Alternative Dispute Resolution: General Civil Cases

Prepared for the Ministry of Justice by

K. Saville-Smith and R. Fraser

Centre for Research Evaluation
and Social Assessment

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DISCLAIMER

This research was commissioned by the former Department for Courts. The report has been prepared by the authors and the views expressed in it are those of the authors and do not necessarily represent the views of the Ministry of Justice.

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1 Introduction

Internationally and in New Zealand, Alternative Dispute Resolution (ADR) has been promoted as encouraging early civil case settlement and delivering consequent benefits to both the courts and disputants. Over the past five years, the judiciary has encouraged parties to consider ADR in the course of the case management process outlined in the relevant practice notes for the District Court and High Court jurisdictions.

The Department for Courts[1] was hesitant, however, to promote ADR more actively or pursue a more formal integration of ADR into the management of civil disputes filed with the District or High Courts without stronger empirical evidence about the current use, impacts of ADR, and the benefits and costs of ADR for both disputants and for the courts.

To establish that evidential platform, the Department for Courts has commissioned a programme of research into ADR, which explores the use, experiences and impacts of ADR from the perspectives of the four critical stakeholders in the resolution of civil disputes:

- Disputants
- Lawyers
- Judiciary and court staff, and
- Accredited ADR practitioners.

A research programme was established to explore ADR experiences and perceptions for each of the stakeholder groups. Separate reports on the findings of each of the research projects focusing on the experiences of each of the stakeholder groups have already been presented.[2]

This report is an attempt to integrate those findings. It identifies the experiences of, and perspectives on, ADR that are shared in common across the different stakeholders. It also identifies where the different stakeholders have differing views about ADR and the processes by which disputes filed with the courts become settled. By reflecting on the various experiences of the stakeholders in a holistic manner this report is able to make a balanced assessment of the six critical questions that have driven the ADR research agenda. Those questions are as follows:

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1 On 1 October 2003 the Department for Courts became part of the new Ministry of Justice. The Department for Courts continues to be referred to in the text as the Department for consistency with earlier reports from this research programme.

2 Saville-Smith, K., October 2003, *Alternative Dispute Resolution Research: Lawyers*. Report prepared for the Department for Courts, CRESA, Wellington; Saville-Smith, K., July 2003, *Alternative Dispute Resolution Research: ADR Practitioners*. Report prepared for the Department for Courts, CRESA, Wellington; Saville-Smith, K., August 2003, *Alternative Dispute Resolution Research: Judiciary and Court Staff*. Report prepared for the Department for Courts, CRESA, Wellington; Saville-Smith, K., February 2004, *Alternative Dispute Resolution Research: Disputants*. Report prepared for the Department for Courts, CRESA, Wellington.

i. Is the use of ADR growing?
ii. Who provides ADR services?
iii. Why do people use ADR?
iv. Why don't people use ADR more now?
v. What impact does the current use of ADR have on:
    - The quantity of civil cases filed with the courts?
    - The rapidity, cost and manner of disposal of disputes after filing with the courts?
vi. Why do cases settle?

Infobox 1.1 sets out the range of detailed information the Department for Courts is seeking in relation to those six broad questions.

The research focuses on general civil cases and excludes cases within the Family Court, those covered by the Employment Relations Act 2002, and the jurisdictions of the other specialist courts such as the Environment Court.

The methods used for each of the ADR stakeholder research projects are discussed in detail in Chapter 2. It is important to note, however, that none of the stakeholder research components could objectively establish the actual trajectories of cases after filing. As a consequence, commentary on why, how and when cases settle is based on an analysis of the subjective reflections of the different stakeholder groups. Analysing the actual trajectory of civil cases through the courts after filing and identifying the determinants of cases' settlement and disposal is more comprehensively approached through a cohort study. Such a cohort study was outside the set of stakeholder research projects on which this integrated report is based.

The report is structured as follows:

- Chapter 2 provides an overview of the ADR research programme objectives and describes the data collection methods used in each of the stakeholder research projects.
- Chapter 3 focuses on the provision of ADR in New Zealand and the extent to which the use of ADR is growing.
- Chapter 4 considers why individuals and organisations that find themselves in disputes do or do not choose to take-up ADR.
- Chapter 5 reflects on the extent to which ADR contributes to settlement, costs and timeliness.
- Chapter 6 considers the impacts of ADR on the Court system, and
- Chapter 7 looks at opportunities for improving ADR take-up.

The content of this report integrates and summarises material in the previously reported stakeholder research reports. The full data and detail presented in each of those reports has not been repeated here. For further detail of the research findings from each of the ADR stakeholders research projects, the separate reports should be referred to.

Infobox 1.1 ADR and Case Settlement Research Agenda Information Specification

Why do cases settle?

- Why do some cases (filed at court) settle and others not?
- What factors are associated with settlement of cases filed in court?
- At what point in court proceedings do cases settle?
- Should/could more court cases settle?
- Should/could more cases settle earlier – at court and pre-court?
- What has been the role of ADR in settlement – at court and pre-court?
- What factors are associated with settlement of cases before filing?

Why don't people use ADR more now?

- How are decisions reached about using ADR?
- What is the quality of the service?
- How available is ADR?
- How expensive is ADR?
- Are there common factors about cases that don't use ADR?
- What are the barriers to the use of ADR?

Why do people use ADR?

- Who uses ADR and in what types of cases?
- Why do they use ADR?
- At what stage do they use ADR?
- How are decisions reached about using ADR?
- What is the quality of the service?
- How available is ADR?
- How expensive is ADR?
- What, if any, cost benefit does ADR offer?
- Are there common factors about cases that use ADR?

Who provides ADR services?

- What qualifications do mediators have? – ADR and other professional qualifications
- What ADR training is available?
- What professional ADR organisations exist? Are there standards, codes of ethics etc?
- What do people know about quality assurance frameworks in relation to ADR?
- What types of ADR are available?
- How do people choose ADR providers?
- How do demand and supply balance?

Is the use of ADR growing?

- Is there increased demand for ADR?
- How much demand for ADR is there?
- How satisfied are people with ADR?
- What are the attitudes of lawyers and the judiciary towards ADR?

What impact does the current use of ADR have on:

- The level of filing of cases with the courts – what volume of cases use ADR pre-court and what are the outcomes?
- Cases already filed with the courts in relation to rapidity of disposal, costs, settlement/disposal rates, and satisfaction and compliance with the solutions agreed between the disputants?

2 ADR Research Programme Objectives and Methods

The current research into ADR has six key objectives broadly focusing on three themes. They are to:

i. Establish the:
   - patterns of settlement in civil cases in relation to the reasons why cases settle, when cases settle in the process after filing, and the mechanisms that prompt settlement
   - role ADR currently plays in settlement processes, and
   - frequency of ADR use during and/or prior to court proceedings.

ii. Assess whether increased use of some type of ADR might, in fact, assist court users in reaching settlement.

iii. Identify the:
   - barriers to ADR uptake by disputants
   - location, accessibility and quality assurance frameworks of current ADR services.

The research programme collected data from accredited ADR practitioners, lawyers, judges, masters, court staff and disputants through national surveys, regional focus groups, face-to-face interviews and in-depth interviews. This section details the data collection methods used across the four component projects of the research programme.

2.1 National Surveys

The research programme included two national surveys: a telephone survey of accredited ADR practitioners, and a self-complete postal survey of lawyers undertaking general civil work equivalent to 50 percent or more of their total workload.

Accredited ADR Practitioners

The national survey of ADR practitioners was designed to establish baseline data regarding the:

- pattern of ADR practice by accredited ADR practitioners
- perspectives of ADR practitioners on the:
  - efficacy of ADR
  - role of the Courts in relation to ADR
  - professional and socio-demographic profile of accredited ADR practitioners.

The target population for the survey of ADR practitioners was members of AMINZ and LEADR with advanced accreditation. AMINZ and LEADR are the two major bodies involved in the accreditation of arbitrators and mediators in New Zealand.[3] In December 2003, LEADR had around 131 members with advanced accreditation, while AMINZ had 97. Some of the practitioners in the target population were simultaneously members of AMINZ and LEADR. Contact was able to be made with 175 accredited ADR practitioners. Of those, 145 agreed to participate in the survey – a response rate of 83 percent.

The questionnaire for the survey of accredited ADR practitioners was developed in consultation with the Department for Courts, and its ADR Research Advisory Committee, LEADR and AMINZ, and was piloted prior to implementation. The questionnaire consisted of 32 primarily closed-ended questions with opportunities for more extensive commentary and was implemented by a professional telephone survey company.

The closed-ended questions were pre-coded and analysed in SPSS using both univariate analysis of frequencies and cross-tabulations. Open-ended questions were subject to a qualitative interpretive analysis. A copy of the survey instrument is included in Appendix A.

Lawyers

The national survey of lawyers was designed to establish baseline data regarding the attitudes, experiences, training and sympathies of lawyers in relation to ADR.

The target population for the survey was a specific and not easily identifiable group - lawyers who spend the majority of their time involved in general civil practice. Although there are a number of sources, such as membership lists and directories, which allow identification of lawyers, there is no accessible listing which systematically and reliably records lawyers' specialisations and areas of work.

A sample framework for the survey was developed with the help of the Department for Courts, court staff and the New Zealand Law Society (NZLS) who assisted with the identification of firms with one or more practitioners reporting doing 50 percent or more of their work in the civil area. Firms were then contacted by letter, with follow-up by telephone and/or e-mail asking for assistance to identify individual practitioners meeting the target criteria to whom a survey could be directed.

In total 630 lawyers were identified during the development of the sample framework. A sample of 450 lawyers were randomly selected for the survey. Those 450 lawyers were sent a survey in mid-August 2003 along with a reply paid envelope for return of the survey. A reminder notice was sent to lawyers by e-mail or fax approximately one week prior to the due date reminding them the survey was due at the end of the month. A further reminder notice was sent by e-mail the week following the due date. These reminders were followed by telephone contacts with firms whose lawyers had not responded by the due date. In some cases multiple follow-ups by telephone were required.

[3] The acronyms AMINZ and LEADR stand for the Arbitrators and Mediators Institute of New Zealand and Leading Edge Alternative Dispute Resolvers.

Calculating the response rate for the lawyers survey was complicated by the uncertainties around the precise numbers of lawyers in the sample who fall into the eligible or ineligible categories. After considerable work with legal firms in the follow-up period it became apparent that a significant number of those lawyers who had not responded to the survey had not done so because they were either non-contactable (primarily due to leave over the survey period) or were ineligible. The ineligible group consisted of lawyers whose predominant work was in the employment, family or environment courts – areas outside the scope of the research.

In total 196 eligible lawyers returned a completed survey. Given the complexity of calculating the response rate, it is appropriate to report the response rate for the lawyers survey as a range. In this instance the response rate was calculated as likely in a range from 62.2 percent to 69.5 percent.

The questionnaire used for the lawyers survey was developed in consultation with the Department for Courts, and its ADR Research Advisory Committee, and was piloted prior to implementation. The questionnaire was a self-completed survey consisting of 54 primarily closed-ended questions with opportunities for more extensive commentary. A copy of the survey instrument is included in Appendix B.

2.2 Regional Focus Groups and Face-to-Face Interviews

Regional focus groups were undertaken with ADR practitioners, lawyers, members of the judiciary, and court staff.

ADR Practitioners

There were eight focus groups undertaken with ADR practitioners in the following seven regions: Auckland (2); Hamilton; Rotorua/Tauranga; Wellington; Nelson; Christchurch; and Dunedin.

The focus groups were used to explore regional variations in ADR practice and ADR practitioners' views on the following issues:

- changing demand for ADR
- factors affecting the supply of ADR
- adequacy of ADR training and qualifications
- adequacy of current quality assurance frameworks
- alignment between court processes and dispute resolution.

Participants for the focus groups were recruited in a number of ways. Where the researchers were aware of pre-existing regional ADR practitioner groups, such as the AMINZ "breakfast groups", the group was invited to be involved in the research as a focus group. In some regions recruitment began with the identification of a key contact person combined with "snowballing" methods to identify other local ADR practitioners. Where no contact person/group was known, the sample framework for the national survey was used as the

basis for recruiting focus group participants. In some cases focus groups were supplemented by individual interviews with ADR practitioners.

In total, 47 ADR practitioners were involved in focus groups or individual interviews. A further two practitioners were unable to attend a scheduled focus group and submitted written comments on the discussion topics. Participants in the focus groups were sent information in advance of the discussion about the research and an outline of the topics on which the focus groups would be asked to reflect upon. The latter are presented in Appendix C.

Lawyers

There were seven regional focus groups with lawyers undertaken in the following regions: Whangarei; Auckland; Hamilton; Rotorua/Tauranga; Nelson; Christchurch; and Dunedin. In addition a further focus group was undertaken with the New Zealand Law Society's ADR Committee.

The focus groups with lawyers were used to explore regional variations in relation to use of, and attitudes towards, ADR and lawyers' views on the following issues, the:

- place of ADR within the court system
- benefits of ADR for disputants
- extent to which lawyers see court promotion of ADR as beneficial to clients
- extent to which lawyers see current quality assurance frameworks and access to ADR as adequate
- changing demand for ADR and court-based resolution of disputes.

Participants for the focus groups were recruited in a number of ways. In some regions recruitment began with the identification of a key contact person combined with "snowballing" methods to identify other local civil litigators. Members of the ADR Research Advisory Committee, the New Zealand Law Society and focus group participants from the ADR practitioner component of the research provided assistance with the identification of key contact people.

Where no key contact person/group was known, contacts provided by court staff as part of the sample framework for the national survey were used as the basis for recruiting focus group participants. In some cases focus groups were supplemented by individual interviews with lawyers involved in ADR practice.

In total, 40 lawyers were involved in focus groups or individual interviews. A further 3 practitioners were unable to attend a scheduled focus group and submitted written comments on the discussion topics. Participants in the focus groups were sent information in advance about the research and a set of questions around which the focus group discussion would be based. The latter are presented in Appendix D.

The Judiciary

Individual interviews were undertaken with High Court Judges, District Court Judges, and Masters at selected registries in all four court regions. Justice Wild and Judge Perkins, members of the ADR Research Advisory Committee, assisted with identification of judges and masters involved in the civil jurisdiction in each of the selected registries.

The interviews with judges and masters were designed to explore the views and practices of members of the judiciary when dealing with civil disputes. To facilitate data collection, interview guidelines were developed and finalised in consultation with the ADR Research Advisory Committee and the Department for Courts. The topics explored with judges and masters included:

- The extent to which civil cases that file with the court attempt ADR prior to filing.
- What factors encourage people to use ADR (pre and post-filing)?
- What factors are barriers to people using ADR?
- Why cases settle (with or without ADR).
- The contribution of ADR to settlement of civil cases filed in the High/District Court under the current case management system.
- The benefits (if any) for parties and/or the courts where parties have been to ADR after filing a civil case with the court.
- The change (if any) in the commitment of lawyers to ADR in the last five years.
- What opportunities there are to promote/integrate ADR more effectively into the process of resolving disputes that are filed with the court.

A copy of the judicial interview guidelines is provided in Appendix E.

Those identified for the judicial interviews were sent information outlining the research by the Manager of Research and Evaluation at the Department for Courts. Each judge/master was then contacted individually via their respective associate or assistant to discuss interview scheduling. Where possible a number of dates and repeat visits were scheduled for regions with multiple interviews in order to ensure opportunities for face-to-face interviews. Where a face-to-face interview was not possible, members of the judiciary were offered the option of a telephone interview.

In total, interviews were completed with nineteen District Court Judges, eight High Court Judges, four Masters and one Court of Appeal Judge. One High Court Judge, three District Court Judges and one Master were unable to be interviewed within the research timetable due to other commitments. In addition to the individual interviews, the research team also spoke with the District Court Civil Committee.

Court Staff

There were four focus groups or interview processes undertaken with court staff in the following court registries:

- Auckland High Court
- Auckland District Court
- Christchurch High Court
- Christchurch District Court.

Those focus groups or interviews were used to explore the views and experiences of court staff in relation to the following topics:

- The extent to which disputants ask advice from court staff about different options for resolution of their disputes.
- Whether and under what circumstances ADR arises as a matter in the interactions between parties and court staff.
- What role the court staff see themselves as having in relation to providing information about ADR.
- Whether the court staff have any sense of:
  - the use of ADR prior to filing:
  - who is amenable to seeking ADR post-filing and why.
- The possible implications of a stronger integration of ADR into court processes.

Participants for the focus groups were recruited in consultation with Court Managers and/or their Civil Jurisdiction Managers. Where possible attempts were made to have a mix of front-counter staff and case management staff involved in each focus group. To minimise disruption to day-to-day court activities registries were given considerable flexibility around the timing of the court staff discussions. In one case, individual interviews with staff were arranged in place of a group session. In total, eleven court staff were involved in focus groups or individual interviews during the course of this research project.

