

**CONFLICT IN THE COMPACT CITY:  
PREFERENCES AND THE SEARCH FOR JUSTICE**

By

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## STUDENT DECLARATION

“I, Peter Francis James Condliffe, declare that the PhD thesis entitled *Conflict in the Compact City: Preferences and the Search for Justice* is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work”.

**Signature**

**Date**

## ABSTRACT

In this study the high density housing sector was studied as a domain for the development of an alternative model of dispute management to that contained in the relevant statutory regime. This formed the basis for a simulation that would empirically test two hundred and fifty-two participants on three levels. These were their preferences, their perceptions of justice and some elements of efficiency. Each of these levels were tested in relation to three processes: mediation followed by arbitration conducted by the same person; mediation followed by arbitration conducted by a different person; and arbitration followed by mediation conducted by the same person.

The research was constructed around two content theories: the instrumental model and the relational model. The instrumental model is principally concerned with the distribution of control in intervention processes. Control theory in particular underpinned the preference research. Relational models, including the group-value model, propose that justice decisions lead to conclusions about one's self-identity and self-esteem and how needs around these are met. The relational models, particularly heuristic fairness theory, were useful in examining the impact of outcomes and other variables on overall perceptions of fairness.

Participants preferred a process that they judged gave them more control. In this research mediation followed by arbitration by the same person was preferred. Participants did not rate any of the three processes more just than the others at post-mediation and post-arbitration stages of the experiment excepting those participants who received an adverse outcome at the end of the arbitration. These participants appeared to use the information about the adverse outcome as a shortcut, or heuristic, in deciding whether the process in a broader sense was fair.

The efficiency of the three simulated processes was examined to provide some data about the way in which they can be evaluated on various criteria and how these could be integrated with justice measures.

## **PUBLICATIONS AND CONFERENCE PRESENTATIONS RELATED TO THE THESIS RESEARCH**

### **Conferences**

Peter Condliffe, “Conflict in the Compact City: Disputing Preferences and Justice in Dispute Resolution” (Paper presented at GDN 2009: An International Meeting on Group Decision and Negotiation, Toronto, Canada, 14 - 17 June, 2009).

Peter Condliffe and Brooke Abrahams, “Providing Online Decision Support for Owners Corporation Disputes” (Proceedings of the 4th IMA Conference on Analysing Conflict Transformation, to be held at St. Anne's College, University of Oxford on 28 - 30 June 2010)

Brooke Abrahams, Peter Condliffe and John Zeleznikow, “Managing Owners Corporation Disputes with Negotiation Decision Support and Alternative Resolution Procedures” in G J De Vreede (ed) *Proceedings of GDN 2010, the 11th Group Decision and Negotiation Conference, Delft, Netherlands, 21 – 23 June 2010*, (University of Nebraska at Omaha, 2010) 122

Brooke Abrahams, Peter Condliffe and John Zeleznikow, “An OWL Ontology and Bayesian Network to Support Legal Reasoning in the Owners Corporation Domain” (Paper presented at International Conference on Data Engineering and Internet Technology, Bali, Indonesia, 15-17 March 2011)

Brooke Abrahams, Peter Condliffe and John Zeleznikow, “An OWL Ontology and Bayesian Network to Support Legal Reasoning in the Owners Corporation Domain” in M Poblet, B Abrahams and J Zeleznikow (eds), *Proceedings of the 6th International Workshop on Online Dispute Resolution* (CEUR Workshop Proceedings Series, 2011) 51

Brooke Abrahams, Peter Condliffe and John Zeleznikow, “A Legal Decision Support Guide for Owners Corporation Cases” in R Winkels, (ed) *Proceedings of Jurix 2010 - the 23rd International Conference on Legal Knowledge and Information Systems, Liverpool, United Kingdom* (IOS Press, 2010) 147

Rebecca Leshinsky, A Parenyi and Peter Condliffe, "Appropriate Dispute Resolution for Owners Corporation Internal Disputes - a Case Study from Victoria, Australia" (Paper presented at 3<sup>rd</sup> World Planning Schools Congress, Perth, 2011)

## Papers

Brooke Abrahams, Peter Condliffe and John Zeleznikow, “Managing Owners Corporation Disputes with Legal Decision Support and Alternative Resolution Procedures” [2011] *Group Decision and Negotiation*, published online 3 March 2010, <http://0www.springerlink.com.library.vu.edu.au/content/2j17774266830554/fulltext.pdf>

Peter Condliffe, Brooke Abrahams and John Zeleznikow, “Providing Online Decision Support for Owners Corporation Disputes” (2011) 22(2) *Australasian Dispute Resolution Journal* 84

Rebecca Leshinsky, Kathy Douglas and Peter Condliffe, “Dispute Resolution under the *Owners Corporation Act 2006* (Vic): Engaging with Conflict in Communal Living” accepted for publication in the *Property Law Review*

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## LIST OF ABBREVIATIONS AND ACRONYMS

ABS	Australian Bureau of Statistics
ADR	Alternative Dispute Resolution
ALRC	Australian Law Reform Commission
ANCOVA	One-way between-groups analysis of covariance
ANOVA	One-way between-groups analysis
Arb/Med	Arbitration and mediation with the same person
CAV	Consumer Affairs Victoria
MANOVA	Multivariate analysis of variance
Med/Arb	Mediation and arbitration with the same person
Med/Arb Different	Mediation and arbitration with a different person
NADRAC	National Alternative Dispute Resolution Advisory Committee
NSS	Negotiation support systems
NSW	New South Wales
OC	Owners Corporation
SPSS	Statistical Package for the Social Sciences
TISCO	Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems
UCA	<i>Uniform Condominium Act 1977</i>
UPCA	<i>Uniform Planned Community Act 1980</i>
VBC	Victoria Body Corporate Pty Ltd
VCAT	Victorian Civil and Administrative Tribunal

## CHAPTER 1: INTRODUCTION - AN OUTLINE OF THE THESIS

*Australian cities are facing a revolution. Little over a generation ago, living in flats was a minority pastime. Relatively few Australians had experienced such housing and fewer actually wanted to. Even today, the Australian suburban ideal of a separate house on a block of land is still the aspirational choice for many. But this may well be about to change forever. Under current metropolitan planning orthodoxy, the higher density compact city is about to become an Australian urban norm.\**

### 1.1 The ARC Grant

This research forms part of a project funded by the Australian Research Council (Project ID: LP 0882329) titled 'Developing Negotiation Decision Support Systems that Promote Constructive Relationships Following Disputes' ('the Project'). It commenced in March 2008. Industry partners are the Queensland Branch of Relationships Australia and Victoria Body Corporate Pty Ltd ('VBC'). In general the research project aims to develop negotiation support systems ('NSS') that accord with notions of equity and fairness. This will hopefully lead to more durable outcomes within contexts where ongoing relationships are important - families and owners corporations ('OC'), formerly known in Victoria, Australia, where the research occurred, as 'body corporate' entities.

The project will also seek to develop online NSS that will complement existing systems of decision support and conflict management in family and OC contexts. The research that forms the basis of this thesis is narrower and will focus upon aspects of dispute management process in OC. From this focus the project team can hopefully further develop online architecture that draws upon the implications and findings of this research.

The reason for this specific focus is both practical and in response to the expressed needs of one of the industry partners - VBC. New legislation in Victoria to regulate OC prompted VBC to develop an internal dispute management process for owners, managers and residents. This provided the author with an opportunity not only to design

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\* B Randolph, "Delivering the Compact City in Australia: Current Trends and Future Implications" (2006) 4 *Urban Policy and Research* 473

such a process but also to research and test issues around such disputes. Accordingly, the author has developed a dispute management process that can be used by OC in Victoria under the legislative regime now in place. This was after a period of consultation and research into comparable legislative and regulatory regimes to those existing in Victoria.

## 1.2 The Australian Housing Sector and OC

Since 1981 the OC housing sector has been growing at about twice that of detached housing. In the big population centres of Sydney and Melbourne such housing now comprises approximately one third of all dwellings.<sup>1</sup> The social impact of this growth upon Australian society is expected to be considerable but is yet to be fully tested and is an important issue for politicians, social planners and the community generally.

The successful management of the OC sector overall will depend upon a number of factors. These will include the quality of the accommodation and buildings themselves as well as the utility of governance arrangements.<sup>2</sup> In addition, the transient nature and other specific demographic characteristics of the resident population, and their relations with owners and absent investor landlords, complicate the management arrangements. The organization of conflict and disputes within these compact urban communities is expected to reflect some of these characteristics.<sup>3</sup>

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<sup>1</sup> Australian Bureau of Statistics, *National Census 2006* (Canberra, ABS, 2006).

<sup>2</sup> M. Billig, "Building Walls of Brick and Breaching Walls of Separation" (2003) 35(2) *Environment and Behavior* 227; H Easthope and B Randolph, "Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia," *Housing Studies* 24, no. 2 (2009) 243; J Warnken, R Russell and B Faulkner, "Condominium Developments in Maturing Destinations: Potentials and Problems of Long-Term Sustainability" (2003) 24(2) *Tourism Management* 155..

<sup>3</sup> Billig, above n 2; N M Yip, and R Forrest, "Property Owning Democracies? Home Owner Corporations in Hong Kong" (2002) 17(5) *Housing Studies* 703; M Miskin, "Give Mediation a Chance: The High Price of Condominium Arbitration" [2006] *The Lawyers Weekly*; M Torres et al, "Quality of Life of Elderly Subjects Living in Basic Social Dwellings" (2008) 136(3) *Revista Medica De Chile* 325; M West and E Morris, "The Tragedy of the Condominiums: Legal Responses to Collective Action Problems after the Kobe Earthquake," (2003) 51 *American Journal of Comparative Law* 51 903.

### 1.3 OC Disputes

Disputes in OC are a form of ‘neighbourhood disputing’ that can be divisive and damaging to the individuals and communities concerned. The *Owners Corporations Act 2006* (Vic) (“the *Act*”) is designed to promote self-governance by providing a legislative framework for owners and residents to work together and to resolve disputes through dialogue, consultation and negotiation.

The *Act* provides for three tiers of dispute management. The first tier is dispute prevention. The second tier provides for access to Consumer Affairs Victoria (‘CAV’) – the responsible government department that provides conciliation services for disputes – and, as necessary, referral to the Victorian Civil and Administrative Tribunal (‘VCAT’). The third tier is VCAT itself that was originally designed to adjudicate cases involving more complex technical and legal issues relating to the operations of OC.

The *Act* also provides that legislated model rules (‘the Rules’) will apply if the OC itself does not have its own internal rules in place: see Part II Division 1 of the *Act*.<sup>4</sup> These model rules are very broad and require, amongst other things, that a written notification of disputes must be made to OC and that the parties in dispute, along with the corporation, must meet to discuss the matter. There are a number of issues concerning the Rules in relation to dispute resolution. First, they are quite general in approach and therefore may not meet the needs of particular OC. Second, they do not specifically allow for the use of specialist third party interventions such as mediation or arbitration. This may leave some disputants uncertain about the procedures or protocols to be adopted. Third, this lack of clear procedures could, for some complex disputes, lead to considerable expense and delay. Finally, the Rules could be quite difficult to implement especially because they require ‘grievance committees or OC’ to meet with parties to the dispute within 14 days of notification. This may be quite difficult for OC to organize and manage and consequently put OC themselves in breach of the *Act* if this provision is not met.

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<sup>4</sup> Sections 162–169.

## 1.4 Designing an Alternative Process

In response to these issues, as part of initial background research and a request from VBC, the author has designed a three-stage process to manage disputes in OC. This consists of self-help, conciliation and arbitration. The process is intended to allow the parties to present their cases without the need for legal representation. It requires the parties to present their cases and supporting materials to a conciliator and then an arbitrator, if required. The advantage of proceeding in this way is that it potentially allows for the quick and efficient resolution of disputes. Also, the parties and the OC can keep the dispute within a clearly defined process where they are able to plan or predict a process with some certainty.

## 1.5 The Research Design

This research will compare three types of third party intervention in a simulated OC dispute based upon the work the author has done in developing a dispute process for VBC. These types of interventions are different combinations of mediation and arbitration. Mediation and arbitration are defined as follows:

**Arbitration:** A process of adjudication where the parties present information/evidence and arguments to the arbitrator who then makes a determination that the parties agree to be bound by.

**Mediation:** a facilitative process where the mediator helps the parties identify issues, develop options and consider alternatives to enable the parties to reach their own solution to the issue/s. The mediator does not offer advice on the content of the dispute but is concerned with providing a process that enables the parties to manage the matter in their own way.<sup>5</sup>

Participants in the simulations will participate in one of three simulated processes as follows:

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<sup>5</sup> Derived from NADRAC, Commonwealth, *Dispute Resolution Terms* (2003).

**Choice 1: Arbitration followed by mediation known as Arb/Med.** This is a process where the fictional Committee of Management appoints an arbitrator. The parties will present information and arguments orally and/or in writing to the arbitrator who will make a decision but not initially reveal it to them. Instead the arbitrator will place his/her decision in a sealed envelope only to be opened if the parties are subsequently not able to settle the matter. After sealing the decision in an envelope the arbitrator will change to the role of a mediator, and will use that process to try and help the parties reach a settlement. If the parties cannot settle the matter in a reasonable time the arbitrator/mediator will then revert to the role of arbitrator, open the sealed envelope and deliver the decision.

**Choice 2: Mediation followed by arbitration by the same person known as Med/Arb.Same.** This is a process where the mediator will help the other parties to reach their own decision. If they cannot reach a decision within a reasonable time the mediator will bring the mediation to a close and will commence arbitration. The parties will be able to present arguments and information to the arbitrator who will then make a decision.

**Choice 3: Mediation followed by arbitration by a different person known as Med/Arb.Diff.** This is similar to Med/Arb.Same except that if the parties cannot reach agreement at the mediation phase a different person to the mediator will be appointed to arbitrate the matter.

The epistemological basis for the research is a post-positivist evolutionary and critical approach that will employ a complex methodology as further outlined in Chapter 2..<sup>6</sup> The simulations will be complemented by extensive statistical and some content analysis. A variety of methods will be used to both conduct the research and view the data indicating a method and methodology that will be procedurally complex and which approaches the research questions from a number of vantage points.

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<sup>6</sup> D Campbell, "Evolutionary Epistemology" in G Radnitzky and W W Bartley III (eds), *Evolutionary Epistemology, Rationality, and the Sociology of Knowledge*, (Open Court, 1987); A Danailov and C Togel, "Evolutionary epistemology : science philosophy" in G Greenberg and E Tobach (eds), *Theories of the Evolution of Knowing: Proceedings of the Fourth T.C. Schneirla Conference* (Lawrence Erlbaum Associates, 1987) 19; A Ryan, "Post-Positivist Approaches to Research" in M Antonesa et al, *Researching and Writing Your Thesis: A Guide for Postgraduate Students* (MACE: Maynooth Adult and Community Education, 2006) 12.

The design is in part inspired by the approach of Barron who used a multiplex approach, combining experimental simulation and post negotiation semi-structured interviews, to the study of different approaches to salary negotiation by men and women.<sup>7</sup> In particular, Barron's use of statistical analysis and content analysis is reflected in the approach taken in the present research. The work of Colquitt in validating and refining four factors in justice research (distributive, procedural, interpersonal and interactional), and an adaptation of his scale, will be used to measure these aspects.<sup>8</sup> A variation on Shestowsky's preference scales for each dispute intervention type will be used to measure preference.<sup>9</sup> Efficiency of process will be measured by a simple time measurement taken of each alternative process as well as a comparison of outcomes. A partial replication of the important work examining the efficacy of Arb/Med procedures by Conlon and Moon will be used to explore this aspect.<sup>10</sup>

The research centres on a two to three hour simulation conducted with 252 participants, using a mix of graduate and undergraduate students. Whilst there have been similar studies of such dispute resolution processes in settings as diverse as labour, organizational, environmental and political disputes, no academic studies exist in the area of OC disputes.<sup>11</sup> This research will attempt to provide some guidance to the optimum process to be used in such disputing environments in Australia.

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<sup>7</sup> L Barron, "Ask and You Shall Receive? Gender Differences in Negotiators' Beliefs about Requests for a Higher Salary" (2003) 56(6) *Human Relations* 635.

<sup>8</sup> JA Colquitt, "On the Dimensionality of Organizational Justice: A Construct Validation of a Measure" (2001) 86(3) *Journal of Applied Psychology* 386.

<sup>9</sup> D Shestowsky, "Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea" (2004) 10 (3) *Psychology, Public Policy & Law* 211.

<sup>10</sup> D Conlon and H Moon, "Putting the Cart before the Horse: The Benefits of Arbitrating before Mediating," (2002) 87(5) *Journal of Applied Psychology* 978.

<sup>11</sup> See: P Carnevale and C De Dreu, "Laboratory Experiments on Negotiation and Social Conflict" (2005) 10 *International Negotiation* Conlon and Moon, above n 10; J Thibaut and L Walker, "A Theory of Procedure" (1978) 66(3) *California Law Review* 541; P Carnevale and M Leatherwood, "Mediation and The "Chilling" Effect of Med-Arb in a Simulated Labor-Management Dispute" (Paper presented at the 93<sup>rd</sup> Annual Convention of the American Convention of the Psychological Association, 23-27 August 1985); W Ross, C Brantmeier, and T Ciriacks, "The Impact of Hybrid Dispute-Resolution Procedures on Constituent Fairness Judgments" (2002) 32(6) *Journal of Applied Social Psychology* 1151; W Ross and D Conlon, "Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration" (2000) 25(2) *Academy of Management Review* 416.

## 1.6 The Research Questions

These considerations lead to the following core questions or propositions:

**Hypotheses 1:** When presented with a preference would parties prefer Med/Arb over Arb/Med?

**Hypotheses 2:** Would disputants who are owners of OC lots rate higher the distributional, procedural, interpersonal and interactional justice elements of Med/Arb.Same and Med/Arb.Diff than the same aspects of Arb/Med, compared to disputants who are renters of lots?

**Hypotheses 3:** Would Arb/Med be more efficient in terms of length of process and result in more mediated settlements than Med/Arb.Diff and Med/Arb.Same?

**Hypotheses 4:** Is there a correlation between the “different types“of justice so that parties who give a higher rating to distributive justice elements after arbitration regard the experimental process to be procedurally, interpersonally and interactionally more just than those parties who give lower ratings to the same distributive justice elements after receiving an arbitrated ruling but not before?

