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Court-Referred Alternative Dispute Resolution: Perceptions of Members of the Judiciary

An overview of the results of a study

Nicky McWilliam, Alexandra Grey

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The Australasian Institute of Judicial Administration Incorporated ('AIJA') is an incorporated association affiliated with Monash University. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

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COURT-REFERRED ALTERNATIVE DISPUTE RESOLUTION: PERCEPTIONS OF MEMBERS OF THE JUDICIARY

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Preface

The AIJA has had an ongoing interest in Court Referred Alternative Dispute Resolution.

In 2003 the Institute joined with the National Alternative Dispute Advisory Council (NADRAC) to present research entitled 'Court Referral to ADR: Criteria and Research' authored by Associate Professor Kathy Mack of Flinders University. The AIJA's Executive Director, Greg Reinhardt and former President and a life member, the Hon Murray Kellam AO, have been involved in educational programmes in relation to court referred alternative dispute resolution both in Australia and in the Asia-Pacific region.

The AIJA is pleased to have commissioned further research by Dr Nicky McWilliam, Visiting Research Fellow, Faculty of Law, University of Technology, Sydney; Sydney Mediation Partnership with Dr Alexandra Grey, Macquarie University Law School, Helen Zhang, Tracey Yeung and Dharmita Padhi, student research assistants.

It is significant that there has been an opportunity to conduct research in respect of the views of the judiciary. It is pleasing to see that Court Referred Alternative Dispute Resolution has been widely accepted as a means of resolving disputes and that the judges participating in the survey were reported as having an overall positive experience.

I am grateful to Dr McWilliam and Dr Grey and their team of researchers. I am also grateful to the members of the Advisory Committee consisting of Professor Kathy Mack, Flinders University, the Hon Murray Kellam AO and Dr Olav Nielssen.

Thanks are also due to Kathy Jarrett for her work in relation to editing and formatting the report.

I commend the report.

The Hon Justice Robert Mazza
Supreme Court of Western Australia
AIJA President

Executive Summary

- This is one of the first comprehensive and comparative studies into the perceptions of court-referred alternative dispute resolution (CADR) by a cohort of the Australian judiciary. It investigates their use and understanding of CADR and their attitudes to it.
- The definition of CADR in the study follows a broad definition of ADR (in the literature) as any judge- or magistrate-directed intervention other than judicial determination. Therefore, it encompasses processes directed by a court with or without the consent of the parties and with or without a request by a party or its legal representatives.
- The study is based on questionnaire and interview data from judges in the Local Court NSW, District Court NSW, Supreme Court NSW, Federal Court, and Federal Circuit Court. The NSW Courts of Appeal and Criminal Appeal were included in the Supreme Court category.
- The study sample of 104 judges represents an overall participation rate of 30 per cent, ranging from 15 per cent of the Local Court bench, to 45 per cent of the NSW Supreme Court (roughly one-third of judges in the five courts and approximately one-tenth of the total Australian judiciary).
- The overall results suggest that judges have a positive view of CADR and engage with it, including 'behind the scenes' where CADR is not ultimately part of proceedings.
- The study shows that the judiciary has low levels of formal (C)ADR training (over a third report none at all) with CADR engagement clearly developed other than through training. Nevertheless, with or without training, judges report engaging with CADR and perceive it to contribute to court efficiency, but judges (even judges from the same court or presiding over the same area of law) are inconsistent about the types of cases for which they think CADR could work.
- The data illustrate how forms of CADR can be practised, and supported by legal policy, court structure of hearings and culture, in almost every type or subject matter of case. While often explicable, each instant case differs as to whether the court hearing structure (docket or listing) provides for the opportunity for CADR and whether or not CADR must remain the instant judge's decision.
- Judges report reluctance to consider CADR in appeals and in criminal matters; however, magistrates report strong acceptance of CADR practices in criminal proceedings.
- The study shows that the criminal/civil division does not categorically predict the engagement with, perceived importance of, outcomes, or understanding of CADR.
- Key factors that contribute to judges' perceptions that CADR is inappropriate are not limited to the major policy motivations for introducing or encouraging

CADR (set out in the literature, such as dealing with a large volume of work and/or backlog), but include:

  - court tier, the trial or appellate nature of a case, the timeline of a case which is closely connected to a court's hearing structure (that is, whether CADR has already been attempted, was available at earlier stages or whether or not an instant judge had the opportunity to consider CADR), the case lawyers' responsiveness to CADR (and interaction with the bench), both the processes and the normative message of CADR-enabling legislation, each court's culture, and the perception judges have of whether and how fellow judges approach CADR.
  - the local legal profession's patterns in their practices of engagement with the bench in suggesting or opposing CADR and whether or not lawyers perceive a judge's level of CADR understanding and/or training makes them competent to make assessments about the suitability of CADR, as well as a judge's perception of the competency of a lawyer to suggest or oppose CADR.

- Judges report deriving satisfaction from the fact that CADR assisted the court to manage its workload efficiently and provided them with a platform for delivering outcomes that would not be achievable in court.
- The positive experience overall, even where some judges saw CADR as slightly increasing rather than decreasing their workload, confirms the potential for CADR to improve the efficiency, accessibility and outcomes for the courts.
- The authors acknowledge potential positive bias in self-selection by the judges and the positive phrasing of survey statements; however, despite this, judges express a diverse range of views about CADR.
- The study provides a credible cross-section of CADR attitudes across the Australian judiciary under study and a detailed window into CADR practices and perceptions of judges, without purporting to represent the whole judiciary. The comparisons of varying attitudes across each level of court, albeit small sub-cohort sample sizes, indicate a starting point for identification and research into common trends and patterns between courts on reasons behind certain outlooks towards CADR.

Abstract

This article presents an overview of the results of a study examining judicial attitudes to court-referred alternative dispute resolution (CADR), drawing on data collated from 104 judges (including magistrates) from the three tiers of NSW Courts, the Federal Court and the Federal Circuit Court. The study consisted of a questionnaire and semi-structured interviews that examined judicial engagement, perceived impact and importance, understanding and the outcomes of CADR. The overall participation rate was 30 per cent, ranging from 15 per cent of the Local Court bench, to 45 per cent of the NSW Supreme Court. The courts studied each have different functions and preside over disparate work requiring distinct CADR processes, but analysis reveals some important consistencies across these courts in relation to CADR, particularly a general engagement with CADR across the judiciary. The overall results suggest that judges across the courts do consider CADR. The positive experience overall, even where some judges saw CADR as slightly increasing rather than decreasing their workload, confirms the potential for CADR to improve the efficiency, accessibility and outcomes for the courts.

In the main, judges presiding over civil matters see CADR as usefully falling within their role, but the data also reveal factors that cause CADR to be perceived as inappropriate in some types of civil cases. Unsurprisingly, judges are generally more reluctant to consider CADR (including therapeutic interventions) in criminal matters; however, magistrates report strong acceptance of CADR practices in criminal proceedings.

The study analyses intersecting factors that contribute to judges' perceptions that CADR is inappropriate in certain kinds of case, factors that go beyond whether a matter is in a civil or criminal division. The key factors are the rank of the court (including whether or not it is appellate), the volume of casework, the timing of CADR within proceedings, lawyers' roles and court culture (including judges' awareness of what their fellow judges do and think in relation to CADR). This article therefore argues that CADR is never categorically or inherently useful (or inappropriate) and that court-by-court guidelines and training are important to increasing the consistency with which judges weigh up these intersecting factors.

I. Introduction

A. Overview

Court-referred alternative dispute resolution (CADR) has been perceived as difficult and complex since it was introduced in Australia.[1] This is partly because CADR challenges the traditional conception of the role of a judge who rules on competing arguments and makes determinations according to legal rights and remedies while remaining a passive, neutral and uninvolved arbiter,[2] and partly because of the guidance and criteria on CADR processes for courts. And yet, CADR is clearly here to stay.

This article will argue, first, that the Australian judiciary is engaged with CADR and generally views it positively. Secondly, it argues that the extent to which CADR is practised and approved of by judges is not simply a function of whether the matter before the court is civil or criminal, although the literature so far emphasises a categorical civil/criminal distinction. This has implications for the focus of policies to promote, train or support CADR.

This article responds to practitioners' and commentators' calls for further research into the value and the actual practices of CADR. Specifically, it reports on qualitative and quantitative data from questionnaires and interviews that investigate the use of, and views about, CADR among a cohort of the Australian judiciary. With 104 valid questionnaire responses from current judges, each augmented by an interview, this study is one of the most systematic and comprehensive studies of judicial CADR practices and attitudes in Australia to date and aims to prompt further research into judicial practice and attitudes to CADR.

B. Background to this Research: Reviewing Legislation and Literature

There is now a routine use of various alternative dispute resolution (ADR) mechanisms in Australian jurisdictions, reflecting at the very least the complementarity of a process outside formal court-based adjudication and demonstrating a growing awareness within the legal system of the complex emotional, social and financial interests and issues that can contribute to legal

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1 Kathy Mack, 'Court Referral to ADR: Criteria and Research' (Report, National Alternative Dispute Resolution Advisory Council and Australian Institute of Judicial Administration, 2003), 1, 7, 76, available at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Court%20Referral%20to%20ADR%20-%20Criteria%20and%20Research.PDF>; National Alternative Dispute Resolution Advisory Council (NADRAC), 'Alternative Dispute Resolution in the Civil Justice System' (Issues Paper March 2009), 46.

2 Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 *Social & Legal Studies* 405, 406; Kathy Mack and Sharyn Roach Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices' (2011) 37 *Monash University Law Review* 187, 189; Kathy Mack and Sharyn Roach Anleu, 'In-Court Judicial Behaviours, Gender and Legitimacy' (2012) 21 *Griffith Law Review* 728, 730–1.

disputes and may require, or at least benefit from these processes.[3] Indeed, because of the potential advantages of less formal mechanisms, judges have always had the discretion to refer all or part of a matter to an ADR process.[4] This is referred to as 'court-referred' ADR or 'court-connected' ADR in some studies.[5] While the judicial 'toolkit' has long included some CADR mechanisms, in recent decades the range of mechanisms has increased.[6] As such, CADR (and ADR more generally) has become an increasingly prominent concern for legal policy and the processes by which judges refer matters have become formalised. Nowadays, CADR may proceed pursuant to legislation,[7] court-based procedures or guidelines (especially bench books),[8] or practice notes.[9] Key among such legislation are civil procedure Acts; for example, the *Civil Procedure Act 2005* (NSW) ('*CPA'*) governing the NSW courts in this study and the *Federal Court of Australia Act 1976* (Cth) ('*FCA')* governing the Federal Court. The overarching purpose and objectives of the *CPA* is detailed in ss 56–57 as 'just, quick and cheap resolution of … disputes'. Similarly, ss 37M(1)–(2) of the *FCA* outline an overarching purpose and objectives very like those in the *CPA*.

A process of court-referred mediation (a form of ADR) without the parties' consent was introduced through legislation first in NSW in 1983 for the District and Supreme Courts.[10] A similar process — but requiring the consent of parties — was

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3 John Woodward, 'Court Connected Dispute Resolution – Whose Interests are Being Served?' (2014) 25 *Australasian Dispute Resolution Journal* 159, 159.

4 Marilyn Scott, Peter Alexander and Philippa Ryan, *Selected Materials on Civil Practice* (LexisNexis Butterworths, 2nd ed, 2016) 39; *Civil Procedure Act 2005* (NSW) s 56; *Federal Court of Australia Act 1976* (Cth) s 37M.

5 Mack, above n 1, 1.

6 Wayne Martin, 'Managing Change in the Justice System' (Speech delivered at the 18th AIJA, Brisbane, 14 September 2012), available at <https://aija.org.au/wp-content/uploads/2017/03/Oration2012.pdf

7 *Federal Court of Australia Act 1976* (Cth), s 53A; *Court Procedures Rules 2006* (ACT) reg 1179; *Civil Law (Wrongs) Act 2002* (ACT) s 195; *Civil Procedure Act 2005 (NSW)* ss 26, 56, 57; *Supreme Court Act 1935 (SA)*s 65(1); *Alternative Dispute Resolution Act 2001* (Tas) s 5(1); *Civil Procedure Act 2010* (Vic) s 48(2)(c); Supreme Court (General Civil Procedure) Rules 2005 (Vic) O 50.07; *Supreme Court Act 1935* (WA) s 167(1)(q); Rules of the Supreme Court 1971 (WA) O 8; See also Justice P A Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia' (Paper presented at the Mediate First Conference, Hong Kong Convention and Exhibition Centre, 11 May 2012), 1, 4–5 [9]–[10], available at <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2012.05.11.pdf>.

8 Judicial Commission of New South Wales, *Alternative Dispute Resolution* (29 November 2015) Civil Trials Bench Book [2-0520], available at <https://www.judcom.nsw.gov.au/publications/benchbks/civil/alternative_dispute_resolution.html>.

9 Supreme Court of New South Wales, Practice Note No 6 of 2010 — Supreme Court – Mediation, 15 March 2010; Federal Court of Australia, Practice Note No CPN-1 — Central Practice Note: National Court Framework and Case Management, 25 October 2016, [8.2]; Federal Circuit Court of Australia, Practice Direction No 2 of 2008 — Family Dispute Resolution – Applications for Orders under Part VII of the Family Law Act 1975, 1 July 2008.

10 Tania Sourdin, 'ADR in the Australian Court and Tribunal System' (2003) 6(3) *ADR Bulletin* 55, 56.

introduced to the Federal Court, via that court's constituting Act in 1987.[11] Judiciary-led case management was introduced in the 1980s in the commercial area of the Supreme Court NSW[12] and throughout the 1990s to 2000s, legislation introduced more CADR processes into Australian jurisdictions.[13] Some courts introduced internal judicial committees or groups within the court to discuss, consider and encourage ADR processes and that may involve consulting with other courts and agencies.[14] This predominantly impacted the way civil litigation, rather than other forms of litigation, could be conducted; Sourdin reports that the initial impacts included delay reductions and increased monitoring and planning for caseload management.[15] One of the largest studies in CADR in Australia is a comprehensive study published in 2003 by the National Alternative Dispute Resolution Advisory Council (NADRAC), which examined CADR programs then available in civil disputes. It included an analysis of empirical information and statistical data,[16] finding:

> The usual ADR process in court-connected [civil law] programs is "mediation" in some form ... Generally, research finds that participants reported fairly high levels of satisfaction, but there is no consensus on increased settlement rates, earlier resolution or cost or time savings for courts or participants.[17]

At the time of its introduction, CADR was seen as a way to address congested court lists,[18] unsustainable caseloads and delays,[19] escalating costs[20] and the inefficiency

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11 Ibid 57.

12 Justice Rogers, 'The Managerial or Interventionist Judge' (Pt November) (1993) 3(2) *Journal of Judicial Administration* 97, 109.

13 Tania Sourdin, 'ADR in the Australian Court and Tribunal System', above n 10, 55–8. See also Australian Centre for Justice Innovation (ACJI), 'The Timeliness Project' (Background Report, Monash University, 15 October 2013), 80; Robert McDougall, 'Courts and ADR: A Symbiotic Relationship' (Paper presented at the LEADR & IAMA Conference, Sydney, NSW, 7 September 2015) [15]; Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40 *Monash University Law Review* 528, 530–1; Angela Bowne, 'Reforms to Civil Justice: Alternative Dispute Resolution and the Courts' (2015) 39 *Australian Bar Review* 275, 280; Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35 *University of New South Wales Law Journal* 929, 931; Michael King, 'Reflections on ADR, Judging and Non-Adversarial Justice: Parallels and Future Developments' (2012) 22 *Journal of Judicial Administration* 76, 76; James Spigelman, 'Mediation and the Court' (2001) 39 *Law Society Journal* 63, 64; Marilyn K A Scott, 'Collaborative Law: Dispute Resolution Competencies for the' New Advocacy''' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 231, 231.

14 For example, the NSW Supreme Court established the ADR Steering Committee in 1993 – referred to in <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Annual%20Reviews%20+%20Stats/Supreme_Court_Ann_Rev_2014_2.pdf>.

15 Tania Sourdin, 'Judicial Management and Alternative Dispute Resolution Process Trends' (1996) 14(3) *Australian Bar Review* 185, 185.

16 Mack, above n 1, 70.

17 Mack, above n 1, 3.

18 Woodward, above n 3, 165.

and complexity of the court (and particularly civil) processes.[21] The lack of research consensus on the realisation of CADR's potential advantages has stymied the resolution of debates over CADR. Nevertheless, CADR has now become a 'standard feature'[22] of civil practice to the extent that the 'judicial system [has become] heavily reliant on it',[23] with CADR provisions permeating legislation[24] and court practice notes,[25] permitting or even mandating the referral of a matter to ADR by a judge.[26] Within the broad class of civil law matters, family law proceedings are especially reliant on CADR.[27] Bowne's recent article agrees that the extent of use of CADR in civil cases is relatively high but contends that CADR processes are less successful than hoped or planned.[28] However, Mack and others report that studies consistently find mediation has 'high client satisfaction',[29] illustrating the variability in perceptions of what stakeholders want from CADR and what constitutes successful CADR.

The literature does not report whether or not the judiciary felt disappointment in CADR nor does it investigate, from a judicial perspective, what might be causing CADR to fall short of planners' expectations. This judicial perspective is needed to understand CADR's successes and shortfalls (as well as what 'success' looks like from the bench) to inform ongoing CADR policy.

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19 Spigelman, above n 13, 63.

20 J L Allsop, 'Judicial Case Management and the Problem of Costs' (2015) 39 *Australian Bar Review* 228.

21 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 189 [23]; Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002), 4; Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205, 205–6.

22 McDougall, above n 13.

23 McDougall, above n 13, [18].

24 See Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia', above n 7.

25 See above n 9.

26 McDougall, above n 13, [17], [20]; Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia', above n 7, 1.

27 The *Family Law Act 1975* (Cth) ('*FLA*'), since its inception, has maintained a strong emphasis on ADR as a primary method of resolving disputes. Approximately 90% of the Federal Circuit Court workload consists of family law matters (Federal Circuit Court of Australia, 'About the Federal Circuit Court' (1 July 2016), available at <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc>). See especially s 60I of the FLA. See also *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

28 Bowne, above n 13, 281. Note that Mack, above n 1, 2, cautions that 'successful' CADR may mean different things to different stakeholders.

29 Mack, above n 1, 2. See also Paula Baron, Lillian Corbin and Judy Gutman, 'Throwing Babies Out with the Bathwater? – Adversarialism, ADR and the Way Forward' (2014) 40 *Monash University Law Review* 283, 296–7; Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2-3) *Common Law World Review* 214, 216–7, 220.

In contrast to the literature's portrayal of the largely uncontroversial acceptance of CADR in civil disputes,[30] albeit a lesser level of acceptance for some,[31] the application and development of CADR in crime[32] and appeal matters[33] continue to be controversial or at odds with expectations,[34] although CADR has been accepted in some criminal law contexts.[35] The literature reveals that the fundamental considerations that hold back support for CADR in criminal matters include: the perception CADR is not condign given the nature of the offending, the concern that its use will not be accepted socially and will therefore erode relations between courts and the community, and doubts about the effectiveness of CADR in criminal law proceedings.[36] However, there are suggestions that the roles of lawyers and judges within the current criminal justice system require review in light of the fact that criminal law nowadays functions beyond the strictly adversarial context. As such, there is a case for CADR within this context.[37] Given the new forms of criminal justice that have emerged by way of restorative, therapeutic and collaborative paradigms, among others,[38] CADR may in fact be appropriate for criminal cases, these proponents argue, and also point out that there are elements of offending that may be resolved more quickly or efficiently in CADR rather than through full deployment of judicial examination.[39]

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30 Mack, above n 1, 25, 69; Tania Sourdin, 'Facilitative Judging' (2004) 22 *Law in Context* 64, 64; Bowne, above n 13, 275.

