



# Pre-Empting Construction Disputes

## International Good Practice Dispute Resolution

PRESENTATION BY

ADJ PROFESSOR KIM LOVEGROVE MSE, RML, OF  
LOVEGROVE AND COTTON LAWYERS, AND CHAIRMAN  
OF THE INTERNATIONAL BUILDING QUALITY CENTRE

UNIVERSITY OF SALFORD, 27 MARCH 2023



# About The Presenter

Throughout his career, Kim's knowledge and experience has led to him being retained by organisations such as the World Bank as well as Federal and State governments, to identify and advise upon international good practice with regards to building regulatory systems in Australia, Japan, India, China and Southern Africa.

# The Problem: The Cost of Construction Dispute Resolution is Exorbitant

---



Claims advisory and dispute resolution experts HKA, investigated claims and disputes on 1,602 projects in 100 countries for its 2022 annual 'Crux Insight' report. The combined value of the projects investigated exceeded US\$2 trillion (roughly £1.7 trillion).

Total claims analysed in the report exceeded US\$80 billion in value, while the cumulative overruns add up to 840 years.<sup>2</sup>



# The Problem

According to one multi-national study published by *Global Construction Review*, 35% of global project spend is burned up in disputes.<sup>1</sup>

---

The impact on schedules is no less damaging: claimed time extensions prolong project schedules by over two thirds (68.6%) on average.

That means ordinary people are waiting longer than they need to for critical infrastructure to improve their lives.<sup>1</sup>

# Key Take-Outs

---



- Construction dispute resolution is increasingly beyond the reach of mainstream.
- In light of the exorbitant costs of construction dispute resolution, a phenomenal amount of resources have to be devoted to non-constructive/non-utilitarian scenarios.
- This has a profound impact on the “bottom-line” and often repudiates commercial relationships.

---

# **The Solution: The Design Of Best Practice Dispute Resolution Theatres (DRTs)**

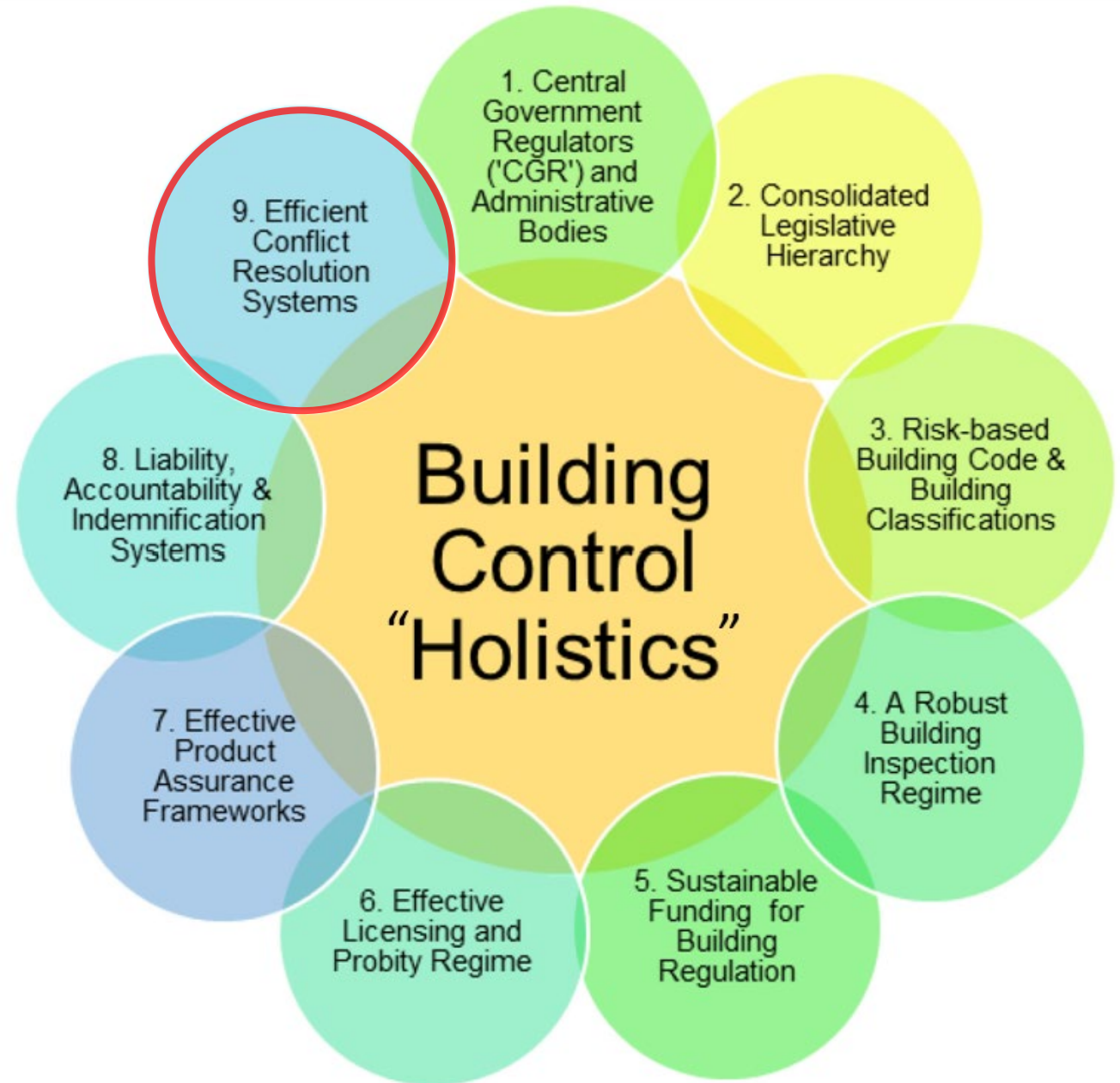
A key component of the following proposed advisory holistic framework is to have efficient conflict resolution systems for the resolution of civil disputes and building control appeals.