## 1.7 The Aims of the Research

The ongoing management and viability of the OC sector is of importance for not only local and larger communities, but also within the realms of overall governmental social, demographic and urban planning. International comparisons and applicability will be possible to consider and it would be expected that this research will be of interest to a wide range of academics and practitioners in government, industry and such diverse

groups as legal, planning and building/property management professionals. It adds to a long line of academic research into conflict management and negotiation processes.<sup>12</sup>

As a recent large content-analysis of over nine hundred articles in negotiation concluded, there are potentially fruitful avenues for future research including the combination of diverse methods for the same research question, known as triangulation.<sup>13</sup> This research will attempt to reflect and contribute to that analysis.

It will also build upon and complement the work of Professor Zeleznikow and his work into decision support systems and issues of fairness in various conflict contexts, as well as on his attempts to move beyond the existing paradigms of an interest-based focus on negotiation to a more holistic view.<sup>14</sup> The present research, like Zeleznikow's work, builds upon and supports the research of key theorists such as Pruitt and others who are keen to move outside the confines of a narrow interest-based approach to research in this field.<sup>15</sup> Also, it will draw from the work by Professor Sourdin and colleagues who have, inter alia, analysed the operation and fairness of 'disputing systems' in such diverse contexts as the finance industry, higher courts and tribunals.<sup>16</sup>

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<sup>12</sup> See for example: R J Bies and J F Moag, "Interactional Justice: Communication Criteria of Fairness" in R J Lewicki, B H Sheppard and M H Bazerman (eds) *Research on Negotiations in Organizations* (JAI Press, 1986) 43; N Ambady et al, "Surgeons' Tone of Voice: A Clue to Malpractice History" [2002] (July) *Surgery* 6; J A Colquitt et al, "Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research" (2001) 86(3) *Journal of Applied Psychology* 425; R Cropanzano and R Folger, "Procedural Justice and Worker Motivation" in R M Steers and L W Porter (eds) *Motivation and Work Behavior* (McGraw-Hill, 1991); M Deutsch, "Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis for Distributive Justice?" (1975) 31 *Journal of Social Issues* 137; D Druckman and C Albin, "Distributive Justice and the Durability of Negotiated Agreements" in (2008) 10 *The Australian Centre for Peace and Conflict Studies (ACPACS) University of Queensland Occasional Papers Series* [Online]; J Greenberg, "The Social Side of Fairness: Interpersonal and Informational Classes of Organizational Justice" in R Cropanzano (ed) *Justice in the Workplace: Approaching Fairness in Human Resource Management* (Hillsdale, NJ:Lawrence Erlbaum Associates, 1993)79; J Greenberg, J A Colquitt, (ed) *Handbook of Organizational Justice* (Lawrence Erlbaum Associates, 2005); G S Leventhal, "The Distribution of Rewards and Resources in Groups and Organizations" in L Berkowitz and W Walster (eds) *Advances in Experimental Social Psychology* . (Academic Press, 1976) 91; Thibaut and Walker, above n 11.

<sup>13</sup> M Buelens et al, "Methodological Issues in Negotiation Research: A State-of-the-Art-Review" (2008) 17(4) *Group Decision Negotiation* 321.

<sup>14</sup> Ibid; J Zeleznikow and E Bellucci, "Family\_Mediator - Adding Notions of Fairness to Those of Interests" (Paper presented at the Nineteenth International Conference on Legal Knowledge Based System, Amsterdam, Netherlands, 2006); J Zeleznikow and A Vincent, "Providing Decision Support for Negotiation: The Need for Adding Notions of Fairness to Those of Interests" (2007) 38 *University of Toledo Law Reviews* 101.

<sup>15</sup> D G Pruitt and P Carnevale (eds), *Negotiation in Social Conflict* (Open University Press, 1993).

<sup>16</sup> See for example: T Sourdin and T Matruglio, *Evaluating Mediation - New South Wales Settlement Scheme 2002* (La Trobe University and the Law Society of New South Wales, 2004); T Sourdin, *Dispute Resolution Processes for Credit Consumers* (LaTrobe University, 2007) available at [http://www.eac.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Credit\\_Research/\\$file/credit\\_report\\_dispute\\_resolution\\_processes\\_for\\_credit\\_consumers.pdf](http://www.eac.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Research/$file/credit_report_dispute_resolution_processes_for_credit_consumers.pdf) last accessed March 21 2011; T Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Australian Centre for Peace and Conflict Studies, University of Queensland, 2008).

## **1.8 Outline of the Thesis**

The thesis is organized into eight chapters which follow the logical sequencing of the research. Each of the Chapters is divided into a theoretical analysis and literature review followed by a description of the experimental results. This arrangement does away with the need for a Chapter devoted to simply a literature review and perhaps makes it easier to follow the subject matter of each. References are subdivided into book, journal, case sections and government publications. The Chapters are:

Chapter 1: Introduction: An Outline of the Thesis

Chapter 2: Methodology

This research, particularly at the epistemological end of the conceptual string, is indebted to the work of the American social scientist Donald Campbell who conceived of research as a struggle between competing ideas which are then adopted and then adapted to manage problems in the social environment. Bringing this approach to bear upon the research questions indicates a method and methodology that will be procedurally complex and approaches the questions from a number of vantage points. The questions posed in this thesis were tested in a structured simulation conducted with post-graduate and undergraduate university students between January and August 2010. Two hundred and fifty-two participants returned the completed questionnaires.

Chapter 3: The OC Housing Sector: Structure, Conflict and Management

OC, or body corporate units as they used to be called in Victoria, are a way of dividing and individually owning lots in a building or property located on a single piece of land. Government planning is increasingly predicated upon a desire to have a larger proportion of residential growth based upon higher density housing much of which will involve OC management structures. This is for a number of reasons including the need to control urban sprawl, the decline in family size, ageing of the population and the desire to infill large inner suburban spaces such as old wharves and industrial areas. A large part of the population will, because of

these various trends, have little choice but to elect for the OC option. The rate of growth of OC figures, according to Australian Bureau of Statistics ('ABS'), is about twice that of detached housing since 1981. The success of the sector overall will depend upon a number of factors. These will include the quality of the accommodation and buildings themselves as well as the ability of governance arrangements to manage conflict. This Chapter will define the different processes to be used in the experiment and describes the development of an alternative scheme of conflict management in the OC sector utilizing mediation/conciliation and arbitration processes.

#### Chapter 4: Preferences

The first hypothesis in this research is:

*When presented with a preference would parties prefer Med/Arb over Arb/Med?*

This question is of some importance because the general utility of such processes will be measured by the preferences expressed by people. This Chapter outlines the theoretical background to preferences research and the results of the simulation where participants were given a choice between three processes: Med/Arb Same; Med/Arb Different and; Arb/Med.

#### Chapter 5: Justice and Fairness: How do disputants who receive worse outcomes than others or who occupy certain roles perceive these elements?

My major concern in examining Arb/Med, Med/Arb Same and Med/Arb Different, within the context of OC disputes, is upon the procedural, distributive, informational, and interpersonal fairness or justice judgments of the participants. This Chapter is concerned with these concepts and how participants in the simulation rated each of these elements at the end of the mediation and arbitration phases respectively.

#### Chapter 6: Efficiency

Efficiency is an element of dispute system design which is seen as fundamental to delivering fair and timely outcomes. This Chapter examines the literature in this field and the issues presented in measuring elements associated with the concept of efficiency including timeliness and length of proceedings. A review of the literature which examines the interplay between dispute resolution processes and economic analysis shows that overly focusing on efficiency alone can be potentially misleading and limiting. It also suggests the need to build fairness into an analysis of costs.

## Chapter 7: Conclusion

This Chapter summarizes some of the major findings of this study and recommends the need for further research and reform. Contributions the research has made are summarised. This is balanced by recognition of the limitations of the study. The research was initially motivated by the need to design an alternative dispute resolution process to the legislated one in existence for OC disputes. Understanding the key elements of dispute system design and how it can be improved is a key part of the analysis resulting from the experiment. The need for further academic research is related to a further and perhaps more pragmatic desire for improved understanding of dispute system design and makes a final critique of the existing system for the management of OC disputes in Victoria.

## References

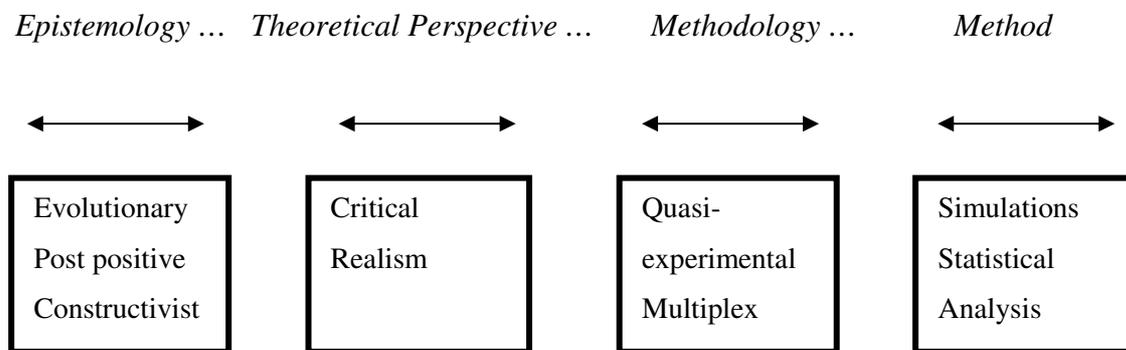
The References section is divided into Books, Articles, Cases, Legislation and Government Reports in which each reference is cited alphabetically.

## CHAPTER 2: METHODOLOGY

### 2.1 Introduction

Good research requires a conceptual framework that incorporates both a cohesive design and ‘legitimate connections,’ or ‘conceptual string,’ between epistemology, theoretical perspective, methodology and methods.<sup>17</sup> The conceptual string was originally conceptualised as outlined in Figure 2.1.

**Figure 2.1: The ‘Conceptual String’ of the Research**



This research, particularly at the epistemological end of the conceptual string, is indebted to the work of the American social scientist Donald Campbell who proposed a rather Darwinian conception of the struggle for ideas and the way they are adopted and then adapted to manage problems in the social environment.<sup>18</sup> Evolutionary philosophers also call themselves ‘hypothetical realists’, a term developed by Campbell in 1959 which implies the uncertain nature of our knowledge of the outside world.<sup>19</sup>

This scepticism about scientific knowledge, especially when applied to the social sciences, is now generally termed ‘critical realism’ and is a theoretical perspective that

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<sup>17</sup> M Crotty, *The Foundations of Social Research: Meaning and Perspective in the Research Process* (Sage, 1998); K Landvogt, *Transforming Talk in Community-Based Groupwork* (University of Queensland, 2004).

<sup>18</sup> Danailov and Togel, above n 6.

<sup>19</sup> Ibid.

lies behind evolutionary epistemology.<sup>20</sup> The assumptions which inform this research are that of an outside reality which one's senses give access to but which can only be imperfectly known. It is impossible to prove a question or theory, although it may be possible to show they are not disconfirmed.<sup>21</sup> In this sense the epistemological and theoretical strings of this research place it firmly in the 'post positivist' school which posits that variable relations or facts are probabilistic, not deterministic.<sup>22</sup> In this research the findings are only probabilistic in the sense that they highlight some possible relationships between the variables described in the hypotheses above. The approach of the research is informed by and overlaps with a number of interlaced social constructivist frameworks including organizational justice theory.<sup>23</sup> That is that the research results have meaning in their particular context and from the viewpoint of those involved or viewing the event and are not derived from some objective standard or reality. For example, the findings in Chapter 5 relating to the impact of the adverse arbitrated decision on one party is firmly centred on the subjective judgements of those involved.

These assumptions underlie the approach of this research that sees the development of ideas – and through them, of actions – as resting upon a process of competition, adaption and selection, but which in the end does not mean a deterministic outcome. Rather, the outcome is a preference, which will last until something else may be preferred. This approach suits the needs of conflict practitioners as it attempts to link theory and practice in a logical and optimal way. It also indicates the plethora of possible and competing approaches to the questions proposed. Therefore the research is not wedded to any single approach. For example, the finding that perceived control may be more important than fairness considerations in Chapter 4 could lead one to conclude that this is the definitive causative answer to preference choice but it is treated as one possible way of viewing the data. This links the experiment in this research to evolutionary epistemology which rests upon the fundamental idea that the development of ideas and knowledge is competitive and selective. That is the results of this research are contestable at a number of levels.

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<sup>20</sup> W Shadish, T Cook and L Leviton, *Foundations of Program Evaluation: Theories of Practice* (Sage, 1995).

<sup>21</sup> D Campbell and J Stanley, *Experimental and Quasi-Experimental Designs for Research* (Houghton- Mifflin, 1963).

<sup>22</sup> Carnevale and C De Dreu., above n 11, 51-65.

<sup>23</sup> Colquitt, above n 8.

Post positivist researchers begin with a theory, collect data that either support or refute the theory, and then make necessary revisions before additional tests are conducted.<sup>24</sup> Out of this approach comes a self-critical multivariate or multiplex analysis. Furthermore, using different methods and techniques allows one to view a particular phenomenon from different angles. This frame seems to fit well within conflict and negotiation research.

Conflict management and negotiation research is marked by several research traditions in the applied behavioural sciences, including psychology, political science, law, economics, communication, anthropology and organizational behaviour.<sup>25</sup> Gramatikov suggests that this field presents ‘.....complex legal, social and political constructs that are eminently difficult to measure.’<sup>26</sup> He summarises the issues presented to the researcher as follows:

On the one hand, socio-legal approaches towards rule of law and access to justice are still in its infancy and the existing body of knowledge is in its developmental stage. Empirical legal research is a discipline with wide perspectives but relatively limited background as compared to other streams of legal research or social sciences. On the other hand, the choice of methodological framework to study rule of law and access to justice is affected by researchers’ goals, background and stance. As we will see below a clear distinction could be made between economic and socio-legal tailored approaches. Multidisciplinary nature of the phenomena is also challenges for the researcher. One imminent risk in measuring rule of law and access to justice related phenomena is the tendency towards reductionism of the complex concepts towards a single theoretical field.

There is, consequently, a large methodological toolbox that researchers can draw upon but with a variety of challenges.

A number of scholars call for the combination of diverse methods for the same research question, known as triangulation.<sup>27</sup> The use of different methods to study the same

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<sup>24</sup> Carnevale and De Dreu, above n 11, 51-65.

<sup>25</sup> M Buelens et al, above n 13, 321-45.

<sup>26</sup> M Gramatikov, M, M Laxminarayan, "Methodological Challenges in Measuring Cost and Quality of Access to Justice" (2007) *TISCO Working Paper Series on Civil Law and Conflict Resolution Systems* 3.

<sup>27</sup> Ibid Carnevale and De Dreu, above n 11; D Druckman, "Doing Research: Methods of Inquiry for Conflict Analysis" (Sage, 2005); J Elix, and T Sourdin, *Review of the Financial Industry Complaints Scheme - What Are the Issues?* (LaTrobe University, 2002); P Hopmann "Negotiating Data: Reflections on the Qualitative and Quantitative

phenomenon potentially offers a solution to deal with deficiencies of each method and technique that may be used. Post positivist approaches can complement the quantitative interest for experimental methods by an interest in using qualitative methods to gather broader information outside readily measured variables, and are therefore compatible with this approach.<sup>28</sup> Such multiplism can be applied to many aspects of research methods, including strategies, settings for data collection, data analyses, investigators and sources of data.<sup>29</sup> This is also referred to as ‘two studies or integrated design’<sup>30</sup>. In this research the disputing parties in the role-play are asked to give three reasons for the preference they make. This qualitative material is inductively explored using justice theory and then coded. This approach has been used with bargaining and negotiation behaviour.<sup>31</sup> It was hoped that this approach would add further insight to the study and produce some generalizable results from qualitative data.

The research is particularly inspired by the approach of Barron who applied a multiplex approach, combining experimental simulations and post-negotiation semi-structured interviews, to the study of different approaches to salary negotiation by men and women.<sup>32</sup> In particular, Barron’s use of statistical analysis and content analysis is reflected in the author’s approach in the present research. The work of Colquitt in validating and refining four factors in justice research (distributive, procedural, interpersonal and interactional justice elements) was used to measure these aspects and an adaption of his scale has been used.<sup>33</sup> A variation on Shestowsky’s preference scales for each dispute intervention type was used to measure preference.<sup>34</sup> Efficiency of process is measured by a simple time measurement taken of each alternative process as

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Analysis of Negotiation Processes" (2002) 7 *International Negotiation* 67; D Moore and J Murnighan, "Alternative Models of the Future of Negotiation Research" (1999) 15(4) *Negotiation Journal* 347; A Ryan, above n 6; T Sourdin, *Dispute Resolution Processes for Credit Consumers* above n 16; T Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Australian Centre for Peace and Conflict Studies, University of Queensland, 2008).

<sup>28</sup> R Gephart, "Paradigms and Research Methods" *Research Method Forum* (London, 1999) [verified 8 July 201009] [http://division.aonline.org/rm/1999\\_RMD\\_Forum\\_Paradigms\\_and\\_Research\\_Methods.htm](http://division.aonline.org/rm/1999_RMD_Forum_Paradigms_and_Research_Methods.htm)

<sup>29</sup> Shadish, Cook and Leviton Above n 20; Elix and Sourdin, "Review" above n 27; Sourdin, "Dispute Resolution" above n 16.

<sup>30</sup> K Srnka and S Koeszegi. *From Words to Numbers: How to Transform Qualitative Data into Meaningful Quantitative Results* (2007) 59 *Schmalenbach Business Review* 29.

<sup>31</sup> L Putnam and T Jones, "Reciprocity in Negotiations: An Analysis of Bargaining Interaction" (1982) 48 *Communication Monographs* 171; L Weingart et al, "Tactical Behavior and Negotiation Outcomes" (1990) 1 *The International Journal of Conflict Management* 7.

<sup>32</sup> Barron, above n 7, 635-62.

<sup>33</sup> Colquitt, above n 8.

<sup>34</sup> Shestowsky, above n 9.

well as a comparison of outcomes. This partly replicates an approach in an experiment by Conlon and Moon who were concerned with settlement and the time taken in hybrid processes.<sup>35</sup> The underlying reliance, in both these precedent studies and the approach in this study, is upon the subjective views of participants. This ‘demand side’ view of justice can be balanced where possible with ‘supply side’ data which can include official statistics, case law, regulations and other data and this will be used where possible.<sup>36</sup>

## **2.2 Simulation Design and Process**

As the research progressed it was clear that the industry partner, VBC, was not able to provide real cases and parties for analysis as part of the research. This limited the methodology employed to a more conventional experiment based upon post-positivist traditions in the tradition of falsification. The quasi-experimental and multiplex nature of the experiment was consequently not possible. This change is reflected in the Figure 2.2 below.