31 Tania Sourdin, *Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts* (Australian Centre for Justice Innovation, 2012), 1, 162 [6.50]; Bowne, above n 13, 277, 279; Olivia Rundle, 'Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77, 84.

32 Freiberg, above n 21, 205.

33 Bowne, above n 13, 275.

34 Michelle Edgely, 'Addressing the Solution-Focused Sceptics: Moving Beyond Punitivity in the Sentencing of Drug-Addicted and Mentally Impaired Offenders' (2016) 39 *University of New South Wales Law Journal* 206, 223.

35 Freiberg, above n 21, 205.

36 Melissa Lewis and Les McCrimmon, 'The Role of ADR Processes in the Criminal Justice System: A view from Australia' (Speech delivered at the ALRAESA Conference, Imperial Resort Beach Hotel, Entebbe, Uganda, 2005) 1, 10, available at <http://www.justice.gov.za/alraesa/conferences/2005uganda/ent_s3_mccrimmon.pdf>.

37 Freiberg, above n 21.

38 Freiberg, above n 21; King, 'Reflections on ADR, Judging and Non-Adversarial Justice: Parallels and Future Developments', above n 13.

39 Freiberg, above n 21, 207; Jelena Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20 *Law in Context* 121, 121; Pauline Spencer, 'From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream' (2014) 39(4) *Alternative Law Journal* 222, 222.

The experiences of the United Kingdom,[40] the United States[41] and Canada[42] indicate the potential benefits and the possibilities of success of appellate court-referred ADR. However, there is debate about whether or not the introduction of mandatory ADR/CADR processes should be considered by appellate judges and the extent to which existing voluntary programs are currently utilised.[43] In Australia, CADR in appellate courts remains under studied, and controversies about appellate CADR have not been thoroughly discussed.[44]

Overall, while CADR has been incorporated in Australian legislation for some time, the literature — including extra-curial commentary and judgments in addition to research — reveals its ongoing complexity. The literature suggests that there is an ongoing dialogue about CADR[45] from academics and many members of the judiciary, as well as debate over if and when to use CADR.[46] However, there has been relatively little research analysing how CADR is used or viewed by the judiciary as a cohort. Such an investigation of the judiciary's experiences of CADR may provide nuance on what makes CADR usable or appropriate in particular jurisdictions or types of proceedings, following NADRAC's call in their initial report on CADR:

> the search for generally applicable criteria [to indicate when CADR is necessary] will not be a productive strategy. It is more valuable to use research to identify areas in which each individual court must make specific choices, and to provide guidance for each court to design its own referral processes and criteria, in light of particular local features such as program goals, jurisdiction, case mix, potential ADR users, local legal profession and culture, internal resources and

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40 Lord Justice Jackson, 'The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review' (Speech delivered at the 11th Lecture in the Implementation Program, RICS Expert Witness Conference, United Kingdom, 8 March 2012), available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf>; Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010) 97–101; Alwi Abdul Wahab, Court-Annexed and Judge-Led Mediation in Cases: The Malaysian Experience (PhD Thesis, Victoria University, 2013), 34.

41 Wayne D Brazil, 'Court ADR 25 Years after Pound: Have We Found a Better Way' (2002) 28 *Ohio State Journal on Dispute Resolution* 93, 107, 112.

42 Nathalie de Rosiers, 'From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts' (2000) 4 *Court Review* 54.

43 Brazil, above n 41, 112; Marilyn Warren, 'Should Judges Be Mediators?' (2010) 21 *Australasian Dispute Resolution Journal* 77, 77.

44 Bowne, above n 13, 281–2.

45 McDougall, above n 13, [24]–[30]; Martin, above n 6, 40–1.

46 Chief Justice Tom F Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35 *University of New South Wales Law Journal* 870, 871; Brendan French, 'Dispute Resolution in Australia – The Movement from Litigation to Mediation' (2007) 18 *Australasian Dispute Resolution Journal* 213, 213–4, 217; Henry Kha, 'Evaluating Collaborative Law in the Australian Context' (2015) 26 *Australasian Dispute Resolution Journal* 178, 179–80; Waye, above n 29, 216.

external service providers.[47]

Although a study of a cohort of the judiciary has not been made (prior to this study), the reported commentary of individual judges has indicated changing norms around CADR. This commentary increasingly reflects a view that judges should become involved in the management of court processes to the extent a judge feels necessary,[48] including by referring matters to ADR in order to prioritise the public interest[49] and facilitate parties' access to a range of options and processes that are less formal and more affordable than litigation.[50] There are extra-curial judicial commentaries[51] and judgments,[52] both supportive and critical of the role, value, and evolving nature of CADR, which reflect the views of individual members of the judiciary. On the one hand, certain judges call for colleagues to adopt a 'robust judicial role'[53] (particularly in relation to the length and costs of litigation),[54] and to promote a dialogue on CADR.[55] For instance, the Federal Court's Allsop CJ includes

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47 Mack, above n 1, 2.

48 Justice P A Keane, 'The Early Identification of Issues' (2011) 14 *Journal of Civil Litigation and Practice* 14, 16; King, 'Reflections on ADR, Judging and Non-Adversarial Justice: Parallels and Future Developments', above n 13, 79, 82; Mack and Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context', above n 2, 187, 188, 212.

49 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 189 [23]; Mack and Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context', above n 2, 191; Rosemary Hunter, Sharyn Roach Anleu and Kathy Mack, 'Judging in Lower Courts: Conventional, Procedural, Therapeutic and Feminist Approaches' (2016) 12 *International Journal of Law in Context* 337, 349, 350.

50 Justice Peter Vickery, 'Managing the Paper: Taming the Leviathan' (Paper presented at the Fourth International Conference on Construction Law for the Society of Construction Law, Melbourne, Australia, May 2012); Justice Peter Vickery, 'Recent Developments in Discovery in Commercial Litigation' (Paper presented at VICBAR CPD Seminar, 5 February 2015), 5, available at <http://www.judicialcollege.vic.edu.au/sites/default/files/VICBAR%20CPD%20Seminar%20[5%20February%202015]%20[FINAL%20VERSION].pdf>; McDougall, above n 13, [20].

51 See, e.g., McDougall, above n 13, [2]; Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape', above n 46, 881; Joe Harman, 'From Alternate to Primary Dispute Resolution: The Pivotal Role of Mediation in (and in avoiding) Litigation' (Paper presented at the National Mediation Conference, Melbourne, 10 September 2014) 1, 8, 22; Justice P A Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia' (Paper presented at the Mediate First Conference, Hong Kong Convention and Exhibition Centre, 11 May 2012) 1, 7; Martin, above n 6, 3–4; Popovic, above n 39.

52 See, e.g., *Idoport Pty Ltd "JMG" v National Australia Bank Ltd* [2001] NSWSC 427 [13]–[20]; *ASIC v Rich* [2005] NSWSC 149 [17]–[21]; *Browning v Crowley* [2004] NSWSC 128 [5]–[6]; *Frazer and Others v State of Western Australia* (2003) 198 ALR 303 [15]–[19], [23]–[33].

53 Keane, above n 48, 15, 17; Australian Law Reform Commission, 'Managing Discovery: Discovery of Documents in Federal Courts' (Report No 115, Australian Government, 25 May 2011) 14. See also F Hanlon, *Criminal Conferencing: Managing or Re-imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration, 2010).

54 J L Allsop, 'Judicial Case Management and the Problem of Costs' (2015) 39 *Australian Bar Review* 228, 232.

55 McDougall, above n 13, [24]–[30]; King, 'Reflections on ADR, Judging and Non-Adversarial Justice: Parallels and Future Developments', above n 13, 78, 81, 83.

the 'referral of appropriate cases to alternative dispute resolution programs' within the broader category of 'case management', and argues that:

> The court's task is to understand how litigation should run, and how it can be encouraged to run cost-efficiently. I suggest a new dialogue based on these fundamentals. How case management works or not, as the case may be, should be part of that dialogue.[56]

Many researchers have expressed the view that for effective judging a judge should not feel constrained to an uninvolved, non-interventionist role,[57] prompting discussions around cultural and constitutional constraints on the use of (C)ADR in court settings.[58] Others have expressed the concern that the benefits of precedent and legal trials will be lost;[59] Genn argues 'let us not get carried away by zeal … zeal for a form of dispute resolution or any other idea, theory, or practice is not so healthy' as it takes the vital quality of 'objectivity' away from lawyers.[60]

Some contrasting views on CADR have been expressed as personal comments in judges' public speeches or within judgments.[61] Variance in judicial culture from one court to the next, and also between states, has been noted in some literature but not studiously investigated.[62] There has not yet been a systematic study of practices across the Australian judiciary with regards to CADR, or a study of judges' evaluations of CADR.[63]

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56 Allsop, above n 20, 232, 243.

57 Lillian Corbin, Paula Baron and Judy Gutman, 'ADR Zealots, Adjudicative Romantics and Everything in Between: Lawyes in Mediations' (2015) 38(2) *UNSW Law Journal* 492, 493.

58 Martin, above n 6, 22, 27, 35–40; McDougall, above n 13, [25]; Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia', above n 7, 3.

59 Genn, *Judging Civil Justice*, above n 40, 76–7 (this includes commentary about the phenomenon of the diminishing civil trial); Marc Galanter, 'A World Without Trials' [2006] *Journal of Dispute Resolution* 7.

60 Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2013) 24 *Yale Journal of Law & the Humanities* 397, 416, quoting Lord Neuberger of Abbotsbury, then Master of the Rolls and Head of Civil Justice in the UK. See also Wahab, above n 40, 79; Olivia Rundle, 'The Purpose of Court-Connected Mediation from the Legal Perspective' (2007) 10(2) *ADR Bulletin* 28, 28–9.

61 Justice P A Bergin, 'Judicial Mediation in Australia' (Speech delivered at the National Judicial College, Beijing, 25–28 April 2011); Sir Laurence Street, 'Mediation and the judicial institution' (1997) 71(10) *Australian Law Journal* 794.

62 Tania Sourdin and Naomi Burstyner, 'Australia's Civil Justice System: Developing a Multi-Option Response' (Report, National Center for State Courts, 27 June 2013), 79, 83; Nancy A Welsh, 'Magistrate Judges, Settlement, and Procedural Justice' (2016) 16 *Nevada Law Journal* 983, 1044; Hanks, above n 13, 944; Dorcas Quek Anderson, 'Navigating Complexity Within an Asian Court's Mediation Programme: A Perspective from Singapore' (Paper presented at Asian Law Institute Conference, Peking University Law School, People's Republic of China, 19–20 May 2016), 6.

63 McDougall, above n 13, [17].

Certain judges express concern about CADR in general, questioning whether developments in CADR have created circumstances where judges are acting as mediators,[64] and voicing concern that the practice of CADR could potentially 'undermine the integrity of the courts'.[65] Discussions have turned to whether or not a judge should attempt to facilitate or bring about an outcome from the bench. It has been suggested that judges can only engage with parties in this way and in a fashion consistent with their judicial role if they: (i) have ADR training,[66] (ii) have ample awareness of the difference between mediation and adjudication,[67] (iii) have a sensitivity to outcomes including parties' reactions,[68] (iv) use client feedback to improve their services,[69] (v) avoid convening private sessions where some parties are excluded,[70] and (vi) address power imbalances between parties.[71]

In addition to the commentary from judges, a number of Australian studies have examined the experiences of legal personnel with CADR[72] and have explored its purpose, fairness,[73] quality[74] and effectiveness.[75] In contrast to the judicial comments

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64 A concern reported and discussed by Martin, above n 6, 22, 27, 35–40. See also McDougall, above n 13, [25]; Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia', above n 7, 3. Further, in David Spencer, 'Judicial Mediators: Are They Constitutionally Valid?' (2006) 9(4) *ADR Bulletin* 1, 6, the author questions whether or not judicial mediators are constitutionally valid, but cites the argument of Moore J of the Federal Court of Australia that judging and mediating are compatible roles for judges because both are characterised by impartiality.

65 Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape', above n 46, 887. See also Welsh, above n 62, 1011–2; Judith Resnik, 'The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR' (2015) 15 *Nevada Law Journal* 1631, 1637–8; NADRAC, 'Alternative Dispute Resolution in the Civil Justice System', above n 1, 17, 19; Mack and Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context', above n 2, 192, 212.

66 Anderson, 'Navigating Complexity Within an Asian Court's Mediation Programme', above n 62, 14–5; Dorcas Quek Anderson, 'Evaluating the Impact of Judicial Mediation on Access to Justice' (Paper presented at the Law & Society Association Annual Meeting, New Orleans, 2–5 June 2016), 25; Jula Hughes and Philip Bryden, 'Implications Of Case Management And Active Adjudication For Judicial Disqualification' (2017) 54(4) *Alberta law Review* 849.

67 Anderson, 'Evaluating the Impact of Judicial Mediation on Access to Justice', above n 66, 25.

68 Ibid 26.

69 Anderson, 'Navigating Complexity Within an Asian Court's Mediation Programme', above n 62, 15; Noone and Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System', above n 13, 550–1; Welsh, above n 62, 990–1, 1036; Mary Anne Noone and Lola Akin Ojelabi, 'Justice Quality and Accountability in Mediation Practice: A Report' (Report, Rights and Justice for Sustainable Communities Research Group, School of Law, La Trobe University, Australia, 2013), 48.

70 Anderson, 'Navigating Complexity Within an Asian Court's Mediation Programme', above n 62, 16.

71 Noone and Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System', above n 13, 550.

72 Bobette Wolski, 'On Mediation, Legal Representatives and Advocates' (2015) 38 *University of New South Wales Law Journal* 5, 31.

73 Rundle, 'The Purpose of Court-Connected Mediation from the Legal Perspective', above n 60.

in support of CADR, these studies suggest that it is perceived as difficult and complex,[76] with practitioners and commentators calling for more research about it.[77] In response to the perceived complexity, academics underline the importance of establishing clearer guidelines for measuring and reporting the use of CADR.[78]

The academic literature about CADR is primarily concerned with its efficacy. For instance, some of the literature[79] suggests that in the civil sphere the focus of CADR 'is to nudge the parties into considering a negotiated resolution'.[80] CADR can be effective, commentators argue, either because parties are 'strongly encouraged [rather than forced] to engage in ADR to reach a settlement'[81] or nudged from the

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74 Hilary Astor, 'Quality in Court Connected Mediation Programs: An Issues Paper' (Issues Paper, Australian Institute of Judicial Administration, 2001), 5.

75 See Mack, above n 1, viii, 7, 26, 76; Amira Galin, 'What Makes Court-Referred Mediation Effective?' (2014) 25 *International Journal of Conflict Management* 21, 21, 28; Welsh, above n 62, 1047; Bruno Deffains, Dominique Demougin and Claudine Desrieux, 'Choosing ADR or Litigation' (2017) 49 *International Review of Law and Economics* 33, 34–40; Deborah Chase and Peggy Fulton Hora, 'The Best Seat in the House: The Court Assignment and Judicial Satisfaction' (2009) 47 *Family Court Review* 209, 211, 216–33; Mary Anne Noone, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37 *Monash University Law Review* 57, 71, 80; Sourdin and Burstyner, 'Australia's Civil Justice System: Developing a Multi-Option Response', above n 62, 56–7; Krista Mahoney, 'Mandatory Mediation: A Positive Development in Most Cases' (2014) 25 *Australasian Dispute Resolution Journal* 120.

76 Mack, above n 1, 38; NADRAC, 'Alternative Dispute Resolution in the Civil Justice System', above n 1.

77 French, above n 46, 216, 219; Bowne, above n 13, 275, 276, 282.

78 Anderson, 'Navigating Complexity Within an Asian Court's Mediation Programme', above n 62, 10; Mack, above n, 1; Welsh, above n 62, 1017–8; Elizabeth Richardson, Pauline Spencer and David B Wexler, 'The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing' (2016) 25 *Journal of Judicial Administration* 148, 150. Further, court analytics utilised in the USA assist researchers. See Victor Li, *Ravel Law Launches Analytics Tool for Entire Court Systems and Jurisdictions* (6 December 2016) American Bar Association, available at <http://www.abajournal.com/news/article/ravel_law_launches_analytics_tool_for_entire_court_systems_and_jurisdiction/>.

79 Rogers, above n 12, 109.

80 Joshua Henderson, 'The Federal Court's Judicial Nudge: Court-Ordered Mediation' (2008) 28(1) *Queensland Law Society Journal* 10, 10, available at <http://www.qls.com.au/files/8eac9a4c-72ef-406d-b1e6-a01a00c1a22e/2-joshhenderson.pdf>. See also *Hopeshore Pty Ltd v Melroad Equipment Pt Ltd* (2004) 212 ALR 66, 74 [27]; 76 [35]; Galin, above n 75, 22; Genn, 'What is Civil Justice For?', above n 60, 406; Welsh, above n 62, 1007.

81 Tania Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37 *Monash University Law Review* 145, 168. See also McDougall, above n 13, [21]; Chris Merritt, 'Mediation in NSW Supreme Court Works: Spigelman', *The Australian* (online), 1 October 2010, available at <http://www.theaustralian.com.au/business/legal-affairs/mediation-in-nsw-supreme-court-works-spigelman/news-story/2371247192af99ede7c841fd43ad0516>.

bench to encourage engagement.[82] Further commentary raises correlation between the effectiveness of CADR and its having the imprimatur of a judge.[83]

Judicial commentary on whether or not a judge should engage with CADR has also historically been closely tied to legal personnel requesting judicial intervention:[84]

> We have all had the experience where counsel have said to the judge that a few appropriate words might achieve a settlement. No doubt, if counsel so request, there is absolutely no reason why a judge should not make a short appropriate speech.[85]

Parties tend to accept a CADR process on the realisation that it allows them to convey their side of the story,[86] which can result in a higher level of engagement, understanding and, where appropriate, settlement rates.[87] The literature argues that specific needs of parties may be met effectively through CADR, particularly in civil matters, because CADR can improve access to justice[88] (including for self-represented litigants),[89] consider individual circumstances (which can assist parties to accept an outcome),[90] decrease the length of the court process[91] and ease legal costs.[92]

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82 Bowne, above n 13, 281.

83 NADRAC, 'Alternative Dispute Resolution in the Civil Justice System', above n 1, 12, 13. The compatibility and appropriateness of CADR — and also judicial mediation (sitting judges form the bench) — is raised in relation to whether or not the main advantage of these processes is the judge's seniority or standing.

84 Rogers, above n 12, 109.

85 Ibid.

86 Spigelman, above n 13, 63; Bowne, above n 13, 281; Galin, above n 75, 26, 31, 34–5; Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape', above n 46, 871.

87 Pablo Cortés, 'Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues' (2008) 35 *Rutgers Computer & Technology Law Journal* 1, 18–9; Woodward, above n 3, 161; Justice Brian J Preston, 'The Use of Alternative Dispute Resolution in Administrative Disputes' (Paper presented at the Symposium on "Guarantee of the Right to Access to the Administrative Jurisdiction", 'Bangkok, Thailand, 9 March 2011)', 14.

88 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Report to the Attorney-General, September 2009), 3, 15, 21; Sourdin and Burstyner, 'Australia's Civil Justice System: Developing a Multi-Option Response', above n 62, 81; Noone and Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System', above n 13, 561; Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape', above n 46, 882; Woodward, above n 3; Julie Macfarlane, 'ADR and the Courts: Renewing Our Commitment to Innovation' (2012) 95 *Marquette Law Review* 927, 928–9.

89 Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants – The Dark Side' (Working Paper No 32, ACJI, 15 April 2014) 12.

90 Anderson, 'Evaluating the Impact of Judicial Mediation on Access to Justice', above n 66; Robert A Baruch Bush and Joseph P Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27 *Ohio State Journal on Dispute Resolution* 1, 7, 11; Noone and Ojelabi, 'Justice Quality and Accountability in Mediation Practice: A Report', above n 69, 13.

