Introduction

1. For many decades if not centuries, the formal judicial system has been revered and accepted as the preferred and acceptable process for resolution of disputes. In recent times however, alternative forms of dispute resolutions (ADR), in particular mediation, has taken the world by storm. This might be causing some fear amongst judges, magistrates and lawyers and those who are associated with the formal court systems that, their positions and their work might be taken away from them and render them irrelevant in society. Given such fears some judges, magistrates and lawyers may be opposed to mediation. This may be the reason why some compulsory mediation or form of ADR annexed to the formal court system are not as successful as they should be. Lack of information around both the availability and how to use mediation or other forms of ADR may also be contributing to the lesser use of these forms of conflict resolution.

2. This paper tries to remove any fears the judges, magistrates and lawyers might be holding. The paper also tries to inform those who are less informed of the availability of mediation and other forms of ADR and how they could be accessed and used. To do that, the paper briefly comments on worldwide trends in the development and use of ADR with a bit more detailed look at the development and use of ADR in Papua New Guinea (PNG), followed by a brief look at the question of, what is driving ADR. A comparative look at the fundamental features of the Courts and mediation processes is next. The paper then devotes some time to making its point that, mediation and ADR are friends of the justice system. There is an imperative therefore for the various forms of ADR and the formal Court processes as different routes to reaching one destination, which is to deliver justice to our peoples expeditiously at less costs and in an efficient and effective manner to work together to deliver on that objective. This is followed by a quick mention of the challenges some have with using mediation and ADR followed by suggestions on how those challenges could be overcome. Finally, the paper concludes that, the formal Courts and mediation and ADR processes are all headed for the same destination which is to deliver, quality justice in a manner that is efficient and

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1 A process this paper will mainly talk about.
effective at less costs to the parties and to the nations. It is therefore imperative that all these processes should work together and if they do so, they would easily attract and keep investor confidence in their respective countries’ economies.

Mediation World Trends

3. Turning then to worldwide developments and use of ADR, it is noted that, in recent times, ADR and in particular mediation, as a preferred form of conflict resolution is taking centre stage. Not so long ago, on 23rd May 2012, the then Secretary General of the United Nations, Ban Ki-Moon issued a circular asking member states to embrace and use mediation as a preferred form of conflict resolution.2 Earlier, on 13th June 2008, the European Union issued a directive in similar terms.3 Following the EU directive, Italy enacted legislation by her legislative Decree 28/2010 which came into force in March of 2011.4 This made mediation compulsory before litigation. The USA and the rest of Europe have legislative foundation for the promotion and use of ADR and mediation. Singapore and almost all countries in Asia have very active ADR programs with some emphasis on mediation. The same is the case for Australia and New Zealand. In 2011, Australia past its Civil Procedure Act 2011, requiring litigants to attempt to resolve their disputes through mediation first before litigation. Nearly all of the South Pacific Island countries led by PNG and Samoa have embraced ADR5 and in particular mediation, with some mediation skills training and awareness workshops, mainly sponsored by the World Bank through its business arm, the International Finance Corporation (IFC) and the Pacific Judicial Development Program initially funded by the Australian and New Zealand Governments and lately only by the New Zealand Government.

4. In recent times cooperation agreements are being entered into between countries or their judiciaries to develop or further strengthen the use of mediation or other forms of ADR either as Court annexed programs or available readily to the community through government or private sector programs or systems. Recently, the PNG Judiciary has been asked and it has agreed to provide technical assistance

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2 “Saying an ‘An Ounce of Prevention is Worth a Pound of Remedy’, Secretary General” UN General Assembly GA/11242 (found at http://www.un.org/News/Press/docs/2012/ga11242.doc.htm
5 Graham Hassall “Alternative Dispute Resolution in Pacific Islands Countries” located at http://www.paclii.org/journals/fJSPL/vol09no2/4.shtml
to the Samoan Judiciary to further enhance her ADR program. A memorandum of understanding (MOU) is set to be signed soon. The MOU will spell out the kinds of assistance required and the level of assistance that will be provided. Similar, assistance is likely to be given to Solomon Islands and other smaller South Pacific island countries. The Court of Tax Appeals of the Philippines is in discussions with the PNG Judiciary for cooperation between the two judiciaries for the development and use of mediation in tax cases in the Philippines. Through these various cooperation arrangements, it is anticipated that judiciaries will help more and more people to turn to and use mediation and other forms of ADR for resolution of their disputes.

**What is PNG’s experience on ADR and mediation?**

7. What is PNG’s experience on ADR and or mediation then? The concept of mediation or some of the other forms of ADR is not a new concept for PNG but the formally introduced system is. Statutory foundation for ADR are many. In the National Court it is sections 7A - 7E of the *National Court Act* as amended and a set of ADR Rules promulgated by the Judges using their rule making powers under the National Court Act and s. 184 of the PNG Constitution. Other provisions, include at the highest for instance ss. 333 - 336 of the *Constitution* and ss. 42, 44 and 118 of the *Organic Law on Provincial and Local-level Governments*.

8. In terms of case law, the National and Supreme Courts have called for more use of ADR to resolve disputes both before and after these legislative enactments. In *Public Officers Superannuation Fund Board v. Sailas Imanakuan* (2001) SC677, the Supreme Court for example stated:

“... Courts are there only to help resolve or determine disputes that cannot be resolved by the parties themselves despite their best endeavours to do so. All human conflicts and disputes are capable of settlement without the need for court action. That is possible only if the parties are prepared to allow for a compromise of their respective positions. People in other jurisdictions are already recognizing the benefits of settling out of court as it brings huge savings to the parties in terms of costs and delay and help maintain good relations between the parties. This is why in other jurisdictions, out of court settlements are actively being pursued through what has become known as Alternative Dispute Resolutions or ADRs.”

