' in practice within the Court.[3430] This coincides with the finding that the magistrates unanimously reported being uncertain as to what precisely occurs during mediation given they take no part in it.[3431]

Mediation Education and Training	**Reported Number of Times**
Magistrates	
Studied mediation at a tertiary level	1
Industry training bodies	LEADR (3)
NMAS accreditation	2

3422 Magistrate 4.
3423 Magistrate 1 and Magistrate 3.
3424 See, eg, Douglas, 'The Evolution of Lawyers' Professional Identity' (n 388); Amanda Carrigan, 'Why Alternative Dispute Resolution Skills are Essential for Business Students' (2012) 5(1) *Journal of the Australasian Law Teachers Association* 115; Menkel-Meadow, 'To Solve Problems, Not Make Them' (n 74).
3425 Magistrate 1; Magistrate 3; Magistrate 2 completed LEADR training but was not an accredited mediator.
3426 Magistrate 5.
3427 Magistrate 1.
3428 See above n 938.
3429 Magistrate 2; Magistrate 3; Magistrate 4.
3430 Magistrate 4.
3431 See above Chapter V at 131 and Chapter VI at 181 and 189.

Figure 9: Mediation Education and Training of Magistrates

Three of the magistrates reported that their mediation training and practice had an impact on their practice as a magistrate. One stated that mediation training gave them a better understanding of engaging constructively with disputants, which did not feature in their legal training. For example, active listening, reframing questions, understanding the importance of language and its effects, the emotional aspects of disputes incorporating ego and pride and 'identifying the "real factor behind the dispute", which is often not anything to do with the legal dispute.'[3432]

Another reported it 'taught me how to approach litigants with a view to proposing an alternative to going to trial and it made me feel more confident that that approach could be appealing to litigants.'[3433] Another reported gaining better understanding as to how mediation is approached so it can be best explained to disputants and improving skills such as active listening and ensuring each party has a voice.[3434] In saying that, this magistrate made it clear that the LEADR model is difficult to apply within the magistrate's role:

> My role is to determine matters, rather than to spend a great deal of time trying to find what really is underlying the party's claim generally. Parties, when they bring matters to the Court, they want a Magistrate to decide the thing for them. However, they are prepared to listen to a Magistrate when he or she tells them to mediate. So that's some value there.[3435]

I discuss the referral of actions to mediation in further detail below.[3436]

The lawyers also had varying levels of mediation education and training. A minority reported having studied mediation at a tertiary level. One reported that an introduction to mediation topic featured in the final year of the law degree at Flinders University, though had not undergone formal training and was not an accredited mediator.[3437] Another reported that there was no standalone subject called 'mediation' or 'ADR' as part of the University of Adelaide LLB but there was a mediation component within the civil procedure subject as well as both within Graduate Diploma of Legal Practice and the Bar Reader's Course, though had not undergone formal training and was not an accredited mediator.[3438] Another reported only studying mediation as part of the GDLP, had not undergone formal training and was not an accredited mediator.[3439]

One lawyer reported not having studied mediation as part of the LLB and instead underwent mediation training through an external mediation provider that was offered at the University of Adelaide.[3440] One lawyer did not study mediation or other ADR processes at a tertiary or other education setting, though had completed mediation training through LEADR.[3441] Two reported not having studied mediation at a tertiary or other education setting, had not undergone mediation training and were not accredited mediators.[3442] These findings coincide with Rundle's finding that 14% of her sample size indicated that they had undertaken any 'formal' negotiation or mediation training and most had obtained their understandings of court-connected mediation through experience.[3443] The findings that most lawyers in the sample size had not studied mediation at a

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3432 Magistrate 1. See also nn 1033, 1343, 1409, 1833, 1853 and 2428.
3433 Magistrate 2.
3434 Magistrate 3.
3435 Magistrate 3.
3436 See also above Chapter VI.
3437 Lawyer 6.
3438 Law 2 (Bar 1).
3439 Law 3.
3440 Law 5 (Bar 3) was unable to recall the name of the external provider and reported having attained NMAS accreditation in 2008 but does not practice as a mediator.
3441 Lawyer 1 had not applied for NMAS accreditation, yet undertakes private mediations outside of the Court.
3442 Law 4 (Bar 2) and Lawyer 7.
3443 Rundle, 'Court-Connected Mediation Practice' (n 38) 226–7, 238.

tertiary level may be a reflection of the fact that the lawyers were all admitted to practice in the 1990s and 2000s. Conversely, ADR processes such as mediation have more recently become integrated into legal practice and is now widely taught as part of law school curricula in Australia and abroad.[3444]

Mediation Education and Training	Reported Number of Times
Lawyers	
Studied mediation at a tertiary level	2
Industry training bodies	LEADR (1) Unnamed external provider through Adelaide University (1)
NMAS accreditation	1

Figure 10: Mediation Education and Training of Lawyers

The mediators also had mixed levels of mediation education and training, the majority of which reported having studied mediation at a tertiary level as well as undertaking training through different industry training bodies.

Mediation Education and Training	Reported Number of Times
Mediators	
Studied mediation at a tertiary level	Graduate Certificate in Mediation (Uni SA) (3) Masters in Mediation and Conflict Resolution (UniSA) (3) Practitioner's Certificate in Mediation and Conciliation (IAMA) (2) Professional Certificate in Arbitration and Mediation (University of Adelaide) (2) Bond University Mediation Course (2) University of NSW (2) Graduate Certificate in Mediation (Adelaide University) (1) Monash University (1)[3445] University of Technology (Sydney) (1) Final year of LLB at University of Adelaide (1)
Industry training bodies	RI (formerly called LEADR) (9) IAMA (3) Relationships Australia (2) Mediation courses from unnamed community mediation service providers (2) CIArb (1) Attorney General's Department of NSW (1) Jim Cyngler in transformative mediation (1)
NMAS accreditation	16
Family Dispute Resolution Practitioner Accreditation[3446]	3

Figure 11: Levels of Mediation Education and Training of Mediators

Each of the mediators reported being NMAS accredited, which accords with the requirements in the *Rules*.[3447]

B Actions Mediated in the Court

In this part of the discussion I explore the number and types of actions Stakeholders reported being involved in, either directly or indirectly, in mediations within the Court.

3444 See above n 74.

3445 Bill Eddy, 'Law 5421: Managing High Conflict Personalities in Legal Disputes' (2015).

3446 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).

3447 See above Chapter III at 88.

I summarise in table format below quantitative data relating to the types of actions that Stakeholders reported about the number of actions mediated in the Court in the past 12 months; the types of actions that are most commonly mediated within the Court, from the most to the least mentioned; and the number of parties to each action. As indicated above, the tables are descriptive in nature only.

The data acts as a baseline indicator of the number of mediations of civil actions Stakeholders reported being involved in within the Court. As discussed in the previous Appendix, I have not confirmed the statistical accuracy of the quantitative data, for example, by comparing what Stakeholders reported against court records, as this was not central to exploration of the three research questions.[3448]

1 *Number of Mediations in the Past 12 Months*

A convergence of views existed amongst Stakeholders regarding the number of actions mediated in the past 12 months. The general consensus amongst the magistrates was that they referred only a small percentage of actions within their case list to mediation within the past 12 months, with a higher amount of actions within the Minor Claims Division referred to mediation than actions within the General Division. This finding coincides with what was reported by most lawyers and mediators, who reported being involved in one to 10 mediations in the past 12 months.

However, unlike the lawyers and mediators, who described the actual number of mediations, three magistrates described the referral of actions within their case list to mediation in percentage terms whereas only one reported actual number of actions. This is reflected in the table below.[3449]

When compared with the quantitative data relating to the number of mediations of civil actions conducted within the Court from 1999 to 2016,[3450] the number of actions the magistrates reported referring to mediation and the number of actions lawyers and mediators reported being involved in appears low. However, given the gaps I have identified in the CAA Reports,[3451] I cannot confirm the statistical accuracy of many quantitative aspects of this data, such as the main proportion of actions mediated in the Court and the different types of actions that fall within each of the Court's separate Divisions.[3452]

One magistrate reported presiding predominantly over criminal actions and occasionally over civil cases 'when requested', so 'virtually none' of the actions within this magistrate's case list were referred to mediation in the past 12 months. Whilst it may appear that this magistrate merely speculated about mediation in the Court, this is not a limitation of the research given that this magistrate reported spending approximately 15 years in the civil jurisdiction, during which they referred actions to mediation. Furthermore, when presiding in the Warden's Court mining jurisdiction, this magistrate reported that 'probably all of' the actions are addressed by 'a form of mediation' conducted by the warden (that is, by this magistrate), which this magistrate estimated as being low in number, 'probably two or three cases.'[3453] Consideration of the Warden's Court is not central to this thesis and not explored further.[3454]

3448 See also Appendix A: Qualitative Research Methodology at 258, 262 and 267–8.

3449 See also Appendix A: Qualitative Research Methodology at 296.

3450 See above Chapter III at 90. See also Appendix K: Number of Civil Actions Mediated in the Court by the Court's Internal Mediators from 2000 to 2016 and Number of Civil Actions Mediated by External Panel Mediators from 2013 to 2016.

3451 See above Chapter III at 91.

3452 See above Chapter VII.

3453 Magistrate 1.

3454 See also Appendix A: Qualitative Research Methodology at 262.

Another magistrate made a distinction between 'formal' and 'informal' mediation, with the former connoting referral of actions to mediation to be conducted by one of the Court's internal or external mediators and the latter connoting a less formal 'kind of limited mediation' conducted by the Court itself at the first directions hearing, predominantly in Minor Claims.[3455] This magistrate reported referring less than 10% of actions to formal mediation in the past 12 months.

This magistrate also distinguished between two types of 'informal' mediation. On one hand, are informal 'hands-off' mediations, where the Court suggests to disputants that they exit the courtroom with a tipstaff to find somewhere to talk in an effort to see if they can reach a resolution, which coincides with descriptions of a settlement conference or conciliation conference without the assistance of an independent third party to facilitate the negotiation process.[3456] On the other hand, this magistrate described conducting 'hands-on' mediations, where disputants are unable to reach settlement themselves, and having to 'get a bit more hands on, set them in a particular direction and suggest the terms of the settlement to them', which coincides with descriptions of conciliation, early neutral evaluation or an quasi-judicial intimation.[3457] This magistrate reported conducting 'probably 10-15%, perhaps more' by informal mediation mainly in the context of Minor Claims. Whilst scope exists in the *Act* for the Court itself to 'endeavour to achieve a negotiated settlement of an action or resolution of any issues arising in an action',[3458] Judicial Mediation is not central to this thesis.[3459]

Two of the magistrates highlighted the distinction between the Minor Claims Division and the General Division. One reported referring approximately 50% of Minor Claims to mediation and 'a much smaller number, less than 10%' of actions in the General Division in the past 12 months.[3460] Another reported referring approximately 60-70 Minor Claims to mediation, equating to approximately 25% or 30% of actions, whereas 'it's a lot harder to get matters within the General Division to mediation, probably only one or two per cent of claims.'[3461]

One magistrate referred approximately 50 actions to mediation in the past 12 months.[3462] I discuss the types of actions referred to mediation by magistrates in further detail below.[3463]

Mediations in the Past 12 Months	Magistrate	Percentage
Referrals by Magistrates		
None	Magistrate 1	20%
Less than 10% of actions	Magistrate 2	20%
50% of Minor Claims less than 10% of general actions	Magistrate 3	20%
25% or 30% of Minor Claims 1% or 2% of general actions	Magistrate 4	20%
50 actions	Magistrate 5	20%

Figure 12: Number of Referral of Actions to Mediation in the Past 12 Months

All of the lawyers reported being involved in one to 10 mediations in the Court in the past 12 months. This finding is comparable with the findings in Rundle's research, where 34 out of the 39 lawyers reported that they had participated in one to 10 mediations in the past twelve months and five had participated in between 11-20.[3464] None of the lawyers in the sample provided reasons for

3455 Magistrate 2. See above Chapter VI.
3456 See above Chapter III at 94.
3457 Ibid.
3458 *The Act* (n 322) ss 27(2b), 27(2c).
3459 See above Chapter I at 14 and Chapter III at 94.
3460 Magistrate 3.
3461 Magistrate 4.
3462 Magistrate 5.
3463 See above Chapter VI.
3464 Rundle, 'Court-Connected Mediation Practice' (n 38) 234.

why they had been involved in the limited number of mediations and none of them commented on whether they considered the number of referrals to mediation as being 'low'.

