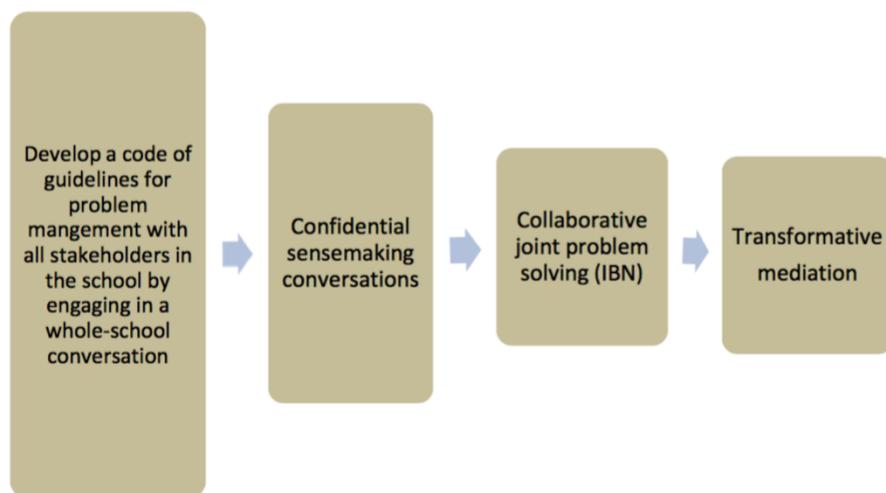


and assists communications between business partners to encourage collaboration so that innovative solutions are found. Whereas in “transformative mediation”, the mediator helps parties go beyond solving the immediate problem to transform their relationship so that future conflict is prevented. It is important to note that mediators do not generally practise only one model and often different models will be tapped into during the course of a mediation as the mediator responds to the parties’ needs and dynamics. Parties may or may not have legal representation at mediation.

Supporters of collaborative law claim it is risky to rely on one person to resolve a dispute¹⁴. Collaborative law is not focussed on any one person but on the collaboration itself¹⁵. It involves in-depth joint meetings between lawyers and their parties after they have entered participation agreements stopping them from using litigation to resolve disputes¹⁶. This process aligns parties and lawyers promoting settlement¹⁷ and requires full discovery fostering openness¹⁸. Despite the benefits of collaborative law being corroborated by overseas studies¹⁹, it is not common in New Zealand and has not extended beyond family law²⁰. This may be similar to the Australian experience where collaborative law has been disadvantaged by a lack of public and lawyer awareness, plus a lack of training opportunities and practice groups²¹. While collaborative law has been used successfully for business disputes overseas²², it might need to be adapted to suit our business sector.

In New Zealand’s education sector, collaborative practices are considered vital for preserving relationships²³. Dr Gaye Greenwood observed that industry experts should be used before lawyers²⁴ because when problems are taken to lawyers and formal processes instigated (such as employment mediation in the format regulated by the Ministry of Business, Innovation and Employment), conflict escalates and groups become polarised²⁵. By using less formal collaborative practices first, parties form psychological contracts with each other to build trust thereby retaining their relationships and avoiding the need to pursue the dispute. Greenwood developed the “Collaborative Conflict Management” model shown in Diagram 2²⁶. This approach has been echoed in a Ministry of Education’s trial dispute resolution process.²⁷

Diagram 2: Embedding CCM A Four Step Process

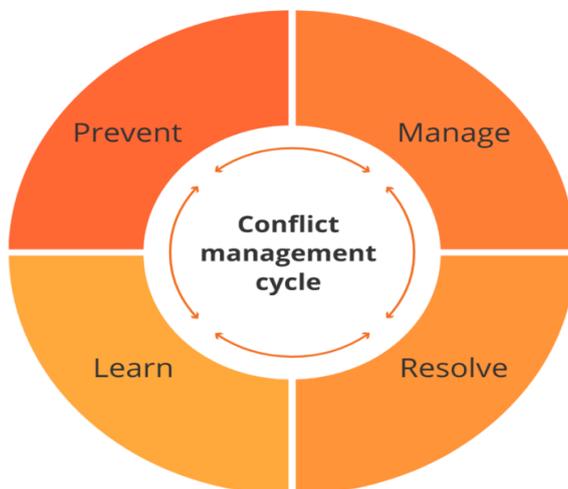


(Reference: Greenwood, G (2016) Figure 9.7 at 220)