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6 This author is personally involved in these developments. Hence the information is based on his person involvement and knowledge.
7 For example, reconciliation, a form of expert case appraisal or med-arb.
8 Chapter 28 as amended.
9 Full title Rules Relating to the Accreditation, Regulation, and Conduct of Mediators and cited in short as the ADR Rules, promulgated in March 2010.
10 Effectively endorsed by the Supreme Courts subsequent decision in *NCDC v. Yama Security Services Pty Ltd* (2003) SC707
9. Later in *PNG Ports Corporation Ltd v. Canopus No 71 Ltd* (2010) N4288, the National Court observed:

“Recognizing the importance of having matters resolved out of Court, the Parliament in 2008, amended the National Court Act and added sections 7A – 7E. These provisions, amongst others empower the National Court to order mediation and other forms of ADR at any stage of the proceedings. These provisions also empower the Court to promulgate appropriate rules to give effect to the legislative intent of making ADR/Mediation an integral part of the Court’s process. In accordance with that mandate, the Judges recently on 30th March 2010 promulgated the “Rules Relating to, Accreditation, Regulation and Conduct of Mediators.”

10. The Court went to observe:

“All these now make it abundantly clear if not already done, the need for parties to seriously explore and exhaust out of Court settlement before coming to Court. If all parties involved in a dispute did that, they would be only appropriately reserving the courts for the hearing and determination of cases, which have merit that warrant only judicial consideration and determination….Thus, unless a case falls into such a category, most of the disputes should be settled and should never get to court. Hence, if they enter the courts without first exhausting out of court settlement options, the very first issue for the courts and the parties to address and resolve should be resolution of the matter through out of court settlement discussions which should take place under the shadow of the Court…. If such discussions fail, parties should be able to agree on what the relevant facts are and which of those facts are disputed and why and clearly set out or disclose the existence of a meritorious issue or issues, which warrant judicial consideration and determination. The parties should then be able to persuade the Court that, there is such an issue for the Court’s consideration. Then on being satisfied that there is such an issue for trial, the Court can allow the parties to progress their matter to trial expeditiously.”

11. In the context of the case then before it, the Court addressed the question of what do all these development in the ADR front mean in the following way:

“What this means then is that, a party who fails to give any serious consideration and fails to make good faith efforts toward resolving a dispute out of Court should be responsible for the other party’s costs. Where as in this case, one of the parties has taken all of the right steps toward having a dispute resolved through the parties own negotiations or with the assistance of a mediator or an independent and neutral third party and the matter subsequently settles after much costs have been incurred, the party concerned
should be responsible for the costs thrown away on a solicitor and client basis, unless the parties otherwise agree.”

12. Later in 2014, in its decision in Abel Constructions Ltd v. W.R. Carpenter (PNG) Ltd (2014) N5636, the National Court pointed out that all cases are capable of resolution by negotiation or ADR or mediation except only for cases in which:

• a real possibility of setting a legal precedent through a judicial determine which would clarify the law or inform public policy is presented;
• any settlement out of court is not in the public interest;
• protective orders such as injunctions are required immediately;
• there is a clear case warranting summary judgment;
• a genuine dispute requiring the Court to give a declaratory relief is presented;
• family disputes especially involving child abuse, domestic violence, etc, is presented;
• the parties are in a severely disturbed emotional or psychological state, such that they cannot negotiate for themselves or others;
• a genuine dispute requiring interpretation of a constitutional or other statutory provision is presented;
• there is a genuine dispute over the meaning and application of a particular provision in a contract or an instrument, a determination of which will help finally determine the dispute;
• a preliminary issue such as questions on jurisdiction, condition precedents, statutory time bar and the disclosure of valid cause of action requires determine before anything else; or
• a public sanction as in a criminal case is needed for public health, safety and good order.”

13. The Court also noted that, after a determination of a preliminary issue such as the ones presented in the second last item in the above list, the substantive matters could still be referred to mediation. This includes even after the determination of an application for injunctive relief unless such reliefs are permanent in nature finally disposing of the case. This author has in at least three cases granted interim injunctive orders and directed the parties to resolve their disputes through mediation. This, the parties did successfully resulting in a final disposal of the cases within two months of their respective filing.

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12 See the decision of the PNG Supreme Court in Heni Totona v Alex Tongayu (2012) SC1182 as an example.
14. Paula Young in what could be taken as detailed look at this aspect in her article “The ‘What’ of Mediation: When Is Mediation the Right Process Choice?” concludes and this author agrees that:

“As mediators, lawyers, and their clients gain more experience with mediation, fewer and fewer types of disputes will seem less amenable to the process. Even if mediation only succeeds in improving the parties’ communication, in identifying their underlying interests, in narrowing the issues in conflict, or in helping them more carefully evaluate their litigation option, it can move the dispute towards a quicker, more cost effective resolution.”

15. The Courts in PNG have gone a step further in their support for ADR by appropriately ordering costs against parties who fail to engage in meaningful settlement negotiations. In PNG Ports Corporation Ltd v. Canopus (supra) case, the Court ordered a party who failed to take any meaningful step to have the matter resolved promptly meet the other party’s costs on a party’s own solicitor and client costs or on full indemnity basis. Similar orders and decisions have been arrived at in a number of subsequent case. In Alex Awesa & Anor v. PNG Power Limited (2014) N5708, the Court ordered the parties to go to mediation for the second time, but this time with the defendant meeting the mediators and parties costs for its earlier failure to take meaningful steps to have the matter mediated. A similar decision was arrived at in the most recent decision in the matter of Kanga Kawira & Ors v. Kepaya Bone & Ors, decision delivered on 5th July 2017.