This finding might also be explained by the distinction between the Minor Claims Division and the General Division. For example, as indicated above, Minor Claims Division actions are not intended to involve lawyers.[3465] It is also unlikely that many lawyers in South Australia practice solely in the Minor Claims Division. Furthermore, mediation of actions within the General Claims Division may be less prevalent than in the Minor Claims Division. The inference to be drawn from this data is that disputants are not always legally represented in mediations or that lawyers do not always attend mediations with their clients.[3466] This inference coincides with the finding that some lawyers and mediators reported that disputants are occasionally unrepresented in mediations in the Court.[3467] A further inference to be drawn from the low participation rate in mediation by the lawyers is that some lawyers and disputants may remain unaware of the mediation opportunity or may not have an appetite to mediate.[3468] It also indicates that magistrates may not be ordering *all* actions to mediation as a matter of course, subject to those that are 'not suitable' for mediation, as expected by a minority of mediators.[3469]

Mediations Attended in the Past 12 Months	**Number**	**Percentage**
Lawyers		
1-10	7	100%

Figure 13: Number of Mediations Attended in the Past 12 Months

The Court's internal mediator at the time reported undertaking the lion's share of mediations, estimated at being approximately 400 mediations.[3470] This was corroborated by another mediator who suggested that the Court's internal mediator undertakes a significantly higher number of mediations of Minor Civil claims than the total number of actions referred by the Court to the Panel.[3471] However, the internal mediator did not specify whether this large figure reflected only mediations or whether it also included the two 'hybrid' ADR processes, which I discuss in further detail below. The Court's internal mediator also reported typically mediating most of the Minor Claims, though reported some are referred to the Court's *pro bono* Panel of Private Qualified Mediators. This coincides with Rundle's finding that the registrar, deputy registrar and an internal court employee conduct the majority of mediations in the Supreme Court of Tasmania.[3472]

In contrast to the Court's internal mediator, the overwhelming majority of Panel mediators reported mediating one to 10 actions within the Court over the past 12 months. This finding may be explained by the fact that the Court's internal mediator mediates actions in both the Minor Claims and General Division on a full-time basis in addition to conducting mediations where disputants are impecunious.[3473] Furthermore, disputants in the General Division may be unwilling to incur further costs in having their action mediated by a Panel Mediator and instead prefer to proceed down the litigation path.

Actions Mediated in the Past 12 Months	**Number**	**Percentage**

3465 See Chapter I at 23 and Chapter III at 86.

3466 Cf Rundle's research suggests disputants are usually legally represented in mediations in the Supreme Court of Tasmania: Rundle, 'Court-Connected Mediation Practice' (n 38) 221, 224.

3467 See also nn 129, 2207, 2891, 3215 and 3497.

3468 See nn 992–3 and 2909.

3469 See above Chapter VI at 174–5.

3470 I have omitted pinpoint references here so as not to identify the Court's then internal mediator.

3471 Mediator 9.

3472 Rundle, 'Court-Connected Mediation Practice' (n 38) 212.

3473 *CAA 2013–14 Annual Report* (n 920) 30.

Mediators		
1-10	12	75%
11-20	2	12.5%
21-30	0	0
31-40	1	6.25%
100+	1	6.25%

Figure 14: Number of Actions Mediated in the Past 12 Months

An outlier existed amongst the Panel who reported mediating between 31-40 actions in the past 12 months. This mediator stated that they were the most utilised out of all the Panel mediators but provided no reasons as to why this mediator believed this to be so. The higher number of referrals to this particular mediator as opposed to the lower number of actions referred to the majority of the other Panel mediators might be explained by 'familiarity' with lawyers and the mediator selection process; that is, lawyers in this jurisdiction and other repeat players[3474] may be selecting this in lieu of other Panel mediators because of this mediator's subject-matter expertise or as a consequence of this mediator having a perceived high level of settlement rate success. This inference is supported by the comments of one lawyer who stated that 'mediator selection as an important issue' and reported that lawyers who practice within this jurisdiction are aware of which mediators have subject-matter expertise in building/construction actions and tend to jointly select such mediators with the lawyers on other side in advance of mediation.[3475] However, unlike Rundle, I did not identify any risks of 'over-familiarity' between the mediators and lawyers who practice within this jurisdiction, such as less objectivity, less being at 'arm's length' and potential for conflicts of interest *et cetera*.[3476]

Apart from the Court's internal mediator, none of the Panel mediators provided reasons for why they had been referred a limited number of actions for mediation by the Court and none of them commented on whether they considered the number of referrals to mediation as being 'low'. Indeed, one mediator stated that the daily cause list indicates that mediations take place in the Court's Conference Rooms on a daily basis.[3477] However, this mediator may have been under a mistaken impression that a higher number of mediations occur in the Court on a daily basis than may actually be the case. Moreover, as indicated above, it is likely that the Court's internal mediator is undertaking the majority of these mediations listed in the daily cause list.

Whilst it is difficult to confirm whether more mediations occur within the Minor Claims Division than the General Claims Division, as suggested by some Stakeholders,[3478] the low number of referrals to Panel Mediators is reflected in the quantitative data relating to the number of mediations of civil actions conducted within the Court from 1999 to 2016.[3479]

2 *Types of Actions Mediated*

The general consensus amongst Stakeholders is that the most common types of actions mediated within the Court are building/construction and commercial disputes. This finding appears reasonably representative of the overall nature of actions filed within the Court and coincides with

3474 See above Chapter I at 16 and VII at 231–3.

3475 Lawyer 3.

3476 Rundle also acknowledged that familiarity may also assist foster an atmosphere of cooperation and joint problem-solving: Rundle, 'Court-Connected Mediation Practice' (n 38) 221, 224–225, 238–9.

3477 Mediator 14.

3478 Magistrate 3; Magistrate 4; Mediator 5; Mediator 7; Mediator 15.

3479 See above Chapter III at 91. See also Appendix K: Number of Civil Actions Mediated in the Court by the Court's Internal Mediators from 2000 to 2016 and Number of Civil Actions Mediated by External Panel Mediators from 2013 to 2016.

the Court's General Claims, Minor Claims, Consumer and Business Divisions.[3480] It also coincides with data relating to interviewees' main practice areas discussed above.

All of the magistrates reported that building disputes are the most commonly mediated types of action within the Court. One magistrate reported actively encouraging mediation in building disputes in the General Division, particularly ones with 'a list of issues' for they lend themselves particularly well to mediation.[3481]

Types of Actions Referred to Mediation	Reported Number of Times
Magistrates	
Building/construction disputes	5
Fencing disputes according to the *Fences Act 1975* (SA) and boundary disputes	4
Neighbourhood disputes	4
Lease disputes according to the *Retail and Commercial Leases Act 1995* (SA)	2
Commercial disputes	2 (debts and loans)
Strata title and community title disputes	1
Mediations in the criminal jurisdiction according to the *Intervention Orders (Prevention of Abuse) Act 2009* (SA)	1

Figure 15: Types of Actions Referred to Mediation

Furthermore, the magistrates reported that a hybrid co-mediation model occurs in building and construction disputes, during which the Court's internal mediator conducts a 'strictly facilitative' mediation with the active involvement of the Court's internal building expert.[3482] One magistrate explained that the Court's internal mediator and building expert work effectively together, particularly in Minor Claims, addressing defect by defect, which 'is really useful' and an efficient use of time because if the action 'doesn't resolve, then we get the expert to send us a report and the parties are on notice about that what's in the report is likely to be accepted by the Court.[3483] This hybrid model is separate to the conciliation process undertaken by the Court's internal building expert for actions within the Court's building jurisdiction.[3484] However, these two processes are not central to the exploration of mediation in this thesis.[3485]

Two magistrates reported that the 'standard go-to' actions in which mediation is utilised within the Court are those involving more of a 'relational' aspect – such as retail and commercial leases, fencing and neighbourhood disputes – given the potential to address 'ongoing relationship issues'.[3486] For example, one magistrate stated:

> And I tell people "beyond anything else, when this matter is resolved, you're still going to live next door to each other. If you can reach an agreement about it, think of how much better that will be for your ongoing relations and it will then also better facilitate further discussions if you need to have them in the future."[3487]

Similarly, another magistrate also reported actively encouraging disputants involved fencing, building, neighbourhood and inter-family disputes relating to debts and loans to attempt mediation

3480 See above Chapter III at 85.
3481 Magistrate 4.
3482 See above Chapter III at 94.
3483 Magistrate 4.
3484 See above Chapter III at 94.
3485 Ibid.
3486 Magistrate 1; Magistrate 4.
3487 Magistrate 4.

'just to try to maintain a relationship in the future and because there's more at stake for them personally. Obviously a court proceeding isn't going to help.'[3488]

One magistrate reported mediation as being appropriate for many actions within the General Division, however, reported not typically referring personal injury actions to mediation.[3489] This view does not take into account the literature that recognises the benefits direct disputant participation, communication and exploration of psychological needs in personal injury mediation over monetary issues.[3490] Similarly, two magistrates reported mediation as appropriate for the majority of actions within the Minor Claims Division, apart from 'crash/bash' claims (property damage caused by motor vehicle accidents).[3491] This finding differs from Rundle's finding that torts claims (personal injuries actions) represent the majority of mediations conducted in the Supreme Court of Tasmania.[3492] However, an expectation gap exists between these magistrates and an outlier among the lawyers who reported most of the mediations this lawyer was involved in in the Court were personal injuries actions.[3493] This finding reinforces an expectation gap between mediators and magistrates relating to referral practices.[3494]

None of the lawyers provided commentary for why most actions they attended at mediation within the Court tend to be building/construction and commercial disputes, nor did any of them report being involved in mediations within the Minor Claims Division.[3495] This finding coincides with the expectation of one of the magistrates that lawyers do not attend mediations within the Minor Claims Division[3496] and the experience of one mediator who expressly stated that disputants in most mediations in the Minor Claims Division are unrepresented.[3497] However, another mediator reported having occasionally mediated actions in the Minor Claims Division where lawyers have sought to be involved and, after obtaining the consent of all participants, have been active participants in 'even though they are not meant to be involved in minor civil actions'.[3498]

Types of Actions Referred to Mediation	Reported Number of Times
Lawyers	
Building/construction disputes	4
Commercial disputes	3
Civil	1 (Personal injuries including motor vehicle accidents and public liability 'slip and falls')

Figure 16: Types of Actions Attended at Mediation

Similar to the lawyers, none of the mediators provided commentary for why most actions mediated within the Court tend to be building/construction and commercial disputes.

Types of Actions Mediated	Reported Number of Times
Mediators	
Commercial disputes	12 (contractual, debts, services, goods, agricultural farm lease and sale of business)
Building/construction disputes	9
Civil	4 (including lease disputes [1], neighbourhood [1] and employment disputes [1])

3488 Magistrate 5.
3489 Magistrate 3.
3490 See, eg, Relis (n 360) 109. See also Chapter II at 42.
3491 Magistrate 3 and Magistrate 4. See also Chapter VI at 171.
3492 Rundle, 'Court-Connected Mediation Practice' (n 38) 152, 185–186, 203.
3493 Law 5 (Bar 3).
3494 See above Chapter VI at 172–6.
3495 Lawyer 7 reported occasionally acting 'behind the scenes' for litigants in Minor Claims.
3496 Magistrate 1.
3497 Mediator 9. See also nn 129, 2207, 2891, 3215 and 3467.
3498 Mediator 1. See above Chapter III at 86.