Informal collaborative practices are used by some family businesses. A 2016 report on New Zealand family businesses found that nearly half intended to pass the business from one generation to the next within five years²⁸. The need to preserve family relationships through such transitions has led to the development of family constitutions. They are non-binding living documents, created through a facilitated process, where family members develop shared goals on the future of the family business²⁹. This process of collaboration enables open and honest conversations so that sensitive issues can be proactively managed before they

escalate into conflicts – similar to the code of guidelines in Greenwood’s model. If disagreements arise between family members, the family constitution is used as a reminder of what was originally discussed and is updated after the family has reflected, for example, through a conflict management cycle like Diagram 3³⁰:

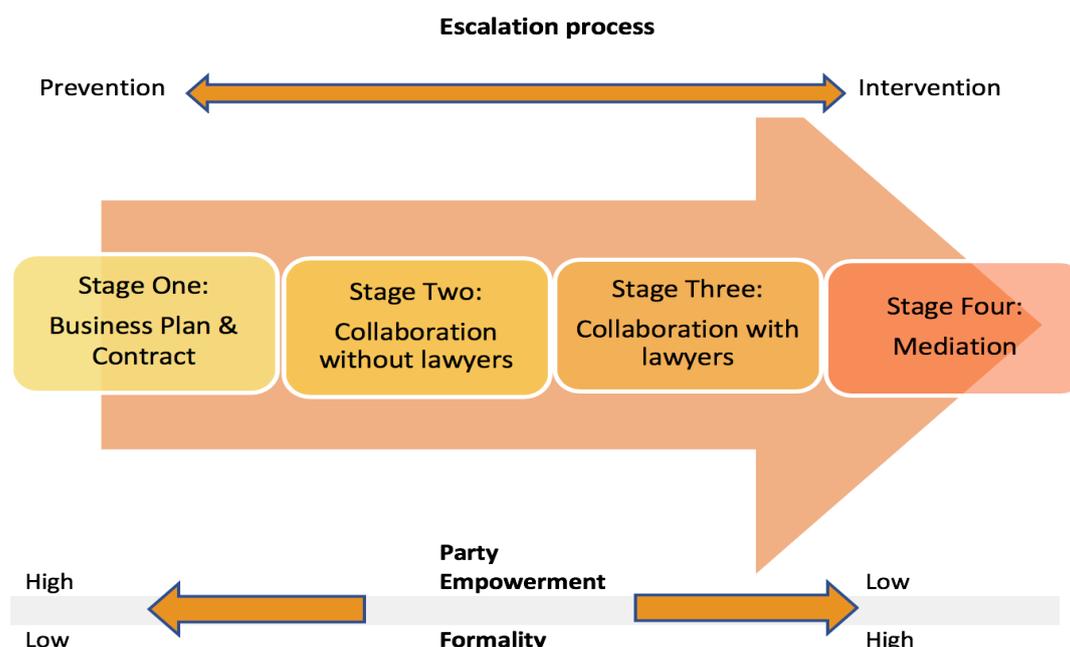
Diagram 3: Conflict Management Cycle



(Reference: Fairway Resolution Limited, Homepage)

To address the challenge of how collaborative practices may be used as an early intervention tool to prevent disagreements from escalating into business disputes, elements of collaborative law, Greenwood’s model and the family constitution process may be used. This is depicted by layering Diagram 4 over the stages of “negotiation and facilitation” in Diagram 1:

Diagram 4: Layers of Collaborative Practices



At Stage One, business plans could be developed with the level of collaboration used for family constitutions. Business plans are created by the people within a business and are reviewed regularly. Therefore they are more bespoke and user-friendly documents for businesses than formal binding contracts like shareholder agreements or joint venture agreements. The latter are developed by lawyers, often by following templates. They may only be varied in writing, normally through the involvement of lawyers. Business plans are more flexible, living documents which can be shaped by a business for its business, like a family may shape its family constitution. A neutral facilitator could be used in their development if there are sensitive conversations to be managed. Business plans could also contain conflict management processes to be followed when conflicts occur such as Diagram 3.