# Essential Elements of a Good Practice Building Regime

## Building Control “Holistics”

- A best practice dispute resolution system should be an essential component of building regulatory ecology, which must be holistic and comprise of 9 essential elements.
- A very important element is the implementation of Efficient Conflict Resolution Systems.



# Dedicated Building & Construction Lists in Courts and Tribunals

- Best practice jurisdictions feature DRT's that resolve disputes quickly and cost effectively by highly qualified decision makers who have formalized access to technical expertise.
- Dedicated construction lists in Courts and Tribunals are paramount.
  - Features are:
    - Promulgated regulations that make mediation compulsory.
    - Dedicated construction dispute resolution divisions of courts and tribunals that specialise exclusively in the resolution of construction disputes.
    - Decision makers that work exclusively in construction dispute resolution theatres.
    - Independent expert review panels.
    - Fast track appeal bodies for building approval disputes.





# Promulgated Regulations That Make Mediation Compulsory



- Mediation is a typical feature of formal dispute proceedings, but a well-functioning ADR solution is preferable.
- Best practice DRT's ensure that mediation occurs at an early stage of legal proceedings.
- The DRT appoints the mediator from an approved panel of expert mediators.

# Good Practice Victorian Civil and Administrative Tribunal

---



- Mediation is compulsory for the resolution of domestic building disputes.
- The VCAT appoints the mediator at no cost to the parties. Mediation occurs shortly after legal proceedings are issued in the VCAT.

---

# Independent Expert Review Panels

- Norm for separate experts to be retained directly by applicants and respondents. In reality there are often quite diverging conclusions made.
- There should be no advocacy, rather there should be clinical and arms length analysis.

## Best practice recommendations are:



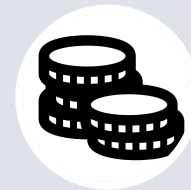
The DRT have an accredited list of expert witnesses.



Accredited on the basis of them being venerated by peers of good repute.



If the cause of the building failure is multi-faceted, then a combination of experts with skills bespoke to the problem will be appointed.



Parties will remunerate on a 50/50 basis.