16. In serious cases of bad faith at mediation, the National Court has demonstrated a readiness to dismiss that case or enter judgement for the plaintiff depending on who is at fault. In Koitaki Plantations Ltd v. Charlton Ltd (2014) N5656, the Court dismissed the plaintiff’s claim and ordered judgement against it on a cross claim against it by the defendants. That was on the basis of the plaintiff acting in bad faith which impeded a court ordered mediation from taking placing in a case that failed to present any issue which warranted only a judicial consideration and determination. Similar decisions and orders have been arrived in the recent decision of the National Court in Roger Meckpi v. Luke Fallon & Anor (2017) N6708, a decision delivered on 08th May 2017.

17. Similarly, the National Court has demonstrated a readiness to uphold mediated agreements provided the basic essential elements for a legally binding contract or agreement are present. This readiness to uphold mediated agreements

14 Decision delivered on 5th July 2017.
15 Hargy Oil Palm Ltd v. Ewasse Landowners Association Inc (2013) N5441
exist even in cases where an individual fails to sign a mediated agreement on an
issue that concerns a person’s right or interest which are exercisable through the
sanctioning, approval or endorsement by his group as against others as in the case of
a clan or tribal setting through whom an individual will have, enjoy and exercise his
or her rights or interests.  

18. Mediation or ADR is not compulsory in PNG. Instead, judges and magistrates
are empowered by legislation to order parties to use mediation to resolve their
disputes with or without the consent of the parties at any stage of the proceedings.
The ADR Rules which the judges promulgated presupposes mediation. Upon any
one of three triggers, namely, the first time a matters is before the court, or after the
filing of a defendant’s defence or upon expiry of the time for the filing of a defence,
the Court is required to consider whether a question inappropriate for resolution by
mediation is presented? Only if such a question is presented, the proceedings may
be ordered to proceed in the normal litigation path. In other words, all cases are to
be referred to mediation for their resolution unless a question that is inappropriate
for resolution by mediation is presented. The judicial pronouncement in the case
of Abel Constructions Ltd v. W.R. Carpenter (supra) and those following it provide
clear guidance on the kinds of questions or cases inappropriate for resolution by
mediation. Under r. 5 of the ADR Rules, the Court can order mediation at any stage
of the proceedings with or without the consent of the parties or on the Courts own
volition.

(b) Administrative support

17. PNG’s ADR program has the full and undivided support of the Chief Justice
and other judges, with two Judges assigned almost full time to Mediation and ADR.
The day to day running of the program is in the hands of a dedicated ADR Division
headed by an Assistant Registrar of the Court, and is housed in a dedicated area with
offices and mediation conferencing facilities. The ADR Division is supported by a
passionately committed ADR Committee led by a judge who provides the
necessary leadership oversight and guidance. The ADR Committee also monitors
and initiates all programs and changes as are required from time to time. The
Committee, initially developed and produce the ADR Rules for the judges to
consider and promulgate, which they did. Currently, the Committee is working on
draft legislation on Arbitration to replace PNG’s archaic and well and truly outdated

17 Section 7B of the National Court Act as amended and s.22B of the District Courts Act.
18 Rules Relating to the Accreditation, Regulation and Conduct of Mediators 2010 (ADR Rules in Short)
19 See Rule 4 of the PNG Rules Relating to the Accreditation, Regulation and Conduct of Mediators 2010 (ADR
Rules).
20 See Alex Awesa & Anor v. PNG Power Limited (supra note 10) and Wantok Gaming Systems Ltd v National
Gaming Control Board (2014) N5809
21 The Committee comprises of Judges which includes the Deputy Chief Justice, magistrates, the private and public
lawyers, and the academia with room for ordinary members of the public to participate.
Arbitration Act. The Committee is also working on draft set of rules to replace the ADR Rules to meet current challenges and realities. The Committee has published a number of mediation and ADR awareness material and is working additional material to enable increased referral of cases to mediation or ADR by the Courts and mediators to perform their task more competently.

18. With some support from IFC initially and later on the judiciary’s own, over 15 basic mediation skills trainings have been packaged and delivered to judges, magistrates, some lawyers and other professionals since 2010. More basic and advanced mediation skills training will be packaged and delivered next year. The trainings have resulted in 126 mediators who are accredited both in PNG and Australia. Out of that, 27 are fully accredited mediators (FAMs) and 79 are provisionally accredited mediators (PAMs). Programs are now well in place to help get the 79 PAMs to achieve FAM status through a process of co-mediation with experienced FAMs in real cases. Through the workings of at least 5 out of the 27 FAMs, we have been able to dispose of more than 1000 cases by mediation with more than 80% success rate. Some of these actual mediations have provided the avenue for practical hands on training for some of the PAMs with some of them progressing to FAM status. The Chief Justice has directed the ADR Committee to focus more on this program with a view to getting the remaining 79 PAMs to FAMs promptly. This has come about after the Judges have resolved to have 60% of the cases pending on the court’s list disposed of by mediation. The ADR Committee is already taking steps to give effect to this important decision, which includes advanced planes to have more than 1000 cases resolved by mediation before or by the end of each year and support the co-mediation program for trainee mediators. Most importantly, the Chief Justice has been able to secure sufficient funding for this and other projects in addition to the judiciary’s normal operational budget. Further, the Committee is working on having a mediators’ hand book to assist both new and experienced mediators. At the same time, the Committee is working on a Judges Mediation Handbook to assist Judges with their task of referring matters to mediation.