Stage Two could be invoked if disagreements arose during the ordinary course of business by following the process incorporated into the business plan. Similar to steps 2 and 3 of Greenwood's model, disagreements could be managed by conversations and meetings between business partners, perhaps with a neutral facilitator³¹. A facilitator may not be needed if training on how to have sensemaking conversations is given to business partners. Often such training is given within the workplace but its value for relationships between stakeholders such as business partners, shareholders and directors should not be overlooked. To ensure that Stages One and Two are completed, the business plan and agreed conflict management process could be linked to the dispute resolution clauses contained in contracts between business partners (such as shareholder agreements). Such clauses could be tiered so that the parties may only move to the next stage if the conflict remains unresolved from an earlier stage. Sufficient time should be given for each stage to allow for full collaboration³².

Stage Three could involve joint meetings between lawyers and parties, like those used in collaborative law³³. The terms by which they collaborate could be agreed separately to suit the particular conflict in question. For example, they could have a participation agreement that is more "C-Lite" by letting parties proceed to court³⁴. Plus, the exchange of information could be tailored to specific requests³⁵ and be protected by targeted confidentiality clauses. If the parties reach an impasse, the participation agreement could require a mediator to resolve particular difficulties³⁶. Alternatively, the whole matter could be referred to Stage 4 using information gathered from Stage 3.

This article identifies how important collaboration is to business and collaborative practices are in dispute resolution. It considers examples of collaborative practices with characteristics of high party empowerment and low informality. Drawing from them, the model in Diagram 4 has been developed to show how informal collaborative practices may be introduced into relationships between businesses and between business partners to enhance those relationships. The earlier collaborative practices are introduced into those relationships, the more likely disagreements will be prevented from escalating into disputes embroiled in litigation. People now expect practitioners to be more humanistic and strategic with non-legal options, not "war managers"³⁷ - to be less like Trump and more like Ardern. This model can be added to our tool box of dispute resolution options and be built upon or modified by exploring other models³⁸ and collaborating with business executives and their professional advisors.



¹ Prime Minister Ardern's address was given to the United Nations General Assembly on 28 September 2018 and was well-received globally. For example, as reported by E A Roy in The Guardian on 28 September 2018. <https://www.theguardian.com/politics/2018/sep/28/we-are-not-isolated-jacinda-arderns-aiden-speech-to-the-un-rebuts-trump>. The full text can be found at <https://thespinoff.co.nz/politics/28-09-2018/kindness-and-kaitiakitanga-jacinda-ardern-addresses-the-un/>

² Cheung, M (2008) *The Reductionist – Holistic Worldview Dilemma* MAI Review, 2008, 3, Research Note 5 Available at <http://review.mai.ac.nz/MR/article/download/186/186-992-1-PB.pdf>. Collaboration is woven into the core values of whanaungatanga and manaakitanga and in the practice of hui, encouraging full participation in decisions. For definitions of whanaungatanga and manaakitanga refer to http://maoridictionary.co.nz/word/10068_Te_Aka_Maori-English,_English-Maori_Dictionary

³ Mika, J P (4 March 2018) "Big Read: Why Māori culture is good for business" NZ Herald. Available at https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12006138 Māori businesses have an estimated economic asset base of over NZ\$42.6 billion.

⁴ For example, Covey S "The 7 Habits of Highly Effective People" First published in 1989, 25th anniversary edition published on 19 November 2013 Simon & Schuster ISBN10 1476740054

⁵ University of Auckland Auckland Business School Newsroom "Collaboration better than R&D for small businesses" published on March 17, 2017 Available at <https://www.newsroom.co.nz/@future-learning/2017/03/16/14344/collaboration-better-than-rd-for-small-business-success>

⁶ Cloke K (2006) "Crossroads of Conflict" Janis Publications at 171. To learn how to develop more collaborative practices, for example, developing honesty and empathy within yourself as practitioner and with the parties, see Cloke K (2001) "Mediating Dangerously" Jossey-BASS Publications.