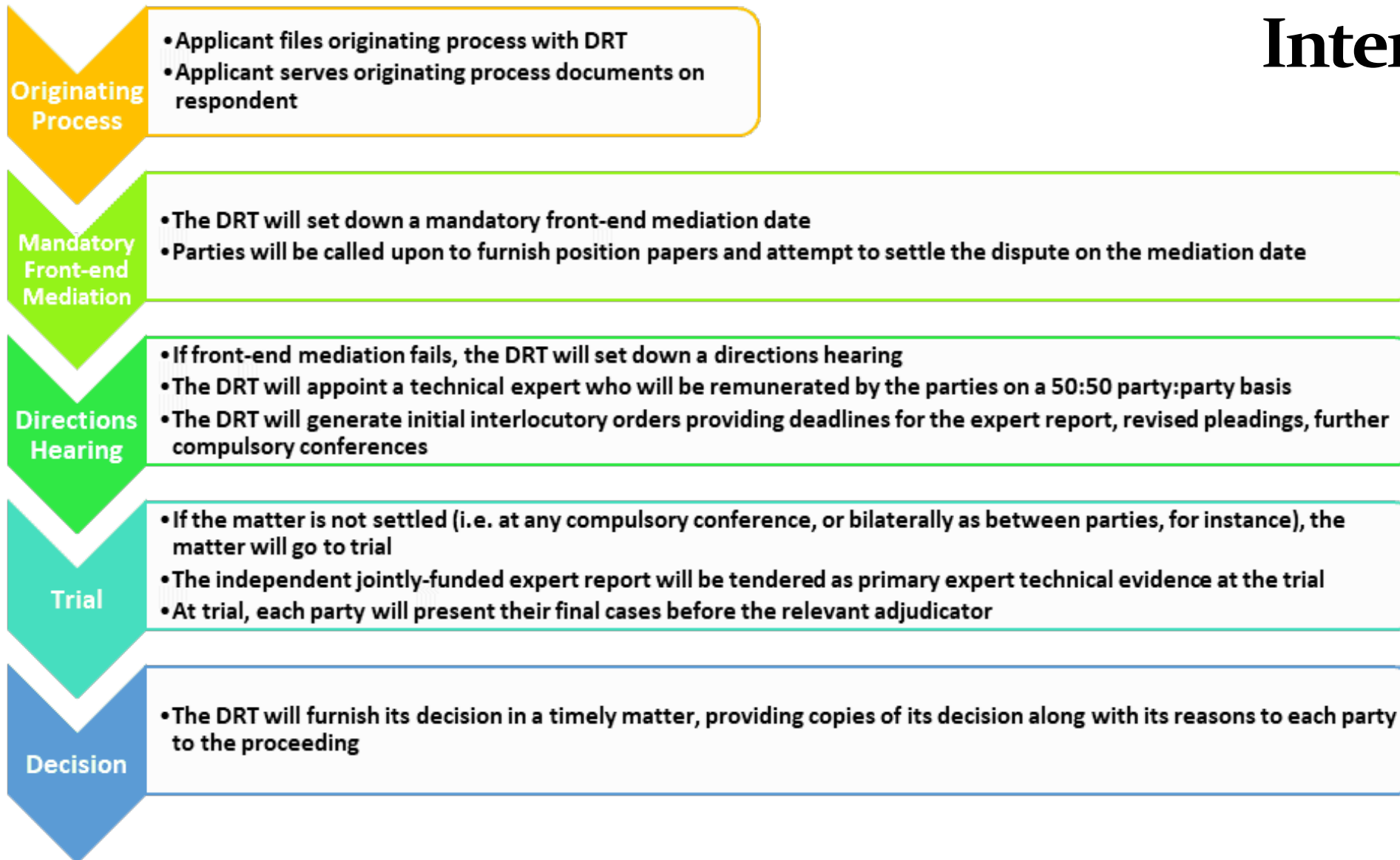
---

# Good Practice- County Court of Victoria/Australia Single Joint Expert Witness Regime

- The Victorian County Court acknowledges the merit in the Court appointing a single joint expert. The practice note leaves a great of discretion to the parties.
- The Civil Procedure Act 2010 (Vic) allows for joint remuneration of expert witnesses.
- This is still a fairly new practice note and the extent to which the practice is adopted is somewhat unclear.
- The default approach to expert evidence in Queensland is that parties agree on a single jointly remunerated expert.



# Best Practice Interlocutory Process



# Fast Track Appeal Bodies for Building Approval Disputes

---



- Some disputes do not necessarily suit the traditional judicial dispute resolution processes of Courts, for example, appeals over a refusal by a building official to issue a building permit or occupancy permit.
- These types of disputes are more suited to be resolved by an appeals board that comprises legally and technically qualified artisans, such as the Victorian Building Appeals Board (BAB).
- The members of the board are pre-eminent in their fields and are Ministerial appointees. There must be a broad spectrum of expertise in terms of the decision makers ranging from building officials, to engineers, architects, and construction lawyers.
- Appeal hearings rarely take longer than a day.