The hypotheses posed in this thesis were tested in a structured simulation conducted with post-graduate and undergraduate university students between January and August 2010. Two hundred and fifty-two participants returned completed and valid questionnaires. Ethics Committee approval was required for the project including the pilot and final stages of simulations and interviews.

The participants were spread across 13 different groups on four separate university campuses. Three of these were located in inner Melbourne (Victoria, Australia) and one in the rural city of Bendigo situated 145 kilometres north of Melbourne. The remainder were conducted in University campuses located within a fifteen kilometre radius of the Melbourne central business district. The plausibility of the simulation to participants, as measured in the pre-simulation questionnaire on a five point Likert scale, (1=Not

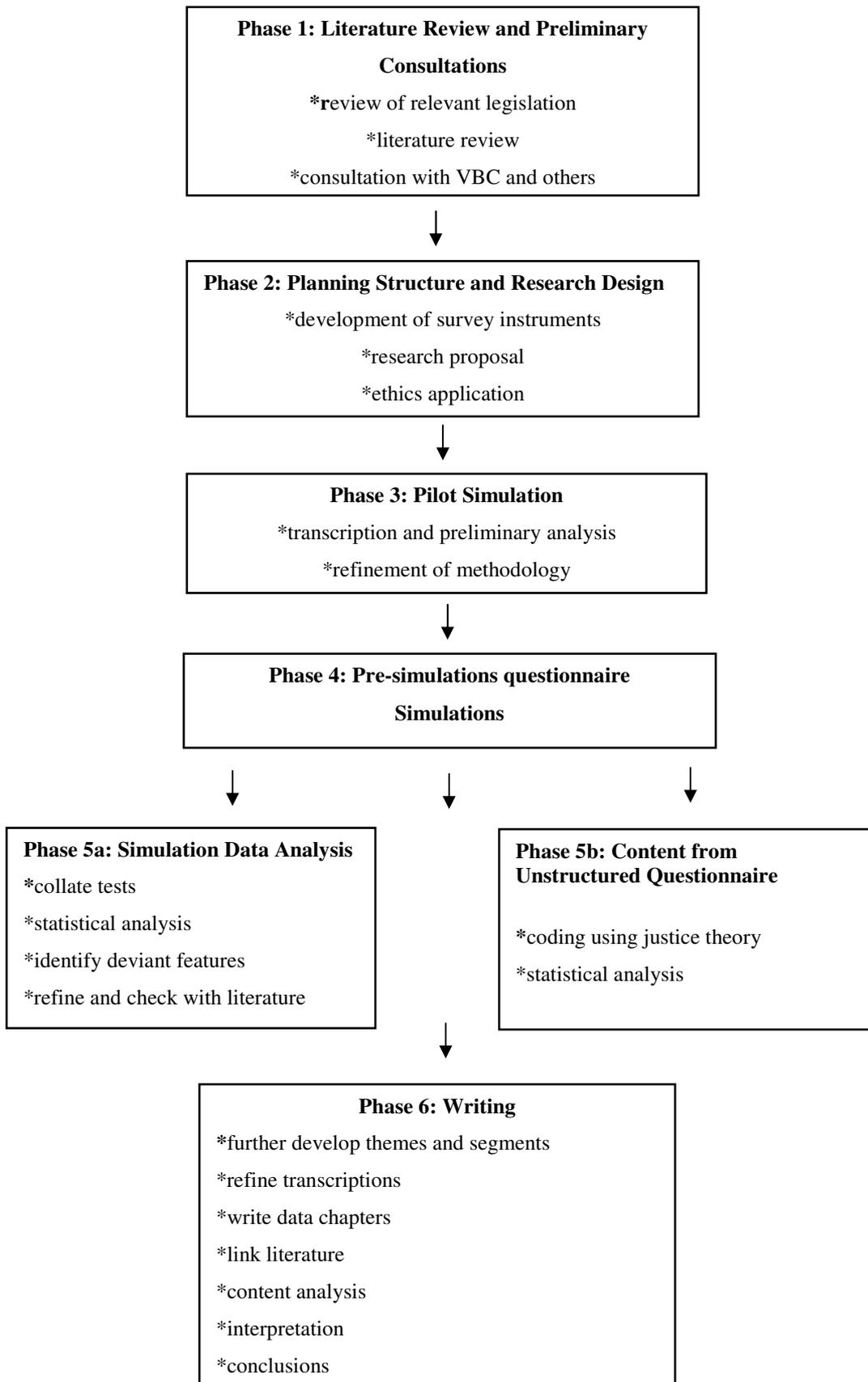
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<sup>35</sup> Conlon and Moon, above n 10.

<sup>36</sup> The terms ‘demand’ and ‘supply’ side are used by the Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems to describe the two principal source of data in justice studies. The former relates to what they term more objective data based upon often official sources including legislation, official reports and case law. The latter is based on the perceptions of users of legal systems: see Gramatikov and Laxminarayan above n 26.

Plausible, 3=Somewhat Plausible, 5=Extremely Plausible; see Pre-Simulation Questionnaire, Question 4 in Appendix A at A2) was 3.6 (N=232).

**Figure 2.2: The Research Design**



The use of simulations involving students is a well-tested and accepted methodology in this type of research across the various disciplinary and professional divides.<sup>37</sup> The key advantage of this approach, as in experimental studies generally, is the reduced ambiguity in specifying the relationship between key variables. Also, it is possible to closely study the details of a process, such as mediation, which would be generally impossible in a real life situation. Finally, it allows the researcher to impose new strategies in the situation that are safe but very difficult to do in a real situation. For example, in this experiment simulations allowed ‘reversal’ of the mediation-arbitration process to analyse the differences this may make, and for the imposition of certain rules to make it difficult to settle in mediation, forcing many participants into an arbitrated process where a decision could be imposed. Each simulation in the 13 groups lasted between two and three hours.

The simulation scenario was based upon two cases that had been tried before the New South Wales Consumer, Trader and Tenancy Tribunal.<sup>38</sup> The first case concerned the issue of rubbish falling from windows onto common property and other lots within an OC. The second case concerned the installation of individual water meters to lots rather than reliance upon one meter for the whole property. The facts of these cases were modified to take account of the different statutory provisions in Victoria, where the simulations were set, particularly as they related to the maintenance and repair of structures on common property.

In summary, the complainant (M. Smithy) is a tenant in an OC who has made a formal complaint under the OC internal rules that contain a dispute resolution process. The OC Committee represents the lot owners (not renters) and has delegated ‘M. Marty’ as a respondent to manage these matters under the terms of the dispute resolution process. M. Marty and M. Smithy have met several times but cannot agree on terms. They have

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<sup>37</sup> See for example: M Zhenzhong, "Conflict Management Styles as Indicators of Behavioral Pattern in Business Negotiation: The Impact of Contextualism in Two Countries" (2007) 18(3) *International Journal of Conflict Management* 260; Druckman, above n 27; D Druckman and N Ebner, "Onstage or Behind the Scenes? Relative Learning Benefits of Simulation Role-Play and Design" (2007) 10 *Simulation Gaming* 1177; Buelens et al, above n 13; Carnevale and De Dreu, above n 11; P Carnevale and C De Dreu, "Disparate Methods and Common Findings in the Study of Negotiation" (2005) 10 *International Negotiation* 193; Ross, Brantmeier and Ciriacks, above n 11.

<sup>38</sup> *Rossetto v Owners Corporation SP 71067* (Strata & Community Schemes) [2008] NSWCTTT 859 (29 February 2008) and *Tanner v OC SP 21409* (Strata & Community Schemes) [2008] NSWCTTT 806 (23 January 2008).

therefore to rely upon the next stages in the internal dispute resolution rules adopted by the OC.

### 2.2.1 Simulation Facts

A summary of the facts is as follows in Table 2.1:

Table 2.1: Simulation Facts Summary
<p><b>Water Metering</b></p> <p>Under her rental agreement the Complainant, M. Smithy, has agreed to pay for service charges such as water and electricity, but not rates. The landlord does not want to change the lease and is seeking to have water charges for unit holders to be based on a user pays basis. The Complainant does not occupy her unit fulltime, but uses it as a holiday home for herself. Lots in the OC do not have individual water meters but rather there is one meter for the whole subdivision. Water charges made by the local council are divided between the unit holders. It is not clear if this was done according to each proprietor's unit entitlement. The Complainant's argument is that this is unfair because she only occupies her unit (and uses water) periodically. A potential way to overcome this was for individual meters to be installed for each unit. According to the Complainant the cost of this was in the vicinity of \$200.00 per unit (\$12,000 overall).</p> <p>Any extra cost relating to the water meters would have to be met out of funds, through a special levy, provided to the OC by owners. The proposal for separate meters had been put to the OC Committee, which had declined to adopt it.</p> <p><b>Falling Debris</b></p> <p>M. Smithy is the occupier of Lot 14 in the block of units. This lot is located on the second level, being the uppermost floor of the podium level of the block of units that comprise the property. Rising above the second floor is a small residential tower building of 6 stories. Lot 14 and a number of other lots on level 2 have access from their small garden/courtyard area to a 'roof top garden' on top of the podium. The rooftop garden is regarded as common property beyond the garden/courtyard areas of the units on that level, and all residents have access to it for enjoyment of the amenities, including a barbecue and sitting area.</p> <p>From a design perspective, the podium forms a low solid base to the residential tower. The result being that the balconies and windows of many of the residential lots overlook the balconies on the northern, eastern and western sides of Lot 14 and the other lots on that level. The air space above the rooftop garden and Lot 14 and those adjacent is common property.</p> <p>The parties agree that occupants of residential lots above Lot 14 are disposing of unwanted items by throwing them from either balconies or windows directly above the balconies of Lot 14. From where they originate is unknown. They may be deposited in common property from lots within the mid-rise section or arrive into the respondent's common property, having been thrown into the air space of the high-rise section. These items fall onto the outdoor areas of Lot 14 and other lots, as well as the rooftop garden. This is a daily occurrence of long standing. The items include cigarette butts, condoms, sanitary napkins, syringes, food and food packaging. They have also included a broken table and a padlock.</p>

There is no report of any person being injured as a result of this conduct. One explanation may be that much occurs under cover of darkness, as there is reference in the evidence of the need to clean up the outdoor areas each morning. A related issue is the protection afforded by the existing coverings. The northern edge of the outdoor garden is protected by a steel frame and mesh awning, which covers some of the open area. Most of the residents' garden/courtyard areas are covered by a number of shade cloth sails.

The complainant says the danger posed to residents, especially those on her level, threatens their safety. She wants awnings erected sufficient to protect them from the risk of injury. This would involve the extension of the existing steel awning over the northern edge and replacement of the shade cloth on the garden/courtyard areas with similar steel structures. Any extra cost relating to the steel supported awnings would have to be met out of funds, through a special levy, provided to the OC by owners. A request to the OC Committee to consider this has been refused.

### **2.2.2 Process of Dispute Resolution**

In the simulation the parties have been advised by the OC that they have one of three choices under the Corporation's internal dispute resolution rules if they cannot settle the matter directly with the other party. These choices combine the processes of mediation and arbitration in different ways as outlined in Chapter 1.4. This, in part, replicated the alternative process developed for the industry partner VBC.

All participants were required to read a detailed description of the dispute and were provided with an outline of the OC dispute process, which encompassed the three dispute resolution choices outlined above. The participants were given their respective roles and provided with handouts containing a description of their role. They were then provided with a 'pre-simulation questionnaire' that gathered information about their preferences, reasons for making those preferences and some general demographic data.

When the pre-simulation questionnaire was completed the participants were allocated to role-play groups using one of the three dispute resolution processes. If they could not resolve all matters in the mediation phase of the process then the matter proceeded to arbitration. The arbitration agreement (written beforehand and given to the arbitrators before they made their decision) was handed to the parties and read out to them: see Appendix A7. Importantly, the arbitrator's decision finds on both matters for the respondent and against the complainant. A detailed process is provided in Table 2.2 below.

**Table 2.2: The Simulation in Detail**

The simulation was organized and proceeded, with some small variations, as follows:

- 1) Introduce key terms and process:
  - i) Provide and have signed consent forms (if possible this would be done beforehand).
  - ii) Ensure each student has a code number which they record at the top of each form.
  - iii) Allocate all students to roles:
    - a) Complainants
    - b) Respondents
    - c) Mediator/Arbitrators Same
    - d) Mediators and Arbitrators for Med/Arb Different process
    - e) Arbitrator/Mediators Same
    - f) Observers (if necessary)
- 2) Hand out:
  - i) Simulation Facts to all students
  - ii) Specific instructions for each of the 6 role-play 'types' above and also the simulation instructions noting that the Arbitrators for the Med/Arb.Diff process did not have anything to do until the Mediators were finished in their respective groups. These students were allocated to observe in the Arbitrator/Mediator groups as observers whilst waiting for the Mediators to form in their groups. When students are ready hand out Pre-simulation questionnaire.
- 3) The process for each group varied but essentially the whole sequence allowed approximately 2-3 hours. The Med/Arb Same and Arb/Med were with the same roleplay group for the whole period, whilst the Med/Arb Different had a Mediator then an Arbitrator running the process with the parties. Each Arbitrator and Mediator was provided with a time sequence on his or her instructions.
- 4) The Arbitrators (part of the Med/Arb Different process) who were to arbitrate a matter at the end of an unsuccessful mediation would not do so if the mediation reached a successful conclusion on all matters. The Arbitrators' role is quite limited because the decision they will 'make' had already been drafted. They will principally be involved in hearing each party in turn, adjourning and then delivering their decision. All students playing the Arbitrators roles were given a copy of the official arbitrator's decision at the completion of the arbitration.
- 5) At the end of every mediation and arbitration the parties were given a questionnaire to complete before continuing.
- 6) At the conclusion of the role-play each group debriefed for about 10 minutes then the whole group was brought back together to discuss the experience. This discussion could last up to 30 minutes where time permitted.

### **2.2.3 The Processes Used**

The comparison between Med/Arb.Same and Med/Arb.Diff draws upon the classic field experiment on mediation by McGillicuddy et al who developed a verbal content

analysis procedure for coding disputant behaviour and mediator behaviour.<sup>39</sup> This experiment showed strong effects of the experimental conditions on process indicators but not on the types of settlements obtained. There were striking differences between the Med/Arb.Same condition and the other two conditions. In the Med/Arb conditions disputants were less hostile and more cooperative although the mediators tended to use more heavy-handed tactics before they turned into arbitrators. However, McGillicuddy et al did not directly investigate procedural fairness judgments.

The use of Arb/Med draws upon a more recent line of research that measures the effects of arbitration if it is placed *before* mediation in the process of dispute management.<sup>40</sup> This research shows that in some circumstances Arb/Med may have certain advantages over Med/Arb. There is evidence that similar processes to this may have been used in prototypal Anglo-Saxon legal systems.<sup>41</sup>

However, the major area of interest in examining these different procedures, within the context of OC disputes, is upon the procedural, interactional, interpersonal and distributive fairness or justice judgments of the participants.<sup>42</sup> It is a critical question because the fairness of the procedure will ultimately have some considerable bearing upon the preferences of disputants or their willingness to take it up. It will draw upon a long line of research examining this issue..<sup>43</sup> These questions are intimately related to intervention preference for parties. Ross and Conlon posit that greater process and decision control, as well as the need to alleviate uncertainty, will move them towards a preference for Med/Arb rather than Arb/Med.<sup>44</sup> This may be crucial when designing and implementing procedures.

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<sup>39</sup> N McGillicuddy, G L Welton and D G Pruitt, "Third-Party Intervention: A Field Experiment Comparing Three Different Models" (1987) 53(1) *Journal of Personality and Social Psychology* 104.

<sup>40</sup> Conlon and Moon, above n 10; Ross, Brantmeier and Ciriacks, above n 11; Ross and Conlon, above n 11.

<sup>41</sup> V Sanchez, "Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today" (1996) 11 *Ohio State Journal on Dispute Resolution* 1.

<sup>42</sup> O Turel and Y. F. Yuan, "You Can't Shake Hands with Clenched Fists: Potential Effects of Trust Assessments on the Adoption of E-Negotiation Services" (2008) 17(2) *Group Decision and Negotiation* 141; Colquitt, above n 8.

<sup>43</sup> Colquitt, above n 8; Colquitt et al, above n 12; Druckman and Albin, above n 12; Ross, Brantmeier and Ciriacks, above n 11; Thibaut and Walker, above n 11; Turel and Yuan, above n 42; Zeleznikow and Bellucci, "Family\_Mediator" above n 14; Elix and Sourdin, above n 27; Sourdin, "Dispute Resolution" above n 27; Sourdin, "Mediation" above n 27.

<sup>44</sup> Ross and Conlon, above n 11.

Med/Arb procedures have several advantages in being perceived as just by parties. In particular, they allow for the incremental relinquishment of party control when the parties are unable to reach agreement by themselves. This is also dependent upon the procedures being appropriately implemented. They are also more likely to be familiar and therefore trusted by parties.<sup>45</sup> As the McGillicuddy research showed there is also less likely to be inter-party hostility and more willingness to follow the directions of the mediator/arbitrator.<sup>46</sup> There is also the so-called 'chilling effect' of arbitration to be considered.<sup>47</sup> This happens because arbitration is an adversarial procedure that may cause the parties to become more competitive and therefore less likely to be cooperative and open.

There are, however, perceived problems with Med/Arb because it may be difficult for an arbitrator who has previously acted as a mediator to maintain an impartial stance because of what s/he has heard in the mediation. In Australia, for example, section 27 of the *Commercial Arbitration Act 1994* (Vic), which is identical to legislation in the other States, allows for such a process but there has been extreme reluctance to use it because of due process or 'natural justice' concerns.<sup>48</sup>

Ross, Brantmeier and Ciriacks identified the role position of the parties in experimental simulations as being possibly implicated in the way in which they indicate preferences and negotiate.<sup>49</sup> They give the example of landlords who prefer a process maximizing disputant control rather than tenants who would prefer a third party to make the decision. That is, third party procedures such as arbitration are generally perceived as favouring the weaker side. Because Med/Arb provides more party control up until the point of arbitration, this is therefore more likely to be favoured by those who may be in a perceived stronger position. For example, an owner of a lot or the OC Committee may perceive themselves favouring Med/Arb more than may a renter of a lot.

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<sup>45</sup> Conlon and Moon, above n 10; Ross, Brantmeier and Ciriacks, above n 11.

<sup>46</sup> McGillicuddy, Welton, and Pruitt., above n 39.

<sup>47</sup> Carnevale and Leatherwood, above n 11; Conlon and Moon, above n 10; Dean G. Pruitt et al., "Long-Term Success in Mediation" (1993) 17(3) *Law and Human Behavior* 313.

<sup>48</sup> P Condliffe, *Conflict Management: A Practical Guide* (Lexis Nexis, 3<sup>rd</sup> ed, 2008).