Recent scholarship from the United States suggests that CADR reduces court caseloads in a wide range of areas, ranging from family law matters to severe criminal offences.[93] This aligns with the general consensus in Australian scholarship that CADR/ADR processes are time efficient and may decrease judicial workload.[94] Australian literature explains that the judiciary is heavily reliant upon CADR, while commentary suggests that 'the courts would be completely overrun within weeks if ADR were to cease,'[95] and that ADR processes may decrease workload where they clarify any legal issues in dispute and assist parties in reaching a resolution.[96] However, a lack of system-wide data in Australia leaves open to question the statistics used to support the claims of CADR's efficacy.[97] Moreover, studies also raise a number of criticisms of CADR. Some say that the practice has done little to address the 'substantive and systematic problems with the administration of justice … [it] may serve to mask the problem, rather than feed into the solution'.[98] Further criticism of CADR schemes has been that they are limited, mainly due to capped funding arrangements and restrictive admittance,[99] and that parties who are unrepresented, minorities or from disadvantaged backgrounds find it difficult to

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91 ACJI, above n 13, 43–4; Allsop, above n 20, 232.

92 Bowne, above n 13. Although some commentary suggests the 'relationship between the level of case management and litigation costs, however, is by no means linear', see Allsop, above n 20, 232, 234, citing J S Kakalik et al, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (RAND, 1996) and J Peysner and M Seneviratne, *The Management of Civil Cases: The Courts and Post-Woolf Landscape* (UK Department of Constitutional Affairs, 2005), 71.

93 Carrie Menkel-Meadow, 'Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the "Semi-Formal"', in Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger and Carrie Menkel-Meadow (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing, 2014), 419, 431–2; Craig A Marvinney, 'Mediation in the United States Circuit Courts of Appeals: A Survey' (2014) 64 *FDCC Quarterly* 53, 53–4.

94 Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape', above n 46, 874; Hanks, above n 13, 951; Preston, above n 87, 2; European Network of Councils for the Judiciary (ENCJ), 'The Relationship Between Formal and Informal Justice: The Courts and Alternative Dispute Resolution' (Consultation Paper, 23 January 2017), 7, available at <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/ADR/ELI_ENCJ_ConsultationPaper.pdf>.

95 McDougall, above n 13, [23].

96 Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape', above n 46, 874; Hanks, above n 13, 951; Preston, above n 87, 3, 5; ENCJ, above n 94, 5.

97 See also ACJI, above n 13, 82; Sourdin and Burstyner, 'Australia's Civil Justice System: Developing a Multi-Option Response', above n 62, 58–9.

98 French, above n 46, 220–1; Ellen Waldman and Lola Akin Ojelabi, 'Mediators and Substantive Justice: A View of Rawls' Original Position' (2016) 30(3) *Ohio State Journal on Dispute Resolution* 391, 403. See also ENCJ, above n 94, 1; Wahab, above n 40, 79.

99 See Community Law Australia (CLA), 'Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System' (Report, July 2012) 6–9; Richardson, Spencer and Wexler, above n 77, 151.

resolve their issues via CADR.[100] It is suggested that they feel constrained by the formal legal framework.[101]

In this vein, the Victorian Government's recent push for an increase in CADR[102] has led critics to warn about the risks of diminishing the judicial role to the more process-oriented role of listening and facilitation, and shifting serious responsibility to lawyers, CADR practitioners and to the parties themselves.[103] In the criminal sphere, commentators warn of dangers associated with the integration of therapeutic CADR processes[104] and caution that these approaches are 'rarely checked by independent research'.[105]

Australian literature builds on global debates about whether or not CADR is effectively reducing courts' workloads and assisting parties or undermining the judicial role, including by investigating the CADR training of judges and its impact on CADR practices. A number of studies suggest that, across all courts, judges lack CADR training especially as CADR practices are evolving.[106] This presents a risk of CADR being applied incorrectly or in the wrong context:[107] for example, Sourdin argues that judges without specific training may not have the requisite skills to understand the potential outcomes of CADR and therefore lack skills to

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100 Noone and Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System', above n 13, 534, 541; Alison Christou, 'Issues of Mandate and Practice for Non-Adversarial Adjudication' (2011) 20 *Journal of Judicial Administration* 178, 178; Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape', above n 46, 870, 884; George Brandis, 'Lack of Access An Impending Social Crisis', *The Australian* (Sydney), 11 May 2012; Woodward, above n 3, 163–4; Waldman and Ojelabi, above n 98, 400, 429; Noone and Ojelabi, 'Justice Quality and Accountability in Mediation Practice: A Report', above n 69, 44; Noone, above n 75, 66, 77, 80; Chief Justice Bathurst, 'Doing Right by "All Manner of People" – Building a More Inclusive Legal System' (Speech delivered at the Opening of Law Term Dinner, Art Gallery of New South Wales, Sydney, 1 February 2017) 1, 4, 15, available at <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20170102.pdf>.

101 See Wahab, above n 40, 80, where he states 'institutionalisation leads to the assimilation of authority and formality of the court to the mediation program'.

102 NADRAC, 'Alternative Dispute Resolution in the Civil Justice System', above n 1, 24.

103 Judy Gutman, 'Litigation as a Measure of Last Resort: Opportunities and Challenges for Legal Practitioners with the Rise of ADR' (2011) 14(1) *Legal Ethics* 1, 4.

104 See generally Jennifer Oriel, 'Society Expects Justice from Courts, Not Therapy', *The Australian* (Sydney), 30 January 2017.

105 Ibid.

106 Christou, above n 100, 178, 180–3; Peter Underwood, 'Educating Judges – What Do We Need?' (2007) 3 *High Court Quarterly Review* 133, 134–5; Noone and Ojelabi, 'Justice Quality and Accountability in Mediation Practice: A Report', above n 69, 12; Noone, above n 75, 65, 79; Michael King, 'Realising the Potential of Judging' (2011) 37 *Monash University Law Review* 171, 175; Hughes and Bryden, above n 66, 868.

107 NADRAC, *The Resolve to Resolve*, above n 88, 66, 98; Sourdin and Burstyner, 'Australia's Civil Justice System: Developing a Multi-Option Response', above n 62, 54.

determine/consider referral or directly oversee ADR processes.[108] This is especially problematic where legislation and practice notes mandate or suggest consideration of certain CADR processes in civil jurisdictions.[109] Furthermore, there is a concern that, unless a judge undergoes appropriate training, CADR may be at variance with key tenets of ADR such as voluntary participation.[110] Bowne notes that most judicial officers prefer to have the consent of the parties and lawyers when deciding to refer a matter to ADR, as this can mitigate this concern.[111] However, Warren CJ, for example, reports not being constrained when consent is lacking: 'I have been told so many times by parties that the case is not suitable for mediation, nevertheless I have referred it and lo and behold it has settled'.[112] Mack has also discussed how the development of court-specific ADR guidelines may enable judicial officers to apply a CADR approach that aligns with the particular needs of a catchment area and alleviates concerns regarding the capabilities of judicial officers.[113]

The literature links the efficacy of court processes (CADR and other litigation processes) to judicial satisfaction: greater court efficiency improves judicial workplace satisfaction. Unsurprisingly then, the literature on judicial satisfaction, specifically in relation to CADR, suggests that the use of CADR has the potential to increase satisfaction where it provides a more appropriate and timely means of resolving a matter.[114] Chief Justice Warren of the Victorian Supreme Court has advocated for her court to have increased mediation capacity to enhance judicial caseload management.[115]

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[108] Tania Sourdin, 'Using Alternative Dispute Resolution to Save Time' (2014) 33 *The Arbitrator & Mediator* 61, 65.

[109] See Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia', above n 7, 9.

[110] Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia', above n 7, 16 [45]; Mahoney, above n 75, 123.

[111] Bowne, above n 13, 275.

[112] Chief Justice M Warren, 'Commercial Litigation and the Commercial List in the Supreme Court of Victoria' (Speech delivered at the Law Institute of Victoria, Victoria, 23 July 2001), 7, available at <http://www.austlii.edu.au/au/journals/VicJSchol/2001/1.pdf>. See also Brennan CJ in support of compulsory 'court-attached mediation': Chief Justice Brennan, 'Key Issues in Judicial Administration' (Speech delivered at 15th Annual Australian Institute of Judicial Administration Conference, Wellington, 21 September 1996), available at <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_aija1.htm>; NADRAC, 'Alternative Dispute Resolution in the Civil Justice System', above n 1, 31; Wahab, above n 40, 39; John P Hamilton, 'Thirty Years of Civil Procedure Reform in Australia: A Personal Reminiscence' (2005) 26 *Australian Bar Review* 258, 264–5.

[113] Mack, above n 1, 8.

[114] Michael King, 'Using Restorative Justice and Therapeutic Jurisprudence in Courts: A Case Study' (2014) 41 *Brief* 14, 15.

[115] Leonie Wood, 'Court Support Proves a Trial for Chief Judge', *The Canberra Times*, 8 December 2007, available at <http://www.canberratimes.com.au/business/court-support-proves-a-trial-for-chief-judge-20071207-1fqq.html>.

Thus, the literature overall presents an ongoing debate as to whether or not, and to what extent, CADR is a useful addition to a judge's 'toolkit', but does not include a thorough-going or broad-based analysis of what judges themselves think about CADR's impact on their role, their workload or their job satisfaction. Nor does the literature to date explore which guidelines, training or goals judges actually consider when the potential for CADR arises in particular cases, including in cases where the judge ultimately decides not to refer the matter to ADR. Such insights would be valuable to understanding when and for whom CADR is beneficial, from the judiciary's perspective. This perspective may have important insights into the appropriateness of CADR to criminal and appellate courts' work, given CADR in those areas remains contentious. Moreover, the potentially common and useful role of CADR in less contentious areas, namely civil litigation, may be underestimated or misunderstood because of the absence of a large-scale study of judges' CADR practices and perceptions.

The contribution of this article, then, is to present the views and experiences of a large cohort of Australian judges. These data were elicited through responses to standardised, comparable questions, as the following section explains.

C. Research Design

1. Scope

The study surveyed an Australian judicial cohort: these judges included magistrates but excluded members of the judiciary who were acting judges, judges serving on tribunals or Royal Commissions, and judges who were temporarily or permanently serving other roles away from their judicial appointment. The study's specially designed survey, comprising questionnaire and interview, examined views in four major areas: engagement, importance and impact, understanding, and outcomes of CADR. During the interviews, respondents were asked to explain their questionnaire responses, which allowed them to report on their own CADR practices, including when and why they consider incorporating CADR into proceedings and whether they do so at their own initiative or only if counsel suggests CADR. It further allowed judges to comment on the roles legislation, bench books and practice notes about CADR play in their reasoning when deciding whether to refer or merely recommend ADR, and the many forms of CADR of which judges make use.

The definition of CADR in the study follows the broad definition of ADR used in the literature.[116] CADR is defined in the study as any judge- or magistrate-directed intervention other than judicial determination, and therefore encompasses processes directed by a court with or without the consent of the parties and with or without a request by a party or its legal representatives. Although ADR has been a common, generic term in both the civil and criminal law spheres since the early 2000s, with a broad meaning encompassing more than the literal meaning of a dispute resolution

[116] Martin, above n 6, 7.

process, some have argued new terminology should replace ADR to more appropriately describe the non-traditional processes now incorporated into the criminal justice system.[117] It was not useful to follow this newer terminology in the study as it would mean adopting the more narrow meaning of 'non-criminal ADR' and a little-known alternative term for 'criminal ADR'; this distinction and terminology was likely to create confusion in interviews. Thus, CADR was explained to the respondents as court-referred ADR including not only well-known and commonly used processes — such as mediation, facilitation and negotiation — but also judicial case management, referral to experts and other interventions derived from non-adversarial processes, including restorative justice, creative problem solving, plea bargains and other ADR processes in the criminal sphere, diversion and therapeutic jurisprudence,[118] whether or not referred by courts in civil, criminal or appellate matters. Included in the definition of CADR explained to respondents is that it includes direct engagement from a judge using suggestions by a judge to the parties to step outside the courtroom environment to explore solutions.[119] It was explained to respondents that judicial mediation (sitting judges acting as mediators) was outside the scope of the study. Clarification in relation to the term 'judicial mediation' was provided when asked for by participating judges. It was explained that this term is often used in the literature and commentary generally to identify CADR processes in which retired judges are retained as mediators *as well as* and more commonly to describe sitting judges acting as mediators.[120]

2. Participants and Data Collection

The study was based on questionnaire and interview data from judges in the Local Court NSW, District Court NSW, Supreme Court NSW, Federal Court, and Federal Circuit Court.[121] Respondents opted into the study. Respondents from the NSW Courts of Appeal and Criminal Appeal were included in the Supreme Court category (noting, however that they are each distinctly constituted), due to their small numbers and because judges rotate from one court to the other. The study design sought to capture a varied set of courts in order to investigate the effects of their

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117 Lewis and McCrimmon, above n 36, 3–4.

118 Attorney-General's Department, 'ADR Terminology' (Responses to NADRAC Discussion Paper, National Alternative Dispute Resolution Advisory Council, 2002), 20–2, available at <http://www.academia.edu/21015117/ADR_Terminology_Responses_to_NADRAC_Discussion_Paper>; Chief Justice Bathurst, 'Off with the Wig: Issues that Arise for Advocates when Switching from the Courtroom to the Negotiating Table' (Speech delivered at the Australian Disputes Centre, 30 March 2017), available at <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20170330.pdf>.

119 NADRAC, 'Alternative Dispute Resolution in the Civil Justice System', above n 1, 31.

120 Ibid 13.

121 Judges presiding over specialty courts – including the NSW Children's Court, and some speciality courts established in response to social and health issues, such as drug courts – who are implementing and providing focused CADR services were interviewed in regard to their roles as judges of the District Court. However, CADR provided at specialty courts was outside the scope of this study.

different structures, diverse functions and disparate range of work. The study was announced to the entire cohort of judges from each of the five courts under study with the support of the respective chief justices and chief judge (including all registries in Australia for the federal courts).[122] Recruitment was conducted primarily by email from the researcher to individual judges except for the Federal Circuit Court, where the Chief Registrar communicated directly with judges.

While 107 judges were interviewed, data from three could not be included as they were not current sitting members of the judiciary in the relevant court. Table 1 details participation data by court for the 104 sitting judges (30% of all eligible judges) over the five courts participating in the study. There was a greater proportion of the higher-tier benches participating, although in absolute numbers the judges per court were similar. For instance, respondents comprised only 15 per cent (n = 20) of the NSW Local Court but 45 per cent (n = 22) of the NSW Supreme Court.

Table 1: Response rate to questionnaire by court

Courts	Total number of judges per court*	Number of respondents in study	Percentage of respondents out of individual court	Percentage of respondents out of total study sample
NSW Local Court (LC)	132	20	15%	19%
NSW District Court (DC)	64	19	30%	18%
NSW Supreme Court (SC)	49	22	45%	21%
Federal Circuit Court (FCC)	61	26	43%	25%
Federal Court (FC)	46	17	37%	16%
Total	352	104	30%	100%

* Figures current as at June 2015 and were supplied by the associates to the Chief Justices and Chief Judge. The figures exclude members of the judiciary who were acting judges, serving on tribunals, Royal Commissions and judges who were temporarily or permanently serving a role away from their judicial appointment.

Data were collected during 30-minute meetings between the lead author (Nicky McWilliam) and each judge between 2015 and 2016, either in person or by telephone (for judges located out of Sydney). During each meeting, respondents completed a written questionnaire as the researcher asked each question, either filling in the responses themselves or requesting the researcher to transcribe their responses if interviews were conducted by telephone. Respondents were asked to comment on and discuss reasons for answers given. Interviews were recorded and transcribed with the written consent of respondents. All data collected were de-identified. As part of the methodology approved and outlined in the UTS Ethics

[122] Support was given for the study by their Honours, Chief Justices Allsop, Federal Court of Australia, and Bathurst, Supreme Court of NSW, Chief Judges Pascoe, Federal Circuit Court, and Price, District Court, as well as Chief Judge Henson, Chief Magistrate of New South Wales, from each of the five courts.

Approval,[123] law students[124] participated in the study by providing research and administrative assistance to the lead author as well as observations and reflections that form part of the qualitative data.

The data collected were both quantitative and qualitative in nature. The questionnaire was designed in two parts. Part One of the questionnaire comprised 14 questions, and employed a Likert Scale to capture the respondents' sentiments in relation to the concepts and experiences examined in each question. Respondents circled their level of agreement with the statement on a scale from 1–5 (1 = Not at all, 2 = A little, 3 = Somewhat, 4 = Quite a lot, and 5 = A lot). Out of context, the hedge 'quite' might ambiguously be interpreted as 'more than', making 'Quite a lot' superlative to 'A lot', but the 1–5 scale makes the meaning clear in this context. The protocol provided for respondents to be briefed on the study's definitions of key terms: CADR; tier or level of a court, which for the purposes of the study refers to the court on which the judge was sitting at the time the questionnaire was conducted; and the term 'judge', which includes magistrate.

The questions in Part One examined the perception of judges in relation to four areas:

1. Engagement with CADR per Questions 1, 2 and 3 that asked the extent to which judges turned their mind to and actively encouraged ADR in cases that came before them.
2. Positive impact of court referrals to CADR per Questions 4, 5, 7, 8, 9 and 10. These addressed the role of ADR, through both its availability and use, in assisting proceedings before the court as well as on the judiciary's work and culture.
3. Understanding of CADR per Questions 11 and 13 asked judges whether or not there were prerequisites to ADR referral, in particular, an awareness of parties' interests as well as knowledge of the process itself.

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[123] UTS HREC REF NO. 2014000507.

[124] The research model for the study involved the lead author (Dr McWilliam) supervising and instructing law students as they assisted with various tasks, including preparation for, assisting with and attending interviews, transcribing interviews, data input and data upload, data analysis, tabulating data, sourcing and researching references, administrative tasks, footnoting tasks, preparation for writing and assistance with writing up the article. UTS law students who participated were drawn from both the UTS Law Faculty, Brennan Justice and Leadership Program and a UTS law subject (based on the study). These students were: S Abdou, R Ali, V Asquith, P Bonjour, R Chan, C Clark, R Dag, C Dang, R Dawson, C Delahunty, F Deng, F Donnelly, M Duligal, E Dwyer, E Eddison-Cogan, L El-Khatib, A Elhosni, J Fisher, H Gillespie, L Grammeno, A Green, U Gunaratne, N Hahn, I Herrera, J Hoogenstein, R Howell, T Jurecska, H Kay, L Ka Mac, A Kruyer, P Kumar, C Lam, J Li, D Lim, S Loughland, L Liu, E McMahon, S Mesbahamin, T Mihell, C Ngu, J Nguyen, Y Nguyen, I Nicolaou, A Norris, A Parnell, H Philip, R Rabin, S Rayat, S Reynolds, J Rooke, S Sadrata, D Saggar, D Semaan, R Size, M Tangonan, S Taylor, K Tran, D Ubaid, S Williams, R Worsley, A Xu, T Yueng, H Zhang. Other law students who assisted with some of the tasks listed above were: J Holloway, T Lysaght, D Padhi, B Parry, A Popovic, H Steinberg. Students who made a significant contribution to writing this article were added as authors. As part of their participation and in keeping with UTS Ethics Approval, each student who participated in the study agreed (either in writing or by email) to adhere to confidentiality and research protocol.

4. Outcomes of referral to CADR per Questions 6, 12 and 14. This involved the subjective assessments of judges on ADR's ability to achieve unique results and positively impact workload and judicial satisfaction.

Part Two of the questionnaire comprised of 15 questions and was designed to collect background data such as the court in which the respondent sits; the type of work the judge presided upon; demographic questions such as age and gender; year appointed to the bench; previous court/s; academic history; and training in ADR. The answers to Questions 1–14 in Part One were analysed statistically in respect of their correspondences to the respondent characteristics in Part Two[125] in order to identify patterns in the reported views on ADR.