19. The ADR Project has already packaged and delivered over 10 ADR awareness workshops throughout the country. This has been in addition to ongoing talks and pronouncements in Court encouraging the use of mediation and other forms of ADR to resolve conflicts and an increased number of referral of cases to mediation and successful resolution of many disputes through that process. This has attracted interest in using mediation from both the private and the public sectors in

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22 Chapter 46.
23 Last three conducted this year for judges, lawyers both private and public and other key persons in the private corporate sector.
24 Including disputes identified in the course of mediating in cases in Court such as those in the extractive industry cases like the LNG cases.
25 Late last year the PNG Judiciary assist the Samoan Judiciary with an ADR awareness workshop and carried out a scoping mission to identify areas of assistance to be given to Samoa with its ADR Program.
terms of having their disputes resolved by mediation and requesting assistance in
designing and implementing their own internal conflict resolution process featuring
mainly mediation. Once the full accreditation of the provisionally accredited
mediators is achieved, the focus will turn to picking up on the interests shown in
imbedding conflict resolution process within companies and departments or industry
for speedier resolution of conflicts within their establishments. It is envisaged that
the end result of all of these will be an increased use of ADR and mediation
resulting in more and more final resolution of conflicts which will enable the formal
courts to discharge their duties and responsibilities with increase competence,
quality and in ways that are less time consuming and very cost effective. Ultimately,
this will enable the judiciaries to stay on top of their respective lists with
little or no backlogs.

20. Since its formal adoption and use of Court Annexed ADR with focus on
mediation in 2010, there has been a gradual but sure increase in the number of cases
referred to and continue to be referred to mediation. For the cases thus far referred
to mediation, the ADR Committee has been running a system of monitoring and
evaluation through a web based survey system. This has seen mediation feedbacks
from parties and lawyers at the conclusion of their respective mediations feed into
the system. The result of this survey continues to be interesting. A sample analysis
of 23 mediated cases reveal the following from respondents:26

(1) 60% stated that mediation increased their trust and confidence in the court
system while the balance stated their level of trust and confidence
remained unchanged;

(2) 92% stated that the Courts should support and use mediation more;

(3) 100% stated going to mediation was safe, comfortable, user friendly and
more secure;

(4) 91% stated that if they were involved in another dispute they would refer
the matter to mediation;

(5) 96% stated they would recommend mediation to a colleague, friend or a
relative as a good way to resolving their conflicts;

(6) 87% thought the mediation process assisted in identifying the real issues
in dispute between parties.

(7) 91 % thought that the mediation process assisted them to understand the
other party’s views;

(8) 87% thought that the mediation process gave them opportunities to
develop options for settlement;

26 I understand similar surveys and analysis in New Zealand which has produced similar results.
(9) 71% stated that they resolved all of the issues in dispute while 19% stated that they had resolved none of the issues in dispute. The remaining 10% stated that they had resolved some of the matters in dispute; and

(10) Parties and lawyers surveyed estimated that settling the case through mediation resulted in an average estimated saving per party of between 80,000 Kina (USD 39,000) to over millions (USD450,000) of kina and a similar amounts or much more in funds or business opportunities locked up in litigation.

21. Additionally, a research report from a Fulbright scholar showed that out of three major agriculture project cases that went to mediation, successfully resolved and removed at least six additional cases on the court’s list. The process also provided the parties with a forum to discuss and generate mutually agreeable solutions built around present and future risks. In other words, mediation has been able help companies and governments to secure their social license from the community for them to operate and remain amongst them as a welcomed integral part of the community rather than an enemy from case of the community against government and companies, thereby posing serious project or development risks. The research than noted that the value added by successful mediations could not be underestimated in that:

(1) **Presence matters.** Every party stated that this was the first face-to-face conversation held between the parties and each party stated they learned new and critical information about the dispute from the conversation;

(2) **The negotiations at mediation dispelled disinformation or misinformation.** Each corporate party found that the negotiations


28 This is being repeated in many other cases.

29 For a discussion on what is social license see my judgment in In Alex Bernard & P’Nyang Resources Association Inc. v. Hon. Nixon Duban, MP, Minister for Petroleum & Ors, (2016) N6299. There I referred to two sources which defined “social license in the following terms at paragraphs 30, 31 of the judgment:

“‘Social license’ generally refers to a local community’s acceptance or approval of a company’s project or ongoing presence in an area. It is increasingly recognized by various stakeholders and communities as a prerequisite to development. The development of social license occurs outside of formal permitting or regulatory processes, and requires sustained investment by proponents to acquire and maintain social capital within the context of trust-based relationships. Often intangible and informal, social license can nevertheless be realized through a robust suite of actions centered on timely and effective communication, meaningful dialogue, and ethical and responsible behaviour.”

On occasions, the Social License can transcend approval when a substantial portion of the community and other stakeholders incorporate the project into their collective identity. At this level of relationship it is not uncommon for the community to become advocates or defenders of the project since they consider themselves to be co-owners and emotionally vested in the future of the project, such is the strength of self-identification.”