⁷ Fisher, R and Ury, W (1981) "Getting to Yes: Negotiating an Agreement without Giving In" at 11-13 (reprinted by Random House Business Books 2012)

⁸ Cloke K (2006) at 31

⁹ Stiponawich, T J (2015) "The International Evolution of Mediation: A Call for Dialogue and Deliberation" (2015) 46 VUWLR 1191 at 1234-1235 Available at <http://www.nzlii.org/nz/journals/VUWLawRw/2015/52.pdf>

¹⁰ Berman LJ (2011) "The Funnel of Conflict Resolution - Part One: The Stages of Conflict and Opportunities for Resolution" Published by Mediate.com February 2011 Available at <http://www.mediationtools.com/articles/FunnelofConflictResolution.html>

¹¹ Marshall B (7 May 2018) Flux Accelerator Partner at The Icehouse. "35% of Founders Are Likely to Suffer a Partnership Breakup; Here's What We've Learned". Available at <https://www.theicehouse.co.nz/35-of-founders-are-likely-to-suffer-a-partnership-breakup-here-is-what-we-have-learned>

¹² Ministry of Business, Innovation & Employment "Understanding dispute resolution - The importance of dispute resolution" available at <https://www.mbie.govt.nz/about/our-work/roles-and-responsibilities/government-centre-dispute-resolution/dispute-resolution-in-nz/understanding-dispute-resolution>

¹³ Some commentators refer to four models of mediation: settlement or positional mediation, facilitative or problem-solving mediation, transformative mediation and evaluative mediation: Boule, L; Goldblatt, V & Green, P (2015) *Mediation Skills and Strategies* Lexis Nexis at Chapter 1

¹⁴ Lande J (2003) "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering" Ohio State Law Journal Vol. 64:1315 2003 at 1325 Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=496722

¹⁵ Zeytoonian, M (2012) "One Key Difference between Mediation and Collaborative Law that is Overlooked". Available at <https://www.mediate.com/articles/ZeytoonianMbl20120228.cfm#>

¹⁶ An example of a participation agreement can be found at https://globalcollaborativelaw.com/wp-content/uploads/2016/11/GCLC_Participation_Agreement_With_Addendum.pdf

¹⁷ Lande J (2003)

¹⁸ Hoffman, D A "Collaborative Law in the World of Business" published in The Collaborative Review, vol. 6, no. 3 (Winter 2003) Available at http://www.motsayandlay.com/articles/CL_in_the_World_of_Business.pdf

¹⁹ For example, Julie MacFarlane's 2005 study conducted in Canada "The Emerging Phenomenon Of Collaborative Family Law (Cfl): A Qualitative Study Of Cfl Cases" 13-15 (June 2005) (Can.) (describing methodology), referred to by Fairman, CM "Growing Pains: Changes in

Collaborative Law and the Challenge of Legal Ethics" (Winter 2008) Campbell Law Review Volume 30 Winter 2008 Number 2 at 5-6 and the 2017 Australian study conducted by Scott, M and Collins P as reported in "The challenges for collaborative lawyers in providing CP processes" Australian Journal of Family Law · August 2017 Available at: <https://www.researchgate.net/publication/319392152>

²⁰ Collaborative Law is practised internationally, for example, the International Academy of Collaborative Professionals has over 5,000 members and 325 practice groups worldwide. See <https://www.collaborativepractice.com/sites/default/files/IACP%20%20History.pdf> . Collaborative Advocacy New Zealand is an organisation made up of lawyers, counsellors, mediators, accountants and other professionals involved in Family Dispute Resolution. See www.collaborativelaw.org.nz. For a review of the development of collaborative law in the family law context, see Greenwood G's paper "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" presented at AMINZ 'Challenges and Change' Conference 5-7 August 2010 Available at http://www.aminz.org.nz/Folder?Action=View%20File&Folder_id=79&File=GGreenwood.PDF