Detailed interview data augmented the questionnaire responses and consisted of respondents' comments and discussions during the interview as well as the lead author and student research assistants' observations and reflections. The data were analysed thematically with NVivo analysis,[126] which was supplemented by manual analysis to identify and analyse patterns or themes. During the interviews, care was taken to ensure that key terms such as 'ADR', 'culture', 'proceedings', 'matter', 'case' and 'satisfaction' were generic enough to cover all tiers or levels of courts included in the sample, and to be defined with enough specificity to enable a comparison of responses.

Respondents in the study are referred to by the number of their interview and the initials of their court (for example, 89LC represents interview 89, Local Court participant).

3. Limitations

While the study's overall sample of the Australian judiciary is quite large (104 respondents representing 30 per cent of the total eligible judiciary) and sufficient to compare largely descriptive trends, the representativeness of this study is limited at the sub-cohort level (that is, at each of the five courts studied) because of the small size of sub-cohorts, and each respondent having self-selected into participation. Self-selection is a necessary constraint in such a study; to have an obligatory study across five different courts would be a matter of public policy outside researchers' power. The authors acknowledge that self-selection by respondents may result in participation by judges positive or familiar with CADR. Also the nature of questions, especially the positive phrasing of statements may have indirectly encouraged respondents towards positive responses in favour of CADR. However, despite this potential positive bias, judges expressed a diverse range of views about CADR. In a bid to report objective results and not give an impression of greater impact, the authors direct readers to consider the results, reported in tables as frequencies, with relation to the sub-cohort size. Therefore, notwithstanding the small sizes of sub-cohorts, descriptive trends can be drawn from results.

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[125] Statistical analysis provided by David Kohn.

[126] NVivo analysis provided by Susan Sherrat.

The study, despite limitations, contributes data on and from judges that are not otherwise studied in the literature. The comparisons of varying attitudes across each level of court, albeit small sub-cohort samples sizes, indicate a starting point for identification and research into common trends and patterns between courts on reasons behind certain outlooks towards CADR.

The study therefore provides a credible cross-section of CADR attitudes across the Australian judiciary sampled and a detailed window into the CADR practices and perceptions of many judges without purporting to represent the whole judiciary. Future studies are encouraged to augment the results by asking comparable questions of judges on other Australian courts or by surveying an even greater number of judges at the courts studied. The total cohort (104 judges) was sizeable enough to enable several noteworthy results, presented below.

II. Results and Discussion

A. Results

First, this section will set out respondent characteristics and then draw out the key findings from the Likert Scale response data. Next, this section will turn to the open response data to elaborate on, and discuss, the questionnaire findings. Questionnaire responses are reported by mean levels of agreement by courts. Frequencies of agreement levels are reported at the cohort level, with Tables (12–16) in the Appendix reporting response frequency at the sub-cohort level for each question.

1. Respondent Characteristics

In order to analyse the data, especially in relation to CADR training, basic information was collected on each respondent, including key demographic information and length of judicial service. The majority at 75 per cent of judges surveyed were appointed to their respective courts in the decade preceding the research, between 2006 and 2014. In line with existing literature, it can therefore be said that most were appointed at the time in which ADR was becoming a standard feature of courts.[127]

Table 2 shows the sub-types of matter over which respondents preside. Judges at all levels dealt with civil matters, with appeals only being heard in the Federal Court and Supreme Court. Criminal matters were the main area presided over by respondents at the District level and represented the dominant subject area for respondents in the Local Court. Family law — noted above as a field known for commonplace CADR practices — was only dealt with by Local Court and Federal Circuit Court respondents. Indeed, family law was dealt with by 21 of the 26 Federal

[127] McDougall, above n 13, [15]; See Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia', above n 7, 9.

Circuit respondents in line with literature that reports that approximately 90 per cent of the Federal Circuit Court's workload consists of family law matters.[128]

Table 2: Number of respondents presiding over each subject area

Subject area	No. of respondents from each court*				
	LC n=20	DC n=19	SC n=22	FCC n=26	FC n=17
1. Administrative / Judicial review / migration	0	0	0	15	0
2. Appeals	0	0	9	0	3
3. Care and protection/Children	11	3	0	0	0
4. Civil (not 1, 2, 3, 6)	12	11	13	15	14
5. Crime	20	15	7	0	0
6. Family	3	0	0	21	0
Total frequency of types of matters presided upon per court	46	29	29	51	17

* Some respondents offered multiple responses if they preside over more than one subject area. Recorded as frequency of respondents identifying subject area they preside over.

Table 3 sets out responses to the question about ADR knowledge and training. A majority (60 per cent) of judges reported having basic knowledge or undergoing ADR training: 36 per cent reported having basic knowledge of ADR, 17 per cent mediator training, 7 per cent advanced ADR training; and 39 per cent reported no ADR training at all. Although sub-cohort numbers were small, the trend conveyed by Table 3 shows that 13 of the total 26 respondents in the Federal Circuit Court who received ADR training drove up the training level of the sample. The court with the largest proportion of respondents who were not trained or do not have basic knowledge was the Supreme Court (14 out of 22). This is partially explained by the Federal Circuit Court dealing with family law, where CADR is well established,[129] and by the Supreme Court handling appeals and criminal cases, where CADR is known to be controversial (see further Section I B). However, there appears to be no correspondence between level of ADR training at a court and whether that court deals with civil matters, even though ADR is widely held to be more appropriate for civil matters than for other matters, as noted in Section I B.

Other than ADR training, background characteristics were largely similar across the courts. A majority of the judges (83 per cent) had not served on a court prior to their current position. The majority (71 per cent) had either an undergraduate or master's degree as their highest qualification. The mean age of the judges was 58 years old,

[128] See above n 27.

[129] *ibid*.

with the youngest judge being 39 years old and the oldest being 71 years old. Most were male (39 female respondents compared to 65 male respondents), married and with children.

Table 3: ADR knowledge training of respondents by extent and by court

			Training	
	None	Basic knowledge	Mediator training	Advanced ADR training
Court				
LC (n=20)	11	6	2	1
DC (n=18)*	7	8	1	2
SC (n=22)	14	5	2	1
FCC (n=26)	2	11	10	3
FC (n=17)	7	7	3	0
Total (n=103)*	41	37	18	7
Total as a percentage of sample**	39%	36%	17%	7%

* One respondent in the District Court did not answer the question about ADR training and is not reported as part of the District Court sub-cohort (full sub-sample n = 19) or 'Total' cohort (full sample n=104) in this table.

** Percentages calculated with reference to total cohort (n = 104) and sum to 99% due to rounding error.

2. Questionnaire Responses to Questions 1–14

Part One of the questionnaire focused on judicial perceptions and practices of CADR. The analysis of responses commenced with data processing, by court sub-cohort and as an entire sample, and then quantitative analysis of the processed data. The quantitative results, comprising of the means, standard deviation and frequencies of responses to Questions 1─14, are reported in Subsections A 2 a)–d) corresponding to the four themes of the questionnaire (engagement; importance and impact; understanding; and outcomes of CADR). The means reported are a measure of central tendency and the standard deviations (SD) are a measure of the spread or distribution of responses (that is, how homogenous the responses were to each question).[130]

Generally, the entire cohort conveyed a positive attitude to CADR, as indicated by the overall mean of 3.9 (almost a 'Quite a lot' response) and relatively low standard deviations (1.1) for all questions. Both figures were calculated by taking the means across questions and courts.

[130] Jeffrey M Wooldridge, *Introductory Econometrics: A Modern Approach* (Cengage Learning, 6th ed, 2015) 656.

a) Engagement

Questions 1, 2 and 3 relate to the judges' engagement with ADR. The results are tabulated in Table 4 and Table 5.

Addressing whether or not judges perceive themselves to consider ADR when conducting cases, Table 5 shows that most judges responded 5 ('A lot') to Question 1, contributing to a mean response of 4.1 (just above 'Quite a lot' on the 1–5 scale) in Table 4. Therefore, at least among the judges in this study, there was a high base level of engagement with ADR.

The questionnaire looked to whether or not considering ADR translated into action, asking for judges' agreement with the statements in Questions 2 and 3. The responses correspond to means of 3.8 and 3.6 respectively, suggesting more than 'Somewhat' and close to 'Quite a lot' of agreement with the idea that some action relating to CADR is taken, whether it be through suggestion or implication (Question 2), or direct referral (Question 3). Overall, the mean for these three questions is 3.8, showing that most judges in the study, in more of their cases than not, engage with ADR processes. There was a high level of willingness to engage with ADR processes by considering and suggesting them, even if this does not result in the judge referring a matter to ADR in all cases (this latter being shown in the drop off between respondents 'considering' and 'referring' to ADR). This evidences significant 'behind the scenes' ADR and CADR practices among the judiciary that literature using reported court outcome data have not been able to shed light on.

Table 4: Questionnaire responses about engagement with ADR

	LC n=20	DC n=19	SC n=22	FCC n=26	FC n=17	All n=104
Q1: I consider ADR process when I am conducting a case.						
Mean ranking	4.1	3.3	3.6	4.8	4.5	4.1
Number of responses	20	17	22	23	15	97
Standard deviation	0.8	1.2	1.6	0.4	0.6	0.9
Q2: I suggest ADR process to parties.						
Mean ranking	4.0	2.9	3.5	4.3	4.1	3.8
Number of responses	20	16	22	26	17	101
Standard deviation	0.8	1.4	1.5	1	0.8	1.1
Q3: I refer parties to ADR processes.						
Mean ranking	3.8	2.4	3.4	4.5	3.7	3.6
Number of responses	20	16	22	24	17	99
Standard deviation	0.7	1.6	1.4	0.9	0.9	1.1
Total mean for Engagement with ADR	4.0	2.9	3.5	4.5	4.1	3.8

Table 5: Frequency of responses about engagement with ADR

	Likert Scale											
	No response		1 Not at All		2 A Little		3 Somewhat		4 Quite a Lot		5 A Lot	
	Freq*	%**	Freq	%	Freq	%	Freq	%	Freq	%	Freq	%
Q1	7	6.7	5	4.8	6	5.8	14	13.5	25	24.0	47	45.2
Q2	3	2.9	6	5.8	9	8.7	22	21.2	27	26.0	37	35.6
Q3	5	4.8	8	7.7	12	11.5	20	19.2	27	26.0	32	30.8

* 'Freq' refers to number of responses.

** '%' refers to the percentage of total respondents (n = 104) with the given level of agreement.

Further analysis shows that Questions 1, 2 and 3 are positively and significantly correlated with each other,[131] meaning that those who reported referring matters to ADR were mainly those who also reported suggesting and considering ADR. The relatively consistent means across statements on CADR engagement indicates that, for the majority of the cohort, initial consideration continues to the stage of taking

[131] Found through statistical analysis and not reported in this paper.

action by 'nudging' parties towards it through suggestion. Although this more active step has a lower degree of engagement than that in Question 3, the pattern continues with judges taking the further, firmer step of referring parties to ADR: referring was slightly less common among the cohort relative to suggesting CADR, but nevertheless the respondents reported that they refer cases to ADR more than 'Somewhat'. Therefore, although there was a noticeable decrease in engagement with CADR as its intensity increased, the consistency in means between questions indicates that judges' consideration goes beyond taking comfort in only 'nudging' parties into proactive referrals.

Despite this overall engagement, responses at a disaggregated level indicate that certain courts drive this result while others are relatively disengaged with CADR. At the level of sub-cohorts, the data reveal distinct jurisdictional differences in engagement. Among the NSW judiciary, the Local Court respondents were most consistently positive in their engagement with ADR at all levels of intensity (considering, suggesting or referring). This consistency is shown in Table 4 by the lower standard deviations for this sub-cohort (0.8, 0.8 and 0.7 in Questions 1, 2 and 3 respectively) relative to those of entire cohort (the 'all' column by question order: 0.9, 1.1 and 1.1). The difference between the standard deviations for Question 1 of the Local Court and all judges remains greater than 0.2, which is statistically significant,[132] and therefore the Local Court stands out as a highly engaged cohort in this study. This result offers a counterpoint to concerns in the literature that CADR is inherently unsuited to criminal matters because the Local Court sub-cohort has a significant criminal law workload, as seen in Table 2.

In interviews, these magistrates explained their openness to CADR as resulting from the higher availability of CADR mechanisms formalised into their proceedings, their experiences of seeing CADR as useful, even in criminal matters, and their experience of CADR assisting the court to efficiently manage its workload. Several mentioned the 'obligation under section 56' (21LC) and general 'statutory obligations that we have' (34LC) that guide decisions to suggest and refer cases to ADR. Magistrates spoke about having an opportunity to suggest ADR in all cases (79LC) or at least always engaging with it where the possibility for CADR presents itself, such as in 'a program to assist them [defendants] to deal with issues before they're sentenced' (34LC). There was an openness among the Local Court respondents to use CADR in criminal matters in ways similar to civil matters, whereby 'in criminal prosecutions, parties are always encouraged to define issues, come to points of agreement to reduce hearing times, to listen' (103LC), as well in ways unique to criminal proceedings, for example when someone pleads guilty then of course there are sentencing alternatives and options that can be used' (34LC). One magistrate highlighted that CADR is 'a very common thing in [the] Local Court in crime, very common. There's always room to move' (39LC), a sentiment mirrored by other magistrates who mentioned using CADR processes often in 'AVO type matters' (37LC), personal violence matters (103LC) and 'sentencing, especially rehabilitation' (79LC).

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[132] The statistical significance was tested and confirmed by t-statistic but is not reported in this paper.

In contrast, another court with a high criminal law caseload, the District Court, was not nearly as positive about CADR: engagement with ADR processes, whether in the form of the more passive consideration (Question 1) or the more active forms of suggestion and referral (Question 2 and Question 3), was notably lower for this sub-cohort than others. While many District Court judges reported considering CADR processes, with one stating: 'I do consider usually at the outset of a case whether it's been the subject of a mediation or not, and if not, why not?' (18DC), a low translation into action was apparent in this sub-cohort's responses. The District Court was the only cohort that returned a total mean (just) below 'Somewhat' for engagement questions requiring 'suggestion' and 'referral'. These results from Questions 1, 2 and 3 are looked at with responses from Question 15.1,[133] which found that 14 out of a total of 19 of District Court respondents agreed that 'they are able to refer parties to ADR as part of their judicial roles'. Among responses, this sub-cohort was the only group whose most popular answer was that the availability of CADR has changed the way judges conduct their matters only 'A little' or 'Not at all' (in response to Question 7), whereas all other groups perceived a higher level of change (see Tables 12-16 in Appendix). Significantly, when asked whether they refer parties to ADR (Question 3), nearly a third of District Court respondents answered, 'Not at all', with well over half answering that they referred parties to ADR processes either 'Not at all', 'A little', or 'Somewhat'. The District Court judges were also notable in their rate of not answering this particular question (see Table 13 in the Appendix).

This low response rate is largely attributable to a widely held view among District Court respondents that CADR is unsuitable to criminal matters: for example, 'in the criminal jurisdiction, you do not refer parties for ADR … parties themselves [negotiate] between the Crown and the defence' (71DC) and judges would at most 'suggest it not refer or order [it]' (30DC). This low usage of CADR in District Court criminal matters was explained as a way to avoid showing bias (25DC), especially as these are cases 'where one party stands to lose a lot' (15DC). This meant that judges 'might stand the matter down [and] let them have a talk' rather than ordering ADR, as they see themselves as 'guided by the parties' (30DC) and would only refer by consent (71DC). Other respondents at this court conveyed apprehension about referring parties to CADR due to the nature of criminal matters: '[you need to] be really careful in crime, not to pre-judge … because you can't make admissions and [you can't be bound by] any discussion by the defence' (25DC) and there is 'complex legislation in terms of thresholds' (81DC).

The contrast between the engagement of Local Court and District Court judges implies that the appropriateness or utility of CADR is not exclusively a factor of whether or not a court does a lot of criminal law work – criminal trials are a

[133] Responses to Q15.1 (yes/no question) indicated that 92% (96) of judges were able to refer parties to ADR as part of their judicial roles. While 4% (3 from DC, 1 from SC) said they were not able to, another 4% (2 from DC, 1 from SC, 1 from FC) did not respond to this question. The ability to refer was expressed in the positive by all respondents from LC (20 in total) and FCC (26 in total), 14 out of a total 19 DC respondents, 20 out of a total 22 SC respondents, and 16 out of a total 17 FC respondents.

mainstay of both these courts and both are very busy courts under pressure to run efficiently – but rather the result of a range of factors such as the interaction between parties' and the court's interests. The authors suggest a key difference is that CADR has not yet been normalised within the District Court's culture, rather than any unsuitability inherent to CADR suggested by respondents; this is elaborated in the discussion of the interview data in Section II 0

That the nature of matters is not, in itself, a determinant of whether or not CADR is used or seen as useful is further illustrated in the Supreme Court data. The Supreme Court judges' responses to Question 1 (in Table 14 in the Appendix) show an almost bimodal distribution on whether they consider ADR processes when conducting a case. Of the Supreme Court respondents, the largest number reported that they consider ADR 'A lot' when conducting a case, but the second largest number reported considering ADR 'Not at all'. Underlying this result, in part, is the distinction made by respondents between appellate and original jurisdiction matters, both of which are heard by the Supreme Court cohort, with one judge explaining that: 'in the Court of Appeal, the scope for considering ADR processes is much less … because it is more difficult to put in place procedures for referrals and you would be sitting as one of a bench of three or more' (99SC). Similarly, 58SC stated of appeals that 'there is no room for ADR … There is very little room for anything there other than the decision'. Of the four Supreme Court judges presiding over criminal matters, all but one made comments similar to the following response from 58SC: 'Court of Criminal Appeal, [Supreme Court] criminal trials and bail applications have in my experience little or no engagement with ADR' (58SC).

Further, by way of explaining their own very strong engagement with CADR (or strong opposition), Supreme Court judges noted their case management system. Some judges perceived this system as providing no role for CADR while others found CADR crucial to it, and this did not turn on whether the judge worked in civil, criminal or appellate jurisdictions. Further, some Supreme Court judges described ADR's potential when undertaken at the court's suggestion but *not* by referral, and *if* it took place in the context of pre-trial case management proceedings; for example: 'there's certainly a very informal instructive process … by which I exhort parties to try and get together and work out what real issues there are … prior to the trial' (76SC). The particular utility of CADR in pre-trial processes, and the way timing of CADR was, more generally, crucial to its perceived impact, was a recurring theme in interviews and is discussed further in Subsection II A 2 b) Importance and Impact. Interlocutory and urgent matters (58SC) and disciplinary proceedings (64SC) were highlighted by those who thought CADR was not suited to the case management system, and were described as proceedings that 'just got to go forward' (64SC) rather than requiring in-depth discussion. Alternatively, other judges cited an 'almost automatic' (84SC) and necessary use for CADR in case management in the Equity Division, 'particularly to fulfil the statutory obligation of determining a [civil law] case speedily and cheaply' (60SC). This indicates factors beyond the traditional civil/criminal law distinction that predict judicial engagement with CADR, and this was further investigated in the interviews.

At the federal level, reported levels of engagement were above the cohort average for Questions 1–3 (combined), with the Federal Circuit Court having consistent responses between 'Quite a lot' and 'A lot' of engagement (4.5) and the Federal Court having an average response just above 'Quite a lot' (4.1). Judges at both levels explained this as a result of their subject matters being largely amenable to CADR (for example, family law), and the structure of the federal courts, that is, their legislative power and docket system (42FC), both of which empower engagement with CADR processes. Several Federal Court judges discussed the use of CADR as a given, stating it is 'a very common part of the armoury used by all judges to get through their dockets in the Federal Court' (102FC), that it is 'probably inevitable that I suggest it' (56FC) and that 'I'm under an obligation to raise it, obviously' (33FC). A general proactivity was apparent from judges' responses in both courts, with many noting a general 'conscious[ness] of the advantages of ADR' (100FC); to use to wording of 100FC, 'if I think there's a capacity for ADR to resolve a proceeding … I will raise it and encourage it' (100FC). Further, judge 32FCC stated that 'at a very pragmatic level, we cannot survive without the assistance of consensual dispute resolution processes both inside the courtroom and outside of the courtroom' (32FCC).