30 In PNG where 97% of the land is in customary landowners, mediation as enabled the PNG government and companies to secure their social license in a number areas from, agriculture projects, mining and logging to public facilities like, hospitals and schools and other infrastructures.
provided them with an opportunity to correct disinformation and or misinformation and make known their own interests and problems to the landowners;

(3) **The mediation improved the “social license” between landowners and companies.** Each company stated that the informed agreement with landowners, allowed and significantly enabled them to improve their relationships and to peacefully carry out business, reduce delay, costs, and risks;

(4) **The mediation forum gave the landowners a sense of ownership over the dispute and its resolution.** Nearly every landowner interviewed expressed that they were able to express themselves and be a part of solving the problem, and expressed a vested sense of responsibility in implementing the solution agreed upon; and

(5) **The mediations taught participants good methods for resolving future disputes.** Two of the three company representatives, and all of the lawyers and parties involved, stated that they would try to resolve future disputes through face-to-face conversations before going to court.

22. As indicated, with the many good results being achieved, more and more people are now beginning to ask for and are use mediation to resolved disputes, even without coming to Court. There is a growing trend of lawyers and parties asking for mediation in their Court proceedings. In one case for example, a senior lawyer initially opposed to mediation but later converted by a successful mediation in one of his cases, went to the National Court in a new matter on behalf of his client and asked for an injunctive order as well as an order for mediation to resolve the substantive matter. The Court granted both orders and within a month of the orders, mediation enable the parties to resolve the substantive matter. There is now more and more of this kind of cases coming through the system. This is happening with the Court consistently encouraging, asking and in appropriate cases ordering matters to be resolved by mediation or a form of ADR.

23. Not so long ago, the Chief Justice introduced a case docketing system (CDS). That saw judges being allocated cases for each of them to manage from beginning to final disposition. In 2015, most judges were not able to go past 200 cases except for two judges who disposed more than 800 cases each. Of the two, one of them used mediation and ADR processes and skills to bring about final outcomes without long drawn out trials. The other’s large number of disposition was on account of summary determinations of cases for want of prosecution.

24. Last year saw good improvement in the number of cases disposed by judges. Out of a total of over 30 judges, two judges disposed over 800 cases, another two over 600 and one other over 300 cases and a couple more over 100 cases each. With
the exception of the one disposing off over 300 cases, most of the judges were able to reach their respective disposition levels through summary determination for want of prosecution and for other technical reasons in addition substantive trials and final decisions on the substantive merits of the cases. The one disposing of 300 was mainly by applied ADR or judicial dispute resolution (JDR). That was in addition to the judge concerned also managing and conducting mediations in a number of more involved cases with long litigation history in the resources extractive industry or sector which play a significant part on the country’s economy. Through these mediations it uncovered other potential or hidden disputes which could have entered the Court system had it not being for mediation resolving the disputes. Most of the cases resolved by mediation or a form of ADR are not likely to enter the Supreme Court’s list on appeal or reviews given the parties own agreement or consent.

25. This year 2017, the results of the past years is set to repeat. One Judge using a combination of mediation, expert or neutral case appraisal and judicial dispute resolution and one or two traditional trial process has thus far disposed of more 433 cases. With more training and upskilling of judges to refer as many cases to mediation or a form of ADR, this trend will continue but this time with increased final resolution of a disputes in a timelier manner at less costs.

**What is driving the ADR?**

28. The question then is, what is driving ADR. Earlier on in human history, when they were fewer in number and resources were in abundance, there were fewer conflicts which, when occurred, got resolved through more informal and flexible forms of conflict resolution. Those process of conflict resolution involved direct negotiations between the parties or negotiations facilitated by a third party. Failing resolution through those process, people in some cases, resorted to self helps resulting in bloodshed and destruction to lives and properties. Later, as the human society advanced and became sophisticated with drastic increases in population placing serious strain on limited resources worldwide, conflicts increased in both complexity and the kind of processes and procedures put in place to resolve them. Courts globally had their case lists become and continue to be too long with lengthy delays in disposition thereby effectively endorsing and giving real meaning to the unfortunate and derogatory statement against the formal Courts “justice delayed is justice denied” with many of their stake holders questioning the relevance of the Courts in society. With a desire to reducing or eliminating the Courts’ long lists and effectively deal with the associated delays in getting to final disposition of cases and the criticisms, many Courts globally accepted, adopted and are now meaningfully continuing to apply ADR in the management of their respective lists. That has seen an increased used of mediation and other forms of ADR, thereby making these process more prominent.
29. The rise and prominence of ADR is also driven by a desire to arrive at a final and lasting resolution of conflicts in ways that are less time consuming, less costly and through processes that are safe, free and easily accessible for many in conflicts. Litigation is by far the most expensive, time consuming and most stressful process of conflict or dispute resolution with a forced or false sense of finality. On the other hand, some forms of ADR, such as mediation, early neutral evaluation, expert case appraisals and JDR\(^{31}\) deliver expedited, less costly, less stressful and most definitely lasting outcomes which the disputing parties can live with. Accessibility of the processes by the disputing parties, meaningfully and directly participating in and taking ownership of the outcomes are other serious and important factors too. Whilst the formal processes and those behind it speak for and consider these processes accessible, only those who have the money and or who know their way around have and can have real access. Even in those cases, only lawyers, judges and magistrates do most of the talking and determine the final outcome. Parties hardly play any significant role in that except only to instruct lawyers and give evidence when called upon. On the other hand, mediation and some other forms of ADR recognize that the parties own the dispute and they have the necessary power and authority to talk about the dispute, consider all settlement options open to them and arrive at an outcome that meets their needs and one they can live with. Mediation and other ADR process allows for even a person without the ability to afford expensive legal fees to have access to them and have their disputes finally resolved at less costs and within shorter time frames.