2.3 In-depth Interviews with Disputants

In-depth telephone interviews were undertaken with 60 disputants involved in civil cases as part of the final phase of the research programme.

The target population for the disputant in-depth interviews was parties who had filed civil cases in either the District or High Court between 2000 and 2002 with an equal split between those who did and those who did not take up ADR.

The research proposal suggested a three pronged approach to identifying and recruiting disputants be undertaken. Those three prongs were as follows:

- identification of disputants through court computerised records that identify ADR take-up
- recruitment through snowballing contacts with disputants through accredited ADR practitioners, and
- recruitment through snowballing contacts with disputants through lawyers involved in lawyer focus groups.

Initial work on the disputant sample framework highlighted some difficulties with the proposed recruitment strategies. The electronic data the research team had hoped to access through the Department for Courts' Case Management System (CMS) project was not available in time for the disputant component of the research.[4] Recruitment through ADR practitioners also proved problematic. The nature of their role in the dispute resolution process means that ADR practitioners do not have on-going relationships with disputants. A number of ADR practitioners also expressed concern about the confidential nature of ADR settlements. Many felt that the ADR process 'laid the dispute to rest' for the disputants and they were reluctant to re-open an issue many disputants would have put behind them.

Initial conversations with lawyers involved in the regional focus groups for the lawyer component indicated that at least some lawyers were willing to approach clients about participating in the research. However, this was expected to be a slow process and one the research team would have little control over, with all initial contact needing to be between the lawyers and their respective clients. Despite follow-up of lawyers only one additional disputant was identified through this mechanism.

Once it became apparent that recruitment through ADR practitioners and lawyers would not be straightforward the research team focused on data collection from court records. Field trips were made to Auckland, Hamilton and Christchurch and data collected from court files on completed civil cases in the following registries: Auckland High Court, Hamilton High Court, Hamilton District Court, Christchurch High Court and Christchurch District Court. Disputant details were collected from those cases where a statement of defence had been filed, on the basis that these cases were more likely to have involved ADR or negotiation between the parties.

Following collection of disputant names from court files attempts were made to find and/or verify addresses. This included address matching using the internet, white pages, yellow pages and the companies register. In total 553 disputants were identified from court files relating to 203 cases. Of the 553 disputants identified, addresses were found or verified for 185 individuals or companies (33.5 percent). The total number of disputants identified included some double ups where cases had been taken against companies and against the directors or shareholders of those companies separately.

Where disputant addresses could be verified, those disputants were sent a letter from the Department for Courts detailing the research and letting them know a member of the

[4] CMS is the newly implemented information technology system.

research team may be calling them to invite them to participate in the research. Attempts were made to contact all disputants with verified addresses identified in the sample framework by phone. Phone contacts were attempted at various times of the day, with a minimum of three attempts made per disputant.

A small number (11) of the disputants contacted declined the invitation to participate in the research at the initial contact. Another six disputants made interview times but were then repeatedly unable to be contacted or unavailable when researchers rang back. In total in-depth phone interviews were completed with 60 disputants.

The questionnaire used for the in-depth interviews was developed in consultation with the Department for Courts, and its ADR Research Advisory Committee. The questionnaire was developed as a phone survey instrument consisting of 36 primarily closed-ended questions. This provided the framework for the in-depth conversational nature of the interviews with disputants and included space to record these conversations and any commentary generated around question topics. A copy of the survey instrument is included in Appendix F.

3 The Use and Provision of ADR in New Zealand

This section focuses on the use and provision of ADR in New Zealand. It commences with a discussion of the range of techniques that constitute ADR. It then looks at the types of disputes for which ADR tends to be used and finishes with a discussion of the range of ADR providers and the way in which the provision of ADR services are delivered and regulated.

3.1 ADR Techniques

Ninety-nine percent of the 145 ADR practitioners surveyed in the ADR Practitioner Research Project identified mediation as a technique falling in the range of ADR. Eighty-three percent of ADR practitioners identified arbitration as a technique falling within the ambit of ADR. ADR practitioners reported that the ADR techniques that they used most often were mediation (86 percent of surveyed ADR practitioners), negotiation (62 percent of surveyed ADR practitioners), arbitration (48 percent of surveyed ADR practitioners).

Lawyers also identified mediation and arbitration as key ADR techniques but also tended to identify negotiation, including informal lawyer-to-lawyer discussions, as an ADR technique. Some lawyers saw Judicial Settlement Conferences as an ADR technique.

The largest proportion (around 62 percent) of disputants in the Disputants ADR Research Project identified mediation with ADR, with only around 28 percent of disputants identifying arbitration with ADR and around 18 percent of disputants identifying negotiation with ADR.

It has already been noted in previous reports[5] that throughout the world ADR embraces a number of different activities and techniques. What the data presented above demonstrates, however, is that most stakeholders in New Zealand readily identify mediation and arbitration with ADR.

Formal negotiation is, to a lesser extent, associated by stakeholders with ADR. Other techniques recognised by stakeholders as ADR techniques included facilitation and conciliation. But only small minorities of each of the stakeholder groups identified those latter techniques with ADR.

While Judicial Settlement Conferences were identified by some lawyers as a form of ADR, the judiciary were careful to distinguish the use of mediation-like techniques, which many used in the Judicial Settlement Conference context, from mediation itself. Judicial Settlement

5 Saville-Smith, K., Fraser, R., and Stevenson, P., 2001, *Alternative Dispute Resolution Scoping Study*. Report prepared for the Department for Courts. CRESA, Wellington.

Conferences were not seen by the judiciary as ADR but as a unique form of dispute/case resolution.

Disputants were typically less concerned with distinguishing between different types of ADR techniques. They were frequently confused as to where Judicial Settlement Conferences fitted in the broad range of mechanisms through which they could attempt to resolve their dispute. Some disputants mixed up Judicial Settlement Conferences with judicial hearings. Others saw Judicial Settlement Conferences as a form of mediation.

Those confusions represented a pervasive lack of knowledge among disputants about the courts and its processes and procedures, as well as limited information about terms such as mediation, arbitration and adjudication. Even disputants who had been previously involved in a case filed within a civil court remained largely ignorant of terms and activities familiar to lawyers, the judiciary and court staff – including activities such as discovery, interlocutories, conferences and hearings.

3.2 Types of Disputes Amenable to ADR

The international literature suggests that ADR can be used in a wide variety of civil disputes. This view is supported by both lawyers and ADR practitioners.

As Table 3.1 shows, however, lawyers perceive ADR being typically used in a relatively narrow set of disputes – predominantly in commercial contracts, building/construction disputes and employment related disputes.

Table 3.1 Lawyers' Views on the Types of Case Typically Taking-up ADR (Lawyers Survey)[1]

Type of Dispute	District Court		High Court	
	Responses	% of Lawyers *(n=132)*	Responses	% of Lawyers *(n=122)*
Building construction	108	81.8	92	75.4
Commercial contracts	98	74.2	108	88.5
Employment related	90	68.2	66	54.1
Family related	57	43.2	43	35.2
Property disputes	47	35.6	43	35.2
Insurance	42	31.8	45	36.9
Environmental	23	17.4	24	19.7
Consumer disputes	22	16.7	17	13.9
Agricultural/Farming	20	15.2	15	12.3
Tenancy	12	9.1	6	4.9
Local Government	8	6.1	8	6.6
Maori Issues	8	6.1	4	3.3
Taxation	2	1.5	4	3.3
Immigration	1	<1.0	1	<1.0

1 Multiple response.

Significant proportions of ADR survey respondents also reported dealing with the following sorts of disputes in the 1 January 2002-31 December 2002 period:

- Commercial relationships and contracts – reported by 63 percent of ADR practitioner survey respondents.
- Building and construction disputes – reported by 39 percent of ADR practitioner survey respondents.
- Property disputes – reported by 37 percent of ADR practitioner survey respondents.
- Employment related disputes – reported by 30 percent of ADR practitioner survey respondents.
- Family disputes – reported by 26 percent of ADR practitioner survey respondents.
- Environment related disputes – reported by 21 percent of ADR practitioner survey respondents.
- Insurance related disputes – reported by 16 percent of ADR practitioner survey respondents.

Data from the focus groups as well as the ADR practitioner survey indicates some of the sectors in which they practise most frequently. In the agriculture/farming sector, especially around share-milking in the dairy industry, ADR appears to be an industry practice. This is also the case with the building industry. In the latter, as well in employment matters, arbitration has been a prominent form of ADR. Similarly arbitration has a long history in property and contractual disputes because of the frequent inclusion of arbitration clauses in contracts. Family disputes, particularly around estates, were also seen as significant areas in which ADR techniques, particularly mediation, could and did contribute.

Fourteen of the 60 disputants who participated in in-depth interviews around a filed case resolved over the previous year, reported that ADR had been used during the course of their case. Table 3.2 summarises those fourteen cases, the position of the disputant in relation to those cases and the case outcomes. A review of the issues in dispute in those fourteen cases also shows the wide range of situations in which ADR can be used.

Table 3.2 Summary of Cases Reported on by Disputants Using ADR

Issue in dispute	Party	Court	Outcome
Sale and purchase agreement of farm	Defendant	High	Settled
Debt recovery in company liquidation case	Defendant	High	Settled
Sale and purchase	Defendant	High	Summary Judgment
Misrepresentation of a business for sale. Plaintiff (purchaser) seeking order for seller to repurchase business	Plaintiff	High	Settled
Dispute between business partners	Defendant	High	Settled
Contractual dispute about time over-run	Defendant	High	Settled
Breach of copyright	Plaintiff	High	Settled
Developers seeking compensation from local authority after building delayed	Plaintiff	High	Settled
Misrepresentation of stock value in sale of business.	Plaintiff	District	Settled
Sale and Purchase Agreement	Defendant	District	Settled
Faulty cladding on new building. Home owners sued developers.	Defendant	District	Settled
Faulty cladding on new building. Home owners sued developers.	Plaintiff	District	Settled
Contractual agreement – dispute over goods supplied	Plaintiff	District	Settled
Rental dispute – commercial property	Defendant	District	Settled

3.3 Use and Trends in ADR Take-Up

With the exception of disputants themselves, all the stakeholder groups expressed a view that the use of ADR is increasing. Among ADR practitioners, however, both among those who combine ADR provision with an active legal practice and among those who focus entirely on ADR, there is a view that the increase in ADR take-up, especially mediation, has not been as pronounced or as extensive as predicted in the 1980s and 1990s. Nevertheless, it is clear that in some sectors, ADR has become a significant mechanism for dispute resolution often prior to disputes being filed within the courts. This is particularly the case in relation to building disputes, insurance, and professional indemnity claims.

It also seems that there is the beginning of a movement away from arbitration as an extra-court or ADR mechanism for dispute resolution and a move towards the use of mediation techniques. This in part reflects a view expressed among lawyers that arbitration fails to give the benefits of other forms of ADR. Many lawyers see arbitration as a costly exercise with the appointment of an appropriate arbitrator often leading to considerable delay. The processes of arbitration are seen as often embracing the adversarial nature of court adjudication without the safeguards of the court in relation to appeal and precedent. Some lawyers felt that there was an increasing trend towards challenging arbitration outcomes on technical grounds, which increased the cost of the arbitration pathway. At the heart of those appeals was a fundamental dissatisfaction among parties with arbitration processes.

Despite perceptions that mediation has benefits that exceed those of arbitration, the lawyers participating in the lawyers survey reported that mediation is still only used in a minority of cases. Lawyers report that in relation to:

- Unfiled cases within the District Court jurisdiction, only 12.2 percent were resolved by mediation and 5.5 percent were resolved through arbitration. The vast majority of disputes were resolved through lawyer-to-lawyer negotiation.
- Unfiled cases within the High Court jurisdiction, 36.6 percent were resolved through mediation, 6.9 percent were resolved through arbitration and 44.9 percent were resolved through lawyer-to-lawyer negotiation.

Lawyers and ADR practitioners tend to agree that there are significant regional variations in the interest shown towards ADR, especially mediation. ADR practitioners – both those in legal practice and other practitioners – identified Auckland, Hamilton and the Bay of Plenty/ Rotorua as high-use regions for ADR.

The reasons why some areas were more likely to use ADR, especially mediation, are varied and complex. In general, the data from stakeholders suggests that high levels of negotiation and/or mediation were used where:

- the local legal culture was non-litigative
- courts were seen as unlikely to be able to adjudicate or provide Judicial Settlement Conferences in the timeframes desired by disputants
- the use of ADR had become the 'usual' pathway, such as for professional indemnity and other significant insurance related disputes
- the judiciary supported ADR
- there was a trusted pool of ADR practitioners well-known and acceptable to lawyers.

It was suggested by some lawyers in Christchurch that Judicial Settlement Conferences in the High Court rather than ADR became a preferred pathway. The Christchurch High Court was seen as providing rapid access to Judicial Settlement Conferences. Those Judicial Settlement Conferences in the High Court were seen as being effectively managed and effective and many lawyers saw a benefit in having disputants being exposed to the weight that a member of the judiciary could bring in encouraging disputants to have realistic views of the implications of pursuing litigation.

3.4 Provision of ADR Services

One of the critical issues for lawyers in confidently referring disputants to an ADR process, especially mediation which, unlike arbitration, is not governed by statute, is the perceived quality and availability of ADR services.

Seventy-six percent of lawyers saw the willingness of the participants as an important factor in the efficacy of an ADR process (Table 3.3). The following discussion provides an overview of the ADR sector, profiles ADR practitioners (including their skills and training) and comments on the regional supply of ADR services.

Table 3.3 Lawyers' Perceptions of Determinants of ADR Efficacy (Lawyers Survey)

Perceived Determinant	Total	Lawyers Working Primarily in District Court *(n=74)*	Lawyers Working Primarily in High Court *(n=64)*	Lawyers Working Equally in High Court and District Court *(n=58)*
Disputant willingness	76.0%	80.8%	78.1%	69.0%
Experienced ADR practitioner	62.8%	68.5%	60.0%	66.1%
Supportive counsel	40.3%	37.5%	40.6%	45.6%
Judicial support	14.8%	21.9%	10.9%	10.7%
Ongoing relationship between disputants	14.3%	13.7%	15.6%	14.3%

The Arbitrators and Mediators Institute of New Zealand Inc (AMINZ) is one industry body for those who undertake dispute resolution in New Zealand. AMINZ accredited membership is associated with undertaking dispute resolution study with the Dispute Resolution Centre in the Massey University Graduate School of Business.

Membership or accreditation is two-tiered with initial qualification levels being achieved by associates, and fellows requiring advanced training and assessment through the fellowship programme, which consists of two written examinations, a practical test and interviews. AMINZ has panel lists of mediators and arbitrators with advanced accreditation, information about which is available to the public. Membership of the panels is based on qualifications and experience and not all associates or fellows are on the panels.

AMINZ has a separate code of ethics for both arbitrators and mediators and also operates disciplinary procedures for members. AMINZ has also been approved as an Authorised Nominating Authority by the Minister for Economic Development for nominating adjudicators for construction disputes under the Construction Contracts Act 2002. AMINZ has developed a public panel list of adjudicators and has just completed a series of seminars for members who may be eligible for the adjudicator list.

LEADR has a national office in Sydney, Australia with a New Zealand chapter administered from Wellington. The organisation is set up to serve the community by promoting and facilitating the development, acceptance and usage of ADR, promoting education and researching in ADR, and disseminating information for the benefit of its members and the community.

LEADR provides a range of services, including those directed to putting the community in touch with its members to access ADR services provided by its members; training; research, and ADR promotion. For members there are benefits including accreditation as a mediator, networking and inclusion in LEADR promotional activities, and professional development.

Membership and accreditation is to LEADR Australasia, with all LEADR chapters requiring standard skills and competencies of members to attain accreditation. Accreditation is available to those who have completed the 4-day LEADR mediator workshop or those who have been assessed as otherwise eligible to join. On the LEADR website there is a list of those organisations who have received in-house training from LEADR. Included in the list

are a number of law firms, one New Zealand corporation, a number of Australian public sector agencies and government departments, and judges of the High Court of New Zealand and various Australian courts.

The accreditation requirements of LEADR and AMINZ are set out in Infobox 3.1 and Infobox 3.2.