<sup>49</sup> Ross, Brantmeier and Ciriacks, above n 11.

### 2.3 Methodology

A variety of methods to both conduct the research and analyse the data were used. This enabled the data to be approached from a number of vantage points. A variation on Shestowsky's preference scales for each dispute intervention type was used to measure preference and was the basis of the pre-simulation questionnaire.<sup>50</sup> The work of Colquitt in validating and refining four factors in justice research (distributive, procedural, interpersonal and interactional) was used to measure these aspects and an adaptation of his scale was used after the completion of mediation and arbitration parts of the simulation.<sup>51</sup> These scales were also used to interpret the qualitative data. In Question 3 of the pre-simulation questionnaire participants were required to give three reasons for their preference. Efficiency of process was measured by a simple time measurement taken of each process as well as a comparison of outcomes. The data was analysed using the Statistical Package for Social Science (SPSS) software. Detailed findings from this analysis are included in Chapter 6. The handouts used (included in their entirety in Appendix A) are outlined in Table 2.3 below and indicate the complexity of the procedure.

**Table 2.3: The Handouts**

<p>There were 13 different handouts as part of the simulation divided into three groups:</p> <p>Group 1: To be handed out at the beginning of the simulation to all participants:</p> <ol style="list-style-type: none"><li>1. Information and Consent Forms</li><li>2. Simulation Facts</li><li>3. Pre-simulation Questionnaire</li></ol> <p>Group 2: Simulation Instructions to be handed out to the various role-play parties:</p> <ol style="list-style-type: none"><li>4. Complainant's Facts</li><li>5. Respondent's Facts</li><li>6. Instructions for the Role of Arb/Med</li><li>7. Instructions for the Role of Med/Arb Same – to Med/Arb</li><li>8. Instructions for the Role of Med/Arb Different – to Med/Arb</li><li>9. Instructions for the Role of Arbitrator – to Arbitrator</li><li>10. Arbitrator and Mediator log – arbitrators and mediators so as to enable them to record times and provided feedback.</li></ol> <p>Group 3: To be handed out at the completion of the mediation and arbitration phases when role-players are in their respective groups:</p> <ol style="list-style-type: none"><li>11. Decision of Arbitrator – to Arbitrator</li></ol>
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<sup>50</sup> Shestowsky, above n 9.

<sup>51</sup> Colquitt, above n 8.

12. Post-mediation Questionnaire
13. Post-arbitration (for Med/Arb parties) Questionnaire

This design enabled the whole of each group to complete the pre-simulation questionnaire on preferences, and then for the Complainants and Respondents to complete questionnaires measuring their responses to the fairness of the process at both the end of the mediation phase and then at the arbitration phase.

## 2.4 Limitations

The limitations of the study are several. The roleplay was designed to be complex so that disputant role players would find it difficult to reach agreement on all matters and hence a reasonable number would need to proceed to arbitration. The findings indicate only 24 per cent of the roleplay simulations resulted in complete settlement and 76 per cent failed to settle. This was also attributed to a 'rule' imposed on the participants that they had to settle all issues in mediation otherwise they would need to proceed onto arbitration. This manipulation of the process enabled a fuller exploration of the processes through to completion. This guaranteed that sufficient numbers would move through the full process of mediation/arbitration in its various permutations to allow for testing of the perceptions of participants at the end of both the mediation and arbitration. This was the major focus of the research. Whilst this strategy was useful in the research design in enabling a fuller study of the impact of the arbitrated decision, it may have diluted the study of the mediation phase and there was no recording of those cases where partial settlement had occurred. Anecdotal and observed evidence would indicate that there were a substantial percentage of partial settlements. This is in the context of a complex fact situation based upon the combination of two real life cases.

The other limitation, which is inherent in these types of studies, is that the group itself had limited time to manage the process. Whilst there was enough time for all groups there was still time pressure on the negotiation. It has been shown that time pressure can be a significant element in negotiations.<sup>52</sup>

Another limitation was related to the dispute domain used. It was confined to certain types of disputes that could be categorized as 'neighbourhood or civil'. The participants

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<sup>52</sup> A Stuhlmacher, T Gillespie, and V Matthew, "The Impact of Time Pressure in Negotiation: A Meta Analysis" (1998) 9(2) *International Journal of Conflict Management* 97.

were not, except for a small group within the sample, actual owners and renters of OC lots but students playing roles. This may have reduced the realism and thus the generalizability of the results. This could have been exacerbated due to Australian students being less familiar with the Arb/Med procedure than the Med/Arb procedures employed.

Larger samples with a wider range of disputing types await some future, more substantive research.

Despite these limitations, however, the research revealed some useful indicators of preference selection and justice/fairness measures in different third-party interventions in disputes, and may be of some significance to one of the major areas of disputing in our society – those with neighbours in compact communities.

## CHAPTER 3: THE OC HOUSING SECTOR: STRUCTURE, CONFLICT AND MANAGEMENT

### 3.1 Introduction

OC, or body corporate units as they used to be called, are a way of dividing and individually owning lots in a building or property located on a single piece of land. They generally have five characteristics: (a) separate ownership of individual lots of the property; (b) indivisible co-ownership of the common property; (c) restrictions on partition of the common property; (d) a schema of rules and covenants to govern the corporation; and (e) day-to-day management of the corporation is usually given to a professional management company or manager while the overall management of the property and its upkeep is the responsibility of the corporation.<sup>53</sup>

These characteristics present many advantages to builders and owners. These include greater and more certain return on their investment to the builder and equity, mortgageability, a more controlled living environment and potentially less maintenance cost than a detached house to owners.<sup>54</sup> Buying a lot in an OC represents a sort of intermediate purchase between the traditional fee simple and rental property. This choice may be for a variety of reasons including the cost of freehold detached housing, availability and suitable location proximate to services and employment in large urban conglomerations.<sup>55</sup> This decision may not be informed by due consideration of the various restrictions placed upon them as owners but the more immediate considerations of price, location, finance, size and general condition.<sup>56</sup> In this way the impact of these restrictions may be glossed over and many lot owners may have little previous experience of such living arrangements.<sup>57</sup>

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<sup>53</sup> R Natelson, "Condominiums, Reform, and the Unit Ownership Act" (1997) 58 *Montana Law Review* 495.

<sup>54</sup> J C McStotts, "Dwelling Together: Using Cooperative Housing to Abate the Affordable Housing Shortage in Canada and the United States" (2004) 32 *Georgia Journal of International and Comparative Law* 131.

<sup>55</sup> D Grassmick, "Minding the Neighbor's Business: Just How Far Can Condominium Owners' Associations Go in Deciding Who Can Move into the Building" [2002] *University of Illinois Law Review* 185.

<sup>56</sup> S Mollen, "Alternate Dispute Resolution of Condominium and Cooperative Conflicts" [1999] (Winter) *St John's Law Journal* 75; Australian Bureau of Statistics, Canberra, *Housing Occupancy and Costs 2005-6*, (2007).

<sup>57</sup> *Ibid.*

In this sense the decision to buy an OC lot with the accompanying restrictions upon its use may not be entirely one of free choice but a matter of necessity.<sup>58</sup> Government planning is increasingly predicated upon a desire to have a larger proportion of residential growth based upon higher density housing.<sup>59</sup> This is for a number of reasons including the need to control urban sprawl, the decline in family size, ageing of the population and the desire to infill large inner suburban spaces such as old wharves and industrial areas. A large part of the population will, because of these various trends, have little choice but to elect for the OC type option.<sup>60</sup>

The rate of growth of OC, according to Australian Bureau of Statistics ('ABS') figures, is about twice that of detached housing since 1981.<sup>61</sup> In the big population centres of Sydney and Melbourne they now comprise approximately one third of all dwellings. There were 8,426,559 private dwellings counted in Australia in the 2006 Census, an increase of 8.2% since the 2001 Census. The largest proportional change was for flats, units and apartments showing an increase of 0.9% (153,176 dwellings) to 14.2% of all housing. Semi-detached houses had risen to 9.2% from the previous 2001 Census where it was 8.9%. Separate housing declined to 74.8% from 75.3% recorded in the previous census. The peak body for OC managers in Victoria, Owners Corporation Victoria Ltd., estimates that the sector in Australia comprises approximately 250,000 OC consisting of 2,000,000 lots (i.e. individual property units). It estimates the total property value to be more than \$500 billion. It further estimates that there are approximately 2,500 OC managers in Australia with 3.5 million people living or working in such schemes. It estimates that approximately 20,000 Australians work in and derive their income from this sector.<sup>62</sup>

The social impact of this change upon Australian society is yet to be fully tested. However, it is necessary to understand some of the demographic and related factors, which may inform and determine the course of these impacts and the management of

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<sup>58</sup> M Wulff, E Healy, and M Reynolds, "Why Don't Small Households Live in Small Households: Disentangling a Planning Dilemma" (2004) 12(1) *People and Place* .

<sup>59</sup> M Buxton and G Tieman, *Melbourne in Transition: The Growth of Medium Density Housing* (RMIT, 2003); Mollen, above n 56; B Randolph, "Delivering the Compact City in Australia: Current Trends and Future Implications" *Urban Policy and Research*, no. 4 (2006).

<sup>60</sup> *Ibid.*

<sup>61</sup> ABS, "Australian Bureau of Statistics National Census 2006," (Canberra 2006).

<sup>62</sup> See [http://www.ocv.org.au/research\\_industryinfo.php](http://www.ocv.org.au/research_industryinfo.php) accessed 25 March 2011.

the conflicts that will arise there from. The available census data shows that higher density housing has the following characteristics:

- the majority of residents are tenants not owners with most lots being owned by investors;
- the properties are relatively small with only 13 per cent having 3 to 4 bedrooms;
- there is a significant higher proportion of overseas born residents;
- there are fewer families with children, with almost half the residents being single, and with group households representing around 10 per cent of lots being a significant group; and
- residents have lower average incomes but high rises have higher incomes than low rises.<sup>63</sup>

These characteristics indicate a distinctive social profile that has remained relatively stable over the last twenty years and is perhaps likely to remain this way.<sup>64</sup> It is reliant upon private investment for further building development as investors will purchase much of the stock. The particular characteristics of the higher density sector may create a sense of segregation from the broader community. For this and other reasons, medium density residential development has been a deeply divisive issue. It at once highlights the tensions and trade-offs between economic development, democracy and community which, according to a range of social demographers, are largely ignored by existing approaches to urban governance, while simultaneously straining existing systems for managing urban change and development, which will continue to have significant implications for local communities and democratic processes.<sup>65</sup>

The success of the sector overall will depend upon a number of factors. These will include the quality of the accommodation and buildings themselves as well as the effectiveness of governance arrangements.<sup>66</sup> The ageing of the housing stock itself and

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<sup>63</sup> Wulff, Healy and Reynolds, above n 58.

<sup>64</sup> Ibid; see also B Randolph, "Delivering the Compact City in Australia: Current Trends and Future Implications" (2006) 4 *Urban Policy and Research* 473.

<sup>65</sup> T Alves, "Medium Density Housing in Melbourne: The Management of Sustainable and Democratic Local Communities under Global Pressure for Increased Urban Efficiencies" in *19th EAROPH World Planning and Housing Congress and National Housing Conference 2004*, (RMIT, 2004).

<sup>66</sup> See for example: Australian Housing and Urban Research Institute Planning and the characteristics of housing supply in Melbourne Final Report No. 157, November 2010.

the demands this places upon maintenance and further investment is of particular concern.<sup>67</sup> The transient nature of much of the resident population and their relations with owners and absent investor landlords complicates the management arrangements. Sherry<sup>68</sup> and Bounds<sup>69</sup> make the point that there is also an inherent imbalance of power between the residents of OC and developers. This can lead to unequal power relationships and the improper imposition of unfair contractual (and other) arrangements usually mediated by developer appointed or connected property managers. Bounds argues that a sense of control is central to residents' feelings of satisfaction and security and that OC residents may have to suffer less control than those who live in free-standing housing.<sup>70</sup> For renters this ability to feel control and participate in decision making may be a particularly acute point, reiterated by Easthope in his review of governance arrangements in Sydney OC. He states:

While owners in a strata scheme usually hold some power based on their market share, renters living within a strata scheme have no right to participate in the representative structures in place in their scheme (they have no vote) and have power only to the extent that they are able to influence the position of the owner of their unit. Given that the majority of renters rent through a real estate agent (ABS, 2006), the potential to influence decisions affecting their building is small. Indeed, this raises an essential point: the implications of the governance arrangement in place in strata schemes are unique when compared to those of private corporations or other club realms because people live in strata developments. This means that any viable governance framework needs to take into account the role of all residents in a strata scheme regardless of whether they own or rent, in particular, their personal ties to their homes and their relationships with each other and other stakeholders within a development.<sup>71</sup>

The management of conflict and disputes within these compact urban communities will likely reflect some of these characteristics.

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<sup>67</sup> Ibid.

<sup>68</sup> C Sherry, "Long Term Management Contract and Developer Abuse in New South Wales" in A Blandy S Dupuis and J Dixon (eds), *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010) 159.

<sup>69</sup> Bounds, M "Governance and Residential Satisfaction in Multi-Owned Developments in Sydney" in A Blandy S Dupuis and J Dixon (eds), *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010) 149.

<sup>70</sup> A Blandy, S Dupuis and J Dixon (eds), *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010), 146.

<sup>71</sup> H Easthope and Randolph, above n 2, 256.

### 3.2 Neighbourhood Disputing and OC

Disputes in OC are a form of 'neighbourhood disputing' that can be divisive and damaging to the individuals and communities concerned.<sup>72</sup> The first research in Australia indicating the extent of neighbourhood disputes and the problems of managing them was the Australian Household Dispute Study.<sup>73</sup> This study sought to provide an analysis of the legal and non-legal processes used to resolve disputes in Victoria. Interviews by telephone with 1,019 householders were conducted. The survey found that the extent of neighbour related problems (such as disputes involving animals, noise, trees, smoke, and so on) went far beyond any other category of grievance. Thirty-nine per cent of households interviewed had experienced one or more neighbourhood grievances within the preceding three-year period. Thirty-five per cent of these reached a dispute level. That is, one or both neighbours approached each other or a third party about the matter.

This research found that there was a high likelihood that those conflicts that reached the dispute level would lead to a damaged or destroyed relationship. Lower-income groups were found to have a higher level of unresolved grievances which they did not act upon and minority ethnic groups were found to not take their grievances to a third party as often. Results from the survey revealed that local government (39 per cent), police (29 per cent) and lawyers (10 per cent) were approached in almost 80 per cent of cases. Satisfaction with the role of all third parties was found to be low amongst those surveyed. Over half the respondents claimed that their dispute had received no outcome or only a partial one. In fact, 29 per cent of the third parties contacted suggested the use of force or threat to resolve the dispute! Only 7 per cent of the third parties were perceived as acting to facilitate an agreement between the parties in a conciliatory way.

A more recent survey, also in Victoria, found that 5 per cent of disputes reported were between neighbours, just behind the disputes about the supply of essential services (gas

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<sup>72</sup> Mollen, above n 56; Australian Bureau of Statistics (ABS), Canberra, *Housing Occupancy and Costs 2005-6* (2007).

<sup>73</sup> J Fitzgerald, *Comparative Empirical Study of Potential Disputes in Australia and the United States, 1982-84* Dispute Resolution Committee (Melbourne Legal Aid Commission, 1985).

and water at 8 per cent) and with family (6 per cent).<sup>74</sup> Most of these disputes (65 per cent) were resolved without assistance, however help from a third party such as lawyers, government officials or police was sought in around 15 per cent of cases. External help from a third party was more likely to be sought in disputes that related to business and government rather than disputes involving family, neighbours or associates. Nearly one-quarter (24 per cent) of all disputes were not resolved at the time of the survey perhaps indicating, as in the earlier study, the high level of unresolved matters. Both studies highlight the relative importance of and need for effective governance and regulatory regimes in this area of disputing. The studies indicate that the escalation of such disputes can lead not only to an escalation of tensions but turn potential civil cases into criminal offences. Interestingly, the later survey found that experience with third parties has a positive effect on Victorians when it comes to resolving disputes with family, neighbourhood and work associates. The majority (63 per cent) of those who have used a third party to resolve their disputes with family, neighbourhood and work associates believe the help they got achieved a better outcome for them than they could have achieved on their own. Furthermore, the majority (73 per cent) feel more confident or able to deal with a similar dispute in the future as a result of their experience of using a third party.<sup>75</sup>

Disputes involve the investment of enormous resources including not only those of the neighbours themselves but legal, local government, police, health and welfare services.<sup>76</sup> Most OC conflict falls into two categories: quality of life or financial disputes.<sup>77</sup> The former can include pets, noise, sub-letting, parking, alterations, use of common property, exterior painting and so on. The latter can include failure to pay maintenance fees, special assessments, fines, access to accounts and related matters. Residents in OC not only have to manage the day-to-day demands of living side by side in close proximity, but also the demands of jointly managing and maintaining the property.

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<sup>74</sup> G Peacock, P Bondjavov and E Okerstrom, *Dispute Resolution in Victoria: Community Survey 2007* (Department of Justice, 2007).

<sup>75</sup> *Ibid* 35.

<sup>76</sup> Mollen, above n. 56; Australian Bureau of Statistics (ABS), above n 72.

<sup>77</sup> ABS, above n 76.

Grosberg posits that there is an increasing correlation between the number of OC lot owners and the incidence of conflict.<sup>78</sup> This is because their relative propinquity, compared with residents in detached housing, is so much greater. Because of this closeness various 'house rules' become necessary to manage everything from paint colours and pets to barbecue use. Living within these constraints requires a considerable degree of tolerance. Compliance with these rules may become a matter of principle to some residents, especially to those who are complying but witness examples of people who are not compliant. This can be exacerbated when renters, who may not share the same concerns and interests, mix in the same building or housing arrangement with owners.<sup>79</sup> Mollen along with McKenzie argue that because decisions in OC are often made by property managers or committees lacking in real estate or property management experience other occupants are less likely to accept and respect them.<sup>80</sup> Toohey and Toohey summarize the particular context of OC disputing, referred to as "community titles" in Queensland, as follows:

Community titled housing involves adjusting to a particular kind of lifestyle, and also to a particularly detailed framework regulating many aspects of life, and many different stakeholders in the scheme - in some situations as many as eleven types - each with different and potentially conflicting interests. The different values and interests of different stakeholders can obviously lead to disputes. Confusion as to the requirements of the legislation and the roles of the different stakeholders can also cause disputes. For example, owners may act on a belief that the body corporate manager, acting as a professional committee secretary, has the authority to approve requests to change by-laws or make other changes to the common property. Similarly, owners and tenants may quite justifiably, but incorrectly, believe that the person at the reception desk is responsible or entitled to enforce by-laws, or can permit changes to a lot or consent to the keeping of a pet. Common causes of conflict also include when a body corporate wishes to enforce by-laws that have not previously been enforced, when the majority of a body corporate wants to make changes that will affect the quality of life of a minority of members, when repairs need to be made, or when occupiers clash with one another over alleged breaches of by-laws. A study by Guilding and Bradley has revealed that those not on the body corporate committee often regard quite suspiciously the motives of those who serve on body corporate committees, and that committee members felt that non-committee members had unrealistic expectations of what the committee should achieve.<sup>81</sup>

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<sup>78</sup> L Grosberg, "Using Mediation to Resolve Residential Co-Op Disputes: The Role of New York Law School" (2003) 22 *New York Law School Journal of International and Comparative Law* 185.