**New Definition for ADR**

30. The foregoing trend and the benefits of using mediation and other forms of ADR more has elevated them to being the primary or preferred form of dispute resolution. Hence, it is now incorrect to continue to think or treat such forms of dispute resolution as an alternative to the formal court process. Instead, they should correctly be taken as primary or preferred form of dispute resolutions that are and should readily be available on a menu, listing a number of forms of dispute resolution process open and available for the parties, our clients to choose from, based on which process best meets their needs. It thus necessitates a relook at the definition of ADR. When we do that, mediation and the other forms of dispute resolution, other than the Courts, become one of “Appropriate”, or “Active”, or “Assisted” Dispute Resolution, which is something the PNG ADR Committee is now promoting. This author notes that similar definitions have been adopted in New Zealand and Australia.

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\(^{31}\) Judicial Dispute Resolution.
Comparative look fundamental features

31. Both the formal Court and the mediation processes have certain fundamental features in common. One of the most important features is the element or the requirement for impartiality which features very firmly in both cases. Impartiality is required as a matter of necessity and as an integral part of both processes. It is this that gives people choosing to use the processes the confidence and an assurance that, the outcome will be based on merit and not by virtue of the facilitator’s interest in the matter or his or her relationship or connection with either of the parties, if any.

32. Another important feature includes the requirement for fairness. That element of course is an inseparable twin to the principle of impartiality. Both processes endeavour to be fair to all parties. Wells J.’s decision in the South Australia case of Donaldson v. Harris, who took the opportunity to trace briefly the origins of the development of procedural rules on discovery from the old common law emphasis on ‘the system of litigation by antagonists’ is a good illustration of the element of fairness. His Honour said:

“Thus, one of the essential features of discovery, deriving as it does from the equitable rules of the former Court of Chancery, is fairness. Its function is to ensure, not only that so far as possible there should be no surprises at the trial, but also that, before the trial, each party should be informed or be capable of becoming informed of all the relevant material evidence, whether in the possession of the opposite party or not, so that he can make an intelligent appraisal of the strength or weakness of the respective cases of the parties either for the purpose of the trial or for the purpose of arriving at a fair or favourable settlement or compromise.”

33. Both the formal courts and mediation processes try to achieve fairness through rules, practices and procedures that apply equally to all the parties. A good example is the right of address in Court as well as in mediation. Also both processes work hard to ensure that each of the parties that go before them have equal time and opportunity to present their cases. This highlights another important factor which is equality. Both processes endeavour to grant equal opportunity to those who have conflicts or disputes to have equal access to their processes and participate equally to ultimately arrive at an outcome that takes into account all of

32 An example is the requirement to put in cross-examination one’s case to the other going by the centuries old authority of Browne v. Dunn (1893) 6 R 67 HL. Another example is the principles built around the principles of natural justice, which essentially requires a person to be heard in his or her defence before judgement
33 (1973) 4 SASR 299.
34 Cited in Public Officers Superannuation Fund Board v. Sailas Imanakuan (2001) SC677
their (parties) positions, arguments or interests. Additionally, both processes try to bring about prompt resolution of the disputes brought before them and in so doing, minimize the time and costs it takes for the parties and those involved in the processes. Finally, both processes try to ensure that the decisions or the outcome arrived at finally resolves all matters in dispute between the parties.

34. However, when one closely examines each of the above factors, mediation stands out way ahead of the formal courts when it comes to prompt resolution of conflicts, less costs, equal access to justice and equal participation and finality in the outcome. Of course this requires further clarification. In PNG, we have had histories of litigation running over 10 to 20 years with deaths on either side in some cases. When court annexed mediation was finally introduced, those cases resolved within a matter of hours to just a few days depending on the nature of the cases and the number of parties involved.\(^\text{35}\) Parties had spent over millions of Kina in legal and other fees and charges and took a very long time without even getting anywhere near to reach a final and lasting outcome. On the other hand, mediation costs were far less and took a lot less time and resulted in clear, certain and lasting outcomes. In those mediations, as is the case with all other mediations, the people who stood to be affected, from the adults including females to younger adults and children who could otherwise have been suppressed or prevented were involved and did participate in the mediations through a process that allowed for their views to be aired and considered. As a result, outcomes that accommodated most of the parties concerns and interests were reached. This was possible with the processes taking place in their own localities and or setting and safe avenues provided by the mediation process for them to fully participate.

35. What happened in those mediations and other mediations makes the mediation process completely different from the courts. In the Courts, a person with a dispute goes to a lawyer if he can afford one and the lawyer then determines how the client’s case is to be pleaded and run in Court from start to finish. The lawyer does all of the talking and the process is concluded by a judge or magistrate making a final decision. The client or the parties in dispute hardly have a direct say in the final outcome in their respective cases. Even the lawyer is restricted in what he can do and put before a court on behalf of his client because, for instance, he has to

\(^{35}\) These are based on mediations this author has successfully conducted and resolved the matters in dispute. In one matter an individual was up against a provincial government and its business arm. The case had its rounds before the National and Supreme Courts and then back to the National court spreading over a period of 15 years. Mediation took only 3 hours to arrive at a final resolution. The other cases was more involved, which involved thousands of landowners in mining and petroleum areas and major agriculture undertakings were involved in litigation for over 20 years as in the case of Nathan Koti & Others v. His Worship David Susuame & Nabura Morrisa & Others (supra). These cases got resolved within 4 days of mediation.
work within the technical requires of say the law of evidence or the law and practice on pleadings and so on.