Infobox 3.1 LEADR Accreditation Requirements

	Membership Type	Accreditation Requirements	Requirements for Retention of Accreditation
LEADR	***Provisional Panel***	The requirements for accreditation are: completion of an approved 4-day LEADR workshop	N/A
	Panel	The requirements for accreditation are: (1) completion of an approved 4-day LEADR workshop, **and** (i) satisfactory completion of a video assessment including simulated role play of an ADR process; or (ii) satisfactory completion of an assessment process agreed by the Accreditation Committee as appropriate to the particular ADR process in respect of which ADR is sought; or (iii) demonstration of the skills required of a practitioner in the process by reference to actual practice in the field.	To retain LEADR accreditation practitioners must in the three year period immediately preceding 30 June each year after initial accreditation or deemed initial accreditation, have: (1) conducted for periods of no less than 75 hours in total the relevant ADR process; or (2) attended workshops, courses or e-lectures relating to that process for periods of not less than 25 hours; or (3) attended workshops, courses or e-lectures relating to that process for periods of not less than 12.5 hours and taught that process for not less than 12.5 hours. Unless the Accreditation Committee has exempted the practitioner from doing so.
	Advanced Panel	The requirements for advanced accreditation are: (1) compliance with the requirements for meeting and retaining accreditation as detailed above; **and** (2) in the three years immediately prior to application for advanced accreditation, the satisfactory completion of a minimum of 250 hours of practice in the relevant process. Satisfactory completion being demonstrated by written evaluations of not less than 20 parties or their advisers that the practitioner's conduct of the process has demonstrated a high level of competence in the process, or the assessment of two qualified independent assessors approved by the Accreditation Committee.	In order to retain advanced accreditation a practitioner must, during the six months following the expiration of each three year period after the initial advanced accreditation or deemed advanced accreditation, provide the Accreditation Committee with written evaluations in respect of the conduct of not less than ten matters applying the process for which the practitioner is accredited that the practitioner's conduct of the relevant process has demonstrated a high level of competence. Unless the Accreditation Committee has exempted the practitioner from doing so.

Infobox 3.2 AMINZ Accreditation Requirements

	Membership Type	Accreditation Requirements	Requirements for Retention of Accreditation
AMINZ	***Affiliate***	N/A - Non-qualified members	
	Associate	The requirements for accreditation are: ▪ Attaining a mark of 50% or more in four 200 level papers as part of the Massey Dispute Resolution Centre's Graduate Diploma in Business Studies (Dispute Resolution) – three theory papers and the 8 day Dispute Resolution practicum; **or** ▪ Attaining a mark of 50% or more in each of the equivalent courses offered by any other University or tertiary educational establishment which may in the future be recognized by the Council of the Institute as providing acceptable training for Associate Members; **or** ▪ Otherwise satisfying the Council that the practitioner in question has the necessary training and/or experience to satisfy the standard prescribed for admission as an Associate member in the Institute's by-laws.	Accredited members are expected to continue their professional development by participating in educational events with the Institute and furthering their own knowledge and experience in dispute resolution. Associate, fellow and panel members who submit a continuing professional development (CPD) return and fulfill the CPD requirements will be acknowledged as holding a current CPD status with the Institute.
	Fellow	The requirements for accreditation are: (1) meeting the requirements for accreditation as an associate member; **and** (2) Attaining pass marks in written fellowship examinations administered by the institute – Fellowship Examination IIA (50% pass mark) and Fellowship Examination IIB for arbitrators or IIC for mediators (75% pass mark); **and** (3) Attaining a pass mark of 80% in the Fellowship Final Test – a one day practical, **and** (4) A final interview with two Fellowship Admissions Assessors who then make a recommendation to the Institute's Council.	Accredited members are expected to continue their professional development by participating in educational events with the Institute and furthering their own knowledge and experience in dispute resolution. Associate, fellow and panel members who submit a continuing professional development (CPD) return and fulfill the CPD requirements will be acknowledged as holding a current CPD status with the Institute. The fellowship qualification is internationally benchmarked against the Chartered Institute of Arbitrators (UK) with reciprocity for fellowship (arbitration).
	Public Panel	The criteria for admission to the Mediator and Arbitrator Panels are: (1) Be an associate or fellow, **and** (2) Have requisite experience as an arbitrator or mediator, **and** (3) Be a member in good standing i.e. no disciplinary matters have affected the status of the member, **and** (4) Submit documents from at least three arbitrations or mediations for peer review by the AMINZ Panel Committee, **and** (5) Attend an interview with two members of the Panel Committee and satisfy the interviewers that the necessary requirements are met.	Panel members are required to have the knowledge, experience and personal qualities and qualifications to qualify for admission to the panels. Panel membership is overseen by the Panel committee. To remain on the panels, members must satisfy the Institute's Continuing Professional Development requirements.

3.5 A Profile of ADR Practitioners

The ADR Practitioners Survey indicates that the vast majority of accredited ADR practitioners are men (83 percent of ADR Practitioners Survey participants) and are almost entirely New Zealand European/Pakeha. Only four of the practitioners surveyed identified as Maori, a further two identified as a Pacific Island person, and two were from one of the Asian communities.

Accredited practitioners tend to be older. Seventy-nine percent of the surveyed ADR practitioners were aged between 40 years of age and 64 years of age. Around 94 percent of the accredited ADR practitioners were aged forty years or more.

There is a strong representation of people with legal training among accredited ADR practitioners. Many of these combine a legal practice with a practice in ADR. In the ADR Practitioners Survey, 59 percent of respondents reported combining their ADR work with legal practice as a solicitor or barrister. It should be noted that the ADR Practitioner Survey sample population has a slight bias in favour of practitioners with a legal background because it surveyed accredited practitioners from LEADR and the AMINZ public panels. Although now open to much wider membership, LEADR as an organisation was originally set-up for lawyers engaged in ADR. In addition, there is a predominance of practitioners with a legal background, including past members of the judiciary on the AMINZ public panels. AMINZ estimate that across all their members, beyond those only on panels, the proportion of lawyers is around 20-30 percent.

The majority (59 percent) of the lawyers also providing ADR services spend 20 percent or less of their time undertaking ADR (Table 3.4). Fifty-six percent of lawyers providing ADR services reported that 15 percent or less of their income was associated with ADR service delivery (Table 3.5). ADR is, consequently, a supplementary rather than a core activity for those lawyers.

Table 3.4 Proportion of Time Associated with ADR work for those ADR Practitioners Combining ADR work with Legal Practice (ADR Practitioners Survey)

Proportion of Time Spent on ADR Service Provision	ADR Practitioners	% of ADR Practitioners
0-5 percent	14	17
6-10 percent	12	15
11-15 percent	6	7
16-20 percent	16	20
21-25 percent	5	6
26-30 percent	8	10
31-50 percent	8	10
51-75 percent	7	9
76+ percent	6	7
Total	82	101[1]

1 Due to rounding.

Table 3.5 Proportion of Income Associated with ADR work for those ADR Practitioners Combining ADR work with Legal Practice (ADR Practitioners Survey)

Proportion of Income from ADR Service Provision	ADR Practitioners	% of ADR Practitioners
0-5 percent	23	30
6-10 percent	11	15
11-15 percent	9	12
16-20 percent	7	9
21-25 percent	7	9
26-30 percent	4	5
31-50 percent	4	5
51-75 percent	7	9
76+ percent	4	5
Total	76	99[1]

[1]Due to rounding

3.6 Experience and Training in ADR

All the stakeholders considered that skilled ADR practitioners were a critical success factor in ADR. Experience and training were seen as underpinning the ability of ADR practitioners to ensure that ADR is carried out with:

- well-defined and agreed processes
- clear engagement of the disputants rather than their lawyers in the mediation process
- a focus on the dispute, rather than legal 'niceties', and its resolution
- outcome oriented process
- neutral but firm mediation or arbitration.

It was notable that those lawyers and disputants who felt that ADR was not an effective dispute resolution mechanism, typically referred to ADR situations (either directly experienced or heard about through others) with poorly implemented or non-transparent processes. Especially among lawyers, anxieties around referring clients to ADR often focused on the perceived competencies of the ADR practitioner.

The average length of ADR practice reported by ADR practitioners was 14 years. The median number of years' experience was 11 years. Fifteen ADR practitioners established practices prior to or in 1975, but only nine practitioners reported undertaking formal training in ADR techniques in that period.

Table 3.6 shows the number and proportions of the surveyed ADR practitioners trained in particular periods and the number and proportions of ADR practitioners establishing practices in particular periods. The "take-off" of interest in ADR in the 1991-1995 period is clearly evident.

Table 3.6 Year Training Commenced and Year ADR Practice Established (ADR Practitioners Survey)

Period	Commenced ADR Training		Established ADR Practice	
	Practitioners	%	Practitioners	%
1975 or before	9	8	15	10
1976-1980	6	5	14	10
1981-1985	16	14	11	8
1986-1990	21	19	22	15
1991-1995	31	28	50	35
1996-2000	23	21	28	20
2001 or after	5	5	3	2
Total	111	100	143	100

Table 3.6 demonstrates the tendency for some ADR practitioners to be undertaking ADR practice without formal training. These practitioners tend to have established ADR practices prior to 1981 and have built up considerable experience prior to the establishment of the range of qualifications and accreditations now available.

Many ADR practitioners have gone through the LEADR training course in New Zealand, established in 1991, and/or joined AMINZ as associates or fellows by undertaking dispute resolution training administered through the Massey University Dispute Resolution Centre, studied overseas, or completed the AMINZ Fellowship programme, which is internationally benchmarked.

Table 3.7 demonstrates the importance of the four-day LEADR accreditation workshop for ADR practitioners and the AMINZ qualification but the relatively low involvement of the universities in training ADR practitioners.

Table 3.7 ADR Qualification and Training* (ADR Practitioners Survey n=145)

Training/Qualification	ADR Practitioners	
	Responses	% of ADR Practitioners
4 day LEADR Accreditation Workshop	95	66
AMINZ Fellow or Associate	66	46
On-going training	44	30
Dispute Resolution Diploma, Massey	21	15
Dispute Resolution LLB papers[6]	2	1

* Multiple response.

Only 15 percent of the ADR practitioner respondents reported having completed the Massey University Dispute Resolution Diploma while only two respondents (out of the 85 ADR practitioners that combine ADR practice and legal practice) reported having undertaken

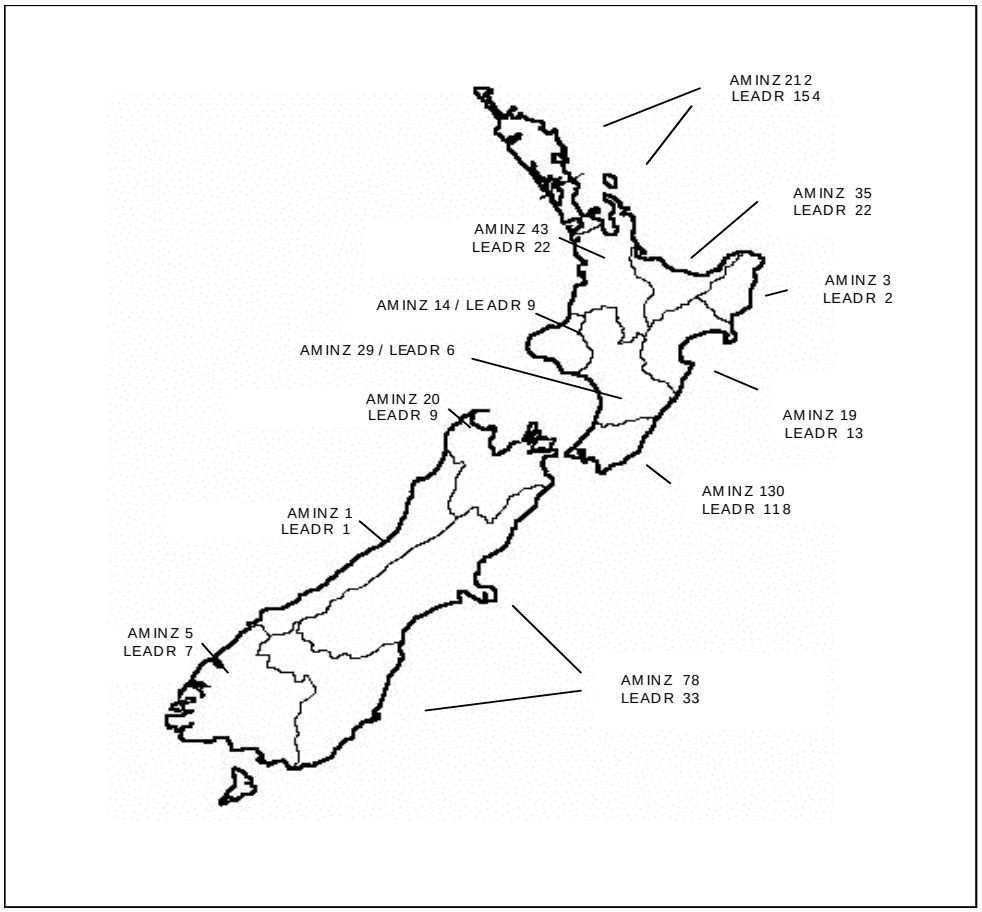
[6] The early 1990s saw universities and other tertiary institutions developing qualifications in mediation and other dispute resolution subjects. See Boulle, L. *et. al.* 1998. *Mediation: Principles, Process, Practice* (New Zealand edition), Butterworths, Wellington.

dispute resolution papers as part of their law degrees. Table 3.7 also highlights the importance of on-going training usually in the form of day sessions and workshops.[7]

3.7 Delivering ADR Services

The supply of ADR practitioners varies regionally. Figure 3.1 below sets out the distribution of AMINZ/LEADR members by region.

Figure 3.1 National Distribution of Current AMINZ/LEADR members*+



* In addition, a small number of members are currently based overseas – AMINZ 27, LEADR 3.
\+ Note ADR practitioners are frequently members of both AMINZ and LEADR

[7] It should be noted that the sample frame was constructed by reference to AMINZ and LEADR membership. While there is a link between the AMINZ accreditation system and the Massey University Dispute Resolution Diploma, ADR practitioners who are not members of AMINZ or LEADR may be trained through university-based tertiary courses such as those provided by Massey University.

4 Advantages and Disadvantages of ADR

The take-up of ADR depends on a combination of three critical factors. First, the extent to which disputants and their advisors are aware of ADR. Second, the adequacy of the supply of ADR services for those that would wish to take-up ADR services. Third, the perceived advantages and disadvantages of ADR.

This section is concerned primarily with the third of those factors. It notes, however, the low level of awareness of ADR among disputants, the critical and influential position of lawyers in determining whether disputants seek resolution through ADR, and comments on the extent to which the court system raises awareness about the potential for ADR as a dispute resolution pathway.

4.1 Benefits of ADR

The international literature on ADR identifies five major outcomes from ADR. They are:

- increased settlement
- improved satisfaction with the outcome or manner in which the dispute is resolved among disputants
- reduced time in dispute
- reduced costs in relating to the dispute resolution
- increased compliance with agreed solutions.

Among stakeholders there is broad agreement that dispute resolution through ADR mechanisms can be beneficial. Nevertheless, there are some significant variations among stakeholders about the extent and nature of those benefits for disputants. ADR practitioners are most enthusiastic about the benefits of ADR take-up. Lawyers and disputants tend to be more qualified with regard to the actual benefits associated with ADR.

ADR Practitioners' View of ADR Benefits

Participants in the ADR Practitioners Survey were convinced of the efficacy of ADR techniques in resolving disputes that were already or could be filed in the District or High Courts. Two thirds of the respondents (66 percent) reported that they believed that more that 80 percent of disputes could be resolved through ADR. Only 4 percent reported that they believed that 55 percent or fewer disputes were amenable to effective resolution through ADR (Table 4.1).

Table 4.1 ADR Practitioners' Estimates of Disputes Effectively Settled by ADR (ADR Practitioners Survey n=139)*

Proportion of Disputes Settled by ADR	ADR Practitioners	
	Responses	%
0-20 percent of disputes	0	0
21-30 percent of disputes	1	<1
31-40 percent of disputes	0	0
41-50percent of disputes	4	3
51-60 percent of disputes	9	6
61-70 percent of disputes	5	4
71-80 percent of disputes	28	20
81-90 percent of disputes	32	23
91-100 percent of disputes	60	43

* Six missing cases.

It was noted in the ADR practitioner focus groups, however, that not all ADR techniques generated benefits in the same way or to the same extent. A strong distinction was made between mediation and arbitration. Table 4.2 represents ADR practitioners' assessment of the relative potential of arbitration and mediation in relation to the benefits typically associated with ADR.