<sup>79</sup> Ibid.

<sup>80</sup> Mollen, above n 56; ABS, above n 72, 81; E McKenzie, "Emerging Regulatory Trends, Power and Competing Interests in US Common Interest Housing Developments" in S Blandy, A Dupuis, and J Dixon (eds), *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010)53, 54.

<sup>81</sup>L Toohey and D Toohey, "Achieving Quality Outcomes in Community Titles Disputes: A Therapeutic Jurisprudence Approach" [2010], *Social Science Research Network* electronic library, <http://ssrn.com/abstract=1607544>, 7.

These disputes, when unable to be resolved between the residents and owners themselves, are governed in Victoria by the procedures of the recently introduced *Owners Corporations Act 2006* (Vic) ('the Act'). Under the previous legislation, *The Subdivision Act 1998* (Vic), persons with a body corporate dispute (the previous name applied to owners corporations) could apply to the Magistrates Court for a declaration or order determining the issue. The Court could make a number of different orders, including orders requiring the body corporate to perform or refrain from an act. Applications could also be made to VCAT on a limited range of issues. For example, an application could be made for VCAT to review a decision of a local Council to refuse the certification of a plan. This schema was perceived by many to be too limited, expensive and inaccessible.<sup>82</sup> It was within this context of rapid expansion overlaid with the traditional complexities of neighbourhood conflict and the management of compact communities, that a review of the body corporate legislation was begun in Victoria in 2003.<sup>83</sup>

### **3.3 The Body Corporate Review**

The review was a response not only to the enormous growth of medium density housing in Victoria since the inception of the *Subdivision Act* in 1988, but also to evaluate the effectiveness of the legislative scheme. The terms of the Body Corporate Review (the Review) initially focused on the dispute resolution provisions of the *Subdivision Act* (1998) and the collection of fees. The breadth of the evaluation was quickly extended, however, given the quantity and variety of responses to the first Issue Paper released on 21 October 2003 (CAV 2004).<sup>84</sup> As well as the complexity of the previous legislated scheme, the accountability of managers and the lack of information to lot owners featured prominently in the Review. In other words, conflict and the mechanisms to address it were seen as part of a wider managerial or organizational context. Nonetheless, the minimisation of disputes, appropriate dispute resolution mechanisms, and the prudent management of body corporate funds remained the most pressing topics

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<sup>82</sup> Consumer Affairs Victoria, (2003) "Issues Paper, Bodies Corporate – Review of the Effectiveness and Efficiency of the Subdivision Act 1988 as It Relates to the Creation and Operation of Bodies Corporate" (ed CAV, 2003).

<sup>83</sup> Consumer Affairs Victoria, (2006) "Final Report of the Body Corporate Review" (ed CAV, 2006).

<sup>84</sup> Consumer Affairs Victoria, (2004) "Future Directions Paper, Bodies Corporate" (ed CAV, 2004).

of the Review. The then Minister for Sport and Recreation, the Hon. J. M. Madden, stated in the Second Reading Speech before the Victorian Parliament that:

One issue that is critical to all owners corporations, whether large or small, is the need for a comprehensive dispute resolution system. Under the current legislative scheme, there is no formal complaint-handling system. Dispute resolution options are limited to services available for resolving neighbourhood disputes, or, if a dispute relates to the Act, regulations or rules, applying for a formal order from the Magistrates Court. These options are too limited for the diverse range of disputes and parties operating in today's complex owners corporation environment. The new scheme will remedy this deficiency by setting out a three-tier approach to dispute resolution. The policy behind this approach is to encourage a sense of personal responsibility in the parties for resolving disputes, sometimes with the assistance of government dispute resolution services, rather than relying on direct state intervention or punitive sanctions to resolve all owners corporation issues.<sup>85</sup>

The *Act* and the Owners Corporations Regulations 2007 ('the Regulations') were passed in early December 2007 and came into operation on 31 December 2007. The *Act* is designed to promote self-governance by providing a legislative framework for owners and residents to work together and to resolve disputes through dialogue, consultation and negotiation. Specifically the *Act*, in section 1(b), states as one of its two purposes, '...to provide for appropriate mechanisms for the resolution of disputes.' It provides for a three layered or tiered schema for managing conflict that arises (See Chapter 3.6).

The *Act* changed the name used to describe the legal entity from 'bodies corporate' to 'owners corporations'. It provides a legislative framework to encourage those involved in OC to work together and to resolve disputes through dialogue, consultation and negotiation. Interestingly it differs considerably from similar legislated schemes in Australia in the way it has designed and structured the dispute management process.

### **3.4 Comparable Jurisdictions: Australia**

All Australian jurisdictions regulate the subdivision of land through a variety of legislative techniques. A range of primary statutes provide for subdivision. Accompanying these principal Acts are regulations to provide for administration

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<sup>85</sup> Commonwealth, *Hansard*, Second Reading Speech, Owners Corporation Bill, 12 September 2006, 3290-3.

procedures. Unfortunately, as is so often the case in this country, there is no common regulatory template resulting in a kaleidoscope of arrangements. For example, there is no agreement as to nomenclature, although the most common terminology historically has been the term 'strata title'. There are more than fifty separate pieces of legislation and over forty separate regulations with over one hundred prescribed forms that regulate the Australian OC sector.<sup>86</sup> Also particularly relevant is the fact that the various state jurisdictions do not have any common way of managing complaints and conflict. The key characteristics of each jurisdiction are summarised in Table 3.1 below.

Several commentators and reviews of the various pieces of Australian legislation have indicated that OC legislation in Australia is so diverse and complex as to pose very real practical problems for both stakeholders in general, and for practitioners operating across state borders.<sup>87</sup> There has so far been little research into and analysis of the differences between these State jurisdictions particularly relating to dispute management provisions. Most of the States provisions as outlined in Table 3.1 appear ad hoc and do not indicate a comprehensive scheme or system of dispute system design relating to OC. Despite these difficulties, an examination of the Australian legislation does provide an interesting overview of the way in which dispute management regimes can be put in place to deal with an essentially similar array of conflicts across the country. For these purposes a short overview of two of the more interesting and important pieces of legislation that do provide some relatively comprehensive provisions around dispute management, NSW and Queensland, is included. The NSW legislation, because it was the forerunner of similar legislation in Australia and overseas, and the Queensland legislation because it has provided an innovative and comprehensive approach to OC management.

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<sup>86</sup> National Community Titles Institute, "How Different Are We: State by State Comparison of Strata and Community Title Management", (2008) Accessed at [http://www.ncti.org.au/state\\_comparison\\_guide.html](http://www.ncti.org.au/state_comparison_guide.html): Accessed 28 March 2011. This guide contains comparisons of each piece of state legislation but does not include a section on dispute resolution. Because the alternative process designed for the industry partner and for use in this research is designed for in the Victorian context the term 'owners corporation' (OC) is used in this research.

<sup>87</sup> CAV, "Issues Paper" above n 82.; K Everton-Moore et al., "The Law of Strata Title in Australia: A Jurisdictional Stocktake,"(2006) 3 *Australian Property Law Journal* 1 ; C Guilding et al., *Investigation of the Strata Titled Tourism Accommodation Sector in Australia: Legal Context and Stakeholder Views* (CRC for Australian Tourism, 2006); C. Guilding et al., "An Agency Theory Perspective on the Owner/Manager Relationship in Tourism-Based Condominiums" (2005) 26(3) *Tourism Management* 409.

The *New South Wales Conveyancing (Strata Title) Act of 1961* was a model for a number of other Australian and overseas jurisdictions when it was introduced, including elements of Canadian, South African, Singaporean and Australian legislation.<sup>88</sup> It was the first Commonwealth legislation dealing with subdivided buildings. In 1973 this legislation was repealed and replaced by the *Strata Title Act (New South Wales) (1973)*. A particular feature of this Act was the introduction of a three-tier dispute resolution process to manage disputes between the body corporate and lot owners, and between lot owners themselves. The dispute management process has several distinctive features. If an owner or occupier is in contravention of a specified by-law, section 45 of the *Strata Schemes Management Act (1996)* empowers the OC to serve a notice on the offending party requiring them to comply with that by-law. If there is failure to comply it can then be enforced through the NSW Consumer, Trader and Tenancy Tribunal ('the Tribunal'), and the party in breach may face a pecuniary penalty. Parties to a dispute are required to attempt mediation before making an application to the Tribunal. This system has reportedly had success, with around 70 per cent of those who attend mediation reaching settlement.<sup>89</sup> This figure, however, does not take account of those who simply refuse to attend a mediation session.

The Queensland *Body Corporate and Community Management Act (1997)* ('BCCM') perhaps provides the most comprehensive scheme. Section 4(h) of the BCCM aims 'to provide an efficient and effective dispute resolution process'. Chapter 6 of the legislation establishes the office of Commissioner of Body Corporate Management ('the Commissioner'). The Commissioner is responsible for providing education, disseminating information and managing the dispute resolution service. An essential part of the Commissioner's role is to assess applications with a view to rejecting or dismissing, or alternatively referring the application onto a dispute resolution service (ss240, 241, 250). These services can include a dispute resolution centre conciliation, specialist conciliation, department adjudication, and specialist adjudication. Along with the Commissioner, adjudicators are appointed under the BCCM and are empowered to

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<sup>88</sup> A Christudason, "Subdivided Buildings-Developments in Australia, Singapore and England" (1996) 45 *International and Comparative Law Journal* 343; C van der Merwe, "Comparative Study of the Distribution of Ownership Rights in Property in an Apartment or Condominium Scheme in Common Law, Civil Law and Mixed Law Systems"[2003] *Georgia Journal of International and Comparative Law* 101; C van der Merwe and L Muniz-Arguelles, "Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme" (2006) 16 *Duke Journal of Comparative and International Law* 125.

<sup>89</sup> Everton-Moore et al, above n 87: For further comment on the NSW legislation see Chapter 3.6 following.

make orders to resolve disputes under Schedule 5 of the legislation. An adjudicator's order can be enforced through the Magistrates Court or appealed to the District Court on a question of law.

**Table 3.1: Dispute Management Provisions in Australian Owners Corporation Legislation**

	Victoria	Queensland	NSW	SA	Tas	NT	ACT	WA
<b>Name of Legislation</b>	Owners Corporation Act 2006	Body Corporate & Corporate Management Act 1997	Strata Schemes Act s*****	Strata Titles Act(STA) 1988; Community Titles Act (CTA) 1996	Strata Titles Act 1998	Lot Titles Act (UTA)	Community Titles Act 2001	Strata Titles Act 1985
<b>Terminology for Scheme</b>	Owners Corporation	Community Title	Strata Title	Strata Title	Strata Title	Lot Title	Lot or Community Title	Strata Title
<b>Regulatory Typologies*</b>	Two lot, small, large (over 100 lots)	Small, commercial, accommodation, community	Freehold, leasehold	Strata, community	Strata, staged development, community development	Estate, condominium, building developments	Lot, lot subdivision, community	Strata, survey strata
<b>Key Dispute Management Provisions**</b>	Part 10	Chapter 6 – Commissioner of Body Corporate Management is responsible and refers out to a dispute process	Chapter 5 – mandatory conciliation before application to Tribunal	STA – Part 3A; CTA – Part 14	Parts 9 and 10	UTA Regs - Schedule 5 ('Model Dispute Resolution Procedure')	Section 55 - Limited provisions/ Magistrates Court or Supreme Court	
<b>Formal Initiation of Dispute/Complaint</b>	Ss 155-157 - Notice by Owners Corporation or on approved complaint form by various affected persons	Ss 242, 248 & 250 - approved form after reasonable attempts using an internal dispute resolution procedure (s 238)	S 45 –notice by Owners Corporation	S 41A, 42 – application to Magistrates Court or District Court with leave	S95 – notice by Body Corporate	S106 – application to local court	Limited – application to Magistrates Court or Supreme Court	Application to State Administrative Tribunal per s105 of the State Administrative Tribunal Act
<b>Formal Notice of Complaint</b>	On affected persons and Owners Corporation	By Commissioner to applicant, body corporate and all affected persons	Owners Corporation serves notice for breach of by-laws on owner or occupier	Service on respondent/s	Notice to owner/ occupier in breach	Service on respondents	Service on respondents	Service on respondents
<b>Forms of Dispute Management***</b>	Not specified **** Conciliation by Director of Consumer Affairs Victoria	Commissioner can recommend conciliation, mediation, adjudication	Mediation by Dept of Fair Trading, adjudication on the papers by Tribunal	Magistrates Court	Tribunal	Local Court	Magistrates or Supreme Court	Tribunal
<b>Appeal</b>	From Owners Corporation to Director of Consumer Affairs or VCAT with usual appeal rights	From adjudicator to District Court on questions of law	Consumer, Trader & Tenancy Tribunal	Usual appeal rights from Magistrates Court	To Resource Management and Appeals Tribunal	Usual appeal rights from Local Court	Usual appeal rights from court	To Supreme Court on question of law

\* 'Regulatory Typologies' refers to the way in which various stratas or lots are grouped or described in the legislation.

\*\* These refer to the legislation not the supporting regulations unless otherwise specified. All jurisdictions have regulations in force to support the head of legislation.

\*\*\* The courts and tribunals referred to in the various jurisdictions usually have discretion to refer to arbitration or conciliation procedures and in the Northern Territory a Panel of Referees can be appointed.

\*\*\*\* Although the default procedure in the legislated model rules specifies the affected parties and Owners Corporation 'must meet' and if still not resolved then to the Director of Consumer Affairs who can require a conciliation or to the Victorian Civil and Administrative Tribunal (VCAT) who can order a conciliation.

\*\*\*\*\*The full titles of the NSW legislation is Strata Schemes (Freehold Development) Act 1973; Strata Schemes (Leasehold Development) Act 1986; Strata Schemes Management Act 1996; Property Stock & Business Agents Act 2002.

### 3.5 Comparison with Selected Overseas Jurisdictions

A review of OC law and legislation in a range of overseas jurisdictions has revealed a significant number of similarities with the Australian statutory schemes and some significant differences. Chief among these differences is a ‘model law’ scheme in the United States to guide State legislature.<sup>90</sup> In general terms, Australian policy makers and legislators have been at the forefront of legislative innovation in this area. The *New South Wales Conveyancing (Strata Title) Act* (1961) was a model for a number of other Australian and overseas jurisdictions when it was introduced, including Canada, South Africa and Singapore.<sup>91</sup> It was the first legislation in the then British Commonwealth countries dealing with subdivided buildings.

As in Australia, OC in most jurisdictions are creatures of statute and the terminology applied to them is varied. For example, ‘condominium’ is the term used in most provinces of Canada and in the United States both this and the term ‘owners corporation’ are used. They are also sometimes referred to as ‘community corporations.’<sup>92</sup> In the Canadian province of British Columbia they are referred to as ‘strata title’, as is the case in some Australian states. In Quebec the term ‘syndicate of co-ownership’ is used. In England and Wales the term is ‘commonhold’, a form of ownership introduced in 2004.<sup>93</sup> Similar terms are also used by most other jurisdictions.<sup>94</sup>

The first condominium law passed in the United States was in Puerto Rico in 1958. McKenzie relates this to the hybrid common law-civil legal system that had evolved in

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<sup>90</sup> J Slaughter, "The Statutes and Procedures of Community Associations" (2005) *National Parliamentarian* (Accessed on 30.3.11) [http://www.frb-law.com/HOAcondostatutes.htm#\\_edn4#\\_edn4](http://www.frb-law.com/HOAcondostatutes.htm#_edn4#_edn4)

<sup>91</sup> Christudason, above n 88; C Van der Merwe, "South African Sectional Titles Act Compared with the Singapore Land Titles" (1999) 3 *Singapore Journal of International and Comparative Law* 134; C van der Merwe, "Comparative" above n 88; Tan Sook Yee, "Facets of Communal Living under the *Land Titles (Strata) Act*: Common Property, Rights of Subsidiary Proprietors of Individual Lots and the Role of the Management Corporation" [2002] *Singapore Journal of Legal Studies* 416.

<sup>92</sup> Christudason, above n.88.

<sup>93</sup> Blandy, Dupuis and Dixon, above n 70l; See especially S Blandy, "Legal Arrangements for Multit-tiered Housing in England and Wales" 13-34.

<sup>94</sup> van der Merwe, "Comparative" above n 88.

this Caribbean state.<sup>95</sup> In 1960, the first condominium in the Continental United States was built in Salt Lake City, Utah which enacted the *Utah Condominium Act* of 1960.<sup>96</sup> By 1967 every state had adopted some form of condominium statute.<sup>97</sup> It is estimated that between 25 and 30 per cent of Americans live in living arrangements governed by some form of OC.<sup>98</sup> They are sometimes now referred to as ‘Common Interest Housing’ which encompasses housing co-operatives and planned private estates commonly characterized by common land and private governance arrangements.<sup>99</sup> McKenzie has recently termed these developments the largest privatization of American local government in its history as public regulatory environments give way to relationships largely governed by private contract.<sup>100</sup> As well as creating internal governance issues he argues that these developments have created wider societal issues relating to regulation and governance.<sup>101</sup>

As in Australia the various United States schemes vary in form and procedures from state to state. A further complicating factor in the United States is that some state schemes provide that some or all of the statute does not apply to communities created before adoption of the statute thus creating a multi-tiered system.<sup>102</sup> In an effort to bring uniformity to the many state statutes, the National Conference of Commissioners on Uniform State Laws published the *Uniform Condominium Act* (‘UCA’) in 1977. Subsequently, the *Uniform Planned Community Act* (‘UPCA’) was created in 1980, with the intent of bringing the same type of uniformity to laws regarding other planned communities. The broader *Uniform Common Interest Ownership Act* (‘UCIOA’) was promulgated in 1982 (and amended in 1995) with the intent of superseding the UCA, UPCA, and the *Model Real Estate Cooperative Act* (1981).<sup>103</sup>

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<sup>95</sup> E McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Governments* (Yale University Press, 1994) English common law tradition holds that real property ownership must involve land, whereas the French civil law tradition recognized condominium ownership as early as the 1804 Napoleonic Code.