Mediations in the criminal jurisdiction according to the *Intervention Orders (Prevention of Abuse) Act 2009* (SA)	2

Figure 17: Types of Actions Mediated

The Court's internal mediator reported mediating 'all civil actions' that are lodged in the Court including intervention order mediations.[3499] Three mediators reported that most of the actions mediated in the Court are within the Minor Claims Division.[3500] This finding coincides with the finding above where some of the magistrates reported more mediations occur within the Minor Claims Division than the General Division, which is one of the three factors that impact upon both the decision to refer actions to mediation and the level of judicial encouragement to mediate.[3501]

3 *Two-Party Actions*

The general consensus amongst Stakeholders is that the bulk of actions mediated within the Court are two-party disputes.

Parties to Actions	Number	Percentage
Magistrates		
Two	5	100%
Multi	0	0
Lawyers		
Two	7	100%
Multi	0	0
Mediators		
Two	14	87.5%
Multi	1	6.25%
Even amount of party and multi-party	1	6.25%

Figure 18: Parties to Actions

All of the magistrates reported that mediation is mostly utilised in two-party actions, apart from strata title or community title disputes, which tend to be multi-party.[3502] One magistrate reported that actions are occasionally multi-party in the General Division involving third parties or multiple defendants.[3503] None of the magistrates provided commentary for why most mediations within the Court tend to be two-party actions.

All of the lawyers and the majority of mediators reported that most of the mediations in which they participated in within the Court were two-party actions. For example, one lawyer expressly stated that mediations in the Supreme Court of South Australia tend to involve more parties than the typical two-party mediations within the Court, particularly, disputes involving large estate disputes between multiple siblings.[3504]

An outlier amongst the mediators reported most of the actions this mediator mediated in the Court were multi-party actions, but did not provide commentary for why this was so.[3505] None of the lawyers or mediators provided commentary for why most mediations within the Court tend to be two-party actions.

3499 I briefly refer to intervention order mediations when exploring the different processes available within the Court's ADR suite, however, they do not are not central to the exploration of the mediation of civil disputes within the Court in this thesis: see above Chapter III at 95.

3500 Mediator 5; Mediator 7; Mediator 15.

3501 See above Chapter VI at 172.

3502 Magistrate 1.

3503 Magistrate 3.

3504 Lawyer 5 (Bar 3).

3505 Mediator 10.

APPENDIX D: COURT DOCUMENTATION

1. Form P1 Final Notice

Form P1

To be inserted by Court
Case Number:
Date Filed:
FDN:

FINAL NOTICE

[*SUPREME/DISTRICT/MAGISTRATES*] COURT OF SOUTH AUSTRALIA
CIVIL JURISDICTION

Please specify the Full Name including capacity (eg Administrator, Liquidator, Trustee) and Litigation Guardian Name (if applicable) for each party. Each party should include a party number if more than one party of the same type.

First Applicant (Sender)

First Respondent (Recipient)

Applicant (Sender)	**Full Name (including Also Known as, capacity (eg Administrator, Liquidator, Trustee) and Litigation Guardian Name (if applicable))**			
Name of law firm / solicitor **If any**	**Law Firm**	**Solicitor**		
Address for service	**Street Address (including unit or level number and name of property if required)**			
	City/town/suburb	**State**	**Postcode**	**Country**
	Email address			
Phone Details	**Type - Number**			

Duplicate panel if multiple Applicants

Respondent (Recipient)	**Full Name (including Also Known as, capacity (eg Administrator, Liquidator, Trustee) and Litigation Guardian Name (if applicable))**			
Address	**Street Address (including unit or level number and name of property if required)**			
	City/town/suburb	**State**	**Postcode**	**Country**

	Email address
Phone Details	**Type - Number**

Duplicate panel if multiple Respondents

Notice to the Recipient

The Sender intends to file an action against you in one of the above named Courts for $[*amount*] plus the cost of this Final Notice $[*amount*]; a total of $[*amount*].

A brief basis of the action is below:

Number each paragraph separately if there is more than one paragraph

The sender seeks a response from you within 21 days. Details of your options, what they mean and how they work are set out below.

Information about this Notice

This notice is not a formal court action. However, it provides an opportunity for you to voluntarily negotiate a resolution with the Sender without further involvement by the Court. This may save you costs, time and court appearances.

Possible Consequences of Ignoring this Notice

You may wish to seek independent legal or financial counselling advice before deciding what to do.

If you ignore this notice or if you are not able to reach a resolution within 21 days of receipt of this notice, the Sender may file an action against you in one of the above named Courts. If you lose the case you will have to pay or provide what is claimed and in addition you may have to pay extra costs if you ignore this notice. A court judgment against you may affect your credit rating.

Options for Payment/Settlement of the Action

- If you accept that you owe the full amount claimed, you can avoid the risk of the Sender filing an action against you if you pay the amount claimed to the Sender within 21 days. **Do not send money to Court.**
- If you accept that you owe the full amount claimed but cannot afford to pay the amount in full, you can try to arrange instalment payments with the Sender. You can use an Enforceable Payment Agreement (EPA) where in return for you acknowledging the debt and making payments, the Sender agrees not to commence a formal action, nor to report the debt to credit referencing agencies. You can obtain these from the CAA website (http://www.courts.sa.gov.au/ForLawyers/Pages/ Rules-Forms-and-Fees.aspx) or any Court Registry. Keep a record of payments made.
- If you agree there is an amount owed but disagree with the amount claimed, try to negotiate with the Sender. If the Sender agrees, you may be able to use the free mediation service to do this (see below).

- If you owe some of the amount claimed, you could pay that to reduce the amount in dispute.
- The Sender is not entitled to debt collecting costs unless you agreed to pay them in your credit or other agreement for goods or services supplied.

Mediation and Expert Services

Mediation is an alternative way of resolving a dispute other than by court processes leading to trial.

- Court mediation is available in the Magistrates Court, depending on the type of matter this may be at no cost or there may be a charge.
- A number of independent court experts are available via the Magistrates Court to provide an opinion on technical issues.
- Information regarding Mediation is available on the CAA website (http://www.courts.sa.gov.au/civil-cases/mediation).

Contacts

For further information about Court services that may be available to you, call CourtSA Registry Services on 8204 2444.

The Interpreting and Translating Centre may be able to assist you if English is your second language. This is not a free service.

91-97 Grenfell Street
ADELAIDE SA 5000
Telephone: 1800 280 203
Website: www.translate.sa.gov.au

2. Form 78C Notice of Alternative Dispute Resolution Conference

Form 78C

To be inserted by Court Case Number: Date Filed: FDN:
Hearing Date and Time: **Hearing Location:**

NOTICE OF ALTERNATIVE DISPUTE RESOLUTION CONFERENCE

[*SUPREME/DISTRICT/MAGISTRATES*] **Delete all but one** COURT OF SOUTH AUSTRALIA
[*COURT OF APPEAL*] **If applicable**
CIVIL JURISDICTION
[*MINOR CIVIL*] **If applicable**
[*NAME OF LIST*] LIST **If applicable**

Please specify the Full Name including capacity (eg Administrator, Liquidator, Trustee) and Litigation Guardian Name (if applicable) for each party. Each party should include a party number if more than one party of the same type.

First Applicant

First Respondent

First Interested Party

Notice of ADR Conference
Mark appropriate sections below with an 'x'

There will be an alternative dispute resolution conference ('ADR conference') at the date and time set out above. The purpose of the conference is to attempt to settle this proceeding.

The ADR conference will take the form of a

[ ] Mediation
[ ] Settlement Conference

[ ] Expert Appraisal
[ ] Expert Appraisal and Mediation

To the parties: WARNING

You and your legal representative (if any) **must** attend the ADR conference along with anyone whose instructions are required to settle the dispute such as an insurer or another to whom you have subrogated your rights or by whom you are indemnified against your liability.

If you do not attend within 15 minutes of the scheduled time, **orders may be made against you** [**Magistrates Court only** *including finally deciding this proceeding against you*], including orders as to costs.

If you will not be ready by the ADR conference date or you will be unable to attend the conference, you should apply to the Court for an adjournment prior to the conference date and as soon as possible. If you leave it until the conference date, your application for the adjournment may be denied or you may be ordered to pay costs.

Before the ADR Conference

The parties must pay the costs of the ADR conference at least 14 days before the date of the conference. Unless the Court orders otherwise, the conference fee is to be divided equally between the parties. **Each party must pay this amount no later than 14 days before the date of the conference or the conference date will be vacated.**

If you need an interpreter, you must advise the Court immediately of the language and dialect you require.

Attending the ADR Conference

When attending at the location of the ADR Conference, you will need to go to a particular conference room. You can find this information:

- online by checking the case list on the Courts Administration Authority website after 5:00pm on the day before the conference; or
- in person by checking the notice board displayed at the Court on the date of the conference.

On arriving in the conference room, you must tell the Court staff that you are there and you must answer your name when called.

Magistrates Court Only
You are expected to **BRING ALL DOCUMENTS** listed in your list of documents to the ADR Conference. You do not need to bring your witnesses. You should allow at least 3 hours for the hearing.

3. Record of Outcome

OFFICIAL

COURTS ADMINISTRATION AUTHORITY MEDIATION UNIT
RECORD OF OUTCOME

ACTION NAMES: _____
ACTION NUMBER: _____
NAME(S) OF ATTENDEES FOR
APPLICANT:_____
_____
NAME(S) OF ATTENDEES FOR RESPONDENT:_____
_____

THIRD PARTY NAME(S):_____
OTHERS (NAMES): _____
DATE OF MEDIATION: _____ LOCATION: _____
TIME COMMENCED: _____ TIME CONCLUDED: _____

- ☐ Mediation settled.
- ☐ A copy of the Settlement Agreement is saved to the Court file as a locked document.
- ☐ Matter is listed for mention only before a Magistrate/Deputy Registrar on a date to be fixed. If there is no attendance by any party at the next hearing, the action will be dismissed.

- ☐ Mediation not settled.
- ☐ Refer to Magistrate/Judicial Registrar
- ☐ Facts agreed between the parties is attached (Rule 131.3(6)).

I certify that the parties/ Applicant/ Respondent attempted to settle the action by mediation.
COMMENT:_____
_____
MEDIATOR – SIGNATURE _____ NAME _____

4. Settlement Agreement and Annexure

OFFICIAL

SETTLEMENT AGREEMENT

ACTION NUMBER: _____

APPLICANT NAME(S): _____

RESPONDENT NAME(S): _____

THIRD PARTY NAME(S): _____

The parties agree to settle the action in the following terms:

1. The respondent will pay the applicant the amount of $_____['the settlement sum']
2. Payment of the settlement sum will be by way of _____ _____['method']
3. Payment of the settlement sum will be on or before _____['date']
4. The parties agree that if the settlement sum is not paid by the agreed date, the applicant can apply to the court for summary judgment in the amount of the settlement sum, less any amount received by way of part payment. This settlement agreement will not be set aside unless exceptional circumstances can be established.

OR

4. The parties agree that if the settlement sum is not paid by the agreed date, the applicant can proceed with the claim (less any amount received by way of part payment) as though this settlement agreement was never made. In that case, the terms of this settlement agreement will not be disclosed to the court except where there is a dispute about costs, and only for the purpose of that dispute.

(*Strike out inapplicable clause above)*

5. Additional terms have been agreed as per the annexure**. (strike out if not applicable).**

The parties agree that the terms of settlement are confidential and not to be disclosed unless required by law, or to enforce the terms of this Settlement Agreement.

The matter is to be listed before the Court for a date for mention, and if none of the parties attend at Court on that day, the action will be dismissed.