Infobox 4.1 ADR Practitioner Views on the Relative Potential of Arbitration and Mediation

	Arbitration	Mediation
Reduced financial costs	Low-Medium	Medium-High
Flexible solution	Low	High
Confidentiality	High	High
Ability to influence outcome	Low	High
Disputant control	Medium	High
Disputants satisfaction	Low-High	Medium-High
Speedy resolution	High	High

ADR practitioners see the real benefits of arbitration lying in the ability of the disputants to select an arbitrator by mutual agreement and the considerable specialist expertise an arbitrator may bring to the resolution of a dispute with substantial technical components. It is for the latter reason that arbitrators have so frequently been used in technical sectors such as the building industry.

Lawyers' Perceptions of ADR Benefits

The majority of lawyers believe that disputants seek ADR resolution of disputes in an effort to:

- reduce the cost of a dispute
- speed resolution, and
- reduce uncertainty around the outcome of judgment in the court system (Table 4.2).

Table 4.2 Lawyers' Perceptions of Disputants' Reasons for ADR Take-up* (Lawyers Survey)

Perceived Disputant Reason	Responses	% of Lawyers *(n=196)*
Want to reduce costs	183	93.4
Want speedy resolution	159	81.1
Uncertainty of court outcome	142	72.4
Preservation of ongoing relationship	86	43.9
Desire for compromise solution	82	41.8
Desire for more control over process and outcome	80	40.8
Privacy and confidentiality	74	37.8
Directed by contract, statute or existing agreement	61	31.1
Desire for creative solution	48	24.5
Concerns about court procedures[8]	39	19.9

* Multiple response.

Mediation and negotiation are seen as more likely than arbitration to generate ADR benefits including:

- increased opportunities to resolve a dispute in a way satisfactory to the parties
- increased likelihood of the parties complying with the remedies or solutions generated through ADR
- reductions in time delays
- reductions in costs, and
- maintenance of confidentiality about both the dispute, the remedies sought and the outcomes.

For lawyers, reaping the potential benefits of ADR is by no means straightforward. For most lawyers the effectiveness of ADR is contingent on two major factors. Firstly, the willingness of disputants to engage in a resolution process, and, secondly, the experience of the ADR practitioners (Table 4.3).

[8] These 'concerns' are an amorphous set of fears that many disputants have about becoming involved with the courts. Disputants often find these difficult to articulate clearly but in sum they reflect a discomfort with the perceived formality of the court and fears that they might not represent themselves well within what they see as an adversarial environment.

Table 4.3 Lawyers' Perceptions of Determinants of ADR Efficacy (Lawyers Survey)

Perceived Determinant	Total	Lawyers Working Primarily in District Court *(n=74)*	Lawyers Working Primarily in High Court *(n=64)*	Lawyers Working Equally in High Court and District Court *(n=58)*
Disputant willingness	76.0%	80.8%	78.1%	69.0%
Experienced ADR practitioner	62.8%	68.5%	60.0%	66.1%
Supportive counsel	40.3%	37.5%	40.6%	45.6%
Judicial support	14.8%	21.9%	10.9%	10.7%
Ongoing relationship between disputants	14.3%	13.7%	15.6%	14.3%

The quantitative data does indicate some of the subtleties around this issue, however, in relation to the importance of judicial and counsel support as factors in the efficacy of ADR. Overall, 40.3 percent of lawyers saw counsel support as an important determinant. Lawyers working in the High Court or equally in the District Court and High Court were over-represented among those who saw counsel support as an important factor. Lawyers working primarily in the District Court were significantly more likely than lawyers working primarily in the High Court to see judicial support as an important factor in the efficacy of ADR.

It is unclear why those differences emerge. The lawyer survey data suggests that there may be some relationship between the ADR skills and experience of lawyers and the extent to which they perceive the importance of their own role in encouraging effective ADR. The High Court lawyers are more likely to be trained in and/or engaged in delivering ADR services than the lawyers working primarily in the District Court (Table 4.4).

Table 4.4 ADR Training* and ADR Practice Among Lawyers (Lawyers Survey)

	Lawyers Working Primarily in District Court *(n=74)*		Lawyers Working Primarily in High Court *(n=64)*		Lawyers Working Equally in High Court and District Court *(n=58)*	
	N	%	N	%	N	%
Combines legal practice with ADR Practice	8	10.8	17	26.6	12	20.7
Trained LEADR Accreditation Workshop	2	2.7	13	20.3	3	5.2
AMINZ Associate or Fellow	3	4.1	2	3.1	6	10.3
Massey University Dispute Resolution Diploma	1	1.4	0	0.0	1	1.7
Dispute Resolution paper(s) as part of LLB	1	1.4	1	1.6	1	1.7
On-going ADR training – workshops, seminars etc	4	5.4	8	12.5	4	6.9

* Multiple response.

In relation to the willingness of the disputants, it was also noted by many ADR practitioners, lawyers and the judiciary that although disputants may initially feel hesitant and uncomfortable about ADR, disputants in retrospect often find the experience very useful. This view is consistent with the findings of the disputant research project.

Disputants' Perceptions of ADR Benefits

In-depth interviews with 60 disputants with civil cases filed with the court system in the 2000-2002 period revealed that only fourteen used ADR to help resolve their dispute.

As Table 4.5 shows, settlement was achieved in eleven of those cases through ADR and for a further case ADR resolved some issues. Eleven of those fourteen disputants reported that they would use ADR if ADR was 'suited' to the nature of the dispute.

Table 4.5 Disputant Views on ADR's Contribution to Resolution of their Dispute (Disputant In-depth Interviews n=14)

ADR's Contribution to Resolving the Case	Interviewees
The case settled as a result of ADR	11
ADR did not lead to settlement	2
ADR resolved some issues in the case	1
Total	14

Overall, thirty of the sixty disputant interviewees had had some experience of using ADR to resolve a dispute. A further twenty disputants knew of ADR. Forty-nine of the sixty disputants involved in in-depth interviews felt able to make some comment about the advantages and disadvantages of ADR. It is clear that ADR is seen as a less costly approach to dispute resolution than having the dispute resolved through a judgment given by the Court. Almost as many see ADR as a comparatively faster mechanism for dispute resolution (Table 4.6).

Table 4.6 Disputant Views on the Advantages of ADR Identified by Interviewees (Disputant In-depth Interviews n=49)*

ADR Advantages	Responses *(n=49)**	% of Interviewees
Cheaper resolution	30	61.2
Faster resolution	27	55.1
More control	8	16.3
Informal process/relaxed/less stressful	6	12.2
More creative solutions	5	10.2
Other	5	10.2
Preserves relationships	3	6.1

* Multiple response.

4.2 Disadvantages of ADR

There was widespread support across stakeholders for the use of ADR techniques to resolve disputes. ADR was not always seen as an alternative to resolution through the courts, however. Moreover, even the most enthusiastic supporters of ADR – ADR practitioners – still saw some potential disadvantages for disputants in using ADR.

ADR Practitioners' Views on the Disadvantages of ADR

Unlike other stakeholders, ADR practitioners tended to see any disadvantages of ADR for disputants as being related primarily to the particular ADR technique used or the methods by which ADR techniques are implemented.

It has already been noted that ADR practitioners, like lawyers and disputants, see arbitration as a less attractive ADR technique than mediation. It should also be recognised, however, that even within mediation, some processes are seen as more likely to achieve all the benefits claimed for ADR than others.

ADR practitioners recognise that mediation may encompass a variety of models, ranging from developing consensual solutions to risk management or evaluative models for dispute resolution. As Boulle notes, mediation is:

> *"a decision-making process in which the parties are assisted by a third-party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can consent".*[9]

Many ADR practitioners believed the full range of potential benefits, especially those related to increased user satisfaction with outcomes and compliance with ADR resolutions, were less likely to be achieved where mediation focused on risk assessment, cost-benefit review, or evaluation of the likelihood of success in court rather than consensual solution development.

Many ADR practitioners, both those who combine their ADR practice with legal practice and those who do not, expressed considerable concern at techniques directed primarily at trading-off the probability of success in court. This was perceived as particularly prevalent in the Auckland region and was characterised by some ADR practitioners as a model which allowed disputants to be 'bullied'. It was a model that some found antithetical to what they believed to be the core philosophical values of mediation and the core elements which led to better quality solutions – the empowerment of the disputants, and the expectation that disputants should take responsibility for mutually generating and committing to consensual solutions.

A trading-off approach in mediation was perceived by ADR practitioners to be particularly widespread in disputes around insurance and employment matters. Some concern was expressed that if that type of approach became prevalent, or the dominant perception of mediation, there would be a backlash against mediation, a hesitancy to take-up mediation opportunities, and a failure to capture the potential benefits of mediation such as solution flexibility, reduction in stress and relationship repair.

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9 Boulle, L. *et.al.* 1998. *Mediation: Principles, Process, Practice* (New Zealand edition). Wellington, Butterworths.

Lawyers' Views on the Disadvantages of ADR

For lawyers concerns about ADR focus on three issues. Those are whether ADR:

- delivers reduced costs and increases timeliness
- delivers a sound and fair outcome, and
- generates agreements that can be sustained and enforced.

Lawyers were directly involved in two of the stakeholders research projects. Some of the ADR practitioners were lawyers and some practising lawyers were participants in the ADR practitioner research project as well as the lawyers' research project.

What emerged from the lawyer and ADR practitioner research projects as well as the disputant research project was that lawyers have, perhaps more than any of the other stakeholder groups, a diversity of views around the merits and potential problems of ADR. In particular there is a view among some lawyers that ADR both delays dispute resolution and increases costs. Increased cost was seen by lawyers participating in the lawyers' survey as a particular limitation of arbitration. Delay was seen as a particular problem associated with mediation.

As Table 4.7 shows only a minority of lawyers participating in the lawyers' survey saw significant limitations with ADR techniques. It is notable that the pattern of those minority concerns differed in relation to arbitration and mediation respectively. With regard to arbitration a substantial minority of lawyers expressed concern that arbitration increased the costs of dispute resolution. By comparison, with regard to mediation the most substantial minority of lawyers expressed concern that mediation could be used as a delaying tactic. A smaller but still substantial minority of lawyers expressed concerns about mediation's enforceability.

Table 4.7 Limitations of Arbitration and Mediation (Lawyers Survey)

Key ADR Limitation	**Limitations of Arbitration** *(n=196)**		**Limitations of Mediation** *(n=196)**	
	Responses	% of Lawyers	Responses	% of Lawyers
Enforceability	17	8.7	54	27.6
Delaying tactics	35	17.9	74	37.8
Increased Costs	80	40.8	35	17.9

* Multiple response.

Only a minority of the lawyers participating in the lawyers' survey expressed concerns about those issues. However, the disputants research does reveal how powerful lawyers' views can be in relation to take-up of ADR. A small group of disputants were explicitly advised by their lawyer not to take-up ADR on the grounds that it was too expensive or ADR would be ineffective. Some disputants assumed that if lawyer-to-lawyer informal discussion had failed to resolve the dispute then ADR would simply not be an option.

Overall, however, surveyed lawyers tended to be supportive of ADR. Indeed, among the lawyers participating in the lawyers' survey around 64.4 percent accepted the notion that there might be merit in the court ordering parties to take-up ADR prior to proceeding with a case. It is notable, however, that only 22.2 percent of the participant lawyers felt court orders to arbitration were acceptable, compared to 53.7 percent who accepted the notion of the courts ordering parties to mediation.

Even among lawyers who believed the benefits of ADR were such as to justify some mechanism by which the courts could order parties to mediation, there was still a concern that ADR should not be promoted in a manner that compromised litigants' access to justice.

Disputants' Views on the Disadvantages of ADR

Although ADR was seen by the disputants participating in the in-depth interviews as a less costly pathway than the court system, a small proportion of the 49 interviewees who felt they could comment on the merits of ADR, identified a series of potential drawbacks with ADR. Those are set out in Table 4.8

Table 4.8 Disadvantages of ADR Identified by Interviewees (Disputant In-depth Interviews n=49)*

Key Disadvantages Identified	Responses	% of Interviewees
Lack of enforcement	10	20.4
Increased costs	9	18.4
Delaying tactic	9	18.4
Other	7	14.3
Compromise of principles	7	14.3
ADR practitioner may not have the technical skills required	3	6.1
Need other party to be willing to come to the table	2	4.1
No right of appeal	2	4.1

* Multiple response.

Twelve of 49 disputants stated that they saw only advantages and no disadvantages associated with ADR.

5 ADR Impact on Settlement, Cost and Time

Without a systematic quantitative study of the trajectory of civil cases filed with the court system, it is impossible to definitively assess the impact of ADR on settlement rates, the cost of case resolution and the duration of cases from filing to disposal. The ADR stakeholders' research projects have allowed the participants in the process of case resolution most affected to reflect on those issues and provide their assessment of the impact of ADR.

While the key stakeholders – disputants, ADR practitioners and lawyers – make somewhat different quantifications of the impact of ADR on the propensity to settle, there is little doubt that they do see ADR as having positive impacts on settlement probabilities. ADR practitioners were so convinced of the efficiency of ADR in resolving disputes that 83 percent of ADR practitioners participating in the ADR Practitioners Survey supported court ordered ADR for that reason.

For lawyers working predominantly within the District Court there does appear to be some association between ADR and settlement. Only 18.9 percent of lawyers reported that half or more of their District Court cases disposed through judicial hearing involved ADR. By comparison 32.6 percent of lawyers reported that half or more of their settled cases involved ADR.

For lawyers working predominantly in the High Court a similar connection between ADR and settlement was reported. Among those lawyers 35.2 percent reported that half or more of their cases settled prior to hearing involved some form of ADR.

Only 14 of the 60 cases about which disputants were interviewed had involved ADR. Of those, twelve cases went to ADR after filing, typically after discovery with three cases going to ADR only when a date was set for hearing and that date was nearing. Eleven of the fourteen cases in which there was recourse to ADR were settled as a result of ADR. A further interviewee noted that while the entire case had not been settled through ADR, ADR resolved some issues. Only two of the fourteen cases involving ADR did not settle as a result of the ADR itself.

A theme among the comments made by those disputants talking about a case that went to ADR and the disputants who were involved in a case that went to a Judicial Settlement Conference was the wish that they had attempted a formalised settlement process earlier.

ADR costs made up a relatively small proportion of the costs associated with the resolution of cases. The ADR costs for the 14 disputants who used ADR are set out in Table 5.1. The legal costs for disputants are set out in Table 5.2.

Table 5.1 Cost of ADR for Civil Cases Reported by Disputants Using ADR (Disputant In-depth Interviews)

ADR Costs	Cases
$1,500 or less	4
$1,501-$4,000	3
$4,001-$6,500	2
$6,501-$9,000	2
$9,001-$11,500	1
Not specified	2
Total	14

Table 5.2 Legal Costs for Civil Cases Reported by Disputants (Disputant In-depth Interviews)

Legal Costs	Cases	
	Number	%
$10,000 or less	26	43.3
$10,001-$20,000	15	25.0
$20,001-$50,000	10	16.7
More than $50,000	6	10.0
Don't Know	3	5.0
Total	60	100.0

Lawyers and ADR practitioners both agree that ADR can reduce costs, although arbitration is consistently seen as an expensive form of ADR. In the course of the focus groups with lawyers and ADR practitioners it became clear that arbitration could be very costly because of the considerable expert and specialist advice sought during the process as well as the fees of the arbitrators themselves. Mediation was agreed to be generally significantly less costly. However, it was noted that the direct financial costs to disputants of mediation went beyond the fees charged by a mediator. In addition to fees, there were charges associated with any preparation undertaken by the legal counsel of the disputants, charges for the attendance of legal counsel with the disputants themselves during the mediation process and, in some cases, travel costs.

Where there can be significant savings – always assuming that a dispute is not subsequently pursued in the courts – are in court fees and the costs associated with extensive interlocutories and discovery. Moreover, there is a wide range of fees charged for ADR services. The fees of ADR service providers range from less than $125/hour to in excess of $400/hour. The average fee for ADR services was $240/hour. The median fee for ADR services was $220/hour. Fees generally cover contract time engaged in the mediation process.

As Figure 5.1 and Figure 5.2 show, ADR practitioners who also run legal practices tend to have a slightly higher charging pattern than those ADR practitioners not engaged in legal practice.