²¹ Scott, M and Collins P "The challenges for collaborative lawyers in providing CP processes" Australian Journal of Family Law · August 2017 Available at: <https://www.researchgate.net/publication/319392152>

²² For example, see the business dispute discussed by Faxon, R P & Zeytoonian M, (Fall 2007). "Prescription For Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case" Collaborative Law Journal Available at http://diclc.com/wp-content/uploads/2016/09/prescription_for_sanity.pdf

²³ Evans, D & Schmidt-McCleave, R (2016) "Collaborative Approaches to Dispute Resolution in Schools" presented at Australia New Zealand Education Law Association Conference 2016. Available at <https://www.fairwayresolution.com/resources/whats-new/collaboration-the-new-frontier-in-dispute-resolution>

²⁴ For example, members of relevant third party associations as the New Zealand Education Institute or the New Zealand School Trustees Association as observed by Chief Judge Colgan in <https://employmentcourt.govt.nz/assets/Documents/Decisions/NZEmpC-4-Lewis-v-Howick-College-Board-of-Trustees-2010-NZEmpC-4-19-January-2010-.pdf> at 123

²⁵ Greenwood, G (2016) "Transforming Employment Relationships? Making sense of conflict management in the workplace" A thesis submitted to Auckland University of Technology in fulfilment of the requirements for the degree of Doctor of Philosophy (PhD) 2016 Faculty of Business and Law Available at <https://aut.researchgateway.ac.nz/bitstream/handle/10292/9944/GreenwoodG.pdf?sequence=3&isAllowed=y> at 214-216

²⁶ Greenwood, G (2016) at 220.

²⁷ The Ministry of Education currently has a trial in three regions of New Zealand for parents of children who need extra learning support. First, participants must exhaust their school's internal complaint process, eg talking to their principal. If that does not resolve the issue then they may access the Ministry's Dispute Resolution Process: (1) The Ministry will supply a facilitator to work with the school and parents (2) if facilitation does not work, the school or parents can ask the regional Director of Education for a review to see if everything that should have been done has been done. (3) If everyone agrees, independent mediation is available. Further information is available at <https://parents.education.govt.nz/learning-support/learning-support-needs/resolving-problems-about-your-childs-learning-support/>

²⁸ PwC New Zealand "The 2016 PwC New Zealand Family Business Survey" Available at <https://www.pwc.co.nz/insights-and-publications/2016-publications/the-2016-pwc-new-zealand-family-business-survey.html>

²⁹ Smellie, P (01 July 2018) "The Secrets to a Successful Family-Run Business or Trust" reported on Noted. Available at <https://www.noted.co.nz/money/investment/how-to-run-a-successful-family-business-or-trust/>

³⁰ Fairway Resolution Limited shows this Conflict Management Cycle on its homepage at <https://www.fairwayresolution.com/>

³² For example, the model dispute resolution clause suggested by the Resolution Institute for New Zealand at clause 1.3.2 provides for 7 days "(or such further period as the parties may agree in writing)" before a dispute proceeds to mediation. Available at <https://www.resolution.institute/documents/item/1707>

³³ Bryan, K A (2008) "Why Should Businesses Hire Settlement Counsel?" Journal of Dispute Resolution Volume 2008 Issue 1 Article 10 Available at <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1088&context=jdr>

³⁴ Lande J (2003). "C-Lite" is a term used to describe participation agreements without disqualification provisions in them. For example, the agreements may permit parties to proceed to litigation or to retain counsel.

³⁵ Hoffman, DA & Hoyt, J (Summer 2004) "CL Agreements for Business Cases" Collaborative Law Journal Available at <https://blc.law/wp-content/uploads/2016/12/2005-09-CL-Agreements-Business-Cases-branchmainlanguagedefault.pdf>

³⁶ Bryan, K A (2008)

³⁷ Scott, M A K *Collaborative Law: Dispute Resolution Competencies For The 'New Advocacy'* Published in Vol 8 No 1 (QUTLJ) (2008) Available at <http://classic.austlii.edu.au/au/journals/QUTLJ/2008/11.html>

³⁸ For example, the "relational facilitation" model of early intervention: Stiponawich, T J (2015) at 1241-1243