OR

Matter referred to Magistrate/Judicial Registrar for dismissal as settlement terms effected during mediation.

(*Strike out inapplicable clause above)*

Signed ……..... Date: _____

Applicant Name(s): _____

Signed ……..... Date: _____

Respondent Name(s): _____

Signed ..... Date: _____

Mediator's name: _____

Settlement Agreement Annexure

INITIALS:

……

APPENDIX E: VARYING *PURPOSES* OF MEDIATION ACCORDING TO FOUR ARCHETYPICAL 'MODELS'

	Advisory/Evaluative	**Settlement**	**Facilitative**	**Transformative**
Bush and Folger's Objectives of Practice (1994)	Settlement	Settlement	Satisfaction	Transformation of conflict Social justice (Equality)
Riskin (1996)[3506]	Settlement		Satisfy business, personal, professional or relational interests	Satisfy community interests
NADRAC (2003)[3507]			Promote self-determination by four mediator functions	
Alexander's Mediation Objectives (2008)[3508]	Efficient delivery of settlements (service delivery) Access to justice	Efficient delivery of settlements (service delivery) Access to justice	Maximising participant autonomy and self-determination Reaching agreement that meets the interests and needs of participants and other stakeholders	Conflict resolution Transformation of destructive behavior into constructive dialogue, transformation of relationships, reconciliation and restorative justice
Boulle's Mediation Objectives (2011)[3509]	Offering a third party's objective view of the situation		Identifying and acknowledging disputants' respective interests Identifying and clarifying issues that are/are not in dispute Decision-making Empowering disputants to make informed decisions Minimising communication barriers between disputants	Reducing stress and anxiety associated with disputes and conflict situations Encouraging constructive dialogue Improving relationships Educating disputants by providing them with skills for use in future decision-making
Allport's Six Interlinked Purposes (2015)[3510]	Settlement	Settlement	Resolution of Issues Relationship Communication End of Conflict Empowerment	Resolution of Issues Relationship Communication End of Conflict Empowerment
NMAS (2015)[3511]	(Blended Processes: advice must be provided in a manner that maintains and respects self-determination)		Promote self-determination by six mediator functions	
Boulle and Field's Mediation Objectives (2018)[3512]	Accessibility Effectiveness Efficiency	Accessibility Effectiveness Efficiency	Accessibility Effectiveness Efficiency	Accessibility Relationship and transformation of individual or societal relations

Practice Ideology

APPENDIX F: DESCRIPTION OF MEDIATION *PRACTICES* ACCORDING TO FOUR ARCHETYPICAL 'MODELS'

	Advisory/Evaluative	**Settlement**	**Facilitative**	**Transformative**
Folberg and Taylor's Approaches or Styles (1984)[3513]	Supervisory Muscle Lawyer Team (aka co-mediation) Celebrity	Court-connected Shuttle * Crisis ** Scrivener	Structured	Therapeutic Labour Community
Silbey and Merry's Styles (1986)[3514]		Bargaining		Therapeutic
Bush and Folger's Approaches/Orientations (1994)[3515]		Settlement		Transformative
Kressel et al's Styles (1994)[3516]		Settlement orientation style	Problem-solving style	
Riskin's Orientations Grid (1994)[3517]	Evaluative (Broad/Narrow)	Facilitative-narrow	Facilitative-broad	Facilitative-broad
Winslade, Monk and Cotter's Approaches (1998)[3518]		Settlement orientation	Problem-solving approach	Narrative approach
Della Noce et al's Models (2002)[3519]			Problem-solving	Transformative
Riskin's 'New Old' and 'New New' Orientations Grid (2003)[3520]	Directive (Broad/Narrow)	Elicitive-narrow	Elicitive-broad	Elicitive-broad
Boulle's Four Paradigm Models (2005)[3521]	Evaluative	Settlement	Facilitative	Transformative (formerly Therapeutic)

3513 Folberg and Taylor (n 333) 130–1, ch 6.
* Crisis mediation can fall within any of the four models depending on the mediator's process and content roles.
** Scrivener mediation, a non-interventionist and passive style whereby the mediator solely records expressed points of agreement and disagreement, does not fall neatly into any of the four models though coincides most with settlement mediation.

3514 Silbey and Merry (n 576) 7, 19.

3515 Bush and Folger, *The Promise of Mediation* (n 204) 262.

3516 Kressel et al (n 576) 68.

3517 Riskin, 'A Grid for the Perplexed' (n 208) 17–18, 44–5.

3518 John Winslade, Gerald Monk and Alison Cotter, 'A Narrative Approach to the Practice of Mediation' (1998) 14(1) *Negotiation Journal* 21, 22–4.

3519 Dorothy J Della Noce, Robert A Bush and Joseph P Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2002) 3(1) *Pepperdine Dispute Resolution Journal* 39, 48.

3520 Riskin, 'Rethinking the Grid of Mediator Orientations' (n 354) 24; Riskin, 'Decisionmaking in Mediation' (n 575) 34.

3521 Boulle, *Mediation: Principles, Process, Practice* (n 71) 43–8.

Albertstein's Three Practical Models (2007)[3522]			Pragmatic Approach	Transformative Approach Narrative Approach
Alexander's Metamodel (2008)[3523]	Expert Advisory Wise Counsel	Settlement	Facilitative	Transformative Therapeutic Tradition-Based
Wade's Types (2010)[3524]	Evaluative	Settlement	Problem-solving	Therapeutic 'Hybrids' Narrative Restorative Humanistic Mindful Intentional Forgiveness Transformative
Wade's Three Types of Evaluative or Advice-Giving Mediation (2018)[3525]	Facilitative or problem solving Med-Recommendation (Medrec) Single Issue Monetised Shuttling with Limited Intake and Lawyer Controlled (SIMSLILC)			

Practice Ideology

3522 Michal Albertstein, 'Forms of Mediation and Law: Culture of Dispute Resolution' (2007) 22(2) *Ohio State Journal of Dispute Resolution* 321, 326–7.
3523 Alexander, 'Understanding Practice' (n 57) 107.
3524 Wade, 'Preparing for Mediation' (n 578) 2.
3525 Wade, 'Evaluative Mediation' (n 57) 4–5.

APPENDIX G: CHARACTERISTICS OF THE FOUR MEDIATION 'MODELS' BY REFERENCE TO *PURPOSE*, *PRACTICE* AND *PROCEDURE*

	Advisory/Evaluative	**Settlement**	**Facilitative**	**Transformative**[3526]
Other names[3527]	Managerial, normative	Compromise, distributive, positional	Integrative, interest-based, problem-solving, rational analytic	Therapeutic, reconciliation
Common mediation contexts	Court and tribunals, typically by court registrars, court staff, retired judges or external mediators	Court and tribunals, typically by court registrars, court staff, retired judges or external mediators	Community, family, workplace, some commercial	Community and workplace Not typically in court or tribunals
Purpose(s)				
Values, premises and principles underlying approaches to practice	Self-determination Dispute Settlement Efficiencies Fair and reasonable settlements	Self-determination Dispute Settlement Efficiencies Fair and reasonable settlements	Self-determination Disputant engagement Communication Flexibility Informality Consensuality Voluntary settlement Procedural fairness	Self-determination Disputant engagement Communication and connection Flexibility Informality Consensuality Transformation of disputants' conflict interaction
Focus	Rights, positions and power[3528] In some statutory conciliation contexts it is also policy-based	Rights and positions	Interests, problem-solving and prevention	'True nature' of conflict interaction and disputants' choices about whether and how to have the 'constructive conversation'
Interaction/discourse	Positional bargaining	Positional bargaining	Interest-based negotiation	Dialogue
Purpose (or Objectives)	Settlement	Settlement	Decision-making Maximisation of satisfaction of needs (or minimising suffering) Problem-definition Dispute prevention, management and resolution	Transform the quality of *conflict interaction* itself Addressing conflict
Outcomes	Likely accord with legal rules, principles and policies	Settlement	'Creative' interest-based settlements rather than solely rights-based Flexible Relationships	Less focussed on outcomes and more on human and interpersonal dynamics Disputants define and decide for *themselves* what 'resolution' of conflict might be, providing 'real satisfaction and closure' and remain durable
Outcome Focus	Short-term	Short-term	Long-term	Long-term
Private benefits	Settlement	Settlement	Satisfaction Efficient use of private resources Greater private savings in terms of economic and non-economic cost	Restoration of disputant competence, confidence and common humanity Enhanced clarity, connection, strength, understanding and enables

3526 See generally Bush and Folger, *The Promise of Mediation* (n 204).

3527 Boulle, *Mediation: Principles, Process, Practice* (n 71) 44.

3528 See generally Boulle and Field's Dispute Resolution Matrix in Boulle and Field, *Law and Practice* (n 78) ch 2; Boulle and Field, *Mediation in Australia* (n 204) 135.

				disputants to reach 'genuine closure' and 'move forward', irrespective of whether particular issues have been resolved Enhanced interpersonal communication and strengthening relationships Increased disputant confidence in their ability to clarify and express their views in future conflict situations and an increased ability to avoid or reverse the negative conflict spiral
Public benefits	Systemic efficiency	Systemic efficiency	Systemic efficiency (Court caseloads and backlogs are reduced minimising public expenses and providing earlier access to justice for the community as a whole)	Conflict transformation Major shift in *moral and social vision* from individualistic self-interest to *relational connection* and understanding Transforming the character of conflict interactions that assists transform society as a whole Civic education in self-determination, mutual consideration, respect, responsibility and community
Success	Settlement tends to be sole criterion	Settlement tends to be sole criterion	Mutually agreeable 'win-win' outcomes	Whatever outcomes disputants consider to be 'genuinely meaningful' and restoration of their sense of strength and connection
Practice(s)				
Mediator's Approach (or orientation)	Narrowing, directive and settlement-focussed	Narrowing, directive and settlement-focussed	Facilitative, narrowing, directive, process and solution-focussed	Proactive
Mediator's subject-matter qualifications, experience or expertise	Required and expected Customarily within statutory or industry contexts	Usual and commonly expected	Not necessary	Not necessary Qualifications and skills in interpersonal conflict, communication, process and relationships beneficial
Mediator's Role	Advise and evaluate Influence potential settlement	Supervise incremental bargaining Facilitate compromise between positions	'Purely' facilitate Uncover underlying needs and interests	Support conflict transformation by fostering opportunities for *empowerment* and *recognition* shifts
Process-Content Distinction	Largely immaterial	Less pronounced	Pronounced	Separating process and content is impossible
Predominant Interventions	Content	Process and Content	Process only	Conversation is driven entirely by disputant choice Mediator interventions support disputant deliberation, decision-making and perspective-taking