Figure 5.1 ADR Practitioners Charging Profile (ADR Practitioners Survey n=135)

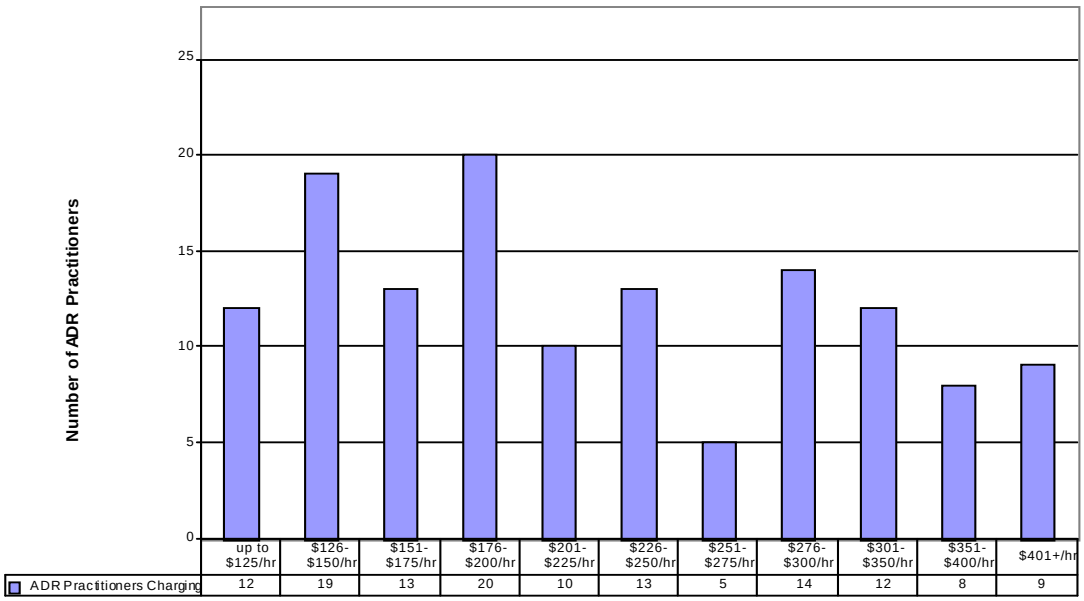
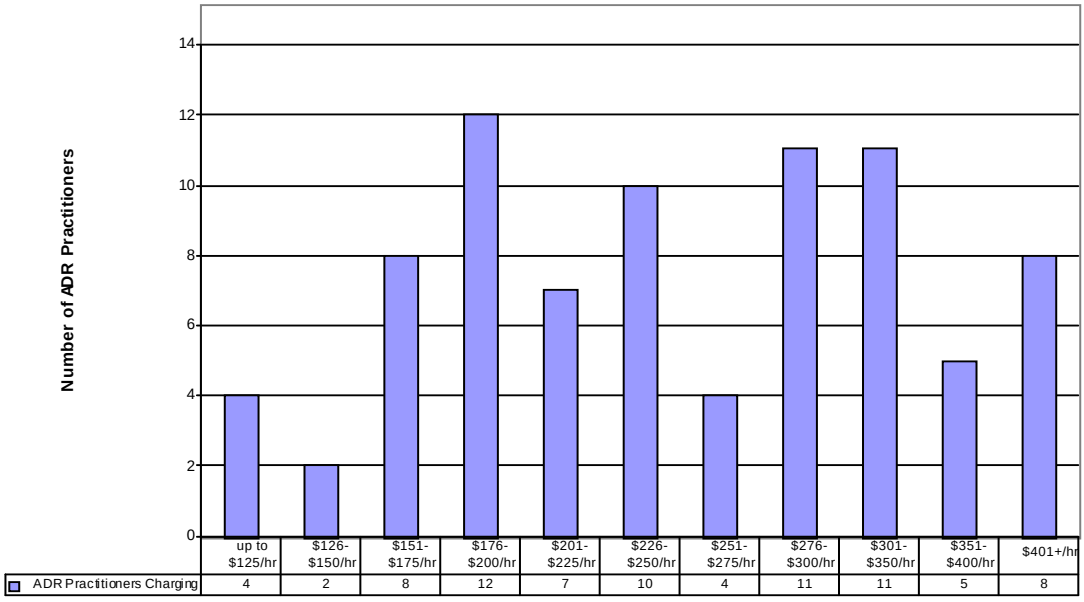


Figure 5.2 ADR Practitioners with Legal Practices Charging Profile (ADR Practitioners Survey n=82)



Costs and time delays may be increased by ADR when ADR is delayed significantly and disputants are confronted with the court and legal timeframes and costs associated with filing, discovery and other court procedures as well as ADR costs. Similarly ADR adds to the costs of disposing a dispute if ADR does not resolve some or all of the dispute.

It is notable that most lawyers tend to see ADR as most effective post-filing (Table 5.3) and after discovery (Table 5.4). Those are both points at which significant legal and court costs may have already been incurred. That point of view is not supported by either ADR practitioners or disputants. ADR practitioners tend to see ADR as a first resort prior to filing or, at least, immediately after filing.

Table 5.3 Points at Which Lawyers Consider ADR Most Effective (Lawyers Survey)

	Number of Lawyers	% of Lawyers
Post-filing	128	66.0
Equally Effective either Post or Pre-filing	45	23.2
Pre-filing	19	9.8
Other	2	1.0
Total	194*	100.0

*Two cases missing.

Table 5.4 Points Lawyers Consider are Effective Timing for ADR Post-Filing (Lawyers Survey)

	Number of Lawyers	% of Lawyers
After discovery	75	59.5
Near to fixture date	38	30.2
Soon after filing	6	4.8
Before discovery	5	4.0
Other	2	1.6
Total	126*	100.1[1]

*Four missing cases, 66 cases not applicable.
[1] Due to rounding.

Of the 126 ADR Practitioners Survey respondents who commented on this issue, 32 percent believed that ADR was more effective prior to filing with the court and 26 percent suggested that ADR was more effective after filing. The majority of those who saw ADR as being more effective post-filing believed that ADR was more likely to be effective near any fixture date rather than immediately after filing.

The largest group of ADR Practitioners Survey respondents (42 percent) regarded ADR as effective irrespective of whether the ADR option was taken up prior to or after filing. Indeed, as one lawyer ADR practitioner said:

> *"Filing isn't always about resolving the dispute. It's often a way of simply getting some action, getting a person to actually focus on the fact that there is a dispute that they are going to have to deal with. Mediation sorts out the dispute."*

The desire on the part of a substantial proportion of lawyers for ADR to be pursued after discovery is explained by lawyers in two ways:

- Firstly, some suggested the delay until after discovery allows 'passions' around the issues to cool. Other lawyers and many ADR practitioners disagree. They argue that delay can lead to positions being solidified and that the processes of filing and discovery can exacerbate tensions rather than clarify the critical issues in, or underpinning, the dispute.

- Secondly, some lawyers who support delaying ADR until after discovery also suggest that only through discovery do the issues become clear. ADR practitioners, again including many in legal practice, argue that discovery is by no means an efficient pathway to either clarity around the issues, nor resolution of the dispute.

6 ADR and the Courts System

ADR is generally used to refer to processes seeking solutions to disputes between disputants that do not involve adjudication by the judiciary and are not determined by the rules of court practice. The reality is, however, that internationally there has been a trend towards closer synergies between the courts and ADR. Indeed, in some quarters, this has engendered a redefinition of ADR from Alternative Dispute Resolution to ADR meaning 'additional', 'assisted', or, even, 'appropriate' dispute resolution.[10] The Australian Law Reform Commission, for instance, described 'ADR' in 1996 as any:

> *"processes that may be used* ***within*** *or outside courts and tribunals to resolve disputes, where the processes do not involve traditional litigation processes. The term describes processes that are non adjudicatory, as well as adjudicatory, that may produce binding or non binding decisions and includes processes described as mediation, evaluation, case appraisal and arbitration".*[11]

Such an approach means that an enormous range of practices could be accommodated under the ambit of ADR including court procedures, especially those associated with caseflow management such as pre-trial settlement conferences.[12]

The research with each of the stakeholder groups – disputants, ADR practitioners, lawyers, and the judiciary and court staff – indicates a broad level of support for a closer association between the court system and ADR, but a strong desire to ensure that the distinction between ADR and court processes is maintained. This section considers:

- The benefits for the court system of ADR take-up.
- The role of the court system in encouraging ADR take-up.

6.1 Benefits for the Court System of ADR Take-up

The international literature related to ADR suggests that ADR has potentially positive benefits for court systems through:

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10 See: Australian Law Reform Commission. 1996. *Alternative or Assisted Dispute Resolution.* Background Paper 2. Australia, Australian Law Reform Commission; Howard, J. 1991. 'Assisted Dispute Resolution' (ADR*). Australian Dispute Resolution Journal.* November; LEADR. 1995. *Australasian Dispute Resolution.* Australia. LEADR, Law Book Company Ltd; Lord Chancellors Department. 2000. *Alternative Dispute Resolution – A Discussion Paper.* London, Lord Chancellors Department. For New Zealand example also see practice notes for civil case management in the District and High Courts.

11 Australian Law Reform Commission. 1996. *Alternative or assisted dispute resolution.* Background Paper 2, Australia, Australian Law Commission.

12 Chiasson, E.C. 1998. 'The Better Way Within: Reaction of Canadian Courts to Modern Needs'. *International Legal Practitioner.* June.

- reducing filings
- encouraging settlement rather than adjudication
- reducing both hearing related as well as case preparation costs by narrowing the issues that require adjudication within the courts, and
- developing sustainable solutions that are less likely to be subject to repeated re-litigation.

Reduced Filings

Eighty-one percent of ADR practitioners reported that disputants who used ADR before filing a claim with the court system were less likely to eventually end up in the courts than disputants who do not take-up ADR. There was a similar view expressed among the sixty disputants involved in in-depth interviews. Many expressed the view that they would wish to avoid the courts in the future, and ADR as well as lawyer-to-lawyer discussion were pathways to do so.

It is clear from the Lawyers Survey that lawyers working predominantly in the High Court already resolve a significant number of disputes prior to filing. Lawyers working primarily in the High Court reported that they had filed 1193 general civil cases and not filed 730 disputes that were within the jurisdiction of the High Court. That is, about 61 percent of the reported disputes were filed.

Of the 730 unfiled disputes that were reported by the lawyers responding to the High Court section of the lawyers survey, 494 were identified as being resolved. Table 6.1 shows that many of the disputes within the High Court jurisdiction resolved without filing with the courts, were resolved through direct lawyer-to-lawyer negotiation. Mediation was also a significant mechanism for resolution of disputes that could, but were not, filed in the High Court.[13] Only a small proportion of disputes were resolved through arbitration.

Table 6.1 Resolution of Unfiled Disputes Reported by High Court Lawyers in 2002 (Lawyers Survey n=196)

Method of Resolution	Number of Disputes	% Resolved Disputes
Lawyer to Lawyer Negotiation	222	44.9
Mediation	181	36.6
Arbitration	34	6.9
Other	57	11.5
Total Resolved Disputes	494	99.9[1]

[1]Due to rounding.

[13] The proportion of unfiled High Court disputes (that is unfiled disputes that could have been filed in the High Court) resolved through mediation is considerably higher than the proportion of unfiled District Court disputes resolved through mediation. Only 12.2 percent of unfiled District Court disputes were reported as resolved through mediation.

The propensity to resolve disputes prior to filing is not as pronounced among cases handled by lawyers working predominantly in the District Court. It has been frequently asserted that lawyers resolve most disputes that come to them without filing with the courts. The lawyers survey suggests, however, that a significant proportion of general civil disputes that fall within the jurisdiction of the District Court are in fact filed with the District Courts. Thus, lawyers working primarily in the District Court reported that they had filed 2907 general civil cases and not filed 1274 disputes falling into that jurisdiction. That is, almost 70 percent of the reported disputes were filed.

Of the 1274 unfiled disputes that were reported by the lawyers responding to the District Court section of the lawyers survey, 898 were identified as being resolved. As Table 6.2 shows, the vast majority of disputes that were resolved without filing with the courts were resolved through direct lawyer-to-lawyer negotiation. Mediation was used in a small proportion of disputes, but more frequently than arbitration.

Table 6.2 Resolution of Unfiled Disputes Reported by District Court Lawyers in 2002 (Lawyers Survey)

Method of Resolution	Number of Disputes	% Resolved Disputes
Lawyer to Lawyer Negotiation	684	76.2
Mediation	110	12.2
Arbitration	49	5.5
Other	55	6.1
Total Resolved Disputes	898	100.0

Thus the impact of ADR on filing levels, at least in the District Court, should not be overstated. The in-depth interviews with disputants indicate a tendency for disputants to be advised to file prior to taking any other pathways of dispute resolution. The Lawyers Survey also found that:

- 11.5 percent of lawyers working primarily in the District Courts did not discuss ADR at all with clients until after filing.
- 13.1 percent of lawyers working predominantly in the High Court reported that they typically discussed ADR as an option after filing.

Reducing Pressure on the Court System after Filing

The stakeholder groups tended to agree to a greater or lesser extent, that because ADR could encourage settlement even after a claim had been filed with the court system, ADR could reduce the pressure on the court system. In doing so, it was argued, by some lawyers in particular but also some members of the judiciary, that if ADR or Judicial Settlement Conferences could be used to channel some cases out for resolution it would enable those cases that could only be resolved by way of adjudication to be heard more rapidly. Seventy-five percent of ADR practitioners reported that they believed that ADR could reduce pressure on the court system. Lawyers also expressed similar views.

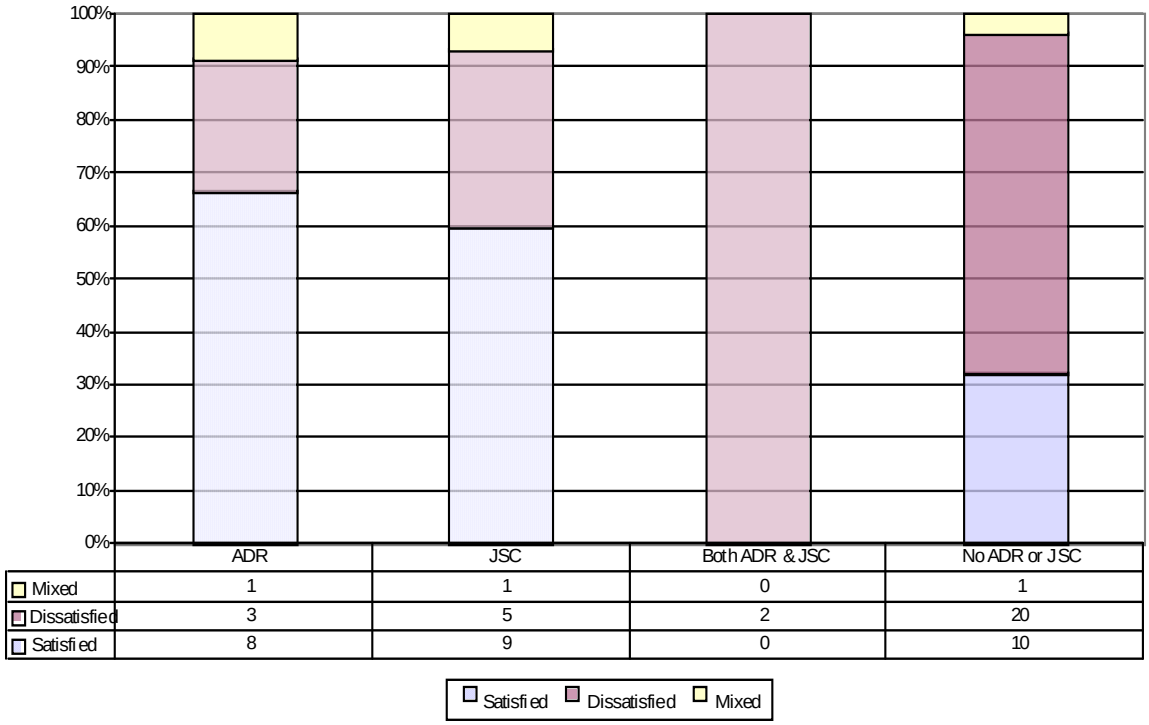
Timeliness and getting access to a means of dispute resolution which would be effective was the critical factor in determining disputant satisfaction with the outcome of a case. For some disputants ADR provided a venue for this and for others the pathway was the Judicial Settlement Conference. Other disputants want to get to hearing as quickly as possible. What was notable from the disputant interviews was the comparative dissatisfaction among those who had:

- *neither* ADR or a Judicial Settlement Conference, or
- ADR *and* a Judicial Settlement Conference or a hearing.

Although there are only two disputants who fell into the latter category, they showed a vociferous dissatisfaction with the court and resolution processes.

What Figure 6.1 indicates is that cases in which ADR or Judicial Settlement Conferences were used are over-represented among the satisfied interviewees. Those cases in which both ADR and a Judicial Settlement Conference (and in those two cases a hearing as well) were involved, interviewees are under-represented in the satisfied set. Similarly, where neither ADR nor Judicial Settlement Conferences were used, there is under-representation of those cases among the satisfied interviewees. Satisfaction with outcome does not appear to be connected with whether the participants in the interviews were plaintiffs or respondents.