<sup>96</sup> Ibid.

<sup>97</sup> Slaughter, above n 90.

<sup>98</sup> Grassmick, above n 55.

<sup>99</sup> McKenzie, above n 81, 54.

<sup>100</sup> Ibid 64.

<sup>101</sup> Ibid.

<sup>102</sup> Slaughter, above n 90.

<sup>103</sup> Ibid.

These uniform acts do not bind any of the American states but are intended to be used as models when writing statutory schemes. They have been criticized as being too prescriptive, too global and failing to take into account local conditions.<sup>104</sup> Nevertheless, many states have adopted some version of either the UPCA or the UCIOA. Many procedures, including dispute management processes, in American OC have their origins in these statutory models. They have long recognized the value of alternative dispute resolution arrangements. For example, the UCIOA provides in Section 3-102 (18) that an OC may:

(18) by regulation, require that disputes between the executive board and lot owners or between two or more lot owners regarding the common interest community must be submitted to nonbinding alternative dispute resolution in the manner described in the regulation as a prerequisite to commencement of a judicial proceeding.

Each Canadian province, like each Australian state, has its own condominium act. This results in twelve separate statutes which govern condominium ownership. Although many similar and often identical aspects exist, variations abound, as in Australia. For example a 'condominium lot' in Ontario would be a 'strata lot' in British Columbia or an 'exclusive portion' in Ontario. Many of the provinces based or borrowed provisions from the *New South Wales Conveyancing (Strata Title) Act* (1961). As in Australia, the ways of managing disputes in OC vary widely.<sup>105</sup>

Whilst there appears to be general agreement across the different systems that litigation through the traditional legal system is an inadequate way of responding to many OC disputes, and this is recognized in the Victorian legislation, there is little or no analysis of the other options.<sup>106</sup> Not only is there expense and delay but also the remedies available are limited and cannot necessarily be tailored to the particular

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<sup>104</sup> Natelson, above n 53, 495.

<sup>105</sup> Christudason, above n 88; Of particular interest concerning the management of owners corporations in the United States is the emergence of the Community Corporations Institute (CAI) that has fifty-seven chapters around the country, active in legislative change and is responsible for the National Board of Certification for Community Corporation Managers (NBC-CAM) a program that was established in 1995; see McKenzie, *Privatopia*, above n 95.

<sup>106</sup> See, eg, David Butler, "The Arbitration of Disputes in Sectional Title Schemes under Management Rule 71" (1998) 9 *Stellenbosch Law Review* 256; CAV "Issues Paper" above n 82; D Cousins, "Vision for Bodies Corporate", Speech delivered at the 'Building Communities: An Insight into Governing Bodies Corporate' Seminar, Melbourne, 5 April 2004; A Faith, "'Leaky Condo' Dispute Resolution." UBC Dispute Resolution Program, Faculty of Law, 2000; Susan F French, "Making Common Interest Communities Work: The Next Step" (2005) 37 *Urban Law* 359; Guilding et al, above n 86; C Hunter, J Nixon and M Slatter, "Neighbours Behaving Badly: Anti-Social Behaviour, Property Rights and Exclusion in England and Australia." (2005) 5 *Macquarie Law Journal* 149; C van der Merwe and L Muniz-Arguelles, above n 88; Yee, Tan Sook, above n 91.

dispute. This indicates the global, as well as local, applicability of this research. This field, unlike organizational and labour disputing, has not been subject to an in-depth analysis of conflict and dispute interventions.

### **3.6 The Three Tiers of OC Dispute Resolution**

The *Act* commenced operation on 31 December 2007. On that date, the bodies formerly called bodies corporate (created when certain plans of subdivision were registered) became styled as OC. The Review that examined *The Subdivision Act 1998*, which preceded the introduction of the *Act*, recommended and outlined a multi-tiered dispute management process and this is reflected in the *Act*.<sup>107</sup> This was substantially adopted in the new legislation. The first tier is dispute prevention. This includes providing information and advice on internal communication and grievance procedures, as well as internal dispute resolution for OC, with a default process set out in the model rules to the *Act*. The second tier provides for access to a low cost dispute resolution process. Consumer Affairs Victoria (CAV) provides conciliation for disputes and, as necessary, referral to VCAT. Under section 161 of the *Act*, the Director of Consumer Affairs can direct a dispute to conciliation or to conciliation from a wide range of interested parties although it would appear this power is seldom used.<sup>108</sup>

The third tier is VCAT. It was proposed by the Review that VCAT consider cases involving more complex technical and legal issues relating to the operations of OC.<sup>109</sup> A review of the applications being made and the cases decided would indicate that this is not the case and that VCAT is dealing with a wider range of disputes than perhaps envisaged.<sup>110</sup>

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<sup>107</sup> CAV "Future Directions Paper: above n 84.

<sup>108</sup> The Department of Consumer Affairs (Victoria), reported no conciliations under the *Act* in the 2009-2010 period: see Consumer Affairs Victoria, *Annual Report 2009-2010* (CAV, 2010). The Department has the power to direct a current or former lot owner; mortgagee of a lot; insurer; occupier of a lot; purchaser of a lot; and manager of an owners corporation to a conciliation.

<sup>109</sup> CAV "Final Report of the Body Corporate Review" above n 83, 4 (Proposal 11).

<sup>110</sup> See Section 3.3 of this Chapter.

An OC corporation cannot apply to VCAT for an order under the *Act* in relation to an alleged breach unless the dispute resolution process required by the internal OC rules has been followed, and the OC is satisfied that the matter has not been resolved through that process.<sup>111</sup> This restriction is not applied to owners or residents who can apply to VCAT directly without proceeding through the internal process. Also, section 18 provides that an OC cannot take legal action, except upon the issues of repayment of overdue fees or to enforce the rules of the OC, without a special resolution of the OC Committee of Management. The crucial sections relating to the powers of VCAT are outlined in section 3.7 below.

### **3.7 The Operation of the Dispute Provisions of the Owners Corporation Act**

The major function of an OC, as provided by section 4 of the *Act*, is to manage and administer the common property of the corporation.<sup>112</sup> In doing this, section 5 of the *Act* provides:

#### **s5: Owners corporation must act in good faith**

An owners corporation in carrying out its functions and powers-

- (a) must act honestly and in good faith; and
- (b) must exercise due care and diligence.

The dispute provisions of the *Act* are found in Part II Division 1 (sections 162 to 169, inclusive). Section 162 confers the relevant jurisdiction upon VCAT. It provides:

#### ***Section 162. VCAT may hear and determine disputes***

VCAT may hear and determine a dispute or other matter arising under this Act or the regulations or the rules of an owners corporation that affects an owners corporation (an owners corporation dispute) including a dispute or matter relating to—

- (a) the operation of an owners corporation; or

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<sup>111</sup> See section 153(3).

<sup>112</sup> Section 30(1)(a) of the *Act* provides that when a plan of subdivision is registered the owners for the time being of the lots specified in the plan are members of the OC. It also provides that the common property identified in a registered plan of subdivision vests in the lot owners for the time being as tenants in common in shares proportional to their lot entitlement. The OC is registered as proprietor of the common property and so is the legal owner, but the lot owners, as tenants in common in their proportional shares, are the equitable or beneficial owners. See section 31(1) of the *Act*; *Body Corporate No.1/PS 40911511E St James Apartments v Renaissance Assets Pty Ltd* (2004-5) 11 V.R. 41.

- (b) an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by this Act or the regulations or the rules of the owners corporation; or
- (c) the exercise of a function by a manager in respect of the owners corporation.<sup>113</sup>

The regulations referred to in section 162 are the Owners Corporation Regulations 2007. Regulation 8 provides that the rules set out in Schedule 2 of the Regulations are prescribed as model rules for an OC. Section 139(2) of the *Act* provides, in effect, that unless an OC has made other rules (by special resolution pursuant to a power conferred by section 138) the model rules are the rules of the OC.

Section 165(1) of the *Act* provides that in determining an OC dispute VCAT may make any order *it considers fair* including one or more of a wide range of orders enumerated as paragraphs (a) to (m) in that section. Section 165 of the *Act* provides:

**Section 165. What must VCAT consider?**

VCAT in making an order must consider the following—

- (a) the conduct of the parties;
- (b) an act or omission or proposed act or omission by a party;
- (c) the impact of a resolution or proposed resolution on the lot owners as a whole;
- (d) whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners;
- (e) any other matter VCAT thinks relevant.

The administration of the *Act* at VCAT including a low application fee (\$37) to commence a case and the limitations on costs orders (parties usually bear their own costs)<sup>114</sup> would clearly indicate that this is a low cost jurisdiction.<sup>115</sup> This is probably

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<sup>113</sup> Part 4 Division 7 of the *Act* deals with decisions of an OC and how they are made. The principle demonstrated there is that, except in circumstances in which a unanimous resolution or a special resolution is required, decisions are made by ordinary resolution, that is to say, by a simple majority of members voting at a meeting or by ballot, with one vote for each lot which VCAT would ordinarily be loath to overturn. However, there is likely to be three circumstances provided for in the *Act* where a majority decision can be overturned. First, section 162 would require that the OC act according to law and the Tribunal could remedy any such deficiency. Second, section 5 requires the OC to act honestly and in good faith. Third, the requirement in section 167(d) for VCAT to consider whether a resolution is “oppressive to, unfairly prejudicial to or unfairly discriminates against” a lot owner or lot owners indicates that it might well be appropriate for VCAT to make a determination that was contrary to a majority decision of the members if that decision was oppressive, unfairly prejudicial or discriminatory: see *Boswell v Forbes & Ors* (Civil Claims) [2008] VCAT 1997 (19 September 2008).

<sup>114</sup> Recent amendments to the *Consumer Affairs Legislation Amendment Act 2010* and the *Consumer Affairs Legislation Amendment (Reform) Act 2010* which came into effect on the 1st January 2011 empowers VCAT to award a much broader range of costs to owners corporations and lot owners in disputes around arrears of fees. It inserts clause 51ADA into Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* to confer discretion on VCAT to award a broader range of costs, including costs incurred, either directly or indirectly, by lot owners and owners corporation managers [including the costs of professional and volunteer managers], in disputes

one reason why this scheme attracts a wider range of disputes than originally envisaged by the Review preceding the *Act*.<sup>116</sup> However, there is no prohibition on lawyers attending, although the ability of parties to use other advocates would appear to be limited.<sup>117</sup> In recent amendments to supporting legislation VCAT will be able to award a much broader range of costs to OC and lot owners in disputes around arrears of fees.<sup>118</sup> It inserts a new section 51ADA into Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* to confer discretion on VCAT to award a broader range of costs, including costs incurred, either directly or indirectly, by lot owners and owners corporation managers (including the costs of professional and volunteer managers), in disputes about arrears of fees and charges imposed by OC. Costs awarded are not limited to costs incurred by a professional advocate. This will have the effect of mainly reducing the costs to OC's who are the major instigators of actions in relation to fee disputes.<sup>119</sup>

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about arrears of fees and charges imposed by owners corporations. Costs awarded are not limited to costs incurred by a professional advocate.

<sup>115</sup> There are a number of cases involving OC disputes which have considered this issue. The Power to Award costs is contained in section 109. In *Owners Corporation PS 414106B v Victorian Managed Insurance Authority Ors (Domestic Building)* [2009] VCAT 1193 (16 July 2009) the Tribunal was asked to provide reasons by one of the parties why it ordered each party to bear its own costs at an earlier directions hearing. The case involved a dispute over building works and, in an amended statement of claim, the OC applicant had made some claims about a leaky swimming pool for the very first time. This then raised various issues including about the joinder of the pool installer and manufacturer which were argued before the Tribunal. While this was proceeding the OC and the pool manufacturer reached an agreement so that the claim about it was no longer relevant to the overall claims. This resulted in a further Amended statement of claim being prepared. One of the aggrieved respondents sought costs against the applicant OC because of this but this was turned down by the Tribunal which adhered to the general principle that parties bear their own costs. At paragraph 8 of the decision the Tribunal stated the general position following a submission of one of the parties as follows:

.....as emphasised by the Supreme Court in *Vero Insurance Ltd v Gombac Group* [2007] VSC 117, the Tribunal should approach the question of whether a party is entitled to costs on a step-by-step basis:

- (i) The prima facie rule is that each party should bear their own costs of the proceeding.
- (ii) The Tribunal should make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.
- (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question: See also *Ryan Ors v Bar Um Storage Pty Ltd Ors (Civil Claims)* [2009] VCAT 610 (6 April 2009).

<sup>116</sup> See Section 4.2 this Chapter and Chapter 7 for a more detailed analysis of this issue.

<sup>117</sup> The question of who could represent an owners Corporation was extensively considered by the Tribunal in *Owners Corporation 6514 v Carlson (Civil Claims)* [2009] VCAT 889 (15 May 2009). The Tribunal applied a narrow view of who could be a "professional advocate" under the *Act*. In an action for recovery of fees an owners corporation was represented by a property manager. The Respondent was not represented and the Tribunal ordered the repayment of the fees. It then had to consider the question of costs including to the property manager for his appearance. To do so he had to convince the Tribunal that he was a 'professional advocate' within the meaning of section 62(8)(d) of the VCAT Act. This is because, as the Tribunal noted, the Tribunal has often held that costs are confined to money paid or liabilities incurred for professional legal services.<sup>117</sup> This approach follows the High Court of Australia decision in *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403.

<sup>118</sup> *Consumer Affairs Legislation Amendment (Reform) Act 2010*. The commencement date for this legislation was 1 September 2011.

<sup>119</sup> See Owners Corporation Victoria website at [http://www.ocv.org.au/bodycorplaw\\_governing.php](http://www.ocv.org.au/bodycorplaw_governing.php)

In the first full year of operation of the *Act* (2008-2009) VCAT reported 1698 applications in relation to OC disputes.<sup>120</sup> In the following year this had jumped to 2174.<sup>121</sup> This compares to less than 1200 applications going to the equivalent statutory body in New South Wales (NSW) which has approximately the same number of OC as Victoria.<sup>122</sup> The main reason for this disparity between the two jurisdictions is probably two-fold. First, the NSW legislation has provided for a virtually compulsory mediation phase (provided by the Department of Fair Trading) before applicants can go onto adjudication. Second, the adjudication is 'on the papers' and a referral is only made for a formal hearing in complex cases. This means that the major venue for 'meeting' the other side is through mediation. It also means that, in comparison with Victoria, the process of adjudication 'on the papers' process ensures that only complex or difficult cases get through to a final hearing. These differences also seem to have an impact on the type of cases the respective Tribunals in each of these States are hearing. Whereas in Victoria 87% of cases coming before the Tribunal are related to fee disputes, in NSW the number is much lower indicating that many of these have been dealt with earlier in the process.<sup>123</sup> This indicates the impact dispute system design can have on the way in which disputes are processed.

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<sup>120</sup> VCAT *Annual Report* (2008-2009) Victorian Government at 28.

<sup>121</sup> VCAT *Annual Report* (2009-2010) Victorian Government 25, 32. This figure is compiled by combining the OC cases collated on the Civil Claims list and on the OC List after its creation on the 1st January 2010.

<sup>122</sup> Consumer, Trader and Tenancy Tribunal. *Annual Report* (2009-2010), 37. There are according to this report approximately 65,000 OC in NSW which is the about the same as that reported by the Owners Corporation of Victoria on its website. By contrast Queensland has had over 38,000 community titles schemes established under the *Body Corporate and Community Management Act 1997 (Qld)*; see Toohey, L., Toohey, D. "Achieving Quality Outcomes in Community Titles Disputes: A Therapeutic Jurisprudence Approach." (2010), *Social Science Research Network electronic library at: <http://ssrn.com/abstract=1607544>* at p. 2.

<sup>123</sup> *Ibid*, 37: The breakdown of the application types are as follows (There are no equivalent records available for VCAT):

**Adjudication**

- Appoint strata manager 92
- By-laws 126
- Contributions and levies (Strata Scheme) 19
- General orders and other 479
- Insurance (Strata Scheme) 3
- Interim orders 207
- Meetings, decisions and records 62
- Property 70

**Tribunal hearing**

- Amend or revoke Tribunal order 6
- Appeal 182
- Appoint managing agent (Community Scheme) 10
- Caretaker contract 1
- Contributions and levies (Community Scheme) 1
- Insurance (Community Scheme) 1
- Initial period 9
- Other 9
- Penalty 155

Of these applications only 174 have been reported by way of written decisions since the implementation of the *Act*, indicating that only a small percentage were substantive matters.<sup>124</sup> Whilst the cases before VCAT appear relatively narrow in scope, the latest VCAT Report for the 2009-10 year<sup>125</sup> also states that a ‘high proportion’ of these matters were referred to mediation performed by a VCAT member.<sup>126</sup> However, the actual number of reported mediations in both the Civil Claims List (where OC cases were listed before 1 January 2010) and the specialist OC List, created in January 2010, was tiny in comparison to the number of applications made. In 2009-2010 only 22 cases were reported as being mediated in the Civil Claims List (11 per cent of this list were OC cases) and four cases were reported as being mediated in the OC list.<sup>127</sup> The settlement rate for these 26 OC matters was stated to be 57 per cent. This is exactly the same as the overall settlement rate for mediations across all of its lists.<sup>128</sup> The settlement rates ‘at the door’ of the Tribunal between the parties themselves is unreported although the number of settlements between the parties before mediation occurred was recorded as zero in 2009-2010 in the OC list. The VCAT Reports do not provide an estimate of the number of hearings in relation to applications made. However, the figures reported would seem to indicate that a substantial percentage of matters go through to a hearing.<sup>129</sup>

The creation, in January 2010, of a separate OC List was perhaps recognition of the increasing number of cases being initiated. Before the creation of this specialised list the median time for settlement of cases had increased to 18 weeks from 11 weeks a year before.<sup>130</sup> Since the creation of the specialist list in January 2010 the median time

- 
- Restricted property 2
  - Unit Entitlement 34
  - Revoke or vary management statement 1

**Applicants:**

- Lot owner 975
- Owners corporation 467
- Other party 12
- Occupier of a lot 15

<sup>124</sup> Source Austli, <http://www.austlii.edu.au/> Accessed 22.2.2011.

<sup>125</sup> VCAT *Annual Report* (2009-2010) 32.

<sup>126</sup> VCAT *Annual Report* (2008-2009) 28.

<sup>127</sup> VCAT *Annual Report* (2009-2010) 23.

<sup>128</sup> VCAT *Annual Report* (2009-2010) 23.