In sum, the results of the engagement questions on the questionnaire indicate further avenues for investigation into what affects judges' engagement with CADR within particular courts and within criminal law work across courts, as the data show that neither tier nor the civil/criminal nature of work categorically predicts engagement with CADR. However, the data also show that, overall, there is close to 'Quite a lot' of engagement with ADR from both the NSW and Federal judiciary (mean of cohorts combined is 3.8). If the outlying District Court is excluded, the sub-cohort total mean for the three engagement questions is 4.0 — that is, unequivocally, 'Quite a lot' of engagement. The District Court judges' relatively lower engagement in ADR processes depresses the overall mean result but does not alter the finding of engagement across the cohort both 'behind the scenes' and in actively referring matters to ADR.

Given this engagement, did the respondents also find CADR important and impactful?

b) Importance and Impact

Questions 4, 5, 7–10 asked respondents to objectively consider the extent to which CADR has a positive impact on judges, the court or parties. Table 6 shows that across these six questions and across sub-cohorts, the mean responses largely agreed that ADR processes, and specifically CADR, had close to 'Quite a lot' of impact and importance. Questions 4 and 5 gauged the assistance of ADR more generally to parties' understanding and to courts, whereas Questions 7–10 narrowed the focus specifically to CADR.

Table 6: Questionnaire responses about positive impact of CADR

	LC n=20	DC n=19	SC n=22	FCC n=26	FC n=17	All n=104
Q4: Referral to ADR processes can assist parties in their understanding of proceedings before the court.						
Mean ranking	3.9	3.9	3.1	3.9	3.7	3.7
Number of responses	20	16	21	26	17	100
Standard deviation	1.0	1.2	1.7	1.0	1.2	1.2
Q5: Referring parties to ADR processes may assist proceedings before the court.						
Mean ranking	4.4	3.8	3.9	4.4	4.2	4.1
Number of responses	20	16	21	26	17	100
Standard deviation	0.8	1.5	1.2	0.6	1.0	1.0
Q7: The availability of court-referred ADR has changed the way judges conduct their matters.						
Mean ranking	3.7	2.4	3.6	3.3	4.1	3.4
Number of responses	18	13	20	25	17	93
Standard deviation	1.1	1.4	1.3	1.2	0.9	1.2
Q8: Court-referred ADR plays an important role in my court.						
Mean ranking	4.5	3.1	3.8	4.6	4.7	4.1
Number of responses	20	15	20	26	17	98
Standard deviation	0.9	1.3	1.6	0.5	0.6	1.0
Q9: The availability of court-referred ADR has a positive effect on the culture of the judiciary (in my court).						
Mean ranking	4.3	3.1	3.3	3.4	4.2	3.7
Number of responses	20	14	21	25	17	97
Standard deviation	0.8	1.4	1.5	1.7	1.2	1.3
Q10: The availability of court-referred ADR processes has a positive impact on the work of the court.						
Mean ranking	4.4	3.9	3.9	4.2	4.5	4.2
Number of responses	20	15	21	26	17	99
Standard deviation	0.7	1.2	1.3	1.1	0.7	1.0
Total mean for positive impact of court referral to ADR	4.2	3.4	3.6	4.0	4.2	3.9

Table 7: Frequency of responses about CADR's positive impact

	Likert Scale											
	No response		1 Not at all		2 A little		3 Somewhat		4 Quite a lot		5 A lot	
	Freq*	%**	Freq	%	Freq	%	Freq	%	Freq	%	Freq	%
Q4	4	3.9	7	6.7	12	11.5	19	18.3	29	27.9	33	31.7
Q5	4	3.9	3	2.9	6	5.8	10	9.6	33	31.7	48	46.2
Q7	11	10.6	8	7.7	13	12.5	26	25.0	21	20.2	25	24.0
Q8	6	5.8	4	3.9	9	8.7	7	6.7	23	22.1	55	52.9
Q9	7	6.7	12	11.5	12	11.5	14	13.5	19	18.3	40	38.5
Q10	5	4.8	4	3.9	2	1.9	14	13.5	29	27.9	50	48.1

* 'Freq' refers to number of responses.

** '%' refers to the percentage of total respondents (n = 104) with the given level of agreement.

Overall, respondent judges perceive that ADR plays a more than 'Somewhat' role in assisting parties in their understanding of proceedings before the court (Question 4), with a mean of 3.7. However, they report CADR to have a stronger effect on assisting the court, seen through not only Question 5's high mean agreement of 4.1 ('Quite a lot'), but also its most frequent response of 5 ('A lot') as seen in Table 7. This is further reinforced by the lower standard deviation of Question 5, relative to Question 4, which is consistent across almost all courts: that is, the cohort was particularly in agreement on whether referring parties to ADR could assist proceedings.[134] Logically, the impact that ADR has on parties' understandings (Question 4) is somewhat opaque to a judge (and anyone beyond the parties themselves) whereas the impact of ADR on the court's own proceedings (evaluated in Question 5) is more observable to a judge.

Despite the visibility, from a judge's perspective, of ADR's impact on court proceedings, many were hesitant to report whether or not the availability of ADR had instigated change in the way matters are conducted (Question 7). This question had the lowest response rate of all questions, with 11 out of the 104 participants leaving the question blank (as seen in Table 7). It also had the lowest overall mean of any question (3.4), indicating that while no individual sub-cohort was strongly in agreement with Question 7, there was an overall perception of at least some change in judges' management of matters from the availability for CADR.

Depressing the mean perceptions of CADR's impact were the Supreme Court and the District Court respondents, who are less enthusiastic about the assistance provided by CADR than other benches (Questions 4–5) and are similarly less enthusiastic about the impact and importance of CADR (Questions 7–10). The District Court had the lowest overall mean (3.4), only (approximately) 'Somewhat' agreeing that court referrals positively impacted the judges, parties and proceedings

[134] T-test reveals no significant variation between courts but is not reported in this paper.

in this jurisdiction. The Supreme Court as a cohort presented ambiguous results, as seen by Table 14, with polarised responses on the issue of ADR's assistance to parties' understandings of proceedings (Question 4), with most answering either 1 ('Not at all') and 2 ('A little') or 5 ('A lot').

Questions 8 and 9 were the first to explicitly draw judges' attention to their own tier of the court hierarchy, eliciting responses that differed particularly strongly by court. In three sub-cohorts — the Local Court, Federal Court and Federal Circuit Court — over half of judges agreed strongly (answering 5 'A lot') with the importance of CADR's role within their court (Question 8). Similarly, 9 out of 20 from the Local Court, 11 out of 26 from the Federal Circuit Court and 10 out of 17 from the Federal Court conveyed 'a lot' of agreement on its positive effect on the culture of the judiciary (Question 9); frequency tables are, correspondingly, Tables 12, 15 and 16 in the Appendix. This result contrasts with only 2 out of 19 and 3 out of 19 of District Court respondents for Questions 8 and 9, respectively, agreeing to the same extent (see Table 13). In the middle were the Supreme Court respondents (see Table 14), half (11 of 22 respondents) of whom agreed 'A lot' that CADR has an important role in their court and 7 of whom agree 'A lot' that CADR has a positive effect on the judiciary's culture.

Overall, the means were lower for Question 9 than for Question 8, indicating that respondents generally perceived an effect on the culture of the judiciary less strongly than they perceived the importance of the role of CADR in their court. The qualitative data for the Federal Circuit Court clarified their questionnaire results in this regard, with many judges making comments such as: 'it's always been part of the culture of this court since it started … so I don't think ... it's changed' (10FCC). This is further explained by the fact, noted in Section II A 1 Respondent Characteristics that most respondents were appointed to the bench in the last decade, when ADR was becoming relatively well established, so they have less first-hand experience of any changes to judicial culture arising from the introduction of CADR.

When it comes to assessing the impact of CADR on a court's work in Question 10, the standard deviation of 1.0 around the mean of 4.2 points towards the cluster of responses formed at stronger agreement levels, as seen in Table 7. The notably small range of means across the five sub-cohorts' (0.6), relative to those of Questions 8 (1.6) and 9 (1.2) further confirms this result of the cluster of strong agreement. This suggests that more judges find a positive impact of CADR on the work of the court than on the culture of the judiciary or the way judges conduct their matters; respondents see the availability of CADR processes as having 'Quite a lot' of positive impact on the work of the court (mean response 4.2).

Respondents from the Supreme and District Courts show slightly lower levels of agreement with this question than others, with judges perceiving 'Somewhat' rather than 'Quite a lot' of positive impact of CADR on the courts' work. Nonetheless, interviews indicate that there are many respondents amongst these courts who believe that there is a role for CADR to play in their court. Interview comments attribute the lower District Court level agreement to the large amount of work in

crime, to which CADR is perceived not to be appropriate and, to a lesser extent, the lack of available ADR. For example, 14DC said: 'the concepts of remediation [and] the concept of [ADR] just aren't relevant to most of the crime that we deal within in this jurisdiction' and 25DC explained that: 'it's tricky with crime because you can't make admissions … and [you] can't put [in] a statement [in an ADR process] without prejudice'. 14DC went on to further explain this common District Court view, challenging one raison d'être of CADR — its efficiency:

> Court-referred ADR [is] not available in crime for excellent reasons. [ADR] has been proven to have very little if any effect on the rates of recidivism, very little if any effect on any kind of offender rehabilitation. It takes a really long time. In terms of the efficiency of the court, recidivism rates and any other thing we have to take into account under the *Crimes Sentencing Procedure Act* … it's totally a waste of time … if you're trying to create victims with deeper satisfaction in the sentencing process, perhaps [it might be useful] but there are more efficient ways of doing it. (14DC)

Similarly, the Supreme Court judges' lower mean in regards to the importance of CADR to that court's work and culture was partly explained by their interview comments that CADR is 'fundamentally inconsistent with the way in which we conduct criminal trials' (58SC) and is not appropriate for appellate matters either. 53SC spoke to both issues:

> In the type of criminal cases I'm involved with in, either first instance trials or sentences or fitness to be tried or special hearings of people who aren't fit to be tried it's just … not appropriate for the judge to get involved in any sort of discussion between the parties and that's probably 60 per cent of my workload [and] 30 per cent of my workload would be sitting in the Court of Criminal Appeal where there is no scope for [ADR] at all. (53SC)

Others noted of criminal matters: 'You can get too involved in the actual process yourself so it's very difficult to be seen as being impartial' (84SC) and 'In the Supreme Court, because the cases are by and large murder cases, there's not a lot of scope for [CADR] … [and dealing] with [the issues] via a non-criminal process' (52SC).

Nevertheless, judges at almost all levels acknowledged the positive impact of CADR processes on unrepresented litigants, who experience 'significant power imbalances' (68LC) of which judges have to be mindful. As such, judges reported often encouraging unrepresented litigants to 'get some independent advice … or at least get someone to assist them in going to a mediation or a settlement conference' (49DC). Where it is 'clear the unrepresented litigant is not going to be able to grasp the issue', more proactive judges usually refer the matter to 'pro bono representation' (107SC) so that the litigant has a greater chance of access. However, turning back to the impact of CADR on parties' understanding, one judge commented that: 'with unrepresented parties [ADR] may perhaps [be] more helpful' (100FC) in enhancing their understanding of proceedings before the court.

Overall, the responses showed that CADR was perceived as important and as having an impact on courts' cultures and work, with a particularly consistent, positive evaluation of the impact on work across the cohort. However, perceptions of whether CADR assists parties to understand court processes were divided, and respondents appeared relatively uncertain about whether or CADR is changing how judges conduct their matters.

How CADR impacts, or does not impact, court cultures and work was further investigated by questions about how judges understand CADR.

c) Understanding

Questions 11 and 13 relate to judges' understanding of ADR processes and were designed with reference to the literature. The results are reported in Table 8 and Table 9.

Question 11 asks whether 'referring matters to ADR processes requires judges to take into account the needs and interests of the parties appearing before the court'. Question 11 has the highest mean response for all courts (4.2, that is, 'Quite a lot',) with no significant variation between tiers of courts (SD 1.1 after rounding).[135] Therefore, these results clearly show that a majority of judges in the study's cohort (53 per cent) believed 'a lot' that they should account for parties' needs and interests in deciding whether to refer them to ADR.

Table 8: Questionnaire responses about understanding CADR

	LC	DC	SC	FCC	FC	All
	n=20	n=19	n=22	n=26	n=17	n=104
Q11: Referring matters to ADR processes requires judges to take into account the needs and interests of the parties appearing before the court.						
Mean ranking	4.7	4.0	4.0	4.0	4.5	4.2
Number of responses	20	16	21	26	17	100
Standard deviation	0.5	1.2	1.3	1.3	1.0	1.1
Q13: Referring matters to ADR processes requires an understanding of ADR.						
Mean ranking	3.7	4.1	3.9	3.9	4.0	3.9
Number of responses	20	16	22	26	17	101
Standard deviation	1.1	0.8	1.2	1.0	1.0	1.0
Total mean for understanding of ADR	4.2	4.1	4.0	4.0	4.3	4.1

[135] Statistical significance of variation confirmed by t-statistic but is not reported in this paper.

Table 9: Frequency of questionnaire responses about understanding CADR

	Likert Scale											
	No response		1 Not at All		2 A Little		3 Somewhat		4 Quite a Lot		5 A Lot	
	Freq*	%**	Freq	%	Freq	%	Freq	%	Freq	%	Freq	%
Q11	4	3.9	5	4.8	5	4.8	8	7.7	27	26.0	55	52.9
Q13	3	2.9	2	1.9	5	4.8	30	28.9	29	27.9	35	33.7

* 'Freq' refers to number of responses.

** '%' refers to the percentage of total respondents (n = 104) with the given level of agreement.

The consistently very high agreement to Question 11 in the Local Court was explained in the interviews largely in reference to the nature of disadvantages affecting Local Court litigants; magistrates saw litigants' circumstances as relevant to how a case could be resolved and CADR as pragmatic. For example, particular attention is given to CADR in matters in which children are involved, with one magistrate explaining: 'the best interests [to be accounted for] are the safety, welfare and wellbeing of the child and the least intrusive way of achieving that [is through ADR]' (46LC). Another acknowledged parties' interests where: 'the minute you have a drug problem … you have to take into account why someone might be resisting' (37LC). These respondents explained the suitability of ADR to such litigants as it 'allows them to have the understanding they're being listened to' and 'maintain their dignity', both of which were described as 'part and parcel of judging' by 103LC. This was further discussed in the context of balancing parties' and the court's interests, particularly in a court that faces a high volume of matters in which litigants are often disadvantaged, as one judge noted:

> I'm not saying the law comes second … but [court proceedings are] emotionally exhausting because there's mental illness and … the same sort of stories, the same traumas, the same poverty, all of those things day after day, hour after hour, and sadly, sometimes the same people. I think that most of us probably don't take a terribly legalistic view of things, we take quite a practical approach so I think that would be very, very true that we would also be looking at the interests of the court … and it's also [about] understanding what [the parties] might not particularly understand. (36LC)

This pragmatic and flexible view of CADR was also echoed at other tiers, with a District Court respondent highlighting: 'there's a humanity side to it as well; you can't just watch while someone is going to burn their assets where a sensible course that is alternative to that is readily available' (15DC). Similarly, several in the Supreme Court stated that taking into account the needs and interests of litigants when deciding whether to employ CADR is 'a must: it's required before it [the court] can exercise its discretion' and 'that [accounting for needs and interests] is

our fundamental function' (67SC). Respondents in the Federal Circuit Court often discussed accounting for the needs and interests of parties when employing CADR in the context of family law matters, saying, for example: 'they are all individual families, and what they need is always slightly different' (82FCC). This was particularly noted where children were concerned — 'although they're not at court, [they] are to some extent, because they get involved in the interviews or reports …' (92FCC) — and in matters of family violence: 'you would obviously take into account where there's family violence and whether the parties need to be seen separately by the family consultant' (98FCC). Moreover, a Federal Court respondent noted the need to acknowledge parties' interests so they know when *not* to refer parties to CADR, with one judge, for instance, saying: 'in the commercial case, often it can just be ridiculous to send people off to ADR because they know perfectly well the dynamics of their relationship' (17FC).

Those respondents who answered below 4 ('Quite a lot') for Question 11 were few but such respondents were often motivated by their perception of overriding abstract rights, explaining that: 'I don't really look at the parties … I just look at the matter and the pleadings' (31FC) and 'the court will look to the rights of the parties rather than their interests in determining matters' (11FC). Related to this was the idea that it was, on principle, better not to account for individual needs as 'there's a power in the uniform rules, obviously, for the court to refer matters to ADR irrespective to the needs and interests of the parties' (76SC) and a self-effacing perception that 'there's very limited opportunity to actually understand what particular needs a person has beyond the fact they've got a claim [and that] they're being sued' (9FCC).

That a judge is perceived to require an understanding of ADR to make a referral is shown by the results from Question 13. The respondents generally agreed that referring matters to ADR processes requires an understanding of ADR: Question 13 had an overall mean of 3.9 and a narrower spread of responses than Question 11 (SD 1.0 after rounding), with all courts recording relatively close mean responses, ranging only from 3.7 to 4.1.

While there was low variation in terms of its range on Question 13 (0.4), there were still some respondents who disagreed; those who did not agree that referring matters to ADR processes requires an understanding of ADR were not concentrated in any one court or field of law. The interview data showed two common ways of reasoning across the cohort, one resulting in agreement (the more widely held view) and one in disagreement. Agreement that an understanding of ADR is required was largely motivated by the judges' perception of a need to convey their own comprehension of the processes to parties in order to increase parties' support for ADR: 'parties are more likely to settle the more they know about the case' (18DC). A Federal Court judge also supported this: 'You shouldn't, as a judge, just say: "alright off you go to mediation" without thinking about it further. I think [there is a] need to explain to parties [what] the point of mediation is' (55FC). Alternatively, many judges who responded that an understanding of ADR is not required stated that all that is required are 'the principles of ADR' (54FCC) and 'to know what their [parties'] aims are, what they hope to achieve, and what it's going to do for you. You don't necessarily need to know the methodology' (39LC). As such, 'a [limited

understanding] doesn't stop [judges] from referring it now. So … I don't think it does require an understanding' (84SC). Variation with respect to understanding ADR processes reflects, therefore, those respondents who find the understanding useful when explaining ADR to parties and those who perceive a basic knowledge to be sufficient.

This outlook is closely linked with the extent of ADR training within courts, as discussed below in Section II B.

Overall, judges conveyed 'Quite a lot' of agreement (total mean 4.1) that referring a matter to ADR requires both taking into account the needs and interests of parties and understanding what ADR processes entail. The interview data revealed two main discourses of reasoning in relation to the theme of 'understanding CADR': an approach delineating between parties' needs and interests, which are the responsibility of their lawyers, and parties' rights and court's interests, which are the judge's priority.

d) Outcomes of CADR

The remaining three questions on the questionnaire investigated CADR outcomes from three different perspectives. They asked whether CADR facilitates outcomes a court would not otherwise achieve (Question 6), whether an outcome of CADR increased judicial workload (Question 12), and whether CADR, among other outcomes, creates satisfaction for judges (Question 14). Table 10 gives the responses on the theme of 'CADR outcomes' and Table 11 displays the frequency of responses/non-responses to these questions.