Figure 6.1 Interviewee Satisfaction with Outcome by Resolution Mechanisms (n=60)



	ADR	JSC	Both ADR & JSC	No ADR or JSC
Mixed	1	1	0	1
Dissatisfied	3	5	2	20
Satisfied	8	9	0	10

Table 6.3 shows this over-representation and under-representation more explicitly.

Table 6.3 Expected & Actual Satisfaction among Interviewees by Mechanism of Resolution (Disputant In-depth Interviews n=60)

Resolution Mechanism Used	Proportion of All Cases	Proportion of Satisfied Interviewees	Proportion of Dissatisfied Interviewees
ADR	20%	30%	10%
JSC	25%	33%	17%
Both ADR and JSC	3%	0%	7%
Neither ADR nor JSC	52%	37%	67%
Total	100%	100%	101%[1]

[1] Due to rounding.

6.2 The Court System and ADR

ADR mechanisms have become increasingly integrated with court practices in the United States, United Kingdom, Canada, Australia and New Zealand. ADR initiatives are used extensively throughout the United States although in the United Kingdom developments in the use of ADR are much more limited by comparison.[14] The following discussion focuses on the views of ADR practitioners, lawyers, the judiciary and court staff regarding the relationship between the courts and ADR.

ADR Practitioners

About a third (32 percent) of the ADR practitioner respondents to the survey noted that judicial support was a 'very important' factor in ensuring that ADR is effective. However, the ADR practitioner focus groups confirm the impressions gathered in the course of the ADR scoping study that while case management has provided an opportunity for the judiciary and the courts to inform parties who have filed a case with the court about ADR, [15] the extent to which this is done appears to vary from court to court and judge to judge. Some ADR practitioners consider that judges and masters were inclined to push cases on to Judicial Settlement Conferences rather than refer parties to ADR and in doing so lost the benefits of reducing caseloads in the courts.

There was a pervasive view among the ADR practitioners, particularly those involved in mediation rather than arbitration, that the courts could be much more pro-active in the promotion of mediation and other forms of ADR.

There has been no strong advocacy of court-annexed ADR among the ADR practitioners. However, the idea of the courts having the power to require disputants to enter into mediation or neutral evaluation of a case does have some currency among ADR practitioners.

[14] Lloyd-Bostock, S. 1996. "Alternative Dispute Resolution and Civil Justice Reform: Is ADR being used to paper over cracks? Reactions to Judge Weinstein's Article." *Ohio State Journal on Dispute Resolution*, 11.

[15] Department for Courts, *Civil Case Management in the District Court Practice Note*, Section 12 and Department for Courts, *Civil Case Management in the High Court Practice Note*, Section 8.

It has already been noted that the majority of ADR practitioner survey respondents support the notion that the court should have the power to order litigants to ADR.

That view is by no means universal. There is a substantial minority, especially among lawyers, who perceive that any form of compulsory or mandatory referral to ADR as inappropriate for both practical reasons and reasons of principle. The reasons for those views are set out in Table 6.4

Table 6.4 Reasons for Not Supporting Court-Ordered ADR* (ADR Practitioners Survey n=37)

Reasons for NOT Supporting the Court ordering ADR	ADR Practitioners	
	Responses	% of Responses
Compulsory ADR tends to be ineffective	21	28
Litigants are entitled to have the court decide a matter	20	26
Inappropriate for the courts to order people to 'go away'	18	24
It risks increased costs to litigants	17	22

* Multiple response.

It should be noted that the notion that ADR is more effective with willing participants is widespread among ADR practitioners. Many ADR practitioners argue, however, that with lawyers who are inexperienced in ADR and the limited public knowledge and understanding of ADR, most disputants are not able to make an informed judgement about the costs and benefits of ADR. Mandatory referral to ADR would provide an opportunity for participants to explore the potentialities of ADR, particularly mediation.

Lawyers

Throughout the focus groups and interviews, lawyers repeatedly expressed the view that ADR had potential benefits for the court system through reducing pressure on the courts by reducing filings, encouraging early settlement, narrowing the issues that require adjudication by the courts and developing solutions to disputes that are less likely to be subject to re-litigation.

The perceived benefits of encouraging ADR to disputants and to the general operation of justice through the courts appear to explain the relatively large proportion of the surveyed lawyers (65 percent) who accepted the notion that the courts should have the ability to order parties to ADR (Table 6.5).

Table 6.5 Views about Desirability of Court Ordering ADR (Lawyers Survey)

Views on Court Ordered ADR	Number of Lawyers	% of Lawyers
Supports Court Ordering		
Arbitration only	13	6.7
Mediation only	44	22.7
'Other' ADR only	7	3.6
All ADR	23	11.9
Arbitration and Mediation only	6	3.1
Arbitration and 'other' ADR only	1	0.5
Mediation and 'other' ADR only	31	16.0
Does Not Support Court Ordering ADR	69	35.6
Total	194*	100.1[1]

*Two missing cases.
[1] Due to rounding.

Table 6.5 shows, however, that lawyers feel significantly less comfortable with the notion of the courts ordering parties to arbitration than ordering them to mediation. Only 22.2 percent of respondents felt court orders to arbitration were acceptable compared to 53.7 percent who accepted the notion of the court ordering parties to mediation.

One hundred and twenty-five lawyers felt comfortable with the courts ordering parties to at least some, although not necessarily all, forms of ADR. There were a variety of reasons why court intervention was seen as beneficial:

- 90.7 percent believed that this would reduce costs for litigants
- 88.1 percent believed that this was justifiable because it would increase settlement
- 78.0 percent believed that this was justifiable because it would reduce time to settlement/disposal, and
- 44.1 percent reported that they believed it would reduce pressure on the courts.

Even when, in principle, lawyers felt comfortable with greater promotion of ADR, they were also careful to express the view that the court system has an obligation to provide disputants with access to justice and it would be inappropriate to exclude people from court adjudication if they wished to pursue the resolution of legal disputes through that process.

Judiciary and Court Staff

Interviews with members of the judiciary focussed on both ADR and Judicial Settlement Conferences. Most members of the judiciary saw these as complementary. Both ADR and Judicial Settlement Conferences provided opportunities to resolve disputes before requiring judicial adjudication.

The major strengths of ADR identified among the members of the judiciary who were interviewed were:

- The choice that ADR provided to parties. They pointed out that neither in relation to adjudication nor in relation to Judicial Settlement Conferences were parties given a choice as to the judicial officer who would deal with their case. In addition, ADR provided parties with choice about timing.
- That mediation could encourage parties to develop a wider range of solutions satisfactory to the disputants that would, however, be outside of the ability of the court to direct as a remedy.
- Confidentiality. Although the judiciary noted that Judicial Settlement Conferences were also confidential, with papers related to the Judicial Settlement Conference being sealed if a case did not settle and moved to adjudication.
- Cost savings. Reduction of cost was identified by most members of the judiciary as a benefit of ADR. It was noted, however, that after filing, parties going to ADR would incur costs that they would avoid if choosing to go a Judicial Settlement Conference. The judiciary noted that ADR and Judicial Settlement Conferences were generally more cost-effective than adjudication.

Overall, the interviewed judges were supportive of disputants attempting dispute resolution before and after filing. Mediation was seen as particularly effective and those judiciary who were interviewed were supportive of it and, as an alternative, Judicial Settlement Conferences. Nevertheless a few judges noted aspects of ADR practice that they saw with some concern, in particular what they considered as an excessive vested interest among some ADR practitioners in getting a settlement so those ADR practitioners could maintain a 'hit rate'.

ADR and Judicial Settlement Conferences largely provide substitutable opportunities for dispute resolution. The major advantages of Judicial Settlement Conferences compared to ADR after a dispute has been filed with the courts were identified by judges as:

- disputants facing no additional fees to enter into a Judicial Settlement Conference
- judges bringing a particular authority and credibility, which is perceived as especially useful in promoting a realistic understanding of the implications of pursuing adjudication, and
- the ability to direct disputants to a Judicial Settlement Conference if deemed necessary.

A number of difficulties with Judicial Settlement Conferences were identified by some members of the judiciary. Those included:

- A risk that Judicial Settlement Conferences could completely dominate the activities of judges. Many of the interviewed judges noted that they wished to have a mix of Judicial Settlement Conferences and adjudication.
- Some judges felt that they needed greater training in Judicial Settlement Conferences and increased clarity around their role and the techniques they can use in a Judicial Settlement Conference.

- Both judges and staff noted that Judicial Settlement Conferences needed to have different sorts of rooms and facilities than traditional court and jury rooms.

There was no clear consensus among the interviewed judges about the extent to which they should have the power to direct disputants to mediation. Many feel that the power to direct disputants to Judicial Settlement Conferences is sufficient to encourage settlement. Others feel that directing disputants to ADR after filing, would ensure that judges focus on adjudication. What is generally agreed, however, is that the courts must not deny disputants the opportunity to have a dispute adjudicated.

Court staff have mixed views about whether the courts should compulsorily refer disputants to ADR. There is consensus around the desirability of the court providing more information, particularly in the form of pamphlets, about options for people trying to resolve disputes. Particularly in their dealings with lay litigants, court staff suggested that having resources regarding ADR options and practitioners (including their specialities) would be advantageous.

7 Opportunities for Improved ADR Take-up

Only a cohort study tracking the trajectory of civil cases after filing with the District and High Courts respectively will determine whether cases that take-up ADR after filing are more rapidly disposed of at less cost and with greater satisfaction than cases that do not take-up an ADR opportunity. Nevertheless there does appear to be broad agreement across stakeholders that ADR can benefit disputants and contribute to the efficiency of the Courts.

The benefits to disputants are clearly in relation to the potential for reducing delay and cost. The benefit for the courts is in the ability to focus on resolving those disputes that can be resolved early and, thus, allowing the reallocation of resources that would otherwise be tied up.

This raises the issue of why ADR opportunities are not used more frequently. Four factors have been posited as generating barriers to ADR take-up, especially among cases that are filed with the courts. Those are:

- lack of awareness and understanding of ADR among disputants and their lawyers
- failure of lawyers to fully inform clients of ADR options
- lack of information about accredited ADR practitioners, which makes it difficult for both lawyers and disputants to access them, and
- under-supply of ADR practitioners.

Data from the ADR stakeholders research projects suggests low levels of awareness is a particularly critical factor. Disputants, and some lawyers, were frequently confused about ADR and equally confused about court process including case management and Judicial Settlement Conferences. There was a strong sense also that lawyers, unless they were themselves trained in mediation or arbitration, frequently under informed their clients about ADR. A number of reasons were suggested for this, including lawyers':

- Hesitancy to suggest pathways for dispute resolution about which they had no experience.
- Lack of networks with ADR practitioners.
- Confidence in their own ability to negotiate lawyer-to-lawyer. This is especially prevalent in localities in which the numbers of lawyers in practice are relatively limited and members of the legal community have longstanding contacts with each other. That environment tends to encourage lawyer-to-lawyer negotiation. The sheer size of the population of lawyers in the Auckland region relative to, for instance, Christchurch and Dunedin was suggested as one of the reasons why there appeared to be a higher incidence of ADR referral in the Auckland region than in the south.
- Concern that ADR might reduce the demand for legal work.

These tendencies are exacerbated by disputants' lack of understanding of ADR and court processes.

The issue of whether there is under-supply of ADR practitioners which inhibits ADR take-up is a little more complex. It is clear that some regions have relatively few ADR practitioners. On the other hand, it is also clear, that the services that ADR practitioners provide are highly mobile and can be accessed from any region.[16] Most ADR practitioners in the focus groups reported that there was an over-supply rather than an under-supply of practitioners. Indeed, some practitioners in smaller, or what were described as more conservative, localities expressed concern that they confronted difficulties in maintaining the number of mediations required to sustain their accreditation.

There are a number of ways in which take-up of ADR could be improved including promotional initiatives within AMINZ, LEADR and the law societies. There were suggestions from ADR practitioners and lawyers that mediation could be promoted by having its own statute in the same way that arbitration is governed by statute. Supporters of a mediation statute suggested that it would promote public recognition of mediation and increase confidence in it by regulating mediation service delivery.

Although a substantial minority of lawyers and ADR practitioners feel that the courts should not have the power to order parties to attempt ADR, most stakeholders feel comfortable with the court sending disputants to attempt ADR. That is, as long as mechanisms are in place to prevent unnecessarily increased costs or delays. Moreover, stakeholders agree parties should not be excluded from judicial adjudication if they find the dispute is unresolved through ADR. There is general agreement that the courts could more actively promote ADR-based resolution and reduce pressure on the court system by the courts:

- Making a 'real' commitment to exploring ADR options in court conferencing and encouraging early take-up of ADR after filing.
- Providing to all parties in filed cases written information about ADR accompanied by contact information of accredited ADR practitioners.
- Providing incentives to parties who take up ADR after filing including some partial reimbursement of court fees.
- Requiring a mandatory declaration at filing of whether mediation has been attempted and charging higher fees for those who have not attempted mediation.

In supporting more active promotion of ADR, however, it must be recognised that stakeholders almost universally agree that it is mediation not arbitration which is the desirable form of ADR. It also needs to be noted that while ADR practitioners, disputants, and the judiciary tend to support exposing the dispute to mediation early after filing, lawyers prefer delaying ADR until after discovery.

[16] Indeed, there was significant disquiet expressed that local practitioners were often ignored in favour of ADR practitioners from elsewhere who had a national profile. This was seen as undesirable for a number of reasons. Apart from not supporting the development of local capacity and experience, it was also seen as inflating the price of ADR, particularly mediation, and encouraging a view that there are considerable difficulties in accessing ADR services locally.

Appendix A: ADR Practitioners Survey

This is a survey about Alternative Dispute Resolution (ADR). Before we go on can you describe which ADR techniques you consider fit within a broad description of ADR?

[prompt only if necessary]

Adjudication	Yes	No
Arbitration	Yes	No
Mediation of civil disputes	Yes	No
Negotiation	Yes	No
Conciliation	Yes	No
Facilitation	Yes	No

Your ADR practice

1. Which of these ADR techniques do you use most often in your practice? *(multiple response)*

   θ_1 Adjudication
   θ_2 Arbitration
   θ_3 Mediation (excluding family court)
   θ_4 Negotiation
   θ_5 Conciliation
   θ_6 Facilitation
   θ_7 Other (*please specify*) _____

2. What type(s) of disputes do you handle in your ADR work? *(multiple response prompt only if necessary)*

   θ_1 Commercial/Contracts
   θ_2 Building/Construction
   θ_3 Consumer
   θ_4 Property
   θ_5 Employment
   θ_6 Environmental
   θ_7 Criminal
   θ_8 Family
   θ_9 Immigration
   θ_{10} Tenancy
   θ_{11} Insurance
   θ_{12} Taxation
   θ_{13} Agricultural/Farming
   θ_{14} Local Government
   θ_{15} Maori issues
   θ_{16} Other (*please specify*) _____

3. Do you do any court-related mediation or other form of ADR linked to the Courts or Tribunals?

   θ_1 Yes → go to Question 4
   θ_2 No → go to Question 5

4. If yes, in which Court or Tribunal area do you work most? *(multiple response – prompt only if necessary)*

   θ_1 Family Court counselling/dispute resolution
   θ_2 Employment Relations Act mediation
   θ_3 Disputes Tribunal mediation
   θ_4 Tenancy Services mediation
   θ_5 Environment Court mediation
   θ_6 District Court/High Court

θ_7 Other (*please specify*) _____

5. Approximately how many ADR clients in total did you have between 1 January 2002 and 31 December 2002?

   Total clients _____

6. Do you have the capacity to take on more ADR clients?

   θ_1 Yes

   θ_2 No

7. Thinking about your clients over the last year. Which regions did most of those clients come from? *(multiple response – do not prompt)*

   θ_1 Northland

   θ_2 Auckland

   θ_3 Waikato

   θ_4 Bay of Plenty

   θ_5 Hawke's Bay

   θ_6 Taranaki

   θ_7 Manawatu/Wanganui

   θ_8 Wellington

   θ_9 Nelson/Marlborough

   θ_{10} West Coast

   θ_{11} Canterbury

   θ_{12} Otago

   θ_{13} Southland

   θ_{14} All of the above – nationwide

8. How do ADR clients hear about you?

θ_1 Advertising → also ask Question 9
θ_2 Marketing (including company promotion/networking)
θ_3 Word of mouth
θ_4 District Courts at Judges/Masters suggestion (also ask Q.10)
θ_5 High Courts at Judges/Masters suggestion (also ask Q.10)
θ_6 Lawyers/Law Firms
θ_7 Other ADR practitioners
θ_8 AMINZ
θ_9 LEADR
θ_{10} Other (*please specify*) _____

[If answered category 1 go to question 9. If answered categories 4 or 5 go to question 10. All others go to question 11]

9. Where do you advertise?

θ_1 Yellow Pages
θ_2 Newspaper
θ_3 Internet
θ_4 LEADR
θ_5 AMINZ
θ_6 Other (*please specify*) _____

[Go to question 11. Unless answered category 4 or 5 in question 8 in which case go to question 10]

10. Is this suggestion as a result of Case Management practices?

θ_1 Yes
θ_2 No

These next questions are about general civil disputes only. Do not include disputes that are family or criminal related or that would go to one of the tribunals.