<sup>129</sup> The VCAT reports use the term ‘finalisation’ to indicate the completion of matters although it is not clear from the Reports if these matters are the result of a hearing or settlement negotiations between the parties.

<sup>130</sup> VCAT *Annual Report* (2009-2010) 25; VCAT *Annual Report* (2008-2009) 29.

was reported to have decreased to 5 weeks.<sup>131</sup> The increasing number of applications to VCAT may indicate that the internal management of disputes within OC may be a viable alternative.

### 3.8 The Model Rules and Alternatives

The *Act* provides the opportunity for individual OC to develop their own rules.<sup>132</sup> If an OC does not make its own internal dispute management rules then the default model rules provided for under the *Act* will apply. This is provided for in section 139 of the *Act*.<sup>133</sup> The Model Dispute Resolution Rules include as follows:

#### Rule 6 Dispute resolution

- (1) The grievance procedure set out in this rule applies to disputes involving a lot owner, manager, or an occupier or the owners corporation.
- (2) The party making the complaint must prepare a written statement in the approved form.
- (3) If there is a grievance committee of the owners corporation, it must be notified of the dispute by the complainant.
- (4) If there is no grievance committee, the owners corporation must be notified of any dispute by the complainant, regardless of whether the owners corporation is an immediate party to the dispute.
- (5) The parties to the dispute must meet and discuss the matter in dispute, along with either the grievance committee or the owners corporation, within 14 working days after the dispute comes to the attention of all the parties.
- (6) A party to the dispute may appoint a person to act or appear on his or her behalf at the meeting.
- (7) If the dispute is not resolved, the grievance committee or owners corporation must notify each party of his or her right to take further action under Part 10 of the *Owners Corporations Act 2006*.
- (8) This process is separate from and does not limit any further action under Part 10 of the *Owners Corporations Act 2006*.

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<sup>131</sup> VCAT *Annual Report* (2009-2010) 32.

<sup>132</sup> Importantly, as noted, section 138 of the *Act* provides that:

“By special resolution, an owners corporation may make rules for or with respect to any matter set out in Schedule 1”.

Schedule 1 of the *Act* specifically provides for the making of a broad variety of rules, in addition to dispute resolution, including internal grievance procedures, hearing procedures and communication procedures.

<sup>133</sup> Section 139 of the *Act* provides that:

#### 139. Model rules

- (1) The regulations may prescribe model rules in relation to any matter in respect of which rules can be made.
- (2) If the owners corporation does not make any rules or revokes all of its rules, then the model rules apply to it.
- (3) If the model rules provide for a matter and the rules of the owners corporation do not provide for that matter, the model rules relating to that matters are deemed to be included in the rules of the owners corporation.

There are a number of potential issues concerning the model rules in relation to dispute resolution as noted in Chapter 1.3 above. These issues raise the question of the utility of implementing alternative rules under the *Act*.

### **3.9 Developing an Alternative Model**

The *Act* has left the design of alternative dispute procedures to the committees of management of OC. Four steps are required to enable an OC to adopt their own process of dispute management. These are:

1. Adopt a set of model rules;
2. Present a special resolution for ratification at an owners corporation meeting;
3. Set up a Dispute Resolution or Grievance Committee; and
4. Register the new rules with the Registrar of Titles.

Survey research of OC managers by the author and others has indicated that the appropriate design of any alternative may also depend upon a number of factors including the size of the corporation as well the nature of the disputes likely to be encountered. It also indicated that these procedures can be onerous for many managers and owners corporations because of a lack of expertise in the area of conflict management and dispute system design as well as the need to obtain a special resolution.<sup>134</sup> The development of the alternative model for OC disputes that was the beginning point of this research was meant, in part, to address these issues by making explicit the way in which different designs could be developed. This then could be then subjected to the an evaluative process through the process of the experiment at the core of this research. Rule making by the OC must balance good governance principles with procedural fairness considerations.

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<sup>134</sup> See Leshinsky, Rebecca, A Parenyi and Peter Condliffe, "Appropriate Dispute Resolution for Owners Corporation Internal Disputes - a Case Study from Victoria, Australia" in *3<sup>rd</sup> World Planning Schools Congress* (Perth, 2011); see also J W Singer, "Democratic Estates: Property Law in a Free and Democratic Society" (2008-2009) *Property* 1009.

It is useful to note that small two lot allotments are exempted from many requirements of the *Act*, including Division 1 of Part 10(see section 7 of the *Act*). This means that two lot corporations do not need to comply with the first tier of the dispute management process as described above. But in any case, complex designs may not be appropriate where OC have only a small number of lots. However larger OC, such as in high rise apartment complexes, may benefit from a more elaborate and considered design due to the higher number of people involved and the implications for the compact community this kind of dispute management structure raises.<sup>135</sup> Before going onto describing a possible process for OC, it may be useful to examine some of the benchmarks for the development of industry based dispute and complaint management systems which are relevant to this scale of dispute management design.

Governments around Australia have established principles or criteria for assisting businesses and organizations in establishing dispute management systems. For example, the Victorian Government's Justice Department has identified eight principles for dispute management systems: fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability.<sup>136</sup> Other government and industry bodies have developed similar typologies.<sup>137</sup>

Having an in-house procedure based upon the principles identified by industry and government may provide a range of procedural advantages which according to the National Alternative Dispute Resolution Advisory Council ('NADRAC') can include:

- greater user choice;
- flexibility;
- the potential for fairer outcomes;

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<sup>135</sup> K Douglas, K Goodman and A Babacan, "Legal Structures in Master Planned Estates: Focusing on the Consumer" in T Dalton (ed) [2009] *Australasian Housing Researchers' Conference 20081*.

<sup>136</sup> Department of Justice, *New Directions for the Victorian Justice System 2004-2014* (Melbourne) 2004.

<sup>137</sup> See, eg., NADRAC *Legislating for Alternative Dispute Resolution* Commonwealth of Australia, 2006; Department of Industry, Science and Tourism *Benchmarks for Industry-Based Consumer Schemes* Commonwealth of Australia, 1997; ACCC, *Benchmarks for Dispute Avoidance and Resolution*, AGPS, 1997; NADRAC, *A Framework for ADR Standards* Commonwealth of Australia, 2001; For commentaries related to constructions and housing industries see, eg, R Cheeks, "Multistep Dispute Resolution in Design and Construction Industry" [2003] *Journal of Professional Issues in English Education and Practice* 84; K W Chau, "Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong" [2007] *Journal of Prof Issues in Eng Education and Practice* 143; Douglas, Goodman and Babacan, above n 135.

- a non-confrontational process;
- cost advantages;
- the ability of participants to be ‘heard’ and to participate in developing the outcomes; and
- user ownership and control of the process.<sup>138</sup>

This range of reports and supporting research into dispute system design generally indicate that greater disputant choice, control and participation within the framework of more flexible systemic processes empowers many disputants, particularly members of disadvantaged groups.<sup>139</sup> This process flexibility can also lead to accommodation of the needs and interests of the parties being more fully considered and is often categorized as a distinct advantage. For example, issues that are considered legally or commercially irrelevant, but which are nevertheless very important to the persons concerned, may be swept aside by professionals engaged to manage a matter in a more formalized traditional context. Flexibility of the process allows adaptation to the needs and culture of the disputants. Participants can agree to apply their own values to the dispute. Potentially this flexibility can lead to greater freedom from any substantive systemic bias. Rather than simply applying the same process template over a range of disputes, practitioners can be innovative in developing a range of processes that meet the particular needs of disputants. The non-confrontational nature of the alternative dispute resolution processes within these more flexible systems it is claimed may also lead to an important benefit: maintenance of ongoing relationships between the parties that can be crucial in neighbourhood and OC type disputes.<sup>140</sup>

Designing a dispute management system involves at least four steps:

1. Conflict analysis: obtain information about the people, issues, sources and dynamics of the conflict. Benchmarking and research into comparative systems

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<sup>138</sup> NADRAC, *Legislating for Alternative Dispute Resolution*, Commonwealth of Australia, 2006.

<sup>139</sup> For an overview of the academic literature in this area see H M Kritzer and S Silbey, *In Litigation: Do the Haves Still Come out Ahead?* (Stanford University Press, 2003).

<sup>140</sup> Dispute system design is a term created by William Ury, Jeanne Brett, and Stephen Goldberg to describe the purposeful creation of an ADR program in an organization through which it manages conflict through a series of steps or options for process: see W Ury, J Bret and S Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Jossey-Bass Publishers, 1988) For further analysis of this question see Chapter 7; see Singer, above n 134.

may be useful. It is usually best to involve as many stakeholders in the analysis process as possible.

2. Strategy selection and design: select a management strategy to meet the identified interests.
3. Action plan and implementation: decide on the particular activities that need to occur.
4. Feedback and review: decide on ways to evaluate what is happening and feed this information back into other systems.<sup>141</sup>

This research follows this process. The process of design is itself a dynamic one with the four steps operating in a non-linear and interdependent way. Modifications to the process can be made as it is trialled and tested. In this research initial analysis and consultation occurred with a key stakeholder management company, VBC, and further analysis and consultation will take place with users of this process. A review of comparable Australian and overseas systems has been undertaken. As part of this process, a possible alternative model of dispute management under the *Act* was developed at the start of the research process. A copy of this process is provided in Appendix B.

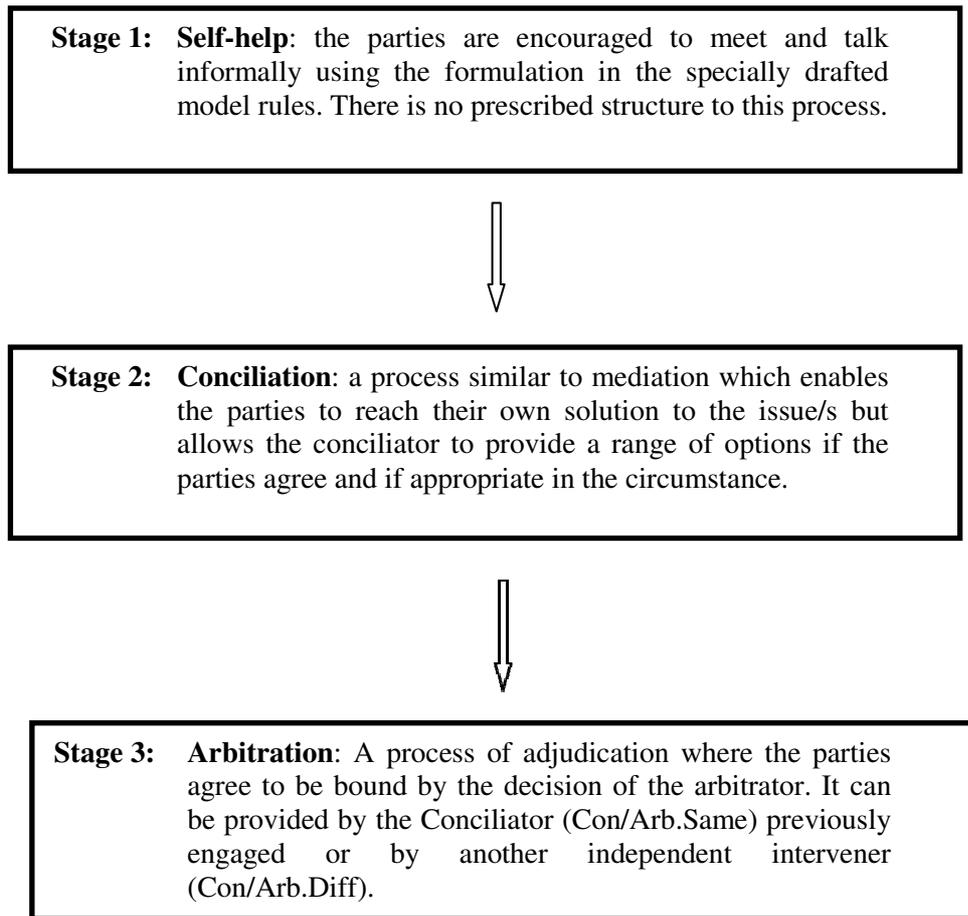
The emphasis of the alternative process is upon the first tier or stage of the legislated scheme: internal dispute resolution and prevention. It is designed to replace the default model rules provided for in the legislation. These processes have been provided to VBC and distributed to its OC clients by that organization in September 2008.<sup>142</sup> This process is, like that in the *Act* itself, a three-stage process described in Figure 3.1.

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<sup>141</sup> Condliffe, above n 48, 290-315.

<sup>142</sup> *Victoria Body Corporate Services Ptd. Ltd., Dispute Resolution Procedures and Other Matters Arising from the Owners Corporation Act 2006*, Melbourne, September, 2008: See Appendix B which contains the content which was included in this booklet.

**Figure 3.1: An In-house Model for OC Disputes**



This research will chiefly test the utility of Stages 2 and 3 of this system in certain ways. However there are two variations of the in-house model that are included in this research. The first is to reconfigure the model to mediation rather than conciliation. The trial of the simulation to test this model indicated that subjects were more comfortable and understood this term more fully. This was largely because nearly all participants in the trial lacked the requisite expertise and or experience with the OC legislation to be able to provide any meaningful options or advice pertinent to the dispute under consideration. Also, a mediation model does not so readily allow the third party to intervene with their own options thus allowing the better flow or sequencing of the intervention for the purposes of the research. ‘Mediation’ in the sense used here is analogous to that described by the NADRAC.<sup>143</sup> The conciliation

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<sup>143</sup> NADRAC. *Dispute Resolution Terms* Commonwealth of Australia, 2003.

process described in the model above is similar to mediation but unlike mediation the conciliator can have an advisory role. It is not, however, dissimilar to the process of mediation used in most contexts and can be regarded as largely analogous.<sup>144</sup> The second variation is the introduction of another hybrid process reversing the intervention sequence of the model, that is, to arbitration – mediation. This will draw upon some relevant research and will provide a further point of comparison.<sup>145</sup> This will therefore provide the three possible combinations described in detail in Chapter 2: mediation/arbitration (same); mediation/arbitration (different); and arbitration/mediation.

The alternative model follows the standard incremental approach to dispute system design, described by Ury, Bret and Goldberg, which suggests that dispute interventions be arranged in a ‘low to high cost sequence’ where decision control and autonomy of the parties is sequentially lessened as the dispute proceeds through various third-party procedures.<sup>146</sup> Arbitration/mediation (Arb/Med) substantially reverses this typical sequence and occurs when the arbitrator hears from the parties and makes a decision, but rather than sharing it with the parties, places the decision in a sealed envelope only to be opened if the parties do not settle the matter at a subsequent mediation conducted by the same person. The rationale for this sequence will be explained further in Chapter 4.

The use of arbitration in such a scheme can be controversial because of all the alternative processes it can leave the parties with less autonomy. Further, when it is not managed properly within the framework of an OC dispute management process, it can, in some circumstances, be both unwieldy and costly.<sup>147</sup> However it is interesting to note that in response to a major crisis in the construction of condominiums due to prolific litigation concerning water leakage, Washington state legislature introduced legislation based upon a mandatory arbitration and conciliation procedure.<sup>148</sup> These

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<sup>144</sup> Ross, Brantmeier be balanced and Ciriacks, above n 11.

<sup>145</sup> See especially Conlon and Moon, "above n 10

<sup>146</sup> Ury, Bret and Goldberg, above n 140.

<sup>147</sup> Miskin, above n 3.

<sup>148</sup> M O'Donnell and D Chawes, "Improving the Construction and Litigation Resolution Process: The 2005 Amendments to the Washington Condominium Act Are a Win-Win for Homeowners and Developers" (2005-6) 29 *Seattle University Law Review* 515.

reforms required the initiating party to advance the costs of the arbitration or conciliation but allowed for these costs to be awarded to the 'winning' party. Arbitration can also have certain advantages. It can lead to improved efficiencies and certainty in the process.<sup>149</sup> It can also open opportunities for potential procedural irregularities to be addressed and ensures that impartial professional skills are brought to bear on the dispute.<sup>150</sup> The inclusion of arbitration also reflects the use of a similar process (adjudication) in the New South Wales and Queensland schemes and in many overseas schemes.<sup>151</sup>

The rules of this alternative model are intended to allow the parties to present their cases without the need for legal representation. However in some instances legal representation will be required. The process requires the parties to present their cases and accompanying materials to the conciliator and arbitrator. It is not an inquisitorial scheme, although both the conciliator and arbitrator can, where appropriate, ask for further information.

The advantages of proceeding in this way are that the parties and the OC keep or maintain the dispute within a clearly delineated process where they are able to plan or predict a process with some certainty. The model rules and the statutory process under the *Act* do not easily allow this, especially from the vantage of the OC. This is because the statutory scheme allows an owner or resident to proceed to CAV or VCAT after the initial complaint, whereas the OC is limited initially to the statutory process. This scheme also allows the OC to budget for projected costs because of the greater certainty of process.

### **3.10 Conclusion**

The review and implementation of the new legislation for the management of OC in Victoria provided an opportunity and a catalyst for the development of alternative forms of dispute resolution in this context. Similar to, but eschewing the processes

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<sup>149</sup> P Condliffe, "Arbitration: The Forgotten ADR" (2004) 78(8) *Law Institute Journal* 42.

<sup>150</sup> Butler, above n 106.

<sup>151</sup> See Chapter 4.

employed in other Australian states, the legislated process principally employed the resources of a large tribunal which has jurisdiction in many fields, VCAT, to manage the cases generated. Although there was provision for the development of internal dispute resolution processes by OC themselves, this would require the development and registration of the process in place of the legislated default scheme for dispute resolution whose main characteristics are simplicity and lack of detail. The legislated default dispute resolution scheme provides no certainty of process and depends upon parties 'meeting' with each other before going onto VCAT for what, in most instances, would be an adjudicated outcome. The alternative scheme retains the meeting procedure but then specifies some alternative steps before needing to resort to adjudication. To test and analyse possible variations to this legislated system, an alternative hybrid model was developed in collaboration with an OC property manager and then used as the basis, with some modifications, for testing in this research. Of principal concern were the preferences and perceptions of justice that the parties in these types of disputes would have within the context of the choices presented by this hybrid model.