# Fast Track Appeal Bodies for Building Approval Disputes

---



- When called upon to adjudicate over a matter, a panel is convened and the registrar will choose experts that have skills that are bespoke to that which is under consideration. Applicants and respondents will appear with their legal advocates and technical experts and present their submissions.
- The system does not visit a great financial burden upon taxpayers as board members are somewhat altruistic, but attain considerable kudos amongst their peers by virtue of their appointments.
- Key benefits are:
  - Hearings can be convened swiftly.
  - The multi-skilled composition lends itself to holistic and balanced decision making.
  - Decisions are generally published quickly.
  - The cost of the decision-making infrastructure is not great hence is attractive to Treasury.

# Aggregation and Centralisation of Dispute Resolution Theatres

---



- There may need to be harmonised legislative amendments in Civil Procedure laws and Building Legislation along with dialogue and agreement between the Parliamentary members vested with responsibility for the judicial process and Building Ministers to give effect to a good practice cross jurisdictional building dispute resolution paradigm.



# Likely Cost and Saving Reduction

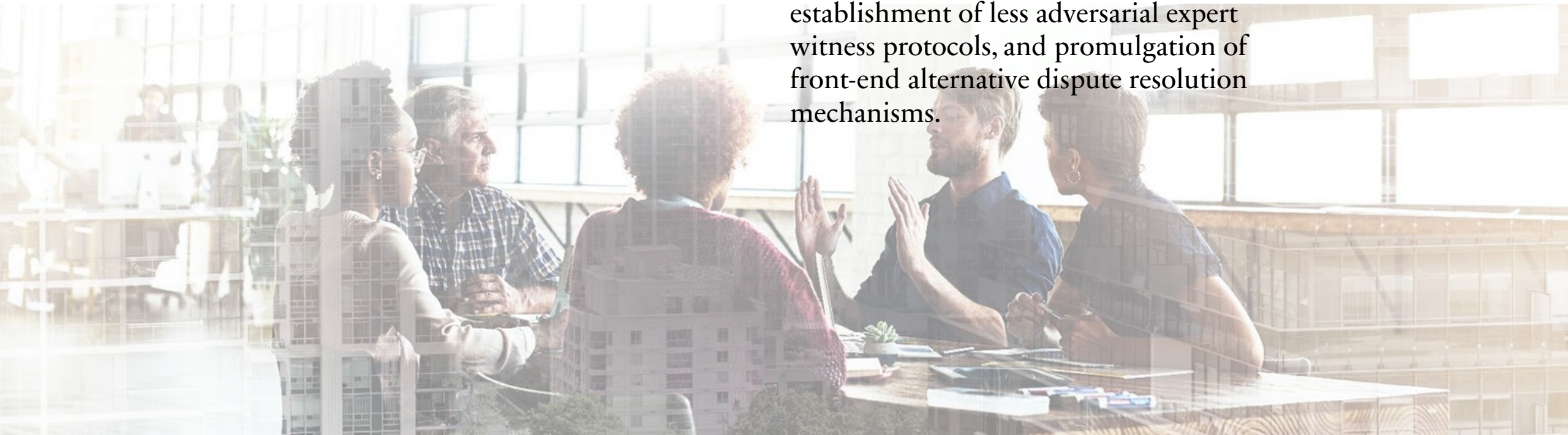


A King's College study showed that successful mediation cost savings are significant. Only 15% of responses reported savings of less than £25,000; 76% saved more than £25,000; and the top 9% of cases saved over £300,000. The cost savings were generally proportional to the cost of the mediation itself. <sup>3</sup>

The survey also indicated that even a failed mediation was not always regarded as negative. It was often still viewed as beneficial – allowing an element of a dispute to be settled, narrowing the disputes, or contributing to a greater understanding of the other side's case generally. <sup>3</sup>