Mediator Functions: Process	Advise on procedures and guide disputants through the process	Supervise incremental bargaining	Advise and assist with all procedural aspects	Focus disputants on their relationship dynamics and underlying emotions, perceptions and biases, to foster empowerment and recognition shifts
Mediator Functions: Content	Provide advice, recommendations or opinions without exercising determinative powers	Induce concessions	Do not provide advice, recommendations or opinions on the content nor potential outcomes	N/A
Mediator's Role regarding Outcomes	Lack authority to make determinations	Lack authority to make determinations	Lack authority to make determinations	Lack authority to make determinations
Mediator encouragement to settle	Self-evident, expected and mediators provide views on what might happen if settlement is not reached	Actively encourages disputants to settle	Invites disputants to consider the consequences of not settling	Not evident
Negative consequences of not settling	Emphasised by mediator	Emphasised by mediator	Discussed by mediator with disputants	Mediator does not direct the conversation
Mediator influence on settlements?	High	Low to moderate	Neutral (in theory)	No
Mediator's Influence and 'leverage' over lawyers and other third party advisers	High	Low to moderate	Low	Neutral
Disputant positions	Challenged by mediator	Challenged by mediator	'Reality-tested' by mediator	Not challenged by mediator
Mediator directs discussions to	Rights and positions	Rights and positions	Interests and problem-solving	Does not direct the conversation
Communication between disputants	Controlled and limited by mediator	Controlled and limited by mediator	Encouraged by mediator and controlled as required	Mediator 'follows' disputant communication
Mediator acts as conduit between disputants?	Yes	Yes	No	No
Expression of Disputants' Feelings and Emotions	Controlled and disputants separated when 'emotions are high'	Controlled	Permitted or encouraged	Supported, not defused or contained
Mediator comfort and tolerance of emotional expression by disputants	Fear are destructive, 'irrelevant' to the legal issues and make settlement difficult to achieve	Fear can be destructive and make settlement difficult to achieve	High emotion is managed: NMAS *Practice Standards* (2015) s 10.1(b)(vi)	Comfortable Supported
Transmission and framing of information	Mediator positively reframes	Mediator positively reframes	Mediator positively reframes	Mediator does not filter out the emotion or 'heat' in disputant expression
Interruptions by disputants (of mediator or each other)	Mediator controls	Mediator controls	Mediator controls	Mediator allows and does not intervene to control
Mediator Proposals	As to content and process	As to content and process	As to process only	Only offer tentative suggestions
Procedure(s)				
Structure	Determined by mediator Particular structure exists in some statutory conciliation contexts e.g. the AAT	Determined by mediator	Linear process with stages Particular structure exists in industry models	Different spheres of activity and conversation cycles in nonlinear fashion Process is 'emergent'
Guidelines or Ground rules	Imposed by mediator	Imposed by mediator	Agreed to with disputants and monitored by mediator	Disputant control and choice
Areas of agreement and disagreement	Imposes common ground Deemphasises disagreement	Imposes common ground Deemphasises disagreement	Identifies common ground Deemphasises disagreement	Highlights topics of agreement and disagreement for building greater

				interpersonal understanding
Mediator involvement in the direction of discourse	Mediator directs disputants toward the future and to disregard the past	Mediator directs disputants toward the future and to disregard the past	Mediators assists steering disputants from past to present and then future	Mediator does not guide but rather 'follows' disputants who direct the conversation at all times and does not steer from the past to the future
Process control and process decisions	Mediator directs and controls process	Mediator directs and controls process	Mediator directs and controls process with input from disputants	Discourages mediator directiveness, judgment and process control Decisions of *any* kind belong to disputants and the mediator supports disputant control and choice in every regard Mediator offers process choices to disputants ('check-ins')
Joint Sessions	Abandoned or minimised in lieu of Private Sessions and Shuttle Negotiations	Abandoned or minimised in lieu of Private Sessions and Shuttle Negotiations	Predominantly Private Sessions can be called by the mediator or disputants	Predominantly Private Sessions is an option if requested by disputants (not the mediator)
Mediator's Role regarding the Settlement Agreement	Dictator or draftsperson	Scribe or dictator	Scribe	Scribe

Practice Ideology

APPENDIX H: MEDIATION *PROCEDURES*

1. Stages of Eight Mediation Procedures

Stages or Steps	**Folberg and Taylor**[3529]	**Egg Diagram**[3530]	**Two Triangles Diagram**[3531]	**LEADR**[3532]	**IAMA Facilitative Mediation 'Model'**[3533]	**RI**[3534]	**Boulle and Field's Mediation Procedure**[3535]	**Bush and Folger's Transformative Model**[3536]
		Pre-Mediation: Arrangements made for Mediation	Pre-Mediation	Pre-Mediation Preliminary Conference		Pre-Mediation: the Preliminary Conference	Preparatory Activities	
1	Introduction – Creating Structure and Trust	Mediator's Opening Statement	Opening	Opening	Preparation, Assessment and Intake	Opening	Preliminaries	Creating the Context (How do I want to do this?)
2	Fact-finding and Isolation of Issues	Parties' Statements and Mediator's Summaries	Parties' Statements	Parties' Opening Comments	Introductions & Setting Framework	Parties' Statements	Mediator's Opening Statement	Exploring the Situation (What is this about?)
3	Creation of Options and Alternatives	Identification of Issues and Agenda Setting	Summaries & Agenda Setting	Reflection and Summary	Statement Taking & Summaries	Reflection & Summary Agenda Setting	Party Presentations	Deliberating (What does this mean?)
4	Negotiation and Decision-Making	Joint Session: Clarification and Exploration of Issues	Joint Exploration & Problem Definition	Agenda Setting – Identifying the Issues	List/Agenda Construction	Exploration of Issues	Identifying Agreement – the 'Common Ground'	Exploring Possibilities (What is possible?)
5	Clarification and Writing a Plan	First Private Sessions: Caucus	Private Session	Issue Exploration – Uncovering Interests	Exploration	Private Sessions	Defining and Ordering the Issues	Decision-making (What do I do?)
6	Legal Review/Processing	Facilitating Negotiations	Joint Session: Option Generation & Evaluation	Private Sessions	Private Meetings	Joint Negotiation	Exploration of Issues, Negotiation and Problem-Solving	
7	Implementation, Review, and Revision	Mediation Outcome: Agreement, Adjournment or Termination	(Private Session)	Option Generation and Negotiation	Option Generation, Selection and Details	Private Sessions	Separate Meetings	
8			Negotiation & Problem Solving	(Private Sessions)	Crafting the Agreement	Agreement & Closure	Final Decision-Making	
9			Agreement	Agreement and Closure	Closure	Post-Mediation: Enforcement of Agreement	Recording Decisions	
10					Finishing, Debriefing and Development		Closing Statement and Termination	
		Post-Mediation: Action Required After Mediation	Post Mediation	Post-Mediation Parties Implement the Agreement			Post-Mediation Activities	

3529 Folberg and Taylor (n 333) 32, 71, ch 3.
3530 Charlton, Dewdney and Charlton (n 382) pt 1.
3531 Ibid.
3532 See Appendix H.2: Three Mediation Procedural Diagrams.
3533 Boyle (n 682) 23–89.
3534 See Appendix H.2: Three Mediation Procedural Diagrams.
3535 Boulle and Field, *Law and Practice* (n 78) ch 3.
3536 Bush and Folger, *The Promise of Mediation* (n 204) 110, 226 adapted from Della Noce (n 772) 80.

2. Three Mediation Procedural Diagrams

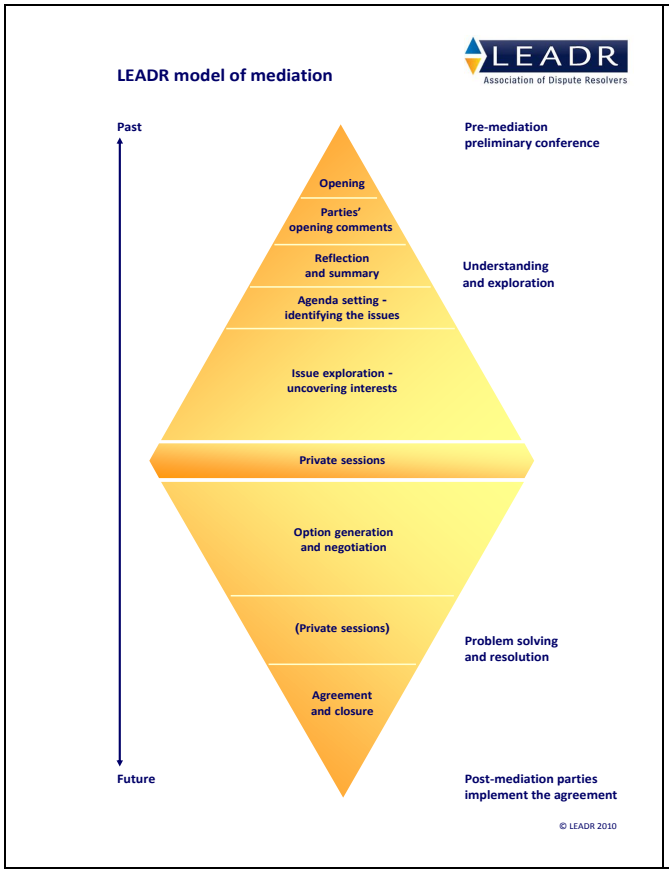

Figure 19: LEADR 'Model'[3537]

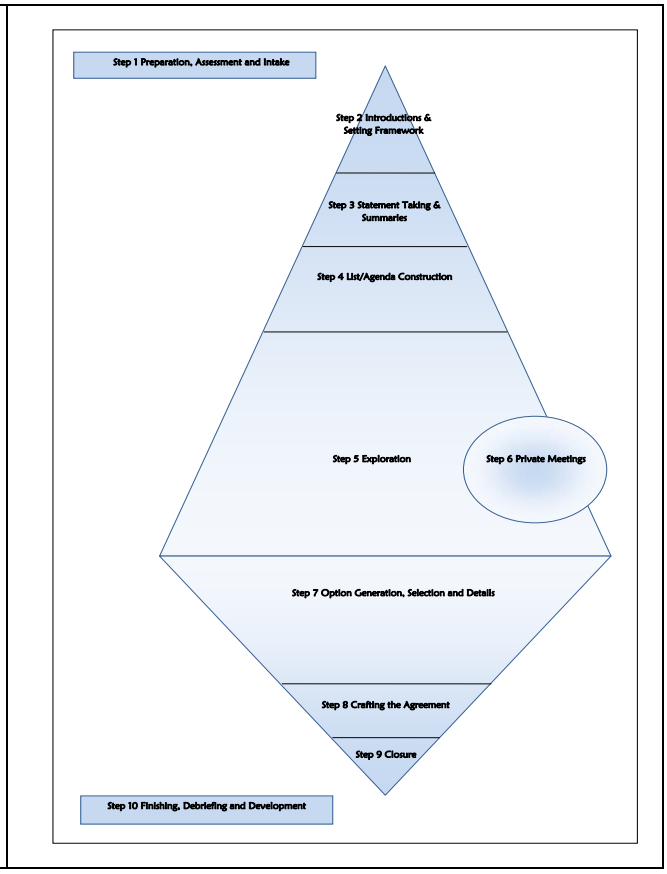

Figure 20: IAMA 'Facilitative' Mediation Model[3538]

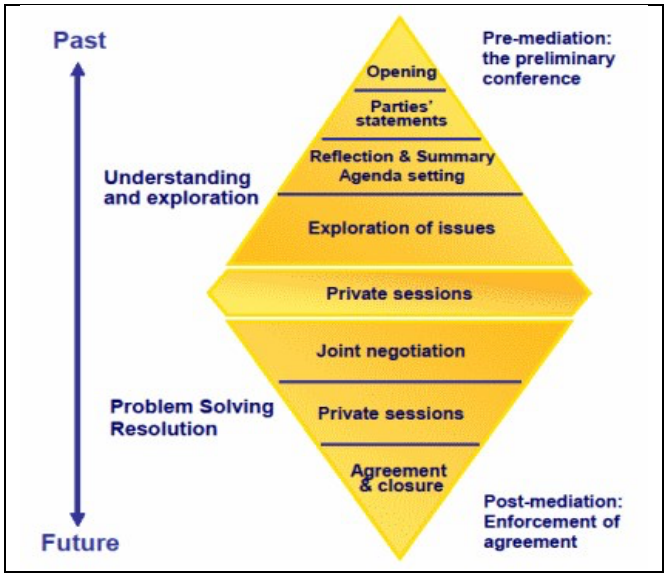

Figure 21: RI 'Facilitative' Mediation[3539]

3537 This was the model I was taught during the LEADR Mediation Workshop in Adelaide on 31 March 2014 to 4 April 2014.

3538 Boyle (n 682) 24.

3539 'What Happens in Mediation?', *Resolution Institute* (Web Page) <https://web.archive.org/web/20170220192736/https://www.resolution.institute/dispute-resolution/mediation>.