Regarding Question 6, only approximately 10 per cent of judges answered 1 or 2, while 68 per cent responded 4 or 5. That is, the cohort largely perceived that CADR would facilitate outcomes not achievable in court 'Quite a lot' or even 'A lot' of the time. There was a consensus across all five courts here, as evidenced by the relatively high overall mean response (4.0) to Question 6. Many judges across all courts attributed the success of ADR to its unique flexibility. For instance, a judge in the Local Court remarked, 'certain ADR models are not bound by rules of evidence or [procedural rules] and all the technicalities that I have to comply [with]' (35LC). In the Supreme Court, judges mentioned this benefit in the context of reaching a final agreement, whereby a 'compromise is difficult to bring into effect by court orders' (50SC), noting that in CADR, by contrast, 'the parties can craft whatever arrangement will suit them, particularly if there's a continuing relationship between the parties … commercial or otherwise' (43SC). The District Court cohort generally considered whether CADR facilitated outcomes not available in court within the context of criminal matters rather than civil matters. Illustrative examples included a restorative justice process that resulted in an appropriate sentence for an offender that otherwise would not have been possible (38DC) and the flow-on benefits from a making guilty plea specifically in ADR, as it 'can go to a discount for utilitarian value [and] can go to prospects of rehabilitation' (77DC).

CADR's impact on workloads was investigated by Question 12. Table 10 shows that there was a general agreement across all five courts that ADR processes did *not* increase the workload for judicial officers, with a mean (of cohorts combined) of 3.5 (between 'Somewhat and 'Quite a lot'). This was also a relatively consistent result within each court, particularly in the Federal Court where the SD was 0, that is, all respondents agreed that CADR did 'Not at all' increase their workload.

Table 10: Questionnaire responses about CADR outcomes

	LC n=20	DC n=19	SC n=22	FCC n=26	FC n=17	All n=104
Q6: Court-referred ADR processes may facilitate outcomes that would not be achievable in court.						
Mean ranking	4.2	3.6	4.2	3.8	4.4	4.0
Number of responses	20	15	21	26	17	99
Standard deviation	1.0	1.4	1.1	1.2	0.9	1.1
Q12:* The availability/use of court-referred ADR processes increases the workload for judges.						
Mean ranking	2.8	3.6	3.3	3.6	4	3.5
Number of responses	20	15	22	26	16	99
Standard deviation	1.2	0.7	1.1	0.8	0	0.8
Q14: Referring matters to ADR can be a source of satisfaction for judges.						
Mean ranking	4.3	3.8	3.6	3.9	4.3	4.0
Number of responses	20	16	20	26	17	99
Standard deviation	0.9	1.4	1.3	1.3	0.9	1.2
Total mean outcomes of referral to ADR	3.8	3.7	3.7	3.8	4.2	3.8

* Q12 was asked in a reverse manner to all other questions (it is not a positive statement), so the response scores have been inverted (e.g. a '1' becomes a '5') for numerical comparative purposes (actual score means: 2.2, 1.4, 1.7, 1.4, 1.0, in order as above, with overall average 1.5). These can be interpreted as agreement with whether the availability/use of court-referred ADR processes do *not* increase the workload.

Table 11: Frequency of responses about CADR outcomes

	Likert Scale											
	No response		1 Not at All		2 A Little		3 Somewhat		4 Quite a Lot		5 A Lot	
	Freq*	%**	Freq	%	Freq	%	Freq	%	Freq	%	Freq	%
Q6	5	4.8	5	4.8	5	4.8	18	17.3	27	26.0	44	42.3
Q12***	5	4.8	69	66.3	10	9.6	15	14.4	4	3.9	1	1.0
Q14	5	4.8	6	5.8	5	4.8	21	20.2	24	23.1	43	41.4

* 'Freq' refers to number of responses.

** '%' refers to the percentage of total respondents (n = 104) with the given level of agreement.

*** Q12 results are not inverted in this table as they were for comparison in Table 10.

While the results of Question 12 show a general perception that CADR processes do not increase workload for judges, the question remains as to whether CADR translates into a *decrease* in workload. Interview data addressed this question, with respondents explaining the extent to which CADR reduces workload at different levels of the court hierarchy.

Magistrates, for example, commented that: 'where the parties resolve [matters] in a civil negotiation, that can significantly decrease the workload, because it means that you don't have to have a hearing and it means that you don't need to prepare a decision' (68LC) and 'it can decrease [the workload] if the lawyers are aware that [CADR is] available and suggest that' (72LC). This was not limited to the Local Court; many Federal Circuit judges commented likewise, including, for example, 54FCC: 'when you've got so many other cases … at the end of the day, the time invested [in CADR] is ultimately worthwhile', and 32FCC: 'even if only half of them settle in that process, even if a third of them settle in the process, that's got to be reducing your workload'. The Federal Court judges noted that CADR 'dramatically reduces your workload' (102FC), and 'if it resolves some messy case that would have taken a couple of weeks with a self-represented party and an unfocused set of claims … your workload improves' (55FC).

It was only in the District Court that respondents were unclear about any reduction in workload resulting from CADR, particularly respondents who themselves had little experience of CADR: 'I would have thought it would reduce it but again I don't speak from practice' (86DC). By contrast, in other courts, judges felt capable of evaluating the impact of CADR on the court's overall workload beyond their own cases. For example, in the Supreme Court, a respondent commented: 'I think that the availability of ADR processes, in an overall sense, decreases the workload of the court because of the success rate that these processes have' (76SC); in the Federal Court, a judge reflected: 'I don't think we could get through our workload without mediation … judicial resources would be too thinly spread' (59FC).

Moreover, judges reported that even if CADR added to their workload it increased their workload only a little and/or they believed that CADR created efficiencies when considered over many matters, although CADR may lengthen the occasional matter. For an example of the former, a Supreme Court judge commented: 'within

the case management process, the additional work involved in thinking about whether something should be referred to mediation or not is minimal' (58SC). Illustrating the latter belief, one Federal Court judge weighed up the increase in workload in some instances against perceived benefits of overall workload decrease:

> Occasionally it does [increase my workload] in the sense that you have somebody who's a little recalcitrant about being ready for the mediation so you have another court event because of that … [but] that's more than outweighed by the prospect of more cases settling a little bit earlier so you can recover dates that you've set aside for trials to give to another case (20FCC).

Similarly, judges at other courts commented that: 'it's an additional task and in post-mediation, there may be some things to do but on balance it's not a burdensome [increase in] workload, [but rather], a productive one' (52SC) and that 'it does [increase the workload], but I don't have a problem with that … it necessitates additional appearances [and] burdens the entire process, but some burdens have positive outcomes' (73LC).

Nevertheless, some judges remarked that any time saved overall is simply used for other work:

> I suppose we look upon it as more work here [CADR] hopefully means less work there because we won't have to hear the dispute but that's a false economy because I'll hear something else. It's not like you just have a day where there are no applications. (33FCC).

Likewise, a number of District Court judges who thought CADR increased their workload without commenting on attendant benefits; for example: 'it may postpone the resolution of the matter' (38DC); 'I'm thinking if it's a sentence matter it comes before you and then you refer it off for some form of process to take place [and when it] comes back there's reporting on that [and] that would take longer' (85DC); and 'it's easier just to sit back and let it flow past you rather than preparing for and thinking about and making people do things that they don't necessarily want to do or trying to bring them along and convince them' (87DC).

To further understand responses to Question 12, that is, what is a judge's incentive to use CADR if they do not perceive a decrease in workload, Question 14's discussion of judicial satisfaction is considered. Question 14 had an overall mean response of 4.0 and SD of 1.2, showing general agreement, albeit not especially strong, that CADR can be a source of satisfaction for judges. Overall, these judges reported relatively high levels of satisfaction arising from CADR, as the differences between the sub-cohorts' means were not significant. The Federal Court judges and Local Court magistrates agreed more fervently about referral to ADR as a source of satisfaction than Supreme and District Court judges, who perceived less satisfaction from referrals. Responses to Question 14 suggests that, sometimes when CADR is perceived as increasing judges' workloads, there is nevertheless high judicial satisfaction. This indicates that impacts of CADR other than its influence on workload are relatively more important to some of the judiciary. For example, a

Federal Court judge explained: '[CADR has] made the judge feel… more responsible to the community for decision making, and more responsible to the parties … it means the judge takes a more holistic view of the dispute and the way in which it can be solved' (59FC). The idea of other, more important outcomes came through even in District Court responses; for example: 'that whole attitude of justice delayed is justice denied [is] true … because memories fade and people are stressed waiting for decisions and outcomes so if ADR can be brought to bear at an early stage [it's better]' (78DC). This aligns with the literature about timeliness of justice.[136]

Further, Question 12 is interpreted in combination with results from Question 6: even where there is no decrease in workload and perhaps even an increase, some judges are still motivated to use CADR to achieve outcomes not available in court. All courts reported comparatively higher if not equal (District Court was equal) agreement with Question 6 than Question 12, which implies that CADR's facilitation of outcomes not achievable in court is a greater incentive than the increase in workload is a disincentive.

The Federal Court cohort reported the highest degree and consistency of agreement on Question 12 (all strongly disagreeing that CADR increases the workload) and also had the highest mean to Question 6, that is, agreeing that CADR would achieve outcomes not available in court. This combination underscores the high satisfaction reported by judges at this court in answer to Question 14; several Federal Court judges commented further on CADR's unique ability to foster cooperation. One emphasised the suitability of CADR to enforce a compromise as it involves 'striking a middle line between the two of them [parties] whereas I can only find in one parties' favour — one or the other' (19FC), while another stated that, via CADR, 'people can deal with a wider set of controversies between them' (100FC).

Thus, not only is there engagement with CADR across the study cohort, but also a perception among much of the cohort that CADR has a positive impact on court work, that it achieves outcomes not attainable in court and that it even contributes to judicial job satisfaction. The results further showed that, while CADR is widely perceived as requiring judges to take parties' needs and interests into account, this is clearly not the only factor judges take into account. This was made evident through the variations across and between sub-cohorts underneath the broad findings that suggest the nature of the case, the jurisdiction and the tier of a court need further investigation as factors contributing to judges' use of and attitudes towards CADR. The next section focuses on these factors, identified through comparative analysis of the data, and discusses how they are being taken into account by judges when considering whether or not to utilise CADR.

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[136] See, generally, Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (2014) 4 *Victoria University Law and Justice Journal* 46.

B. Discussion

The findings above show that the sample judiciary as a whole engage with CADR and largely perceive a positive impact from doing so, whether it be the impact on parties and proceedings or on judges' workload and satisfaction. Moreover, judges acknowledge that a degree of understanding of parties and the process itself is required before referring a matter to ADR so as to enhance its outcomes. At the sub-cohort level, however, data indicate that some tiers of courts are consistently more engaged than others and perceive greater impacts from CADR. Interview data augments these indications and lend weight to the authors' view of these sub-cohort trends as worthy of attention in further research despite the relatively small sample numbers. The thrust of this section is not to argue that these indications must exactly mirror the range of views and patterns of CADR practice across the whole Australian judiciary, but rather a qualitative 'drill down' into certain common perceptions and practices. Through doing so, it reveals the kind of reasoning and discourses behind them in order to shed light on key factors affecting CADR that can then be further explored by researchers and managed by policy-makers. This section will discuss the indications and patterns relating to the main factors that influence judges' CADR perceptions and practices, arguing that the factors are significant as they transcend the categorical factors to which the suitability/inappropriateness of CADR is often ascribed.

The first focus of discussion is whether the criminal or civil nature of cases is a key reason for the divergence in results about judicial engagement, a divergence noted above in relation to the responses of Local and District Court respondents in particular. Next, the Supreme Court interviews are explored 'close-up' to investigate that which judges see as the reasons why engagement with CADR varies markedly even within one court. Drawn out here are intersecting impacts on CADR practices of the nature of the work (criminal or civil, but also first instance or appellate), the range in types of matters the court can hear, and the tier or level of court, with some comparison to the Federal Court and District Court. Discussed next are two key factors that emerge in the interview data but not in the questionnaire data — namely, timing of CADR and the interaction between lawyers' engagement with CADR and the court's culture around it. Many of the Supreme Court respondents, as well as some the District Court respondents, explained aspects of timing that affects their willingness to turn to CADR, while some respondents also elaborated on their interactions with parties' lawyers that affects CADR; the discussion homes in on these interviews. Finally, interview data are used to further examine the impacts of training on judges' views and usage of CADR.

1. Is CADR Perceived as Less Appropriate for Criminal Cases?

Initially focusing on the Local Court, the data collected in this study does not suggest that magistrates view CADR as inappropriate for criminal matters. Rather, respondents in this sub-cohort spoke explicitly of the appropriateness of CADR in their criminal cases. They further discussed other factors that motivate their use of and outlook towards CADR regardless of the criminal/civil distinction, including volume of work, lower-tier rank of the court and their statutory empowerment to

refer cases to ADR. In turn, these factors inform respondents' views on the judicial role and culture of their court, and their views on how the Local Court compares to the District Court and Supreme Court.

Local Court interview responses on the whole suggested it was the high-volume and lower-tier nature of Local Court matters, rather than the criminal/civil division, which resulted in the court's high engagement with CADR. The factor of court tier plays a role in that it is seen to mean that Local Court matters are less complex and relatively easier to resolve; magistrates commented that: 'where you're dealing with a lower end of criminality, you will try your best to make sure someone doesn't go to gaol' (21LC) by turning to ADR, since, ultimately, in-court options are limited to 'gaol or no gaol' (72LC) and 'so, you've got to go through all the other steps [such as ADR]' (21LC). Some nevertheless made explicit their view that the suitability of CADR in criminal matters at the Local Court contrasts to its suitability for other tiers of court, viewing CADR in serious criminal cases as inappropriate, as 21LC demonstrated: 'perhaps the Supreme Court would take a different view of [CADR in the criminal jurisdiction] because they're dealing with things that are at a much higher level, that is never going to be appropriate. But for us, with a high turnover of matters, that sort of thing can be really good' (21LC).

This characterisation of their matters as less complex contributed to the exercise of CADR in the criminal jurisdiction by magistrates. They explained that CADR is particularly useful in those criminal cases where there is a young offender (68LC), especially if the offender has no record (21LC), where the crime is low level or 'victimless' (21LC), in apprehended violence matters (36LC), and for sentencing and rehabilitation (79LC). Magistrates also thought CADR was appropriate for civil matters. Indeed, some saw this as a categorical fit: 'civil matters in general' suit CADR (89LC).

The lower level of this court meant that its magistrates deal with a greater number of cases; the high volume of Local Court work is described statistically in the court's annual reviews.[137] The perception that the Local Court's work is less complex, although higher in volume, allows for predictions that it is easy to resolve matters through CADR (21LC). With its high volume of cases, the Local Court particularly benefit from having alternative routes for resolution and settlement. This high caseload is, in fact, growing in the criminal sphere while decreasing in the civil sphere,[138] while the number of magistrates decreased, especially in country circuits.[139] This means that not only is the court's overall caseload increasing, but also the magistrates' workload. One of the ways CADR eases this workload is by providing processes that make the legal issues clearer than they are in litigation for parties who

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[137] Local Court of New South Wales, *Local Court of New South Wales: Annual Review 2015* (2015), 2, 39–41, available at <http://www.localcourt.justice.nsw.gov.au/Documents/Annual%20reviews/2015%20Annual%20Review%20web-access.pdf>.

[138] Ibid 14, 16.

[139] Ibid 2.

are self-represented, have English difficulties, or are otherwise disadvantaged. As 80LC noted, the Local Court has higher rates of such parties than other courts.

Supporting, and perhaps prompting, judicial engagement with CADR in both criminal and civil matters are the statutory guidelines and sentencing principles of the Local Court. These provide a broader range of offences that give rise to the option of CADR in comparison to other courts' rules and guidelines. In the Local Court, the CADR options include several clearly established 'diversionary programs': Community Corrections; Magistrates' Early Referral into Treatment Program (MERIT); CREDIT; Life on Track; Forum Sentencing; and Circle Sentencing.[140] These clearer guidelines appear to foster a culture in which CADR use is normalised; as one Lower Court respondent reported: 'if there is the possibility of referring someone to a program that will assist them … I will do it' (34LC). Further, all 20 of the Lower Court respondents agreed that 'judges are able to refer parties to ADR as part of their judicial roles' (Question 15.1).

This perception of (C)ADR as squarely within the judicial role was not uniformly shared in other courts. While there was general engagement with CADR at the Supreme Court, some respondents with low CADR engagement saw it as unrelated to their jurisdiction, the tier of the court, or the nature of their cases but also, more fundamentally, unrelated to the role of the judiciary; for example, once parties 'commence proceedings in the court … they're entitled to a judicial determination' (105SC). Another judge noted that: 'by the time they come here [to court], they just want a decision' (58SC). A parallel concern is the respect for the parties' choice to litigate, with a Supreme Court judge reporting that judges generally refrain from forcibly referring parties 'if they vociferously object' (104SC), although adding that such objections are rare. Along this line of thinking, it is not the civil/criminal nature of the matter that determines CADR's suitability.

This line of thinking came through particularly strongly at the District Court, where many respondents shared the view that their role is to 'make determinations regarding disputes' (14DC), reporting they would 'definitely not suggest or make an order for referral to ADR [as the] statutory duty of a judge is to resolve genuine disputes' (70DC) as 'that is what happens in directions hearings' (23DC). That said, some did see CADR as an option where traditional judicial options did not seem to resolve a matter: 'you just have to be careful about pushing [CADR] too much, because that's what I'm paid to do, to make decisions, resolve disputes but sometimes when a case is going quite badly for one side or the other, you might say look have you thought about discussions?' (30DC).

The data show that a culture that is more prone to seeing CADR as being at odds with the judicial role would be especially wary of CADR in criminal matters and vice versa: positive experiences of engaging with CADR in criminal cases can significantly change a court's overall culture around CADR. This certainly seems to be the case at the Local and District Courts. Unlike their Local Court counterparts, the District Court respondents largely perceived the key reason for low engagement

[140] Ibid 22.

with CADR was that it was not suitable for crime. Recall for Question 3 (about actively referring parties to CADR), the District Court stood out, with 6 out of a total of 19 respondents indicating 'Not at all' and a further 6 out of a total of 19 responding they were merely 'A little' or 'Somewhat' in agreement that they would refer cases to ADR. A common theme in the interviews was that the District Court is a 'relentless criminal trial court' (1DC) where mainly criminal matters are heard and that these are not amenable to CADR due to the 'nature of the criminal justice system' (14DC, 23DC, 25DC). Most District Court respondents shared the view that 'the concept of alternative dispute resolution just isn't relevant to most of the crime … in this jurisdiction' (14DC) and 'it's only referred to some extent in civil' (1DC). It was noted that when CADR is used in criminal cases special care must be exercised: it must be used 'carefully' (23DC) and 'with caution' (25DC). Moreover, a few District Court judges made the point that, in the criminal jurisdiction, the therapeutic jurisprudential and restorative justice concepts underlying CADR processes were not within the ambit of the statutory duties that judicial officers are bound to uphold (14DC). One who presides over criminal matters regarded CADR as 'social engineering' (30DC), whereas another commented that: 'judges are not social workers … ADR is some social worker's job somewhere down the track' (14DC). This respondent added that the concept of CADR aggravates an inherent power imbalance between the judge and the accused in criminal cases and is therefore not appropriate.

Further, the structural limitations of the listing system in the District Court were mentioned as providing less scope to perform case management and minimising opportunities for CADR, despite the District Court having similar a legislative empowerment in regards to CADR as the Local Court. For example, what was termed as 'overnight mediation' was described as 'out of the question usually' because of the District Court listing system, where cases are allocated less than 24 hours prior to hearing, meaning that judges will have 'no [future] option to hear the case if the parties can't settle it' (15DC). Another remarked that a docket system would increase the chances of settling because 'you've really got the same group of people [as] the case goes on' and the process becomes more streamlined (18DC). The same judge contrasted a docket system and the attempt at efficiency in the current system which imposes time restrictions for hearings, which assists the court's workload but limits ADR options available in a hearing (18DC). Another respondent noted that the limited time between case allocation and the set hearing date of a listing system restricts the opportunities for CADR (81DC). The significance of this structural factor is affirmed by recent administrative changes at the District Court: the most recent Annual Report introduces a new Rolling List Court model and 'two special call-overs' to increase access to and facilitation of CADR.[141]

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[141] District Court of New South Wales, *District Court of New South Wales: Annual Review 2015* (2015), 2, available at <http://www.districtcourt.justice.nsw.gov.au/Documents/2015%20District%20Court%20Annual%20Review.pdf>.