36. The most important feature that sets mediation or ADR apart as a better form of dispute resolution compared to the Courts in all cases, except for a few clearly identifiable cases, is its ability to bring about finality in the outcome. Mediation enables the parties in dispute to explore all possible options for an efficient and effective resolution of their dispute and settle upon one that best meets both of their needs and interests and one they can live with. Hence a majority of mediated outcomes last longer and do not return to the courts. On the other hand, the Court process will usually have expressed legislative provisions that prevent appeals or reviews once a final court of appeal or reviewed has considered the matter and has come to a decision.\textsuperscript{36} If it were not for the written law, well accepted legal principles like \textit{res judiciata} or \textit{issue estoppel} ensures which ensure finality in litigation,\textsuperscript{37} there would be endless litigation, with appeals or reviews upon appeals and reviews. This would possible given that people usually do not readily accept a defeat. Hence, finally is reached only as a matter of procedure rather than as final outcome on the merits from each of the parties’ perspective or view point.

\textbf{An imperative to work together}

37. People all over the world like to have no disputes with anybody and like to pursue fun and happiness and that which is good. Unfortunately, it is part of human nature to have disputes which are brought upon humanity by many factors, such as, claims of interest and rights over land, basic human needs, rights and freedoms and many more. Once caught up in a dispute, many involved in the disputes prefer an early, if not, an immediate resolution of their disputes, if that were possible at little or no costs so they can move on in life, their employment, business and other enjoyable pursuits. The formal Courts, as already noted, demonstrate a clear slowness in delivering on that wish or aspiration of our people. It is this author’s submission that, this has been the case not because the formal system is incapable of delivering on that objective. Instead, the main contributing factor has been an inundation of the formal Courts’ lists with matters that should not have entered the Court system at the first place. Clear examples of these are for instance, simple debt

\textsuperscript{36}For a decision of the Supreme Court that discusses the relevant statutory provisions and the cases law develop around that in terms of further appeals or review by the Supreme Court in PNG see \textit{Review pursuant to Constitution Section 155(2) (B) and Section 155(4) Application by Joseph Kintau, Acting Director, Civil Aviation Authority of Papua New Guinea} (2011) SC1125.

\textsuperscript{37}For a discussion of these principles see the PNG Supreme Court decision in \textit{Telikom PNG Limited v. Independent Consumer and Competition Commission and Digicel (PNG) Limited} (2008) SC906.
claims and all other claims that require the people involved telling the truth or a better understanding of the reasons for the conflict and resolving them through the parties’ direct or assisted negotiations. Such cases referred to mediation or a form of ADR to resolved and reserve the Courts for cases not suitable for resolution by mediation or a form of ADR.

38. It is accepted the world over that Judges and Courts are important gatekeepers.38 Hence, they have a much more important and critical role to play in the expedited resolution of disputes. For it is the Judges and the Courts that can choose to allow the unnecessary overloading problem and its consequences to continue against them or welcome and embrace the intervention of mediation and ADR. Choosing the latter can enable the Courts to use ADR and mediation to their advantage. Through such use, the Courts can bring the backlog problem under control, if not eliminate it. This would in turn enable them to deal with cases they strictly need to deal with and deliver on our people’s objective of promptly resolving their disputes at less costs and within shorter timeframes. This could ultimately, lead to a removal of the foundation for the statement and the statement itself that “justice delay, is justice denied.” This writer notes that, earlier on, many judges were opposed to mediation and there was a serious debate on the question of whether Judges should support mediation and other forms of ADR. It is now no longer an issue39 because undoubtedly, mediation and other forms of ADR can assist the Courts to be on top of their lists and dispose of cases as they come instead of continuing to allow all sorts of matters to go to them and continue in their usual habit of carrying backlogs over to the many next years.

39. Hence, there is an inevitable imperative for each of the processes to view and accept each other as friend ready to help each other in delivering on their ultimate object of deliver quality justice to our peoples at less costs, time and in a manners that that are efficient and effective. This would bring many benefits including reduction case backlog, increased public confidence in them and such other benefits through these process working together in identifying and channelling the cases to the correct process for expedited and final resolutions. The imperative to work together is necessitated by the fact that the formal courts and the various forms of ADR and more so mediation have only one destination to reach and that destination

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38 Others include professionals like lawyers, accountants, psychologist, doctors and others to whom people turn to with their problem those may in turn refer their client to go to mediation or a form of ADR. For more information on how lawyers are gatekeepers and how they have discharged that role see: http://www.ncl.ac.uk/cflat/news/documents/gatekeepers.pdf; http://www.law.stanford.edu/sites/default/files/biblio/108/138070/doc/slspublic/AyeletSela-tft2009.pdf

39 See Ambeng Kandakasi, *Developing A System Of Court Annexed ADR In AN Ever Increasing Litigious Society: (Paper delivered at the Asia Pacific Mediation Conference in Suva Fiji June 2006 and published in the Malayan Law Journal)*
is called, justice which must be arrived at safely and promptly, at less costs and finally with the parties going away satisfied. That destination can easily be reached because the formal courts and the various ADR processes all have the following set of indispensable features or principles and objectives like a set of traffic rules, which, if followed, can enable people to reach their ultimate destinations safely:

(1) Impartiality in the process and one facilitating or presiding;
(2) Fairness in the processes and administration of them and the eventual outcomes;
(3) Equality in both access to justice and participation in the process by those affected by the dispute and having a meaningful say in its resolution;
(4) Promptness with little or no delays in delivering the final outcome;
(5) Less costly from filing to final disposition; and
(6) Real finality in the resolution of the problem.