APPENDIX I: SHUTTLE MEDIATION *PROCEDURE*

Stages or Steps	The 'Traditional Method'[3540]
	Pre-Mediation Intake or Preliminary Conference The entire Shuttle Mediation process remains in Private Sessions
1	*Mediator's Opening Statement* Mediator makes Opening Statement to Party A (and confirms they will be making the same Opening Statement to Party B) *A's Opening Statement* *Reflection and Summary* Mediator Summarises A's Opening Statement to check for accuracy Mediator checks with A to confirm how much of A's Opening Statement can be repeated to B
2	*Mediator's Opening Statement* Meditator repeats Mediator's Opening Statement to Party B *B's Opening Statement* B makes Opening Statement (without knowing the content of A's Opening Statement) *Reflection and Summary* Mediator Summarises B's Opening Statement to check for accuracy Mediator informs B of A's Opening Statement Mediator notes B's Response to A's Opening Statement Mediator checks with B to confirm how much of B's Opening Statement and Response can be repeated to A
3	Mediator revisits A Mediator informs A of B's Opening Statement and B's Response to A's Opening Statement
4	*Agenda Setting* Agenda topics (elicited from both Opening Statements by the mediator) are clarified with A Agenda topics (elicited from both Opening Statements by the mediator) are then clarified with B Mediator addresses whether there is any dissension between A and B regarding content of the Agenda Mediator settles Agenda Mediator records Agenda items on whiteboard in each party's room
5	*Issue Exploration* Mediator explores the first topic of the Agenda with each party in turn (mediator can begin with either party depending upon convenience) Focus is predominantly on the substantive issues given the limitations of the forum Mediator notes the position advanced by each party and their rationale for same before checking with each party for accuracy
6	*Shuttle* Mediator acts as 'communication agent' conveying messages between A and B (their respective positions and their rationale behind them) Communication is usually reduced to 'bare bones' given the inability to flesh matters out Main focus is on outcomes rather than the past Prior to delivering the message from one party to the other, the mediator: a. reiterates the limits of what the mediator is permitted to convey to each party (stating 'this is what I am authorised to say'); and b. reassures each party that they are conveying messages on behalf of the other party, not negotiating on behalf of the other party or acting as that party's agent nor endorsing the message When leaving one party to convey their response or additional message(s) to the other, the mediator further reminds the party of 'b' (above)
7	Option Generation and Negotiation
8	Agreement
8A	*Variation to the Traditional Method*[3541] Lawyers meet with the mediator (without their respective clients present) to convert an agreement in-principle into a document or court orders

3540 Charlton, Dewdney and Charlton (n 382) 171.

3541 Ibid 172.

APPENDIX J: COMPARISON BETWEEN THE *ACT*, *RULES*, *PRACTICE DIRECTIONS* AND *UCRS* REGARDING *PURPOSE*, *PRACTICE* AND *PROCEDURE*

	The Rules and *Practice Directions*	*UCRs*
Definitions/Descriptions		
Duty of Court/Objects of the Rules	'the expeditious, economical and just conduct and resolution of an action or proceeding by negotiated agreement or judicial determination': r 3(1)(a)	'to facilitate the just, efficient, timely, cost-effective and proportionate resolution or determination of the issues in proceedings': r 1.5 *Objects of Pre-Action steps* encourage disputants to resolve actions prior to commencing litigation; facilitate litigation (if unavoidable) proceeding 'expeditiously, efficiently, at a proportionate cost and on narrowed issues'; involve insurers early; require disputants to take pre-action steps in accordance with the principles of proportionality; and 'require substantial compliance without emphasis on technical matters or minor departures from the requirements': r 61.1(a) to (e) *Objects of Minor Civil Actions* Encourage disputants to resolve actions prior to commencing litigation; 'facilitate the just, efficient, timely and cost-effective resolution or determination of the real issues in the proceeding'; and ensure that all appropriate parties have been joined in the proceeding: r 331.2 (a) to (c) Respondents must indicate in their Pre-action response whether they agree to a pre-action meeting or mediation for negotiating settlement: r 332.3(f)
ADR	'an umbrella term for dispute resolution processes (other than judicial determination) in which an impartial person assists the parties resolve the issues between them and to conduct their litigation in a cost efficient manner': r 2	A 'process in which parties attempt to resolve, narrow or make a more efficient determination of disputes the subject of a proceeding or potential proceeding, with or without the involvement of a neutral party, including (without limitation) a pre-action meeting, settlement conference, mediation, conciliation or judicial intimation': r 2.1 'Neutral party' (r 2.1) and 'facilitator' (r 131.1(1)) are referred to but terms not defined
Mediation	Facilitative process: r 2 and cl 11(1) *Practice Directions*	Referred to in the definition of 'ADR process' but term not defined: r 2.1

Conciliation	Advisory process: r 2	Referred to in the definition of 'ADR process' but term not defined: r 2.1
Conciliation-Mediation Distinction	Pronounced	Not clearly pronounced
'Other' Processes Within the Court's ADR Suite	Judicial intimation: rr 74(1)(c) and 77 Conciliation before a magistrate: r 76 Expert opinion: rr 2 and 21A(6) and s 29 of the *Act* Expert appraisal: rr 73(4) and 74(1)(c) Expert investigation: rr 69(2) and 94(6) and s 29 of the *Act* Arbitration: rr 72 to 75 Settlement conferences: r 106(7)	Pre-action meeting: Ch 7 Div 4 Settlement conference: rr 2.1 and 131.2 Judicial intimation referred to but not defined: r 131.3(4) Expert appraisal referred to but not defined: rr 337.1(b) and 337.2(4)(a) Expert referee referred to but not defined: rr 11.4(2)(c) and 151.4 Arbitration: rr 11.4(2)(b); Ch 14 Part 4, Ch 19 Part 3 and Schedule 5 Assessor: rr 11.4(2)(a) and 151.2(3) An 'on-site inspection' by a mediator or court expert for Minor Civil Actions: r 337.2(4)(j)
Referral of Actions to Mediation and Costs		
What Can Be Referred to Mediation?	An 'action' or 'claim' and mediation and/or other ADR process arranged by the Court in relation to an intended claim within the jurisdiction of the Court's Civil Division: r 2	'disputes the subject of a proceeding or potential proceeding': r 2.1 *'Proceeding'* includes a 'claim' and an 'originating application': r 2.1
Criteria for Referral of 'Appropriate' Actions to Mediation	Silent	Silent
Timing of Referral to Mediation	Once a defence is filed in a Minor Civil claim, the magistrate can list the action for mediation: r 73(3) Once a defence is filed in a General Civil claims, a directions hearing is conducted by a magistrate who may list the action for mediation: r 74 Optional step available on a *pro bono* basis *before* formal legal proceedings are commenced via the pre-lodgment process (Form 1A)	Pre-action meeting: r 61.12 The Court may order mediation 'at any stage' of the proceedings and make orders for that purpose: r 131.3(1) Pre-trial directions hearing: r 153.2(2)(r) *Minor Civil Actions* Pre-Action response: r 332.3(1)(f) When a defence is filed to a Claim or on the filing of an Originating Application, the Registrar will refer the file to a magistrate or judicial registrar to determine whether to list matter for mediation or expert appraisal: rr 337.1(b) and 337.2(4)(a)(j)
Costs of Mediation	2% of the amount claimed (for claims between $25,000 and $100,000) or $500 (for claims under $25,000): r 72(2) and cl 11(6) *Practice Directions*	'The Registrar must publish the fees which are charged by external mediators for the purposes of Court ordered mediation on the CAA website:' r 131.3(9). The website is silent as to the mediation fees
Contributions Towards Mediator's Fee	Rule 72(2)	The Court may make orders regarding the contributions to be made by disputants to any mediation fee payable for a court mediator or charged by an external mediator: r 131.3(2)(h) Parties must pay their proportion of the cost of mediation (if any) into Court at least 7 days before the date fixed for the mediation. Subject to any order of the Court, the costs of

		the mediation will be borne equally by the parties: r 131.1(10)
Mediators		
Definition of 'mediator'	'Qualified mediator' (see Mediator Accreditation below)	Silent
Mediators	Court employed mediators and panel of private qualified mediators: r 72 A Magistrate, Judicial Registrar or other judicial officer may endeavour to settle an action or to resolve any issues arising in an action: ss 27(2b)(2c) of the *Act*	Silent as to requirements for a panel of private qualified mediators Judicial or non-judicial officer or an external mediator, though 'external' mediator not defined: r 131.3(2)(a)
Mediator Accreditation	Mediators must be NMAS Accredited though the Court has the discretion to appoint non-NMAS accredited mediators 'where cultural, regional or other considerations make it necessary': r 2	Silent
Mediator's Qualifications, Experience or Expertise	Silent	Silent
Mediator Immunity	Section 27(2) of the *Act*	
Purpose		
Settlement of Actions/Proceedings (Effectiveness and Efficiencies)	Rule 2 Clause 11(1) *Practice Directions*	Rules 2.1(1) and 131.3(3)(4) The purpose of the ADR conference is to attempt to settle the proceeding: Form 78C: Notice of ADR Conference
Narrow Issues in Dispute	Silent	Rules 2.1(1) and 131.3(4)(6)
Practice		
Reference to the Four Predominant Practice Models	Silent	Silent
Mediator's Role and Functions	'Purely' facilitative; namely, to assist disputants 'identify issues, develop options, consider alternatives and endeavour to reach an agreement: r 2	Silent
Process-Content Distinction	Pronounced	Not clearly pronounced
Predominant Interventions	Process only	Silent
Mediator Functions: Process	Mediator may advise on or determine the process of the mediation: r 2	Silent
Mediator Functions: Content	Mediator has no advisory or determinative role in relation to the content of the dispute or its resolution: r 2	Silent
Mediator's Role Regarding Outcomes	Lack authority to make determinations	Silent
Power to Make Orders or Directions for Mediation	Silent	A judicial or non-judicial court officer presiding over an ADR process 'may make orders and give directions for the purpose of the process': r 131.1(6)
Mediator Proposals	As to process only	Silent
Procedure		
Pre-Mediation	Silent	Silent
Guidelines for the Conduct of Mediation or Ground Rules	Silent Clause 11(1) *Practice Directions*	Silent
Protocols for Addressing Conflicts of Interest	Silent	Silent
Voluntary Process	Clause 11(4) *Practice Directions* * the Court has the power refer an action or any issues arising in an	Silent

	action for mediation without disputant consent: s 27(1) of the *Act*	
Confidentiality	Clause 11(5) *Practice Directions* Section 27(3) of the *Act*	Rules 61.4, 131.1 and 331.3(h)
Privacy	Clause 11(2) *Practice Directions*	Silent
Particulars	Silent	Provision of limited particulars: r 131.3(2)(e)
Discovery of Documents	Copies of all discovered documents, in which privilege is not claimed, are to be filed 7 days before mediation (if the Court directs): r 71(6) A party may be excused from filing documents if it would be considered unduly onerous to do so: cl 11(3) *Practice Directions*	Parties who are required to make discovery under the 'general discovery' rules must file and serve a list of documents within 28 days after the close of pleadings: r 73.7(4). Parties to a Minor Civil Action must file and serve a list of all relevant documents within 14 days of the filing of a defence or a response the expiration of the time for filing a defence to a Cross Claim or a response: r 336.1. Persons who file a list of documents must make the discovered documents, other than privileged documents, available for inspection by a party to the proceeding: r 73.12. Provision of limited discovery: r 131.3(2)(f)
Exchange of Expert Reports	Silent	R 131.3(2)(g)
Preparation and Exchange of Position Papers	Silent	R 131.3(2)(d)
Who is to Attend Mediation	Rules 75(1) and Form 78C	Disputants or representatives with authority to settle (including insurers) and their lawyers: rr 131.1(5) and 131.3(2)(b)(c) Form 78C
Role of Support Persons	Silent	Silent
Disputant Authority to Settle	Form 78C	Rule 131.1(5)
Disputant Conduct Obligations 'Good faith'	Silent, but disputants must make an attempt to settle: r 72(5) (by implication), though no guidance is provided as to what constitutes same	Disputants 'are expected to participate appropriately' and 'negotiate in good faith with a view to resolve the dispute': r 131.3(3), though no guidance is provided as to what constitutes either *Overarching Obligations of Disputants and Lawyers* To use reasonable endeavours to resolve or narrow the scope of a dispute by agreement: r 3.1(g)
Structure (Steps or Stages of the Procedure)	Appendix N: Information Regarding Mediation Procedure in the Court: the *Rules*, *Practice Directions* and Court's Website	Silent
Process Control and Process Decisions	Mediator may advise on or determine the process of the mediation: r 2	Silent
Mediator's Role Regarding Settlement Agreement	Mediators must assist disputants 'record the agreement and any agreed consequences upon default of its terms and report that outcome to the Court': r 72(4)	Mediator is expected to 'assist' disputants record the agreement: r 131.3(4)