We note that the District Court respondents were not all opposed to CADR for criminal cases. One judge commented: 'hopefully, given the right case, the courts might always look for an alternative way of resolving some dispute, whatever that dispute could be' (38DC) and another remarked that: 'in my view it's not utilised sufficiently, and part of the problem is in crime judges don't [use CADR]' (6DC).

Moreover, challenging the significance of the categorical criminal/civil factor from another angle, the District Court was *also* less supportive of CADR in civil cases. This calls into question the culture of the court in regard to CADR as a factor intersecting with the distinction between criminal and civil cases. A number of District Court judges working in the civil area responded that they had 'never done a referral' (30DC) (or words to that effect), and 'had no … civil cases that have had to be referred to mediation or have come from mediation' (25DC). In one civil judge's opinion, CADR processes are 'all done but where it gets to [the Court]', and thus their colleagues 'effectively not at all' (13DC) refer parties to mediation (the factor of where CADR fits within the timeline of a case getting to court is further discussed below). A District Court judge in the civil division commented that: 'we have the power to order mediation but it's sparingly used' (78DC). However, there were District Court judges with a practice of habitually making referrals for parties in the civil area, stating that 'the court's policy and it'll certainly be my policy is to try and get the parties to talk' (71DC). This engagement, like at the Local Court, built on judges having positive experiences of CADR: 'it's amazing how sometimes a mediation will resolve it or at least they will move their position' (6DC).

In sum, the District Court respondents include those supportive of CADR for civil cases and those staunchly against it, and in contrast to District Court responses that largely reject CADR in criminal matters, CADR is supported by many respondents for criminal matters at the Local Court. The questions are then, what is intersecting with the criminal/civil factor to make criminal cases amenable to CADR at the Local Court but not the District Court, and to make civil cases amendable to CADR in the eyes of some District Court judges but not others? Is there a difference in volume of work or an increased 'seriousness' of a higher-tier court or legislative support for CADR processes? Is there a difference in court culture? These intersections are examined below in a close-up of the Supreme Court interview data.

2. Intersecting Factors Considered by Supreme Court Judges: A Close-up

The questionnaire data found that distributions between engagement levels with CADR differed within the Supreme Court, suggesting that there are intersecting, contemporaneous factors motivating judicial outlook on the subject. These intersections are discussed below with reference to other sub-cohorts' data where relevant.

One such factor, against which the extent of judicial engagement with CADR was compared, was that of jurisdiction within the Supreme Court (Supreme Court, Court of Appeal and Court of Criminal Appeal). Interestingly, the 'Not at all' responses to Questions 1, 2 and 3 were not exclusively from appeals judges. Rather, even those in the Supreme Court cohort who mostly preside over trials expressed a view of incongruence between CADR and appellate work, both because of its nature and its

procedures. In terms of the former, interviews showed that some Supreme Court respondents were concerned that CADR could not suit statutory appeals as 'there is no room for ADR ... either the decision is lawful or it's not, they set it aside or they don't' (58SC). This sentiment was echoed by another judge whose support for CADR was checked by the nature of administrative law (of which statutory appeals are part): 'I suggest ADR processes to parties quite a lot ... Pretty much anything except administrative law cases, and maybe some sorts of bankruptcies and other things' (41FC). Nevertheless, in another court a respondent countered that, 'when parties' lawyers say to me, "we can't mediate in administrative law", I just say that's rubbish. If you know about ADR then of course you can, it's like in any other area' (62FC).

Moreover, Supreme Court respondents considered the procedures and associated costs of reaching the appeal stage in relation to whether to refer a matter to ADR, citing in particular the inherent imbalance of strength at the appeals stage given one party has won the first instance and that this can often make a matter intractable and 'unsettle-able' (43SC). One judge, however, reported: 'I will encourage the parties to have discussions. I will offer, in appropriate cases, reference to mediation, which is free, which is offered by an arrangement between us and the community justice centres' (106SC). While this may be 106SC's practice, Supreme Court appeals usually require multiple judges' consensus, which can make it harder to refer matters to ADR: 'it's more difficult to put in place procedures for referrals [as] you would be sitting as one of a Bench of three or more [in an appeal]' (99SC). This judge, 99SC, also had experience as a trial judge in the Supreme Court Equity Division and was able to highlight how views on CADR change for appeal cases — where it is usually seen as inappropriate — even if the judge's underlying acceptance of CADR for trials remain. This judge reported never having seen CADR at the hearing stage of an appeal and reasoned that this is because appellate procedures constrain CADR more than a natural impossibility:

> In the Court of Appeal, the scope for considering ADR processes is much less … also because it's more difficult to put in place procedures for referrals … we've certainly looked at how we can encourage alternative dispute resolution and mediation in appellate matters and it is possible but it's … difficult to do it in a protocol type of way (99SC).

Intrinsic to this view of CADR's unsuitability to appellate matters is the lack of involvement of judges in case management that therefore reduces the opportunities for CADR. Judge 43SC highlighted this through a comparison of two courts:

> The other difference, from my point of view, is that on the Federal Court [one can be] involved very much in the management of cases, so you can raise matters at a much earlier stage. In the Court of Appeal, you don't see it until you walk onto the bench to hear it.

This raises clearly the intersection of two factors — appellate jurisdiction and CADR timing — with the latter also noted by other judges in the context of trial cases above, and further discussed in Section II B 3.

The factor of appeal/trial work was considered in other sub-cohorts' interviews too, but not always leading to the conclusion that CADR is inappropriate for appeals. At the Federal Court, many interviews echoed that of 40FC, who noted that: 'in appeals, generally you wouldn't [consider CADR]'; however, the Federal Court respondents who sit on appeals expressed a range of outlooks. A few were open to CADR, commenting that 'there's a lot more referrals of appeals now for mediation in appropriate cases. It's nowhere near as extensive as first instance, but it does happen' (83FC) and it 'can be used in appellate work as well, quite successfully' (59FC). One Federal Court judge highlighted CADR's particular applicability in cases on migration, disability and sex discrimination and where parties are unrepresented, 'mainly because they're overwhelmed by the process' (42FC).

Despite the nature of appeals and Supreme Court procedures warding judges off attempts to use CADR to resolve disputes during appeals hearings, CADR can still assist in appeals case management. Two Court of Appeal judges remarked on processes aiding the minimisation of issues, with one stating 'in various ways, either because we've decided to raise [CADR] or because something strikes us as we are going along, we'll raise it because, particularly in a court of criminal appeal [and] the volume of the work, we are trying to minimise the issues which we have to decide. We try to do that quite actively' (87SC). The other noted that CADR is helpful in dealing with 'the volume of work' of the court, and 'is something that we initiate to try and bring order to what otherwise would be large and unmanageable appeals', to 'corral them into what are the real issues' (107SC).

This view was not unique to the Supreme Court, with many at the District Level, Federal Circuit and Federal Court citing active referral 'to ADR at the interlocutory stages of cases' (15DC) for the purposes of narrowing issues (6DC) by removing the 'stumbling blocks to resolution' (77DC). However, it is notable in the Supreme Court that, CADR is viewed by some as relevant to appeals case management, whereas other sub-cohorts focused on trial case management.

A group awareness of CADR that comes with the internal organisation of the Supreme Court was also cited as influencing judicial perceptions of CADR. This was explained by respondents as a structure wherein groups of judges regularly work on similar matters rather than across the Supreme Court's entire range, as best shown by the Equity Division. On the whole, judges presiding in the Equity Division expressed a greater propensity to engage in CADR. One Equity judge cited this group awareness, which may be understood as a culture, reporting that 'across the whole Equity Division … we've only very recently had a reminder that the expectation is that every case will have been through ADR processes, before it'll be given a hearing date' (63SC). Another judge emphasised its persistence within the culture of the division itself, stating that 'in general equity cases … ADR is essential in a way that enables us to continue to function' (60SC), while another affirmed the constant interaction with CADR due to the cases involving 'a pure question of property rights … [that were] very susceptible to settlement' (16SC).

Judges from the Supreme Court Common Law Division also reported engaging with CADR, but were more resistant to CADR in criminal cases. Judges from the

Common Law Division typically preside over a mix of criminal and non-criminal cases and therefore have varied levels of exposure to CADR. During interviews, some respondents contended that in the Common Law Division 'it is quite common … [to attempt mediation] before a hearing date is fixed' (52SC), 'especially in medical negligence [cases]' (50SC). However, similar to the procedures of appeals constraining opportunities for CADR, some judges commented that the Common Law Division's listing system and the structure of hearings were not amenable to case management or the incorporation of CADR processes (99SC). Some Supreme Court judges explained their low engagement in relation to the intersection of the criminal nature of the law but also jurisdiction and the particular tier or level of court: they saw superior court criminal cases as too serious for CADR, both in their own view and the community's view: 'it would be expected that many alleged victims would be quite opposed to any conferencing or therapeutic program being used instead of criminal sanctions' (53SC). Others also thought that CADR risked 'eroding the rights of the accused' (67SC) or that the 'excessive involvement [of judges] in criminal cases' (84SC) could erode impartiality more than in other types of matter.

Although there were distinguishable differences in attitudes and perspectives among individual judges, most Supreme Court judges in the Equity and Common Law Civil Divisions noted that their motivation to consider CADR was from s 56 of the CPA.[142] Two judges explained that they do consider CADR to explore 'whether there is some way the real issues in a case can be determined speedily and cheaply' (58SC, whose comments were very similar to those of 52SC). Another judge explained that s 56 represents 'the parliament saying judges should drive things more' (87SC), another stressed that the section provided judges with a platform 'to be more involved with the discussion of cases ... [which generates] a positive effect' (51SC), while another stated 'I'm licensed by section 56 to be infinitely creative ... with the object being to actually get to the answer as quickly and cheaply as possible' (63SC). Similar to the Local Court and District Court judges who saw CADR as their court's policy because of statutory empowerments in relation to CADR, s 56 encourages judicial engagement with CADR at the Supreme Court both in establishing specific processes but also as a normative directive.

Therefore, the variation in the Supreme Court response is attributable to various intersecting factors. Those responses indicating lower CADR engagement are generally associated with appellate and criminal cases that, due to their complex nature and procedures, are perceived as less suitable for CADR. While some voiced potential for CADR in these contexts, the low experience of appellate CADR, in particular, appear to make it difficult to implement as protocol. By contrast, there is greater awareness and experience of CADR among sub-groups of Supreme Court judges, creating a greater propensity for those groups to engage in CADR as seen especially with respondents from the Equity Division. This suggests that workplace culture influences CADR attitudes and practices but also highlights that 'court culture' may be better considered as multiple cultures within one court. Several of

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[142] *Civil Procedure Act 2005* (NSW) ('CPA') s 56.

the Supreme Court judges cited legislation on CADR as a motivation to implement CADR. Finally, the 'seriousness' of tier of the Supreme Court underscored some judges' explanations for relative disengagement with CADR.

3. Timing of Court Referral to CADR

The Supreme Court interview data discussed above revealed yet again the pertinacity of timing in decisions about CADR. A large number of judges raised the factor of timing when reflecting on their own practices of suggesting or referring parties to CADR. As one judge put it, in a discussion of trial fairness: 'it's terribly important to pick the time at which you might intervene to have it [CADR] occur' (66SC). Specifically, these judges' openness to CADR depends on whether CADR had already been used in the history of the case and at which stage the case is at along the litigation process. Another commented: 'if I am dealing with a matter at an interlocutory level ... then I have more freedom to suggest [CADR] because we aren't at the stage of a final hearing and costs don't become an unscrupulous burden to achieving a negotiated outcome' (60SC). Similarly, another explained the ideal times to refer parties to CADR is 'either the very beginning or when the matter becomes a little loaded, when it becomes loaded with work, which therefore means it's loaded with costs, when the prospects are looming not so far ahead, and the prospects can include losing a lot of money just by way of costs' (97SC).

Adding nuance to the understanding of timing as a factor, many of the Supreme Court cohort described a tension between CADR happening early and *too* early. That is, judges strive to ensure that a case's issues have been sufficiently delineated to then allow some form of negotiation to take place before 'the process starts taking it off the rails and it is difficult' (16SC), whereas if settlement is attempted too early, one side's case may yet be 'unclear, and even a position paper ... is not going to cure that sufficiently' (50SC). CADR is considered inappropriate 'until some evidence emerges, or until the dynamic nature of litigation plays out a bit' (16SC). Further, Supreme Court judges noted CADR is sought more when cases started to show signs of going off-track in terms of time spent; CADR is often considered in circumstances of 'larger, difficult matters' in terms of case management (107SC), particularly 'if a case was going to be adjourned for a significant period' (58SC) or 'if it's only tumbling through the system' and at least one party shows willingness to mediate (95SC). If there have already been previous mediation attempts during the litigation process, a judge is less open to further CADR processes (52SC).

District Court judges, too, drew out the influence of timing in relation to CADR in their civil matters. Mostly, these judges qualified their comparative lack of engagement with CADR by explaining the court hearing structure in that 'matters would have already been through mandatory ADR from the civil perspective, by the time a case comes on for hearing before us, all of those processes basically have been or ought to have been considered' (71DC) and that CADR is 'more part of the case management process at the judicial registrar [stage]' (78DC). Another judge commented: 'I think that the expectation is that at the case management stage (that is, before this judge encounters a case), parties are required to consider ADR' (15DC), and indeed other District Court respondents made explicit their own

expectation that any CADR will have be attempted before they begin presiding. With respect to civil matters, the majority of District Court respondents referred approvingly to the statutory empowerment under the CPA reasoning that 'every case is worth talking about' (49DC) and that the statutory process will at a minimum 'assist the court by forcing parties to create statements of claim or affidavits' (49DC). One judge explained how referring a case to ADR after the pre-trial stage can be seen as abnormal because CADR's association with the pre-trial stage is normalised: judges may gain a reputation for delaying imposing a decision or being 'a ditherer or incompetent' (81DC) because when ADR is referred 'clients often say to barristers "this bloke doesn't want to hear your case"', and the judge continued: 'I have to say they are right' (81DC). Two judges commented that they 'do consider, usually at the outset of a case, whether it's been the subject of a mediation or not' (18DC), but this does not mean they perceive CADR as appropriate at that stage. Rather, they are considering whether the pre-trial opportunity has been missed, with one reporting 'varying degrees of either irritation or satisfaction' (15DC) depending on what CADR had already taken place and explaining it 'annoys me when I hear that parties haven't pursued ADR in a difficult case'.

Similar to the District Court judges dealing with civil matters, those who deal with criminal trials also saw CADR as part of pre-trial processes. One District Court judge noted that:

> in crime [CADR] tends to happen more with bail. [In] bail applications you'll get someone coming up who has a serious drug problem and you go, well, there's no way I can grant this person bail unless it was to go into a residential rehabilitation program (87DC).

Another, who had argued against CADR's appropriateness to criminal proceedings, noted an exception for earlier stages:

> That does not mean that I don't encourage parties in criminal cases to resolve issues in advance. That can be done by simply indicating that there are benefits to pleading guilty. There are benefits to negotiating between the Crown and the defence. Where a matter is for trial, I believe that there should be, so far as possible, pre-trial disclosure and pre-trial discussion (25DC).[143]

Akin to the civil case judges at the District Court, some judges presiding regularly over criminal trials expressed regret or irritation that ADR did not occur more often before the case reached them:

> We don't have any mediation in the crime jurisdiction. We have what's called the *Young Offenders Act* and that gives the police the capacity in the first instance to deal with children before even bringing them to court … and that's probably akin to a mediation process … but unfortunately in my view it's not utilised sufficiently,

[143] Whether a guilty plea is ADR is debatable, but this study focused on what judges perceive as relevant types of ADR.

> and part of the problem in [the] crime area [is that] the specialist court magistrates only deal with 60 per cent of youth crime (6DC).

These sentiments in the District Court are parallel to those of the appeal judges of the Supreme Court, as in both contexts judges do not see a case 'down the line' and therefore hold an expectation that it has already been through stages of case management in which CADR may have been more appropriate. However, respondents who do their own case management are alert to timing issues, expect to deal with it themselves and are proactive about early CADR (for example, 19FC and 83FC). Judge 83FC emphasised pro-actively considering and suggesting ADR early despite having a background in which it was not commonly thought about. At the Federal Court, several respondents identified the stress on parties as a motivating factor for their CADR pro-activity, for instance, saying, 'I'm appalled at the cost and resources and stress that people spend arguing with each other through a court process, so, I always prefer to try and encourage them to settle their differences as early as possible and as cheaply as possible' (62FC) while 42FC reported: 'aggressive case management is becoming even more important because there is a real concern at the moment to reduce the cost of litigation because it's just proven to be inaccessible and unaffordable for most people'. Likewise, respondents at the Federal Circuit Court reported pro-activity about CADR during case management to 'stop people getting to the big contested hearing which is very … taxing, distressful, expensive, anxiety-producing and also takes the decision-making away from them [parties]' (90FCC). This concern has even seen one judge 'attempt to map out a litigation plan for [every] case [that starts before them], given that 95 to 98 per cent of cases settle' (20FCC) and another to 'strongly suggest that they attend a further mediation or an informal conference' whenever parties seem 'close enough to avoid a trial' (91FCC).

Other reasons for not engaging with CADR that arose in interviews also turned on the stage of the litigation: an anticipation of parties' desire for the proverbial 'day in court', although this was not a reason widely suggested by respondents, and a belief that lawyers know best by the trial stage. For example, echoing some Supreme Court colleagues, some District Court respondents reason that by the time they encounter a case parties expect 'a determination by court process' (70DC) and as 'by the time it [the matter] gets to me, with what I consider to be complex legislation in terms of thresholds … the best persons to be able to work out where it's going are the lawyers' (81DC). Similarly, the majority of appeal judge respondents made more or less this point: 'normally by the time it gets to the appeal stage, particularly if you have competent counsel, a lot of these [CADR] things have been explored (43SC)' and are no longer relevant. This commentary leads to discussion of lawyers' engagement with CADR.

4. Lawyers' Engagement with CADR

A number of respondents mentioned the role and influence of lawyers in CADR. As mentioned above in Section I B quoting Rogers J, judicial intervention has

historically been associated with a request by counsel.[144] One judge explained that judges 'do rely upon the parties' representatives and if we have good counsel appearing for the parties and I'm told that ADR would be a waste of time and resources to go down that path then I don't second-guess that' (61FC). Judges reported giving due weight to an assumption that lawyers are experienced in ADR (49DC) and relying on a nudge from them before referral: 'lawyers suggesting informal discussions during a hearing serve[s] as a very good signal in considering CADR approaches' (77DC). Another judge commented that: 'I completely depend upon Counsel. If Counsel tell me it is worthwhile, I will give them some time [for ADR]' (63SC). Judges also report considering lawyers' perceived resistance to CADR, saying, for example: 'the personality of the litigants and practitioners are significant factors, as there are some with whom common sense suggestions are just an obvious waste of time, unfortunately' (10FCC). This theme was developed by another judge who believed junior prosecutors' lack of discretion meant that 'trying to negotiate a middle ground [with them] is a waste of time' (72LC) and ultimately restricted access to CADR.

The division of labour in case management at the District Court, with judges hearing cases only after other judicial officers (registrars) have managed the case, is a potential reason why District Court respondents perceived the impact of lawyers' engagement with ADR more than judges in other courts. These judges rely more on lawyers to keep matters on track, including in respect of taking alternatives routes to dispute resolution. As one District Court judge reasoned, the onus to advise parties of the availability of ADR is on the lawyers as parties are not the judge's clients (70DC). At the Supreme Court, by contrast, where judges generally manage (trial) cases through the same sort of listing system as the District Court, lawyers' engagement with CADR was not mentioned as much. It was identified, for example, in the case of unrepresented litigants, where CADR processes were considered (at least by some) to be more 'successful when they work in tandem with a referral to pro bono representation' (107SC). Moreover, the Supreme Court judges who did mention lawyers indicated a general view that a lawyer — specifically, a lawyer who is willing and perceived by the judge to be competent — is needed for effective (C)ADR.