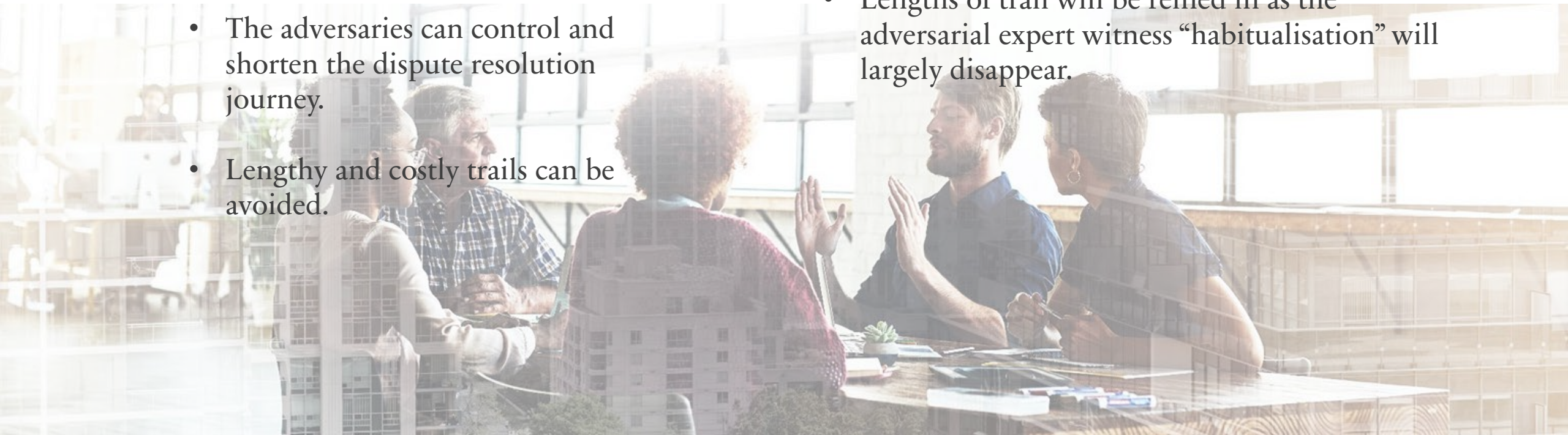
# Concluding Take Outs

- The rationalisation and consolidation of dispute resolution apparatuses will be required to generate faster and more cost-effective dispute resolution theaters.
- There should be an emphasis upon a cross-jurisdictional approach to specialist dispute resolution theatres, the establishment of less adversarial expert witness protocols, and promulgation of front-end alternative dispute resolution mechanisms.



# Concluding Take Outs

- If mediation is made mandatory at an early stage of legal proceedings, immense resources and concentration of money and time can be migrated to more utilitarian and constructive outcomes.
- The adversaries can control and shorten the dispute resolution journey.
- Lengthy and costly trails can be avoided.
- If independent, jointly remunerated tribunal nominated experts are appointed, costs of expert witness retention will plummet.
- Expert witness adversarial advocacy will largely disappear.
- Lengths of trail will be reined in as the adversarial expert witness “habitualisation” will largely disappear.





# LOVEGROVE & COTTON

Construction & Planning Lawyers



University of  
**Salford**  
MANCHESTER

**Presentation conducted by Adj Professor Kim  
Lovegrove MSE, RML.**

## References

1 Harry Colledge and Julia Humpidge, '35% of global spend is burned up in disputes. This Tragic Waste is unnecessary' *Global Construction Review* (Research Article, 16/11/22)  
<<https://www.globalconstructionreview.com/35-of-global-project-spend-is-burned-up-in-disputes-this-tragic-waste-is-unnecessary/>>.

2 The Construction Index, 'Claims and Disputes Plague Major Projects' *The Construction Index: The Construction Search Engine* (Research Article, 28/10/2022)  
<[https://www.theconstructionindex.co.uk/news/view/claims-and-disputes-plague-major-projects?utm\\_source=tci&utm\\_medium=sharing&utm\\_campaign=linkedin](https://www.theconstructionindex.co.uk/news/view/claims-and-disputes-plague-major-projects?utm_source=tci&utm_medium=sharing&utm_campaign=linkedin)>.

3 Nicholas Gould et al, '*Mediating Construction Disputes: An Evaluation of Existing Practice*' King's College London: Centre of Construction Law and Dispute Resolution' (Research Article)  
<[https://www.fenwickelliott.com/sites/default/files/KCL\\_Mediating\\_Construction\\_Complete.pdf](https://www.fenwickelliott.com/sites/default/files/KCL_Mediating_Construction_Complete.pdf)>.