	Mediator will 'assist' disputants record the agreement before leaving the mediation: cl 11(7) *Practice Directions*	
Adjournment of Mediation by Mediator	To provide additional time to complete the mediation: r 72(7) Mediator may adjourn if there is 'good cause': cl 11(7) *Practice Directions*	Silent Mediator is expected to report adjournment to the Court: r 131.3(5)
Termination of Mediation by Mediator	Silent	Silent
Mediator Certification	Mediator must certify whether disputants made an 'attempt to settle': r 72(5)	Mediator must certify whether the parties to the mediation 'made an attempt to settle': r 131.3(8) (Magistrates Court *only*, not higher courts)
Report by Mediator	Where no aspect of an action is settled the mediator must confirm that the mediation took place and may with disputant consent report any factual matters that were agreed 'and any other report the mediator … considers appropriate': r 72(5) Once mediation is complete the mediator must report to the Court 'that the mediation took place; any agreement made; any other matters that the mediator considers appropriate': cl 11(7) *Practice Directions*	Mediator is expected to report to the Court whether the dispute was resolved or narrowed and if the mediator considers that a disputant 'did not participate appropriately in or make genuine attempts to resolve the matters in issue at the mediation': r 131.3(6)
Post-Mediation	Silent	Silent

APPENDIX K: NUMBER OF CIVIL ACTIONS MEDIATED IN THE COURT BY THE COURT'S INTERNAL MEDIATORS FROM 2000 TO 2016 AND NUMBER OF CIVIL ACTIONS MEDIATED BY EXTERNAL PANEL MEDIATORS FROM 2013 TO 2016

Reporting Periods	Civil Lodgments	Number of Actions Referred to Mediation	Settlement Rate
98-99[3542]	51,793	(Silent)	(Silent)
99-00[3543]	41,480	Approx. 200 each year	Approx. 50%
00–01[3544]	34,681	97	58%
01–02[3545] Counter: Internet:	 30,373 1,516	142	54%
02–03[3546] Counter: Internet:	 31,760 3,756	187	59%
03–04[3547] Counter: Internet:	 27,337 5,340	268	64.5%
04–05[3548] Counter: Internet:	 23,922 10,755	245	72%
05–06[3549] Counter: Internet:	 21,384 14,388	209	71%
06–07[3550] Counter: Internet:	 18,412 14,689	140	78%
07–08[3551] Counter: Internet:	 17,467 13,418	118	73%
08–09[3552] Counter: Internet:	 16,713 13,854	120	63%
09–10[3553] Counter:	 14,730	112	57%

3542 *CAA 1998–99 Annual Report* (n 947) 9.

3543 *CAA 1999–20 Annual Report* (n 946) 18, 20.

3544 Courts Administration Authority of South Australia, *Annual Report 2000–01* (Report, September 2001) 22; *CAA 2001–02 Annual Report* (n 920) 25.

3545 *CAA 2001–02 Annual Report* (n 920) 23, 25; *CAA 2003–04 Annual Report* (n 920) 28.

3546 *CAA 2002–03 Annual Report* (n 920) 25, 27; *CAA 2003–04 Annual Report* (n 920) 28.

3547 *CAA 2003–04 Annual Report* (n 920) 25, 26, 28.

3548 *CAA 2004–05 Annual Report* (n 920) 21, 22.

3549 *CAA 2005–06 Annual Report* (n 920) 19, 20. It is unclear why this report states that the number of mediations in 2004 were 205 and in 2003 were 215.

3550 *CAA 2006–07 Annual Report* (n 920) 17, 18.

3551 *CAA 2007–08 Annual Report* (n 920)17, 18.

3552 *CAA 2008–09 Annual Report* (n 920) 24, 26.

3553 *CAA 2009–10 Annual Report* (n 920) 26, 29.

Internet:	13,651		
10–11[3554] Counter: Internet:	 11,719 15,942	160	43%
11–12[3555] Counter: Internet:	 11,194 15,478	95	56%
12–13[3556] Counter: Internet:	 10,586 17,025	183	63%
13–14[3557] Counter: Internet:	 9,655 15,758	220	71%
14–15[3558] Counter: Internet:	 9,039 14,016	177	82%
15-16[3559] Counter: Internet:	 7,647 13,189	238	67%

Table 1: Number of Civil Actions Mediated by the Court's Internal Mediators from 2000 to 2016

Reporting Periods	Number of Panel Mediators	Number of Actions Mediated	Settlement Rate
13-14[3560]	(Silent)	(Silent)	(Silent)
14-15[3561]	28	35	60%
15-16[3562]	27	78	69%

Table 2: Number of Civil Actions Mediated by External Panel Mediators from 2013 to 2016

Reporting Periods	Civil Lodgments	Number of Actions Referred to Mediation	Settlement Rate
16-17[3563]	25,017	(unclear)	59%[3564]
17-18	24,836	(unclear)	55%
18-19	23,335	(unclear)	59%

3554 *CAA 2010–11 Annual Report* (n 920) 25, 28.
3555 *CAA 2011–12 Annual Report* (n 920) 26, 29.
3556 *CAA 2012–13 Annual Report* (n 920) 27, 33.
3557 *CAA 2013–14 Annual Report* (n 920) 27, 30. It is unclear why this report states that the number of actions referred to mediation in 2011–12 were 90.
3558 *CAA 2014–15 Annual Report* (n 920) 13, 15.
3559 *CAA 2015–16 Annual Report* (n 920) 21, 23.
3560 *CAA 2013–14 Annual Report* (n 920) 30.
3561 *CAA 2014–15 Annual Report* (n 920) 15.
3562 *CAA 2015–16 Annual Report* (n 920) 23.
3563 Court Performance — Criminal and Civil Statistics for the Magistrates Court of South Australia in 'Statistics' (n 981).
3564 'CAA Annual Report: At a Glance' (n 981).

19-20	18,720	(unclear)	58%
20-21	13,920	(unclear)	51%

Table 3: Number of Civil Actions Mediated (unclear as to whether by the Court's Internal Mediator or External Panel Mediators) from 2016 to 2021

APPENDIX L: FINAL NOTICE PRO BONO MEDIATIONS IN THE COURT FROM 1999 TO 2016

Reporting Periods	Number of Notices Issued	Number of Mediations Undertaken	Settlement Rate
99-00[3565]	3,477	82	63%
00–01[3566]	5,024	88	49%
01–02[3567]	4,856	127	64%
02–03[3568]	4,622	102	72%
03–04[3569]	4,425	105	80%
04–05[3570]	4,770	118	61%
05–06[3571]	4,864	95	60%
06–07[3572]	4,745	77	57%
07–08[3573]	5,748	66	69%
08–09[3574]	5,959	47	52%
09–10[3575]	6,795	24	58%
10–11[3576]	5,278	19	53%
11–12[3577]	5,481	23	61%
12–13[3578]	5,409	18	72%
13–14[3579]	3,811	11	72%
14–15[3580]	5,513	19	53%
15-16[3581]	8,454	9	77%

Table 4: Number of Pre-lodgement *pro bono* Mediations in the Court from 1999 to 2016

In the 1999-2000 reporting period the Court *pro bono* Mediation Scheme had 46 registered mediators.[3582] This is the first and last report to specify the number of volunteer mediators, though most of the CAA reports since then makes reference to them.[3583]

3565 *CAA 2001–02 Annual Report* (n 920) 26. It is unclear why the 1999–20 report states that approximately 4000 notices were issued since inception, 90 mediation conferences undertaken and settlement rate was 74%: *CAA 1999–20 Annual Report* (n 946) 53.

3566 *CAA 2001–02 Annual Report* (n 920) 26.

3567 *CAA 2001–02 Annual Report* (n 920) 26.

3568 *CAA 2002–03 Annual Report* (n 920) 28.

3569 *CAA 2003–04 Annual Report* (n 920) 27.

3570 *CAA 2004–05 Annual Report* (n 920) 24.

3571 *CAA 2005–06 Annual Report* (n 920) 21.

3572 *CAA 2006–07 Annual Report* (n 920) 19.

3573 *CAA 2007–08 Annual Report* (n 920) 19.

3574 *CAA 2008–09 Annual Report* (n 920) 26.

3575 *CAA 2009–10 Annual Report* (n 920) 29.

3576 *CAA 2010–11 Annual Report* (n 920) 28.

3577 *CAA 2011–12 Annual Report* (n 920) 30.

3578 *CAA 2012–13 Annual Report* (n 920) 33.

3579 *CAA 2013–14 Annual Report* (n 920) 31.

3580 *CAA 2014–15 Annual Report* (n 920) 15.

3581 *CAA 2015–16 Annual Report* (n 920) 23.

3582 *CAA 1999–20 Annual Report* (n 946) 53.

3583 *CAA 2001–02 Annual Report* (n 920) 23; *CAA 2002–03 Annual Report* (n 920) 28; *CAA 2003–04 Annual Report* (n 920) 27; *CAA 2004–05 Annual Report* (n 920) 24; *CAA 2005–06 Annual Report* (n 920) 21; *CAA 2006–07 Annual Report* (n 920) 19; *CAA 2007–08 Annual Report* (n 920) 19; *CAA 2008–09 Annual Report* (n 920) 26; *CAA 2009–10 Annual Report* (n 920) 29; *CAA 2010–11 Annual Report* (n 920) 28; *CAA 2011–12 Annual Report* (n 920) 30; *CAA 2012–13 Annual Report* (n 920) 33; *CAA 2013–14 Annual Report* (n 920) 33;

APPENDIX M: NUMBER OF CIVIL ACTIONS MEDIATED IN THE HIGHER COURTS OF SOUTH AUSTRALIA FROM 1998 TO 2015

Reporting Periods	Civil Lodgments	Number of Actions Referred to Mediation	Settlement Rate
98-99[3584] Supreme Court: District Court:	 1,536 1,886	 64 (Silent)	 69% of 58 reported on
99-00[3585] Supreme Court: District Court:	 1,285 1,818	 Approx. 2 per week (Silent)	 67%
00–01[3586] Supreme Court: District Court:	 1,501 1,842	 1-2 per week (Silent)	 58%
01–02[3587] Supreme Court: District Court:	 1,472 1,976	 (Silent)	 (Silent)
02–03[3588] Supreme Court: District Court:	 1,662 1,750	 (Silent)	 (Silent)
03–04[3589] Supreme Court: District Court:	 1,534 2,105	 (Silent)	 (Silent)
04–05[3590] Supreme Court: District Court:	 1,548 1,967	 (Silent)	 (Silent)
05–06[3591] Supreme Court: District Court:	 1,692 2,151	 (Silent)	 (Silent)
06–07[3592] Supreme Court: District Court:	 1,564 2,078	 (Silent)	 (Silent)
07–08[3593] Supreme Court: District Court:	 1,771 2,111	 (Silent)	 (Silent)
08–09[3594] Supreme Court:	 1,960	 14	 5 settled

CAA 2014–15 Annual Report (n 920) 15; *CAA 2015–16 Annual Report* (n 920) 23; *CAA 2020–21 Annual Report* (n 920) 17.