40. Put in another way, greater encouragement and use of mediation and ADR has been, is able to and has the ability to deliver to our people as well as the Courts’ and other process the following:

(1) Speedy resolution of disputes;
(2) No unnecessary delays;
(3) No backlogs;
(4) Less costs to resolve and arrive at final and lasting outcomes;
(5) Less harm and less damage to personal and business interests;
(6) An opportunity to choose either one or a combination of a number dispute resolutions process that best meets the parties’ needs;
(7) Having a say and choice in the outcomes that would better meet the parties needs which a formal court might not be able to grant;
(8) Allows for equal access to justice and eventual outcomes; and
(9) In most cases, finality in the resolution.

41. Undoubtedly, the kinds of results thus achieved has freed up time and costs and other investment decisions unnecessarily held up or locked up in litigation. Parties have been enabled to apply their time and money to generate more income and achieve increased productivity in business and other important and beneficial pursuits. In other cases, mediation and ADR has delivered to many companies and
governments, their social licenses from the community to remain and operate this time as an integral part of the community and hence secure their investments and other developments. These developments have consequently led stakeholders and the Courts’ clients to have increased confidence and trust in the judicial system. This is not surprising because, the combined efforts of the Courts and mediation and other forms of ADR have delivered on the parties wish to have their disputes resolved promptly and finally with the involvement of a respectable and impartial third party mediators or facilitators of an ADR process at less costs with outcomes that last. More importantly, these developments are fast bringing to the fore the broader role of our judicial systems. That broader role is one of promoting peace and nation building.

**Broader role of the Judiciary**

42. Traditionally, the formal court process has always locked the parties in their respective positions and keep them in a repeated cycle of conflict by deciding who is right and wrong. The losing party would often go away unsatisfied even if he or she is in the wrong which causes him or her to find a way to be victorious against the winner in one way or form in the same matter or in other matters in future. The great display of leadership through a clear demonstration of forgiveness and a willingness to work together with his former aggressors and violators by the late Nelson Mandela, is a living testimony of how a process that is not necessarily focused on finding fault and being vindictive can do a lot for our people, their hurts and wishes and aspirations which informs design and arrive at an outcome that is future focused. Although the great leader was a lawyer who suffered immensely could have resorted to the Courts. However, in the great leader’s wisdom and foresight, that was not going to shape a better and new South Africa with strong walls and foundations of apartheid broken down and with African and white South Africans living together. He therefore chose the path or negotiation with his then aggressors and arrive at an outcome they could all live together.

43. It is well accepted that the formal courts exist for the peaceful resolution of disputes in society by impartial and competent judges. Whether a judiciary in anyone country lives up to that is demonstrated in how it goes about discharging its duties and responsibilities. A country that has a system of conflict resolution that promptly resolves conflicts easily attracts much confidence both internally and externally. This attracts more local and international investments. The World Bank in its Doing Business Reports constantly reports Singapore in the first 5 countries out of 190 countries as the most preferred country for foreign investment.\(^{40}\) One of the important contributing factors the World Bank uses is Singapore’s efficient judicial system with her formal Courts for matters warranting judicial consideration and mediation and other forms of ADR for all other disputes and these processes

working together to produce an efficient and effective system of conflict resolution. Having such a system promotes the peaceful co-existence of peoples and businesses with their conflicts resolved promptly. Clearly, therefore, the developments brought to bear upon judicial systems worldwide by the developments in the mediation and ADR areas provides the judicial systems with the necessary keys and or tools to truly become peace builders in our respective, communities, nations and ultimately the world.

**Current use of mediation and ADR**

44. Notwithstanding the benefits of using mediation and ADR, globally not all Courts or judges and magistrates, lawyers and parties are using this useful tool. This may be due to say a:

1. lack of education, knowledge and information about the existence and use of this tool and its many invaluable benefits; or

2. lack of court rules and or other positive legislation compelling or requiring the use of these processes; or

3. lack of knowledge and skill necessarily required to appropriately use the mediation and ADR process; and

4. a deliberate decision not to use mediation and ADR.

45. These are problems that can be easily overcome through:

1. appropriately packaged and delivered information and training around the existence and use of mediation and other forms of ADR and the kinds of skills and techniques required for their effective use;

2. Enactment of appropriate legislation and court rules requiring and encouraging the use of mediation and other forms of ADR for the resolution of the disputes or conflicts that do not feature in the list of cases not suitable for mediation; and

3. Finally, for those who make a deliberate decision not to use mediation and a form of ADR, they could be encouraged to try these processes out and allow themselves to be guided by the results of their trials.

**Conclusion**

46. For a long time, the formal Court system has been the main process for resolving disputes but sadly it has been overburdened. Now mediation and other
forms of ADR are fast becoming accepted worldwide as preferred forms of dispute resolution. All these processes have one destination to reach. That destination is delivering justice quality justice to our peoples expeditiously, at less costs and in a manner that is efficient and effective and long lasting. That being the case, there is an imperative for these processes to work to better deliver justice. Mediation and other forms of ADR are very useful tools that can produce outcomes that can speak well of the judicial system provided it is properly developed and applied correctly with good and strong judicial leadership. There is enough experience and knowledge in this room to draw from and make better use of mediation and other forms of ADR. This will in turn enable the Courts to discharge their broader role of promoting peace and nation building in addition to staying on top of their case lists. A failure to appreciate the goodness of mediation and other forms of ADR either by inadvertence or by deliberate choice is a choice made to remain with the problems of backlog and its related consequences. PNG stands ready to share its experience with anyone who might be interested in following her footsteps and wishes you all well in you ADR and mediation programs.