The researcher anticipated that the interviews might shed light on how judges and lawyers at each court together create a culture in regard to CADR, as many lawyers, not only judges, reoccur in each court. However, culture was, as it turned out, barely discussed in relation to lawyers, and indeed the cultural factor was relatively rarely an explicit part of interview discourses at all, as discussed in the next section.

5. Judicial CADR Cultures

It is hard to isolate court culture as a factor in judges' CADR perceptions as judges are immersed in their court's culture rather than outside onlookers. This, we found, was compounded by a reluctance among respondents to identify characteristics of

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[144] Rogers, above n 12, 109.

court culture. While many comments in interviews reflected a cultural shift in regard to CADR, judges themselves were apprehensive to categorise these changes as being 'cultural' or to claim to know what other judges commonly did or felt regarding CADR. Nevertheless, and somewhat surprisingly given that court's lower engagement with CADR, the majority of District Court respondents agreed in interviews that CADR has produced a 'cultural shift' and a positive one at that. For example, it was commented: 'there's been sort of a cultural shift in the whole of the court since we introduced [CADR] … [it's promoted a] more inclusive approach … I think you're getting a more interactive process between the judicial officers and the practitioners and the parties in court' (6DC). In the Supreme Court, judges perceived a 'cultural acceptance' of CADR: 'we are far more prepared than we were 10 years ago to force people to mediation … it is symptomatic of an underlying cultural acceptance [of] ADR' (60SC) and 'I think every judge in the Equity Division would [agree] … there is a culture now where there must be in every armoury the process of alternative dispute resolution' (66SC). At the Federal level, likewise, came reports such as: 'the preferable course of all my peers is to have people talking under a structured ADR process with a view to sorting out their differences and doing anything possible to avoid having it decided by a judge or a jury' (57FC) and 'we've just got this culture going where we just don't take another step in the proceedings until they've mediated' (96FCC).

Perceptions of court culture were, however, divergent. Some comments conveyed a reluctance to allow cultural change regarding CADR in wider society to affect longstanding court practices. Thus, comments such as 'I think it's the culture of the judiciary that encourages ADR' (63SC) and that ADR is something judges 'would regard it as an absolutely central and critical part of our job' (57FC) are tempered by comments such as:

> A lot of judges … are very reluctant to accept pro-activity from the parties, they're very reluctant to innovate because they haven't done it … and they haven't got any faith in negotiation … it's partly due to some people being quite black and white about outcomes … some judges think: judges are here to judge, they're only here to give judgments, they're not here to give parties suggestions about resolving things, they're not here to play sort of quasi-mediators from the bench (16SC).

Moreover, there were some comments proposing no culture of CADR because, essentially, there can be no court culture given the individual nature of the judicial role: 'we are all independent, we are all independently allocated cases here and determine them … so we don't develop a common culture in hearing and determination … [and] we don't sit around discussing how we are going to manage cases' (58SC).

Nonetheless, in some courts, judges *do* 'sit around' talking about case management and CADR, and certain courts attempt to foster consistency rather than individuation in relation to CADR. For example, in the Federal Court, 'the Chief Justice is driving [CADR] hard … every court is trying to address these problems because of grave

concerns about access to justice and making sure that public confidence [still exists] in this part of [the] government' (42FC). There are also indications of group awareness and explicit group discussions/policies around the usage of CADR in relation to the Supreme Court's Equity Division, noted above. Indeed, other judges argued that, while there had not been a shift in their own court's culture around CADR, this was not because judges are each unique but, to the contrary, because a common culture already existed and pre-dated CADR legislation. This view was strongest at the Federal Circuit Court: 'it's always been part of the culture of this court since it started in any event so I don't think in that sense, it's changed the culture of the judiciary' (10FCC); 'I don't really see that it's had much of an effect on the culture of the judiciary … even from my youngest days I remember judges being, uh, quite keen to be sure people identified key issues … I think that's always been an underlying theme' (20FCC); and 'I think it's always been part of the family law ethos' (33FCC). Therefore, it is argued that judges' positive or negative views and engagement or disengagement with CADR (and the comments we reproduce here from their interviews) are not only outputs of CADR processes but also feed back into creating cultures around CADR.

In short, the data reveal that the criminal/civil nature of cases factors into judicial responses to CADR in an interplay with many other key factors including the where the court sits in the judicial hierarchy (and the related perception that higher courts adjudicate more serious matters), the pre-trial/trial/appellate nature of the matter, the timing of the litigation and of CADR within it, and the lawyers' responses to CADR. All of these factors intersect with, and may gradually change, each court's culture (and sub-cultures).

The way these many intersecting factors influence CADR practices may depend on judges' exposure to relevant training, and training is also highly relevant to how changes in court culture are directed, and how judges talk together about their CADR practices and perceptions.

6. (C)ADR Training

Of the 104 respondents, 39 per cent (41) reported they have no basic knowledge or no ADR training, 36 per cent (37) reported having basic knowledge of ADR, and 24 per cent (25) reported receiving ADR training (either mediator training or advanced ADR training) (see Table 3 above).[145] That is, some 75 per cent had not had any ADR training despite the majority having been appointed to the bench since 2006 after CADR came to be legislated as part of some court processes and during a period when ADR was relatively common.

The first question that this issue of training raises is why such a substantial portion of the judiciary are untrained in ADR or CADR. Legal policy and courts increasingly incorporate ADR and CADR, and indeed are even seen to rely on it in

[145] One respondent in the District Court did not answer the question about ADR training; note rounding error of percentages in Table 3.

some areas, as the literature review noted.[146] While it may be argued that judges appointed in an age when ADR is common do not need training, that surely underrates the contribution training can make: not everything can be, or is best left to be, learnt by osmosis. Moreover, there are now many technical tools and texts about (C)ADR such as bench books, guidelines, statutory directives as well as internal court ADR judicial groups (for example, NSW Supreme Court ADR Steering Committee) that would require corresponding training to achieve consistent and fair court practices in relation to CADR.

Secondly, the results give rise to questions about the impact training has on judicial perceptions and practices of CADR. In the study, the Federal Circuit Court had the highest proportion of respondents (half of Federal Circuit Court respondents, that is, 13 respondents) who received mediator or advanced ADR training, accounting for 13 per cent of the total number of respondents in the cohort. The Federal Court had the second highest proportion of respondents (3 of the total 17 Federal Court respondents) with the same level of training. These two courts were also the most engaged with CADR, having consistently high means for Questions 1 to 3 (see Table 4 above). This suggests that CADR training begets CADR engagement. However, such a hypothesis is challenged by the District Court results: 3 out of the total of 19 District Court respondents received ADR training, making them the third-most 'trained' sub-cohort, but their engagement with CADR on Questions 1 to 3 was the lowest of all the courts under study.

Respondents' general agreement that an understanding of ADR is required in order to make referrals (Question 13) is in line with the National Alternate Dispute Resolution Advisory Council's position ('NADRAC').[147] Nevertheless, this study revealed no correlation between respondents' understanding of CADR and their engagement with CADR. Responses ranged from judges acknowledging their lack of understanding — 'I don't think generally the judiciary is well informed about [CADR]. I'm sure they're not. Take myself' (38DC) — which suggests that more training would be welcomed by judges, to believing that knowledge about ADR is 'probably inherent in [judicial] knowledge [you] just need to know the aims, what they hope to achieve, and what it's going to do for you. I don't really know the methodology' (39LC), which suggests that CADR training would not be this kind of judge's priority. Respondents did question whether more training, aiming to deepen judges' understanding, is necessary: as 84SC noted, a lack of understanding currently 'doesn't stop [judges] from referring it [ADR]' and while 'there are probably judges around who probably don't have a clue … the parties can still get a benefit out of it, and so can the court' (7FCC). Moreover, the form of training is contentious, echoing the controversy over mediation by judges noted in the literature review: 61FC emphasized that judges should not be trained how to mediate as this would be 'unethical' and 'disgraceful; rather, training courses should be used to educate judges about the overall court referral process' (61FC).

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[146] See McDougall, above n 13.

[147] NADRAC, 'Alternative Dispute Resolution in the Civil Justice System', above n 1, 23–4.

However, some judges did in fact reflect that training increased usage of CADR: 'the more you understand ADR the more likely you are to use it' (6DC). Respondents identified gaining knowledge of CADR processes as valuable 'because you're talking about looking at alternatives to having a hearing' (72LC) and 'you need to understand ADR and its role in the litigation process' (59FC). Some respondents framed the need for improved understanding of CADR in terms of public benefit, noting that: 'my time is public money being spent, so you want to be sure they're ready to make the most of it … you don't have to have a deep understanding of the process, but there are practical things you can educate judges to do' (45FCC). Other respondents chose to emphasise the practical value of process-oriented CADR training, as 'you need to triage the matter to ensure parties are directed to appropriate services' (73LC).

The variety of answers elicited in this study suggests the worth of further research into (C)ADR training, as discussed further in Conclusions and Recommendations.

III. Conclusions and Recommendations

This is one of the first comprehensive and comparative studies of a cohort of the Australian judiciary's usage, attitudes and understanding of CADR. One main finding is that there is a generally positive view of CADR across the five courts studied. While often explicable, there is certainly not universal support for CADR within any individual court or across courts. There is a particular reluctance to consider CADR in criminal matters (but not at the Local Court) and in appeals, revealing the intersection of nature of matter and tier of court, but also revealing the factor of judges' perceptions that the community expects 'serious' sentences rather than CADR at higher courts. While this may not be surprising given the general assumption in the literature that CADR is a readier fit with civil rather than other litigation matters, it is important to have confirmed that the judiciary's perceptions are, in the main, consistent with the literature on this point. It is also important to have identified, through interview data, the many factors in addition to whether or not a matter is criminal, which will affect CADR's suitability from a judge's perspective. This study shows the criminal/civil division does not categorically predict the engagement with, perceived importance of, outcomes, or understanding of CADR.

Of particular interest is the finding that there is actually *resistance* to CADR in civil matters in some courts but a preference for it in others, and that there is an *enthusiasm* for criminal case CADR in some courts, while it is virtually absent in other courts' criminal divisions. While very few judges saw CADR as categorically useful in all criminal matters, many raised significant types of criminal matter where CADR was seen as appropriate and efficacious. The data show that, while many judges perceive CADR as useful in some civil matters, they also raised important reasons and instances where CADR would not be supported in a civil case. Thus, there is an argument against any categorical assumption of broad classes of matter in which CADR will be inappropriate.

Rather, the findings and analysis of the study drew out many integral and intersecting factors affecting judges' perceptions of CADR. These are not limited to the major policy motivations for introducing or encouraging CADR in the literature, such as dealing with a large volume of work and/or backlog, but also include reasons concerning the court tier, the trial or appellate nature of a case, the time line of a case (which may be connected to a court's docket or listing hearing structure and whether CADR was already attempted or available at earlier stages), the case's lawyers' responsiveness to CADR (and interaction with the bench), both the processes and the normative message of CADR-enabling legislation, each court's culture, and the perception judges have of whether/how fellow judges approach CADR. The data illustrate how forms of CADR can be practised and supported by legal policy and culture, in almost every subject matter or type of case (but, of course, each instant case differs and whether or not to rely on CADR must remain the instant judge's decision). Due to these intersections, any assumption that CADR is inherently better suited to some categories of case should be further examined. Timing is a good example of a factor that influences when CADR is or is not seen as appropriate but which is largely not a focus in the literature. More nuanced than a general category-by-category strategy for when to apply CADR, guidance about the timing of CADR, informed by judicial practice, could still provide an example of the kind of 'guidance for each court' that NADRAC called on researchers to help develop over a decade ago:[148]

> It is more valuable to use research to identify areas in which each individual court must make specific choices, and to provide guidance for each court to design its own referral processes and criteria, in light of particular local features.[149]

NADRAC then lists specific 'local features' including 'jurisdiction' and 'local legal profession and culture', factors which this study affirms as integral. To this list, the authors would now add tier, structure of hearings and appellate procedures, timing, CADR statutes and court cultures.

Specifically, the factor of the local legal profession should be pursued with a focus on lawyers' engagement with CADR, their patterns in their practices of engagement with the bench in suggesting or opposing CADR. Whether or not lawyers perceive a judge's level of CADR understanding and/or training makes them competent to make assessments about the suitability of CADR is a potential factor, as is a judge's perception of the competency of a lawyer to suggest or oppose CADR. As observed in Section II B 4, the interviews indicate a general view that a lawyer is needed for effective (C)ADR, which challenges an argument that ADR should be promoted in order to reduce the reliance on lawyers in dispute resolution and an argument that ADR is less legalistic and more simple and accessible for parties.

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[148] Mack, above n 1, 1.

[149] Ibid.

This article has also argued that, based on the sample of roughly one third of judges in the five courts, there is a fairly commonplace engagement with CADR by Australian judges, including 'behind the scenes' even where CADR is not ultimately part of proceedings, and a fairly positive view of CADR. It was found that when this cohort of the judiciary does consider CADR they do so with reference to legislative guidance, specific guidelines, bench books and practice notes as well as common practices and policies within their court and the factors discussed above. This study shows the judiciary has low levels of formal CADR training with CADR engagement clearly developed other than through training. Nevertheless, with or without training, judges are engaging with CADR and perceive it to contribute to court efficiency, but judges (even judges from the same court or presiding over the same area of law) are somewhat inconsistent about the types of cases for which CADR could work. These findings have implications for the focus of policies to promote, train or support CADR. It is suggested that increased training may be useful to provide guidance on weighing up the many factors which this study shows affect judicial perceptions of whether or not CADR is appropriate and to share experiences of how CADR is being considered and used by other judges. The study indicated that judges' perceptions of CADR rely, in part, on what they feel they know about other judges' CADR practices; training can increase this knowledge and therefore has a particular role to play in shaping court cultures vis-à-vis CADR. Training also has a role in fostering consistent and fair CADR practices, as discussed above. Thus, one path for further research illuminated by this study is the investigation of which judges are receiving CADR training, why them and not others, and what the training entails.

Respondents were often reluctant to agree with questionnaire statements that presumed a level of insight into *other* judges' CADR practices and attitudes. This reticence is aptly judicious, however, as the study has surveyed many of each respondent's colleagues, it is hoped that the judges who participated (and other judges) will be able to use this article as a resource for gauging more firmly what their colleagues in the study do and think in regard to CADR. It may be that the level of engagement with, and positive evaluation of, CADR across the cohort encourages members of the bench to re-evaluate and/or to engage further in the dialogue on CADR for which the literature calls.

It is hoped that this article will prompt further research into the systematic effects of the factors we have identified on the judicial practice of, and attitudes towards, CADR. That is, the many intersecting factors which have drawn out from judges' perceptions and reported experiences of CADR can be further researched to test the extent to which CADR depends not only on the type of matter (especially where it falls on a criminal/civil law divide) but also on the level of court, what level of workload and what the judge is able to perceive about the engagement with CADR of their judicial colleagues. Future research could also study whether the weighing up of these factors changes with changes in each court's culture despite the types of cases remaining constant. Literature on this topic and policy would be complemented by comprehensive data collection on actual ADR and CADR use and outcomes over time.

Finally, as noted, the data show that the judges tended to derive satisfaction from the fact that CADR assisted the court efficiently to manage its workload and provide judges with a platform for delivering outcomes that would not be achievable in court. Consequently, they were also able to better account for the needs and interests of all parties involved. This kind of outcome is very rarely explored in research about judicial work, and lays a foundation for the development of studies about judicial workplaces and wellbeing, for which there are now calls.

IV. Appendix: Response Frequency Data

Table 12: Frequency responses of all questions for the Local Court

	Likert Scale					
	No Response	1 Not at All	2 A Little	3 Somewhat	4 Quite a Lot	5 A Lot
Q1	0	0	0	5	8	7
Q2	0	0	0	7	7	6
Q3	0	0	0	7	10	3
Q4	0	0	2	4	8	6
Q5	0	0	0	3	6	11
Q6	0	1	0	2	9	8
Q7	2	1	1	5	6	5
Q8	0	0	1	2	4	13
Q9	0	0	0	4	7	9
Q10	0	0	0	2	8	10
Q11	0	0	0	0	7	13
Q12	0	8	5	4	2	1
Q13	0	1	1	7	5	6
Q14	0	0	0	5	5	10

Note: Sample size n = 20.

Table 13: Frequency responses of all questions for the District Court

	Likert Scale					
	No Response	1 Not at All	2 A Little	3 Somewhat	4 Quite a Lot	5 A Lot
Q1	2	1	3	6	4	3
Q2	3	3	4	3	3	3
Q3	3	6	4	2	1	3
Q4	3	1	1	3	5	6
Q5	3	2	2	1	4	7
Q6	4	1	3	3	2	6
Q7	6	4	4	3	0	2
Q8	4	2	3	4	4	2
Q9	5	2	3	4	2	3
Q10	4	1	1	2	5	6
Q11	3	1	1	2	5	7
Q12	4	11	2	2	0	0
Q13	3	0	0	4	7	5
Q14	3	2	0	5	2	7

Note: Sample size n = 19.

Table 14: Frequency responses of all questions for the Supreme Court

	Likert Scale					
	No Response	1 Not at All	2 A Little	3 Somewhat	4 Quite a Lot	5 A Lot
Q1	0	4	3	2	3	10
Q2	0	3	3	4	4	8
Q3	0	2	5	3	6	6
Q4	1	5	5	1	3	7
Q5	1	1	2	4	5	9
Q6	1	0	5	3	12	1
Q7	2	1	4	4	5	6
Q8	2	2	5	0	2	11
Q9	1	3	5	3	3	7
Q10	1	2	1	2	8	8
Q11	1	2	1	2	6	10
Q12	0	14	2	4	2	0
Q13	0	1	2	4	7	8
Q14	2	2	2	4	6	6

Note: Sample size n = 22.

Table 15: Frequency responses of all questions for the Federal Circuit Court

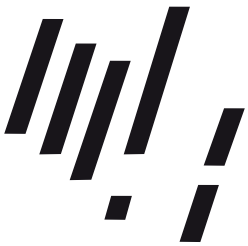
	Likert Scale					
	No Response	1 Not at All	2 A Little	3 Somewhat	4 Quite a Lot	5 A Lot
Q1	3	0	0	0	5	18
Q2	0	0	2	3	7	14
Q3	2	0	2	1	5	16
Q4	0	0	2	7	8	9
Q5	0	0	0	2	11	13
Q6	0	2	1	6	9	8
Q7	1	2	4	9	5	5
Q8	0	0	0	0	10	16
Q9	1	6	3	2	3	11
Q10	0	1	0	6	4	15
Q11	0	2	1	4	6	13
Q12	0	20	1	5	0	0
Q13	0	0	1	10	6	9
Q14	0	2	2	5	6	11

Note: Sample size n = 26.

Table 16: Frequency responses of all questions for the Federal Court

	Likert Scale					
	No Response	1 Not at All	2 A Little	3 Somewhat	4 Quite a Lot	5 A Lot
Q1	2	0	0	1	5	9
Q2	0	0	0	5	6	6
Q3	0	0	1	7	5	4
Q4	0	1	2	4	5	5
Q5	0	0	2	0	7	8
Q6	0	0	1	2	4	10
Q7	0	0	0	5	5	7
Q8	0	0	0	1	3	13
Q9	0	1	1	1	4	10
Q10	0	0	0	2	4	11
Q11	0	0	2	0	3	12
Q12	1	16	0	0	0	0
Q13	0	0	1	5	4	7
Q14	0	0	1	2	5	9

Note: Sample size n = 17.



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