3584 *CAA 1998–99 Annual Report* (n 947) 8, 15.

3585 *CAA 1999–20 Annual Report* (n 946) 12, 15, 17.

3586 *CAA 2000–01 Annual Report* (n 920) 7, 14, 15.

3587 *CAA 2001–02 Annual Report* (n 920) 8, 13.

3588 *CAA 2002–03 Annual Report* (n 920) 16, 22.

3589 *CAA 2003–04 Annual Report* (n 920) 14, 22.

3590 *CAA 2004–05 Annual Report* (n 920) 10, 18.

3591 *CAA 2005–06 Annual Report* (n 920) 8, 15.

3592 *CAA 2006–07 Annual Report* (n 920) 8, 14.

3593 *CAA 2007–08 Annual Report* (n 920)) 8, 14.

3594 *CAA 2008–09 Annual Report* (n 920) 11, 12, 19.

District Court:	2,277	(Silent)	
09–10[3595] Supreme Court: District Court:	1,813 2,354	13 (Silent)	5 settled fully; 1 partly settled; 1 in the process of settling
10–11[3596] Supreme Court: District Court:	1,838 2,604	4 (Silent)	(Silent)
11–12[3597] Supreme Court: District Court:	1,942 2,217	5 (Silent)	2 resolved during the year
12–13[3598] Supreme Court: District Court:	1,701 2,803	5 (Silent)	2 resolved during the year
13–14[3599] Supreme Court: District Court:	1,674 1,730	2 (Silent)	1 resolved during the year
14–15[3600] Supreme Court: District Court:	1,642 1,467	(Silent)	(Silent)
15-16[3601] Supreme Court: District Court:	1,664 1,483	(Silent)	(Silent)

3595 *CAA 2009–10 Annual Report* (n 920) 13, 20.
3596 *CAA 2010–11 Annual Report* (n 920) 9, 10, 18.
3597 *CAA 2011–12 Annual Report* (n 920) 10, 12, 19.
3598 *CAA 2012–13 Annual Report* (n 920) 11, 13, 19.
3599 *CAA 2013–14 Annual Report* (n 920) 9, 10, 17.
3600 *CAA 2014–15 Annual Report* (n 920) 6, 9.
3601 *CAA 2015–16 Annual Report* (n 929) 13, 17.

APPENDIX N: INFORMATION REGARDING MEDIATION PROCEDURE IN THE COURT: THE *RULES*, *PRACTICE DIRECTIONS* AND COURT'S WEBSITE

Stages or Steps	***Rule 2***[3602]	***Practice Directions***[3603]	**Court's Website**[3604]
	(Silent as to Pre-Mediation)	(Silent as to Pre-Mediation)	(Silent as to Pre-Mediation)
1	Identifying Disputed Issues	Mediator's Opening Statement	Mediator's Opening Statement
2	Developing Options	Parties' Statements	Parties' Opening Statements
3	Considering Alternatives	Parties' Responses	Mediator's Summaries and Identification of Issues that Need Discussion
4	Endeavouring to Reach Agreement	Identification of Key Issues in Dispute	Discussion of Issues and Attempts to Resolve Issues
5		Private Sessions to Clarify Issues and Discuss Settlement Options	Agreement
6		Recording the Outcome	
	(Silent as to Post-Mediation)	(Silent as to Post-Mediation)	(Silent as to Post-Mediation)

3602 *Rules* (n 917) r 2.
3603 *Practice Directions* (n 971) cl 11.
3604 'Mediation' (n 947).

APPENDIX O: SUMMARY OF STAKEHOLDER UNDERSTANDINGS, EXPECTATIONS AND EXPERIENCES OF MEDIATION *PRACTICE* MODELS WITHIN THE COURT

Practice Model Utilised	**Advisory/Evaluative**	**Facilitative**	**'Techniques' from Other Models**	**Unsure**
Magistrates		Magistrate 1 Magistrate 2 (the 'LEADR model') Magistrate 4		Magistrate 3 (not 'hands-off' facilitative mediation) Magistrate 5
Lawyers	Lawyer 3 ('Highly Evaluative')			Lawyer 1 Lawyer 2 (Bar 1) Lawyer 4 (Bar 2) Lawyer 5 (Bar 3) Lawyer 6 Lawyer 7
Mediators	Mediator 1 ('conciliation' with self-represented litigants) Mediator 6 ('conciliation') Mediator 14 ('Street's technique')	Mediator 2 Mediator 3 Mediator 4 Mediator 5 Mediator 7 Mediator 8 Mediator 9 Mediator 10 Mediator 11 Mediator 13 Mediator 15 Mediator 16	Mediator 3 (transformative and narrative) Mediator 4 (Bill Eddy High Conflict) Mediator 5 (Non-Violent Communication)	

APPENDIX P: SUMMARY OF STAKEHOLDER UNDERSTANDINGS, EXPECTATIONS AND EXPERIENCES OF MEDIATION *PROCEDURE* WITHIN THE COURT

Stages or Steps	**Magistrate 1 (RI Model)**	**Magistrate 2 and Magistrate 3 (LEADR Model)**	**Magistrate 4 and Magistrate 5**	**Lawyers**	**Mediators**
	Brief Pre-Mediation Discussions	*No Pre-Mediation*	*No Pre-Mediation*	*No Pre-Mediation*	*No Pre-Mediation*
1	Opening	Opening	Mediator's Introduction in Joint Session	Mediator's Opening (in Joint Session)	Opening (in Joint Session)
2	Parties' Statements	Parties' Opening Comments	Parties Address their Issues (in turn)	Opening Statements (in Joint Session)	Parties' Opening Comments (in Joint Session)
3	Reflection & Summary Agenda Setting	Reflection and Summary	Private Sessions to 'chips away' at the issues	Private Sessions Mediator Shuttles (Shuttle Negotiation)	Reflection and Summary
4	Exploration of Issues	Agenda Setting – Identifying the Issues	Discussion of Issues (in Joint Session)	Recording Agreement	Agenda Setting
5	Private Sessions	Issue Exploration – Uncovering Interests	Private Sessions		Issue Exploration
6	Joint Negotiation	Private Sessions	Discussion of Possible Solutions to Issues (in Joint Session)		Private Sessions
7	Private Sessions	Option Generation and Negotiation	Agreement		Option Generation and Negotiation
8	Agreement & Closure	(Private Sessions)			Agreement & Closure
9	*No Post-Mediation*	Agreement and Closure			
10		*No Post-Mediation (but a post-mediation directions hearing)*	*No Post-Mediation (but a post-mediation directions hearing)*	*No Post-Mediation*	*No Post-Mediation*

APPENDIX Q: MEDIATOR EXPERIENCES OF MEDIATION *PROCEDURE* WITHIN THE COURT

Stages or Steps	**LEADR**	**IAMA**	**Bill Eddy High Conflict Institute**	**Non-Violent Communication**
	Pre-Mediation Preliminary Conference		Pre-Mediation Coaching	
1	Opening	Preparation, Assessment and Intake	Signing Your Agreement to Mediate	Observations
2	Parties' Opening Comments	Introductions & Setting Framework	Making Your Agenda	Feelings
3	Reflection and Summary	Statement Taking & Summaries	Making Your Proposals	Needs
4	Agenda Setting – Identifying the Issues	List/Agenda Construction	Finalizing Your Agreements	Requests
5	Issue Exploration – Uncovering Interests	Exploration		
6	Private Sessions	Private Meetings		
7	Option Generation and Negotiation	Option Generation, Selection and Details		
8	(Private Sessions)	Crafting the Agreement		
9	Agreement and Closure	Closure		
10		Finishing, Debriefing and Development		
	Post-Mediation Parties Implement the Agreement			

APPENDIX R: LAWYER EXPERIENCES OF MEDIATION *PROCEDURE* WITHIN THE COURT

Stages or Steps	Lawyer 2 (Bar 1)	Lawyer 3	Lawyer 4 (Bar 2)	Lawyer 5 (Bar 3)	Lawyer 6	Lawyer 7
No Pre-Mediation Procedure						
1	Mediator's Opening (in Joint Session)	Mediator's Introduction (in Joint Session)	Mediator's Opening (in Joint Session)	Mediator's Opening (in Joint Session)	Mediator's Introduction (in Joint Session)	Mediator's Explanation (in Joint Session)
2	Short Opening Statements by Lawyers (in Joint Session)	Opening Statements (in Joint Session)	Short Opening Statements (in Joint Session)	Opening Statements (in Joint Session)	Opening Statements (in Joint Session)	Mediator invites Opening Statements by disputants or their lawyers (in Joint Session) or Lawyers 'Cut to the Chase'
3	Mediator's Reframe	General Comments by Mediator	Private Sessions	Private Sessions	Private Sessions	Private Sessions
4	Private Sessions or Issue Exploration	Private Sessions	Shuttle Negotiation	Mix of Joint Sessions and Private Sessions with Shuttle Negotiation	Shuttle Negotiation	Shuttle Negotiation
5	Recording Agreement	Shuttle Negotiation	Recording Agreement	Recording Agreement	Recording Agreement	Recording Agreement
6		Recording Agreement				
No Reference to Post-Mediation Procedure						

* when answering this question Lawyer 1 reported that the 'Duty Mediators' utilise the LEADR model when undertaking the 'impromptu short-cut mediations' at the MIS. Given that further discussion of the MIS is outside the scope of this thesis, I omitted Lawyer 1 from the above table.

APPENDIX S: ADRAC PROPOSALS REGARDING DESCRIPTION AND DEFINITION OF CONCILIATION

ADRAC's proposed description of conciliation is as follows:

> *Conciliation is a non-determinative confidential dispute resolution process which is usually established by legislation, but may also be conducted under a private regulatory system (such as the rules of a club or association). The conciliation process may vary – for instance, it may be compulsory or voluntary; legal representatives may be present or not; and the input of the conciliator may be facilitative, advisory or a mix of different forms. However, three important features of conciliation concern the role of the conciliator.*
>
> *The first feature is that even though a conciliator's role includes even-handedness in assisting the disputants to resolve their dispute, a conciliator is expected to ensure that the terms upon which a dispute is resolved accord with a particular set of norms or principles embedded in the legislative or regulatory framework under which the conciliation is conducted. To that extent, and for that reason, a conciliator is not entirely disinterested and may be regarded as a system representative. The second (and related) feature of conciliation is that conciliators normally possess expertise in the area under dispute. The third feature is that conciliators may be required to (and often will) provide advice to the disputants, when appropriate, about the implications of the legislative framework under which the conciliation is conducted.*

ADRAC's proposed definition of conciliation is as follows:

> *Conciliation is a confidential, non-determinative dispute resolution process, usually established by legislation. A conciliator is expected to ensure that the terms upon which a dispute is resolved accord with a particular set of norms or principles applicable to the dispute. Conciliators normally possess expertise in the area under dispute, and provide advice to disputants when considered appropriate.*[3605]

[3605] 'Conciliation' (n 232) xiii, 23.

APPENDIX T: SUMMARY OF THE ADMINISTRATIVE APPEAL TRIBUNAL MEDIATION AND CONCILIATION 'PROCESSES'

Stages or Steps	**AAT Mediation Process Model**[3606]	**AAT Conciliation Process Model**[3607]
1	Preparation and Mediator's Opening Statement	Preparation and Conciliator's Opening Statement
2	Parties' Statements and Mediator's Summaries	Parties' Statements
3	Identification and Listing of Issues (Agenda Setting)	Joint Exploratory Session and Discussion
4	Joint Exploratory Discussion	Private Meetings
5	Private Meeting	Concluding Joint Session
6	Joint Negotiation	
7	Final Session	

3606 'Mediation Process Model' (n 877).

3607 'Conciliation Process Model' (n 285).

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