11. Thinking just about the calendar year 1 January 2002 to 31 December 2002. Approximately what proportion of civil disputes have you been involved in as an ADR practitioner that were:

Disputes where parties intended to file a claim in the District or High Court if ADR was unsuccessful _____ %

Disputes where the parties had no intention of filing a claim with the Court regardless of the ADR outcome _____ %

Post filing (after a claim has been filed with the court) _____ %

[If answered 0% for post-filing go directly to question 13]

12. Thinking about just the civil disputes that have been filed in the High or District Court. Approximately what proportion of those disputes came to you after filing in the District Court and what proportion came to you after filing in the High Court?

θ_1 Proportion filed in the District Court _____
θ_2 Proportion filed in the High Court _____

13. Do you believe that disputants who use ADR before filing a claim in the Court, are:

θ_1 More likely to end up ion Court?
θ_2 Less likely to end up in Court?
θ_3 Neither more nor less likely to end up in Court than other disputants

Efficacy of ADR

[For this next section I want you to think just about those disputes that could or did end up in the High or District Court]

14. What are the main reasons disputants went to ADR to resolve the dispute(s)? (multiple response - prompt only if necessary)

θ_1 Uncertainty of Court outcome

θ_2 Unfamiliarity with Court procedures

θ_3 Concerns about Court procedures

θ_4 Desire to reach a compromise solution

θ_5 Want to reduce costs

θ_6 Want speedy resolution

θ_7 Directed to ADR in contracts/statutes

θ_8 Want to keep settlement details confidential

θ_9 Believe they will achieve a longer lasting solution

θ_{10} Have an on-going business or other relationship to preserve

θ_{11} Other (*please specify*) _____

15. How often is ADR effective in settling disputes?

θ_1 Three-quarters or more of disputes

θ_2 ½ to ¾ of disputes

θ_3 ¼ to ½ of disputes

θ_4 less than ¼ of disputes

θ_5 Never

16. How important are the following factors in ensuring ADR is effective?

	Not important	Some importance	Very important
Willing participants	1	2	3
Experienced ADR practitioner	1	2	3
Disputants' counsel supportive of ADR	1	2	3
Parties have on-going business or other relationship	1	2	3

The issue in dispute isn't one of principle	1	2	3
Judiciary supportive of ADR to resolve the dispute	1	2	3
ADR is a contractual requirement	1	2	3

17. Do you find ADR more effective prior to filing or post- filing?

θ_1 Pre filing
θ_2 Post filing → **when after filing**
θ_3 Equally effective pre or post filing
θ_4 N/A – all cases last year were prior to filing or post filing

θ_A Soon after filing
θ_B Near to the fixture date

18. Should the Court, for general civil cases, be able to order the parties to go to ADR?

θ_1 Yes → go to Question 19 (Why)
θ_2 No → go to Question 20 (Why Not)

19. Why do you think the Court <u>should</u> have this power? (read list)

θ_1 ADR can encourage settlement
θ_2 ADR can reduce pressure on the Courts
θ_3 ADR can reduce time to settlement/disposal
θ_4 ADR can reduces costs for litigants
θ_5 Other reason _____

[go to question 22]

20. Why do you think the Court <u>should not</u> have this power? (read list)

θ_1 Litigants are entitled to have a Court decide the matter if they choose
θ_2 Access to justice - inappropriate for Court to order people to "go away"
θ_3 Compulsory ADR tends not to be effective
θ_4 It risks increasing costs to litigants → **also ask Question 21**
θ_5 Other reason _____

21. If there was no increase in cost to litigants do you think the Court, for general civil cases, should have the authority to order parties to go to ADR?

θ_1 Yes
θ_2 No

22. What makes people go directly to Court rather than first going to ADR? *(multiple response – prompt only if necessary)*

θ_1 They believe they can win
θ_2 Want an enforceable decision
θ_3 Don't know about ADR
θ_4 Don't think ADR is effective
θ_5 Advice from counsel
θ_6 They want a Court ruling
θ_7 Difficult legal issue involved
θ_8 Other (*please specify*) _____

Practice Profile and Demographics

23. Do you combine your ADR work with legal practice as a solicitor or barrister?

    θ_1 Yes → go to Question 24
    θ_2 No → go to Question 26

24. What proportion of your time is spent on ADR work? *(please specify)*

    _____ %

25. What proportion of your income is from ADR work? *(please specify)*

    _____ %

26. What is your standard charge for ADR services? *(Please indicate if this charge is per hour, per day etc)*

    $ _____ *hourly / daily/ other period*
    Specify other period _____

27. What ADR training/qualifications have you completed? *(multiple response – prompt if necessary)*

    θ_1 4 day LEADR accreditation workshop
    θ_2 AMINZ qualification as Associate or Fellow
    θ_3 Massey University, Dispute Resolution Diploma Course
    θ_4 Dispute Resolution paper(s) as part of LLB
    θ_5 On-going training – day sessions/workshops
    θ_6 Other (*please specify*) _____

28. When did you first start your formal ADR training?

    Year: _____

29. When did you start practising ADR?

    Year: _____

30. Which age group are you in?

    θ_1 20 – 29 years
    θ_2 30 – 39 years
    θ_3 40-49 years
    θ_4 50 – 64 years
    θ_5 65 years or more

31. Are you:

    θ_1 Male
    θ_2 Female

32. Ethnicity:

    θ_1 New Zealand European/Pakeha
    θ_2 Maori
    θ_3 Pacific Island
    θ_4 Asian
    θ_5 Other (*please specify*) _____

Appendix B: Lawyers Survey

DEPARTMENT FOR COURTS
ADR RESEARCH PROGRAMME: LAWYERS SURVEY

This survey is designed to collect information from barristers and solicitors involved in civil cases and/or civil litigation as a significant proportion of their legal practice.

All data collected in this survey will be aggregated and used for research purposes only. Your responses are confidential. No individual details will be used in reports or research summaries and you will not be individually identified to the Department for Courts or any other party.

Fill out this questionnaire and send it back to us in the reply paid envelope enclosed by

31 August 2003

All completed surveys returned by the due date will go into a draw to win one of 36 bottles of Taittinger

IF YOU HAVE A QUESTION about the research, the survey or you need a new reply paid envelope
Please contact Ruth Fraser on
Freephone 0508 427 372
e-mail ruth@cresa.co.nz

The research is focusing on general civil cases at the District and High Court level, and excludes cases that were filed or could have been filed at the Family Court, Employment Court, or Environment Court.

***If your civil practice is primarily (66% or more) concerned with family, employment or environmental matters you are outside the sample framework please check this box and return the survey in the enclosed reply paid envelope*.**

NB: Instructions are included throughout the survey in *italics*

Section 1: Practice Profile and Demographics

This section is designed to collect some background information about you and your practice. Remember neither you personally, nor your company will be able to be identified.

1. How many years have you been practising in the area of civil litigation? *(please tick one box only)*

   1 Up to 2 years
   2 2 years - 5 years
   3 6 years - 10 years
   4 11 years or more

2. Are you a: *(please tick one box only)*

1 Queen's Counsel in sole practice → go to Question 4
2 Barrister in sole practice → go to Question 4
3 Solicitor in sole practice → go to Question 4
4 Partner in a firm
5 Barrister in a firm
6 Solicitor in a firm
7 Corporate lawyer
8 Other *(please specify)* _____

3. How many partners are there in your firm/practice? *(please tick one box only)*

1 2 partners
2 3-6 partners
3 More than 6 partners

4. Do you combine your legal practice with work as an ADR practitioner e.g. a mediator or arbitrator? *(please tick one box only)*

1 Yes → go to Question 5
2 No → go to Question 11

5. What proportion of your time is spent on ADR work? *(please specify)*

_____ %

6. What proportion of your income is from ADR work? *(please specify)*

_____ %

7. What is your standard charge for ADR services? *(Please indicate if this charge is per hour, per day, or another period)*

$ _____ *hourly / daily/ other period*
Specify other period _____

8. What ADR training/qualifications have you completed? *(multiple response – prompt if necessary)*

1 4 day LEADR accreditation workshop
2 AMINZ qualification as Associate or Fellow
3 Massey University, Dispute Resolution Diploma Course
4 Dispute Resolution paper(s) as part of LLB
5 On-going training – day sessions/workshops
6 Other (*please specify*) _____

9. When did you first start your formal ADR training?

Year: _____

10. When did you start practising ADR?

Year: _____

11. Are you:

1 Male
2 Female

12. Which age group are you in?

1 20 – 29 years
2 30 – 39 years
3 40-49 years
4 50 – 64 years
5 65 years or more

13. Ethnicity:

1 New Zealand European/Pakeha
2 Maori
3 Pacific Island
4 Asian
5 Other (*please specify*) _____

14. Thinking about the general civil cases you were involved in as counsel that were filed with the courts between 1 January 2002 and 31 December 2002, which of the following best describes your practice? *(please tick <u>one</u> box only)*

1	The majority of civil cases I was involved in were filed in the District Court	→	Go to Section 2
2	The majority of civil cases I was involved in were filed in the High Court	→	Go to Section 3
3	My time on general civil cases is divided equally between the District and High Courts	→	Go to Section 2

Section 2: Civil Practice in the District Court

Thinking just about those general civil cases (including cases filed for summary judgment) you were involved in as counsel that filed with the District Court in the last calendar year (1 January 2002 – 31 December 2002).

(Note: if the majority of your civil cases were filed in the High Court please go directly to Section 3 on page 6)

15. How many general civil cases were you involved in as counsel that filed at the District Court between 1 January 2002 and 31 December 2002?

_____ cases

16. Please estimate what number of those cases were resolved in each of the following ways and what proportion of the resolved cases went through an ADR process at some point during the dispute (e.g. mediation, arbitration etc but excluding judicial settlement conferences).

	Number	% trying ADR process at some point during the dispute
Number settled prior to hearing	_____	_____ %
Number discontinued prior to hearing	_____	_____ %
Number heard	_____	_____ %

17. Please estimate – for how many of those general civil cases filed at the District Court between 1 January 2002 and 31 December 2002 did a member of the judiciary recommend ADR?

_____ cases *(Include in your estimate all cases filed for the period - resolved & unresolved)*

18. Please estimate - for how many of those general civil cases filed at the District Court between 1 January 2002 and 31 December 2002 did you attend a judicial settlement conference?

_____ cases *(Include in your estimate all cases filed for the period - resolved & unresolved)*

19. Thinking about the general civil cases were you involved in as counsel that filed at the District Court between 1 January 2002 and 31 December 2002. Which District Court registry were the majority of those cases filed in?

Registry _____

Thinking just about those general civil cases you were involved in as counsel that did <u>not</u> get filed but which would have been within the jurisdiction of the District Court in the last calendar year (1 January 2002 – 31 December 2002).

20. Approximately how many general civil disputes between 1 January 2002 and 31 December 2002 were you involved in as counsel that did <u>not</u> get filed but were within the jurisdiction of the District Court?

Number of disputes _____ [if nil → go to Question 24]

21. How many of those un-filed disputes are resolved/un-resolved?

Number of disputes resolved _____

Number of disputes un-resolved _____

22. Of those un-filed disputes that were resolved, how many of these went through a formal arbitration or mediation process?

Number that went through arbitration _____

Number that went through mediation _____

23. Did you resolve any of those un-filed disputes through negotiation with counsel of the other party(ies)? *(please tick one box only)*

1 Yes → Please estimate number _____

2 No

Now thinking generally about your civil practice involving District Court cases or disputes which were within the jurisdiction of the District Court

24. Have you ever recommended a client proceed to arbitration (where arbitration was not required by a contract or other agreement)? *(please tick one box only)*

1 Yes _____ Number 1 Jan 2002-31 Dec 2002

2 No

25. Have you ever recommended a client proceed to mediation (where mediation was not required by a contract of other agreement)? *(please tick one box only)*

1 Yes _____ Number 1 Jan 2002-31 Dec 2002

2 No

26. How do you locate an ADR practitioner to refer clients to? *(Please tick all that apply)*

1 ADR practitioners' adverts – e.g. yellow pages, internet etc

2 Word of mouth

3 AMINZ

4 LEADR

5 Seek advice from Court staff

6 Other lawyers/Law Firms

7 Other (please specify) _____

27. Which of the following statements best describes your experience of the initial consideration of ADR? *(please tick one box only)*

1	I as counsel typically explain the option of ADR with my clients before filing
2	I as counsel typically explain the option of ADR with my clients after filing
3	The client raises the option of ADR with me
4	The court recommends parties attempt ADR

28. In your experience what types of cases go to ADR? *(please tick all that apply)*

1 Commercial/Contracts
2 Building/Construction
3 Consumer
4 Property
5 Employment
6 Environmental
7 Family
8 Immigration
9 Tenancy
10 Insurance
11 Taxation
12 Agricultural/Farming
13 Local Government
14 Maori issues
15 Other (*please specify*) _____

29. Thinking about all your general civil clients over the last year. Which regions did the majority of those clients come from? *(Please tick all that apply)*

1 Northland	9 Wellington
2 Auckland	10 Nelson/Marlborough
3 Waikato	11 West Coast
4 Bay of Plenty	12 Canterbury
5 East Coast	13 Otago
6 Hawke's Bay	14 Southland
7 Taranaki	15 All of the above – nationwide
8 Manawatu/Wanganui	

If the majority of your general civil cases were filed in the District Court
Go to Section 4: Efficacy of ADR- page 8

If your general civil cases are divided equally between the District and High Courts please continue and answer Section 3: Civil Practice in the High Court

Section 3: Civil Practice in the High Court

Thinking just about those general civil cases (including summary judgment cases) you were involved in as counsel that filed with the High Court in the last calendar year (1 January 2002 – 31 December 2002).

30. How many general civil cases were you involved in as counsel that filed at the High Court between 1 January 2002 and 31 December 2002?

    _____ cases

31. Please estimate what number of those cases were resolved in each of the following ways and what proportion of the resolved cases went through an ADR process at some point during the dispute (e.g. mediation, arbitration etc but excluding judicial settlement conferences).

	Number	% trying ADR process at some point during the dispute
Number settled prior to hearing	_____	_____ %
Number discontinued prior to hearing	_____	_____ %
Number heard	_____	_____ %

32. Please estimate - for how many of those general civil cases filed at the High Court between 1 January 2002 and 31 December 2002 did a member of the judiciary recommend ADR?

    _____ cases *(Include in your estimate all cases filed for the period - resolved & unresolved)*

33. Please estimate - for how many of those general civil cases filed at the High Court between 1 January 2002 and 31 December 2002 did you attend a judicial settlement conference?

    _____ cases *(Include in your estimate all cases filed for the period - resolved & unresolved)*

34. Thinking about the general civil cases were you involved in as counsel that filed at the High Court between 1 January 2002 and 31 December 2002. Which High Court registry were the majority of those cases filed in?

    Registry _____

Thinking just about those general civil cases you were involved in as counsel that did <u>not</u> get filed but which were within the jurisdiction of the High Court in the last calendar year (1 January 2002 – 31 December 2002).

35. Approximately how many general civil disputes between 1 January 2002 and 31 December 2002 were you involved in as counsel that did <u>not</u> get filed but were within the jurisdiction of the High Court?

    Number of disputes _____ [if nil → go to Question 39]

36. How many of those un-filed disputes are resolved/un-resolved?

    Number of disputes resolved _____

    Number of disputes un-resolved _____

37. Of those un-filed disputes that were resolved, how many of these went through a formal arbitration or mediation process?

    Number that went through arbitration _____

    Number that went through mediation _____

38. Did you resolve any of those un-filed disputes through negotiation with counsel of the other party(ies)? *(please tick one box only)*

1 Yes → Please estimate number _____

2 No

Now thinking generally about your civil practice involving High Court cases or disputes which were filed in the High Court

39. Have you ever recommended a client proceed to arbitration (where arbitration was not required by a contract or other agreement)? *(please tick one box only)*

1 Yes → _____ Number 1 Jan 2002-31 Dec 2002

2 No

40. Have you ever recommended a client proceed to mediation (where mediation was not required by a contract of other agreement)? *(please tick one box only)*

1 Yes → _____ Number 1 Jan 2002-31 Dec 2002

2 No

41. How do you locate an ADR practitioner to act as mediator/arbitrator etc for your clients? *(Please tick all that apply)*

1 ADR practitioners' adverts – e.g. yellow pages, internet etc

2 Word of mouth

3 AMINZ

4 LEADR

5 Seek advice from Court staff

6 Other lawyers/Law Firms

7 Other (please specify) _____

42. Which of the following statements best describes your experience of the initial consideration of ADR? *(please tick one box only)*

1	I as counsel typically explain the option of ADR with my clients before filing
2	I as counsel typically explain the option of ADR with my clients after filing
3	The client raises the option of ADR with me
4	The court recommends parties attempt ADR

43. In your experience what types of cases go to ADR? *(please tick all that apply)*

1 Commercial/Contracts

2 Building/Construction

3 Consumer

4 Property

5 Employment

6 Environmental

7 Family

8 Immigration

9 Tenancy

10 Insurance

11 Taxation

12 Agricultural/Farming

13 Local Government

14 Maori issues

15 Other (*please specify*) _____

44. Thinking about your general civil clients over the last year. Which regions did the majority of those clients come from? *(Please tick all that apply)*

1 Northland	9 Wellington
2 Auckland	10 Nelson/Marlborough
3 Waikato	11 West Coast
4 Bay of Plenty	12 Canterbury
5 East Coast	13 Otago
6 Hawke's Bay	14 Southland
7 Taranaki	15 All of the above – nationwide
8 Manawatu/Wanganui	

Go on to Section 4: Efficacy of ADR

Section 4: Efficacy of ADR

This final section includes all general civil disputes, both those that could and those that did end up in the High or District Court.

45. In your view, what are the main reasons disputants go to ADR to resolve dispute(s)? *(Please tick all that apply)*

1 Uncertainty of Court outcome
2 Unfamiliarity with Court procedures
3 Concerns about Court procedures
4 Desire to reach a compromise solution
5 Want to reduce costs
6 Want speedy resolution
7 Directed to ADR in contracts/statutes or other agreement
8 Want to keep the matter private/confidential
9 Want to have more control over the process
10 Want a creative solution – outside the square
11 Believe they will achieve a longer lasting solution
12 Have an on-going business or other relationship to preserve
13 Other (*please specify*) _____

46. How important are the following factors in ensuring ADR is effective? *(please circle one number for each of the following factors)*

	Not important	Some importance	Very important
Willing participants	1	2	3
Experienced ADR practitioner	1	2	3
Disputants' counsel supportive of ADR	1	2	3
Parties have on-going business or other relationship	1	2	3
The issue in dispute is not one of principle	1	2	3
Judiciary supportive of ADR to resolve the dispute	1	2	3
ADR is a contractual requirement	1	2	3

47. Do you find ADR more effective prior to filing or post- filing? *(please tick one box only)*

1 Pre filing
2 Post filing → **when after filing**
3 Equally effective pre or post filing

(please tick one box only)
θ_A Soon after filing
θ_B Before discovery
θ_C After discovery
θ_D Near to the fixture date

48. In your view what are the limitations of Arbitration/Mediation? *(please tick all that apply)*

	Arbitration	Mediation
Enforceability	1	1
Delay tactics – e.g. potential for parties to use ADR to delay court proceedings	2	2
Potential risk to parties if legal counsel or other advisors not present	3	3
Increased costs	4	4
Other	5	5

Please specify 'other' _____

_____

_____

_____

_____

_____

_____

49. Should the Court, for general civil cases, be able to order the parties to go to arbitration, mediation or other forms of ADR? *(please tick either yes or no for each category)*

	Yes	No
Arbitration	1	2
Mediation	1	2
Other forms of ADR	1	2

If you answered 'No' to <u>ANY</u> of the options for Question 49→ answer Question 50

If you answered 'Yes' to <u>ANY</u> of the options for Question 49→ answer Question 51

50. Why do you think the Court <u>should not</u> have this power? *(please tick all that apply)*

1 Litigants are entitled to have a Court decide the matter if they choose
2 Access to justice - inappropriate for Court to order people to "go away"
3 Compulsory ADR tends not to be effective
4 It risks increasing costs to litigants → complete Question 50.A
5 Other reason *(please specify)* _____

50.A If there was no increase in cost to litigants do you think the Court for general civil cases, should have the authority to order the parties to go to ADR? *(please tick one box only)*

θ_1 Yes
θ_2 No

51. Why do you think the Court <u>should</u> have this power*? (please tick all that apply)*

1 ADR can encourage settlement
2 ADR can reduce pressure on the Courts
3 ADR can reduce time to settlement/disposal
4 ADR can reduces costs for litigants
5 Other reason *(please specify)* _____

Go on to Section 5: ADR Skills and Training

Section 5: ADR Skills and Training

52. What skills do ADR practitioners need for general civil cases? *(please tick all that apply)*

    1 ADR process skills
    2 Industry specific technical skills/knowledge
    3 AMINZ/LEADR qualifications
    4 legal training
    5 Practical experience of ADR process e.g. minimum number of mediations etc
    6 Other *(please specify)* _____

53. Are the current quality assurance frameworks for ADR practitioners provided by LEADR (ethical guidelines and complaints processes) and AMINZ (code of ethics for members combined with disciplinary procedures) adequate? *(please tick one box only)*

    1 Yes
    2 No
    3 Don't know

    Why/Why not? _____
    _____
    _____
    _____
    _____

54. If you have any other general comments about ADR and civil cases please note them here.

    _____
    _____
    _____
    _____
    _____
    _____
    _____
    _____
    _____
    _____
    _____
    _____
    _____
    _____

THANK YOU FOR COMPLETING THE SURVEY.
Please place in the enclosed reply-paid envelope and return by 31 August 2003 to go in the draw to win one of 36 bottles of Taittinger

Appendix C: ADR Practitioners Focus Group Questions

FOCUS GROUP GUIDELINES
ADR Practitioners

1. Changing demand for ADR?
2. Factors affecting the supply of ADR?
3. Adequacy of ADR training and qualifications
4. Adequacy of current quality assurance frameworks?
5. Relationship between ADR and court processes

Appendix D: Lawyers Focus Group Questions

FOCUS GROUP GUIDELINES
Lawyers

1. Changing demand for ADR and Court-based resolution of disputes?

2. Benefits of ADR for disputants?

3. Are the current quality assurance frameworks for and access to ADR adequate?

4. The place of ADR within the court system

5. Would Court promotion of ADR be beneficial to clients?

Appendix E: Judicial Interview Guidelines

JUDICIAL INTERVIEW GUIDELINES

NB: The following provides a guideline for the key themes/issues to be discussed with judges as part of the ADR Research programme. The interviews with judges will be conversational. The use of guidelines enables flexibility in the interview as well as the ability to focus on issues of particular interest/importance to individual judges. We do not expect to go through these key issues one-by-one or in a particular order.

1. To what extent do civil cases that file with the Court attempt ADR prior to filing?
   - Do cases that attempt ADR prior to filing tend to be a particular type of dispute?
   - Do cases that attempt ADR prior to filing have any other common features?

2. What factors encourage people to use ADR (pre and post filing)? What factors are barriers to people using ADR?

3. Why do cases settle (with or without ADR)? What factors are associated with settlement of cases filed in court?
   - Should/could more cases settle?
   - Should/could more cases settle earlier?
   - What would be the best time to refer cases to ADR? At what stage after filing?

4. Contribution of ADR to settlement of civil cases filed in the High/District Court under the current case management system.
   - What is the role of ADR in the settlement of civil cases after filing?
   - To what extent has ADR been integrated into current case management practices?
   - Are there significant differences in the way in which ADR has been integrated in different localities? If yes, what are some possible explanations for those differences?
   - Who are the key promoters of ADR? – the parties? lawyers? courts? the judiciary?

5. Where parties have been to ADR after filing a civil case with the Court, what are the benefits (if any), for?
   (a) parties
   (b) the courts
   - do the benefits vary depending on the type of case and/or the type of parties?

6. Have you seen a stronger commitment to ADR by lawyers in the last 5 years? If so, what type of ADR?

7. Do you see opportunities to promote/integrate ADR more effectively into the process of resolving disputes that are filed with the Court? If so, how?

8. Do you have any other comments about ADR?

Appendix F: Disputants Survey

DEPARTMENT FOR COURTS
ADR RESEARCH PROGRAMME: DISPUTANTS SURVEY

This survey is designed to collect information from parties involved in general civil litigation who filed a case with the District or High Courts between 2000 and 2003

All data collected in this survey will be aggregated and used for research purposes only. Your responses are confidential. No individual details will be used in reports or research summaries and you will not be individually identified to the Department for Courts or any other party.

Section 1: Background to the Dispute

These first few questions relate to your civil case. If you were involved in multiple civil cases between 2001 and 2003, these questions relate to the most recent completed case you were involved in.

1. Did you bring the civil case to court or were you defending a case brought against you? *(tick one box only)*

   θ_1 Plaintiff – I brought the case to court
   θ_2 Defendant – I was a defendant in a case
   θ_3 Other (please specify) _____

2. Were you involved as an? *(tick one box only)*

   θ_1 Individual
   θ_2 Company
   θ_3 Government Agency
   θ_4 Local government
   θ_5 Other (please describe) _____

3. Can you briefly describe the nature of the dispute and the remedies sought

   _____
   _____
   _____
   _____
   _____
   _____

4. Where was the case filed? *(Note which registry and indicate court type)*

   Registry _____

   District Court / High Court / Disputes Tribunal / Other _____

5. What year was that? _____

6. What was the amount claimed in the dispute?

   $_____

7. Did you have a lawyer or did you represent yourself? (*tick one box only)*

   θ_1 I had a lawyer
   θ_2 I represented myself
   θ_3 I represented myself for part of the case

8. Which of the following statements best describes the outcome of the case? *(tick one box only)*

θ_1	The case was settled at, or as a result of, a judicial settlement conference at the court	
θ_2	After a final hearing the Judge granted (fully or partially) the remedy sought	
θ_3	After a final hearing the Judge refused to grant the remedy sought	
θ_4	The case was discontinued	
θ_5	The case was settled outside the court process by you and the other parties only	
θ_6	The case was settled outside the court using Alternative Dispute Resolution	

Section 2: Previous Dispute/Litigation Experience

9. Have you ever filed/defended one or more cases in the Court or Dispute Tribunal before (excluding the current case)? (*tick one box only)*

   θ_1 Yes ➡ If Yes, how many in the last 5 years? _____
   θ_2 No

Section 3: Your Civil Case

10. In your civil case did you and the other party/parties attempt formal mediation or ADR either before or after filing the case with the Court *(tick one box only)*

    θ_1 Yes ➡ go to Section 3A
    θ_2 No ➡ go to Section 3B [PAGE 6]

Section 3A: Attempted ADR

11. At what stage in the dispute did you and the other parties attempt formal mediation or ADR? *(tick one box only)*

θ_1 Before filing		θ_2 After filing
⬇		⬇
How much time elapsed between first seeing a lawyer about the dispute (or realising you had a dispute) and first attempting mediation or other ADR process? θ_A 6 months or less θ_B Between 6 months and a year θ_C 1 -2 years θ_D More than 2 years		*When after filing did you and the other parties FIRST attempt mediation or another ADR process ?* θ_A Soon after filing θ_B Before discovery θ_C After discovery θ_D Near to the hearing date

12. What ADR process(es) did you use in the current dispute/case (please tick all that apply)?

    θ_1 Mediation θ_2 Arbitration
    θ_3 Other _____

13. How did you find an ADR practitioner in the current case?

- θ_1 My lawyer located an ADR practitioner
- θ_2 ADR practitioner's advertisement
- θ_3 Sought advice from the Judge/Master
- θ_4 Word of mouth
- θ_5 I used an ADR practitioner I had used in a previous dispute
- θ_6 Other (please specify) _____

14. Were there any difficulties finding an ADR practitioner? (such as delays, practitioners not available in your area/location, or a specific practitioner not being available?)

_____

_____

15. Why did you use ADR in this case*? (please tick all that apply)*

- θ_1 Uncertainty of Court outcome
- θ_2 Unfamiliarity with Court procedures
- θ_3 Concerns about Court procedures
- θ_4 Desire to reach a compromise solution
- θ_5 Want to reduce costs
- θ_6 Want speedy resolution
- θ_7 Directed to ADR in contracts/statutes
- θ_8 Want to keep settlement details confidential
- θ_9 Believe they will achieve a longer lasting solution
- θ_{10} Have an on-going business or other relationship to preserve
- θ_{11} Other (*please specify*) _____

16. Did any of the following recommend/advise that you try ADR in relation to this case? *(please tick all that apply)*

- θ_1 Lawyer
- θ_2 Judge
- θ_3 Master
- θ_4 Other (*please specify*) _____

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17. How much did ADR cost? _____

Explore what this cost includes (e.g. ADR practitioners fee, lawyers costs, etc) _____

_____

18. Did the case settle as a result of ADR?

- θ_1 Yes
- θ_2 No
- θ_3 Not fully – but we did resolve some issues

19. Was this the first time you had been involved in ADR?

- θ_1 Yes
- θ_2 No

20. Would you use ADR again in the future?

- θ_1 Yes
- θ_2 No

Go to Section 4: Conferences [PAGE 7]

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Section 3B: Did Not Attempt ADR

21. Were you encouraged by the Court to settle your case out of court?

- θ_1 Yes
- θ_2 No

22. Why did you <u>not</u> use ADR in the current case? *(please tick all that apply)*

- θ_1 Believed I/we would win
- θ_2 Wanted an enforceable decision
- θ_3 Don't know about ADR
- θ_4 Don't think ADR is effective
- θ_5 Advice from counsel not to use ADR
- θ_6 Difficult legal issue involved
- θ_8 Other (*please specify*) _____

23. Have you ever been involved in ADR before this case?

- θ_1 Yes
- θ_2 No

Go to Section 4: Conferences [PAGE 7]

Section 4: Conferences

24. Did you attend a judicial settlement conference in the course of your case?

θ_1 Yes

θ_2 No ➡ go to Question 29 [PAGE 8]

25. Who initiated the judicial settlement conference?

θ_1 One of the parties

θ_2 The Court

26. Did the judicial settlement conference achieve a settlement?

θ_1 Yes ➡ go to Question 28

θ_2 No ➡ go to Question 27

27. If not, did you find attending the judicial settlement conference useful?

θ_1 Yes

θ_2 No

Why? Why not? _____

_____

_____

_____

28. Are there any ways in which the effectiveness/helpfulness of the judicial settlement conference could be improved?

_____

_____

_____

Section 5: Timeframe & Costs

29. How much time elapsed between first seeing a lawyer about the dispute (or realising you had a dispute) and the case being filed with the court? *(tick one box only)*

- θ_1 6 months or less
- θ_2 Between 6 months and a year
- θ_3 1 -2 years
- θ_4 More than 2 years

30. Was the time taken in the case when it was before the court shorter, longer or about what you expected? (tick one box only)

- θ_1 Shorter than expected
- θ_2 Longer than expected
- θ_3 About the same as expected

31. Approximately how much were the total costs of your legal representation in relation to your case?

- θ_1 Less than $10,000
- θ_2 $10,001 - $20,000
- θ_3 $20,001 - $50,000
- θ_4 $50,001 - $100,000
- θ_5 Over $100,000
- θ_6 Don't know

Section 6: Satisfaction with Outcomes

32. Were you satisfied with the outcome of your case?

- θ_1 Yes
- θ_2 No

Why? Why not? _____

Section 7: Alternative Dispute Resolution Generally

33. When I say the words Alternative Dispute Resolution what sorts of processes do you think of? *(prompt if necessary)*

- θ_1 Arbitration
- θ_2 Mediation
- θ_3 Negotiation
- θ_4 Facilitation
- θ_5 Other (please specify) _____
- θ_6 None – I have never heard of it before now

34. What do you see are the benefits of ADR?

- θ_1 Faster resolution of disputes
- θ_2 Cheaper resolution of disputes
- θ_3 Confidentiality
- θ_4 Ability to preserve on-going relationships
- θ_5 Parties to a dispute have more control over the process
- θ_6 Ability to achieve more creative solutions
- θ_7 Other (please specify) _____
- θ_8 None – no advantages

35. What do you see as the disadvantages of ADR?

- θ_1 Can lead to increased costs
- θ_2 Lack of enforceability
- θ_3 Delay tactics
- θ_4 May have to compromise principles
- θ_5 Other (please specify) _____
- θ_6 None – no disadvantages

36. Where have you heard about ADR from?

- θ_1 My lawyer
- θ_2 Other legal advice i.e. community law centre CAB etc
- θ_3 Court staff
- θ_4 Judge/Master
- θ_5 Friends and family
- θ_6 Other (please specify) _____