## CHAPTER 4: PREFERENCES

### 4.1 Introduction

The first hypothesis in this research is:

*When presented with a preference would parties prefer Med/Arb over Arb/Med?*

This genus of questions is one that has been of interest for both theorists and practitioners in ADR for a considerable time.<sup>152</sup> It is of some importance because the general utility of such processes will be measured by the preferences expressed by people. This can be explained for a number of reasons. By offering reasonable and legitimate alternatives to litigation governments, courts and policy makers can encourage the most appropriate use of ADR and reduce pressures on the courts and the public purse. The introduction in Victoria of the *Civil Procedure Act 2010*, with the aim of facilitating the determination of disputes in a more timely and cost effective manner before litigation, is a good example of a government attempting to create a greater range of responses in the legal system to disputes.<sup>153</sup> Similarly, the *Civil*

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<sup>152</sup> See, eg, C S Cukur and C Ozbayrak, "Analyses of Procedural Justice Preferences and Judgments for Adjudicative Dispute Resolutions in Turkish Context" (2007) 22(59) *Turk Psikoloji Dergisi* 91; Deutsch, above n 12; R. Folger and E.E. Kass, "Social Comparison and Fairness: A Counterfactual Simulationsv Perspective" in J Suls and L Wheeler (eds) *Handbook of Social Comparison: Theory and Research* (Kluwer Academic/Plenum Publishers, 2000) 423; S M Garcia and D T Miller, "Social Categories and Group Preference Disputes: The Aversion to Winner-Take-All Solutions" (2007) 10(4) *Group Processes & Intergroup Relations* 581; Greenberg, above n 12; E Kass, "Interactional Justice, Negotiator Outcome Satisfaction, and Desire for Future Negotiations R-E-S-P-E-C-T at the Negotiating Table" (2008) 19(4) *International Journal of Conflict Management* 319; Leventhal, "The Distribution" above n 12; G. S. Leventhal, J Karuza, W R Fry, "Beyond Fairness: A Theory of Allocation Preferences" in G Mikula (ed) *Justice and Social Interaction*(Springer-Verlag, 1980) 167; E. A Lind et al, "Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic" (1993) 38 *Administrative Science Quarterly* 224; Shestowsky, above n 9; T R Tyler and E A Lind, "A Relational Model of Authority in Groups" in M P Zanna (ed) *Advances in Experimental Social Psychology* (Academic Press, 1992) 115.

<sup>153</sup> This followed several comprehensive consultations and reports by the Justice Department of Victoria: see Department of Justice, "New Directions for the Victorian Justice System 2004-2014" (Melbourne2004); Department of Justice "Civil Justice Review Report" (Melbourne2008); At the Federal level the immediate precursor to the introduction of the Civil Disputes Bill was the report by NADRAC titled *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction* (September 2009); see also Senate Standing Committee On Legal And Constitutional Affairs: Access To Justice Advisory Committee, *Access to Justice: An Action Plan*, AGPS, Canberra, 1994; Australian Law Reform Commission, Issues Paper 20, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Sydney, 1997; Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62, Sydney, 1999; Australian Law Reform Commission, *Review Of The Adversarial System Of Litigation ADR - Its Role In Federal Dispute Resolution Issues*, Paper 25, Sydney, 1998; Australian Law Reform Commission, *Costs Shifting - Who Pays For Litigation*, ALRC Report 75, 1995.

*Dispute Resolution Act 2010* enacted by the Commonwealth Parliament provides for an even wider range of strictures on disputing behaviour once it reaches the legal sphere. Indeed the introduction of *The Owners Corporation Act 2006*, as outlined in Chapter 3, was principally done to provide owners and residents of such entities with a better range of improved dispute processes.

Experimentation with alternative methods in managing neighbourhood, housing and construction disputes has of course been going on for hundreds of years.<sup>154</sup> The traditional two-step process involving an expert advice or determination then arbitration has been a cornerstone of such process at least since the nineteenth century.<sup>155</sup> The shortcomings of this approach became apparent in the latter part of the twentieth century particularly as delay and the costs associated with arbitration became more entrenched at the same time as the ADR movement was burgeoning and case management theory and expertise developing. Studying this evolution Cheeks concludes that this dissatisfaction has resulted is a multistep dispute resolution process consisting of the following steps:

1. Loss prevention and dispute avoidance;
2. Direct negotiations;
3. Facilitated direct negotiations with preselected standing neutrals;
4. Issue specific with outside neutral facilitated negotiations; and
5. Binding adjudication.<sup>156</sup>

This reflects many of the developments described in the organizational and legal literature listed above. It is also reflected in the recognition of the need for more active case management in courts and tribunals themselves<sup>157</sup>. Empirical findings with respect to preferences are therefore especially important given that courts and tribunals in Australia are currently experimenting and trialling various ADR processes in order

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<sup>154</sup> Condliffe, “Arbitration” above n 148; Condliffe “*Conflict Management*” above n 48.

<sup>155</sup> Cheeks, above n 137.

<sup>156</sup> Cheeks, above n 137.

<sup>157</sup> In *Aon Risk Services Australia Ltd V Australian National University* [2009] HCA 27 the High Court held that parties do not have an entitlement to raise any arguable case at any stage of the proceedings, subject only to payment of costs and in dealing with such matters the court should have regard to the public interest and the efficient use of limited court resources per Forrest J. in *Tinworth v WV Management Pty Ltd* [2009] VSC at [27].

to meet the policy directions of government or to improve their case management practices.<sup>158</sup>

Courts and tribunals may be able to improve their responsiveness to disputants needs by resorting to empirical findings rather than simply guessing or anecdotally relying upon principles of equity and case management to guide their procedural reform. ADR practitioners can also benefit by adapting and applying the processes they are using in more systematic and perhaps sensitive ways.<sup>159</sup> Also, and importantly in the context of this research, the preferences disputants have for ADR processes is intimately related to their perceived fairness or justice.<sup>160</sup>

According to Tyler and Lind individual choice and preference are important elements of procedural justice.<sup>161</sup> The self-empowerment and recognition of the concerns, needs, and values of disputants who seek to use dispute management systems, including legal procedures, is progressively more recognized and it is their preferences which increasingly will guide their management. In other words the subjective judgment of disputants is relevant to the way in which disputes should be managed. It is incumbent upon those who manage these systems to recognize and understand this to ensure continued confidence in their use and governance. It is implicit, for example, in the National Mediator Accreditation Standards that guide the conduct of accredited

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<sup>158</sup> The trial of ‘early neutral evaluation’ in the Magistrates Court of Victoria is a current good example. Parties will be ordered, at an ‘early stage’ to present arguments to a Magistrate, who evaluates the key issues in the dispute and the most effective ways of resolving it without this being a binding determination; see P Lauritsen, "Early Neutral Evaluation," in *Continuing Professional Development Program* (Melbourne: Victorian Bar, 2010). Other ‘experiments’ in the State of Victoria include the establishment of a “Neighbourhood Justice Centre” in an inner suburb of Melbourne that attempts to integrate court and community service; Koori Courts, Drug and Alcohol Courts and a special division of the Magistrates Courts for the mentally ill. For an overview of these developments and the policy reasoning in support of them go to: Department of Justice, "New Directions for the Victorian Justice System 2004-2014"(2004, Department of Justice "Civil Justice Review Report"(2008).

<sup>159</sup> Shestowsky, above n 9 211, 213.

<sup>160</sup> See, eg, J A Colquitt, above n 8; J. A. Colquitt et al, above n 12; D Conlon and P Fasolo, "Influence of Speed of Third-Party Intervention and Outcome on Negotiator and Constituent Fairness Judgments" (1990) 33(4) *Academy of Management Journal* 833; D Conlon and H Ross, "Influence of Movement toward Agreement and Third Party Intervention on Negotiator Fairness Judgments" (1992) 3(3) *The International Journal of Conflict Management* 207; Druckman and Albin, above n 12; Thibaut and Walker, above n 11; Sourdin, "Dispute Resolution" above n 27; Sourdin "Mediation" above n 27; O Turel, Y Yuan and J Rose, "Antecedents of Attitude Towards Online Mediation" (2007) 16(6) *Group Decision and Negotiation* 539; Zeleznikow and Bellucci, "Family Mediator" above n 14.

<sup>161</sup> Tyler and Lind, above n 152, 115-9.

mediators under the National Mediator Accreditation Scheme.<sup>162</sup> Paragraph 5 of these Standards states:

Mediators do not advise upon, evaluate or determine disputes. They assist in managing the process of dispute and conflict resolution whereby the participants agree upon the outcomes, when appropriate. Mediation is essentially a process that maximises the self-determination of the participants. The principle of self-determination requires that mediation processes be non-directive as to content<sup>163</sup>.

## 4.2 Research on Dispute Preferences

Experimental research on disputant preferences began in the 1970's.<sup>164</sup> Such research has been most frequently used in organisational psychology and management.<sup>165</sup> In Australia however there exist few such studies and reliance has been placed on findings from overseas. There is therefore a need for such research, especially in relation to court and semi-judicial or tribunal settings as in this study. The experiment reported on in this study and outlined in detail in Chapter 2 investigates, inter alia, the preferences that disputants make after they have been assigned a role in a dispute set in an OC. It tests the utility of a model process actually proposed to be used in such disputes. The research emphasis is upon pre-experience rather than post-experience evaluations of preferences.<sup>166</sup> Therefore the findings here are not necessarily generalizable to post-experience evaluations.<sup>167</sup> However, this research does provide

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<sup>162</sup> National Mediation Accreditation Scheme 2008, accessed 15 August 2011 at [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatIsADR\\_NationalMediatorAccreditationSystem\\_NationalMediatorAccreditationSystem](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatIsADR_NationalMediatorAccreditationSystem_NationalMediatorAccreditationSystem)

<sup>163</sup> NADRAC. *Practice Standard* Commonwealth of Australia, 2007.

<sup>164</sup> In Australia there are limited examples of this type of study but see Elix and Sourdin, above n 27; Sourdin, "Dispute Resolution" above n 16; Sourdin "Mediation" above n 27; K Daly, S Curtis-Fawley and B Bouhours, "Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders 1995-2001" (School of Criminology & Criminal Justice, Griffith University, 2003) Available online at <http://www.griffith.edu.au/school/ccj/kdaly.html>; C Jones, "Does Forum Sentencing Reduce Re-Offending?" (2009) 129 *NSW Bureau of Crime Statistics and Research*; M King, "Problem Solving under the *Dangerous Sexual Offenders Act (Wa)*" (2007), [https://elaw.murdoch.edu.au/issues/2007/1/eLaw\\_problem\\_solving.pdf](https://elaw.murdoch.edu.au/issues/2007/1/eLaw_problem_solving.pdf); J People and L Trimboli, "An Evaluation of the Nsw Community Conferencing for Young Adults Pilot Program " NSW Bureau of Crime Statistics and Research (ed) (Sydney 2007).

<sup>165</sup> A useful summary of the Australian and overseas literature in organization theory is provided in a PhD thesis by P Webster, *Why Are Expectations of Grievance Systems Not Met?* (Melbourne University, 2010).

<sup>166</sup> Shestowsky, "Procedural Preferences" above n 9.

<sup>167</sup> For an examination of the differences between pre and post experience preferences see Tom Tyler, Yuen J Huo and E A Lind, "The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations" (1999) 2(2) *Group Processes & Intergroup Relations* 99 This article reported upon four studies showing that people arrive at pre-experience preferences for decision-making procedures by choosing procedures that help them to maximize self-interest in terms of material outcomes but base their post-experience evaluations on the quality of the treatment received during the course of the procedure. This study has contrary findings to this research where preferences appeared to be predominantly evaluated upon procedural

some useful information about why people make procedural preferences as an initial first step for further research.

The psychological perspective on procedural preferences builds on the research of Thibaut and Walker.<sup>168</sup> They investigated the types of trial procedures that people wanted to use to settle their disputes. Their approach was based upon the premise that people prefer those procedures that are most fair, while also generally taking a longer-term view. They maintained that this was ascertained by the ‘distribution’ of control that the procedures offered. That is, disputants are motivated to seek control.

#### **4.2.1 Control as the key element in preferences**

Thibaut and Walker compared the procedural preference of individuals who were either in front of, or behind, a “veil of ignorance” regarding their role in a physical assault case. Participants who were placed behind the veil were not informed as to their role (i.e., they were not assigned the role of “victim” or “defendant”), whereas those in front of the veil were informed of their role. The weight of the evidence strongly favoured the victim over the defendant; the defendant was therefore “disadvantaged” by the facts of the case, whereas the victim was relatively “advantaged.” Participants were given descriptions of the following procedures: *inquisitorial* (an activist decision maker who is also responsible for the investigation), *single investigator* (a moderately activist decision maker assisted by a single investigator who is used for both disputants), *double investigator* (a less activist decision maker is assisted by several investigators), *adversary* (essentially adjudication—the decision maker is relatively passive and the process is chiefly controlled by the disputants through advocates who represent them in an openly biased way), and *bargaining* (disputants meet in an attempt to resolve the dispute without the intervention of any third-party).

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justice justifications and where outcomes received appeared to have a marked impact on post-experience evaluations of process: see Chapter 6.

<sup>168</sup> Thibaut and Walker, above n 11.

Their research had three parties: two disputants and a third-party decision-maker (e.g., a judge). In addition, the conflict resolution intervention progressed through two stages, the first of which was called the “process stage.” In this stage, information pertaining to the conflict was presented. Control over the delivery of information could be exerted by either of the two disputants (high process control) or by the third party (low process control). The “decision” stage was when a judgment was delivered. Either the two disputants (high decision control) or the third party (low decision control) made the final decision. The study found that participants in all roles—whether behind or in front of the veil of ignorance—preferred the adversarial procedure. Adversarial representation induced greater trust and satisfaction with the procedure and produced greater satisfaction with the judgment, independent of the favourableness of the judgment to the participant. Participants also deemed the adversarial procedure the most fair.

Thibaut and Walker’s emphasis was upon *decision and process control* and their approach is often referred to as the *instrumental model of justice*. *Decision control*, or as it is sometimes known *outcome control*, refers to the ability of the parties to control final decisions and outcomes. *Process control* refers to the ability of the parties to control the type of information or evidence provided in the process. It remains the prevalent model of analysis.<sup>169</sup> Until Shestowsky extended this analysis to include *rule control* in 2004, preference research was limited to these two control elements.<sup>170</sup> *Rule control* refers to the ability of the parties to make rules that govern the process.<sup>171</sup>

Shestowsky posits that some ADR procedures, such as mediation, are readily amenable to disputants choosing alternative rules and accordingly some parties may

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<sup>169</sup> Other and more recent research has shown that disputants often can perceive fairness in regard to how the third party treated them which relates to social status and group inclusion: see E. A Lind et al, “Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments”(1990) 59(5) *Journal of Personality and Social Psychology*, 952; Nancy A Welsh, “Perceptions Of Fairness In Negotiation” (2004) 87 *Marquette Law Review*: This Relates To The Social exchange or group value theory fairness; See Tyler and Lind, “A Relational” above n 152, 115-19; E Allen Lind & Tom Tyler, *The Social Psychology Of Procedural Justice* (Plenum Press, 1988) 221-41; There is also the “fairness heuristic” model which posits that disputants can be unsure about how to assess the fairness of an outcome they can use their evaluation of the process as a sort of mental shortcut for assessing it: see K Van den Bos, “Fairness heuristic theory: Assessing the information to which people are reacting has a pivotal role in understanding organizational justice” in S W Gilliland, D Steiner and D P Skarlicki (eds), *Theoretical and Cultural Perspectives on Organizational Justice*. (Information Age Publishing, 2001) These differing models are further examined in the Chapter 5.

<sup>170</sup> Shestowsky, above n 9, 211.

<sup>171</sup> For a discussion of the limitations of the party’s ability to manage *rule control* see L Boulle, *Mediation: Principles, Process and Practice* (Lexis Nexis, 2005).

have a preference for such procedures.<sup>172</sup> His research reports upon three experiments that elaborate on previous research regarding preferences for alternative dispute resolution procedures for the resolution of legal disputes. He examined preferences for decision control, process control, and control over the choice of substantive rules used in the resolution process. The moderating effects of social status (equal vs. lower status relative to the other disputant) and role (defendant vs. plaintiff) were also assessed. He also investigated the relative preferences for the two common types of mediation (evaluative versus facilitative). Participants generally preferred the following: (a) control over outcome, such as a neutral third party helping the disputants reach a mutually satisfactory resolution; (b) control over process such that disputants would prefer to relay information on their own behalf without the help of a representative; and (c) either substantive rules that disputants would have agreed to before the resolution process, or the rules typically used in court. Preference strength was moderated by experimental conditions of status and role. The results indicated that mediation was the most preferred procedure and facilitative mediation was generally preferred over evaluative mediation.

The large number of studies on preferences has however delivered findings that have been deeply ambivalent. This appears to have two aspects. First, studies on the issue of control have generally been consistent with the research summarized above. That is that high process control, or “voice,” increased perceptions of fairness even in the absence of decision control.<sup>173</sup> Disputants also appear to take a self-interested but longer term approach to the issue of control. For example, they may want decision control when it will aid resolution and they will not want it if it will not be useful in this respect, while they may consider third-party process control is desirable when the conflict is of high intensity<sup>174</sup> and involves face-saving.<sup>175</sup> Second, studies in relation to the preferences for different types of procedures are conflicted.

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<sup>172</sup> Shestowsky, above n 9, 211.

<sup>173</sup> For a summary see R Cropanzano et al, "Moral Virtues, Fairness Heuristics, Social Entities, and Other Denizens of Organizational Justice," (2001) 58 *Journal of Vocational Behavior* 164.

<sup>174</sup> C Deck, A Farmer and D Zeng, "Amended Final-Offer Arbitration over an Uncertain Value: A Comparison with Ca and Foa"[2007] *Experimental Economics*; H N Wheeler "Compulsory Arbitration: A “Narcotic Effect”?" (1978) 17(1) *Industrial Relations*.

<sup>175</sup> J M Bartunek, A A Benton and C B Keys, "Third Party Intervention and the Bargaining Behavior of Group Representatives" (1975) 19 *Journal of Conflict Resolution*.

A number of studies have supported the idea that people tend to prefer more adversarial procedures to less adversarial ones.<sup>176</sup> This has also been confirmed in several cross-cultural studies.<sup>177</sup> However, results from other studies sharply contrast with this conclusion. In this other research, participants tended to prefer less adversarial procedures (such as mediation or bargaining) to more adversarial ones (such as trial or arbitration).<sup>178</sup> For example, a study by Peirce et al, which investigated procedural preferences in a landlord–tenant dispute, found that mediation not only was preferred to arbitration, but it was the most preferred procedure involving a neutral third party.<sup>179</sup> They found that the preferred sequence of procedural choices was: negotiation, mediation, advisory arbitration, arbitration and then “struggle,” which was defined as “pressure tactics,” and finally inaction.<sup>180</sup> They also found that respondents preferred inaction and disliked arbitration compared with complainants. These findings are consistent with Thibaut and Walker’s premise that disputants prefer to keep control over their decisions. Also, research in the anthropological disciplines, which has been going on for a considerably longer period of time, has generally found that negotiation was preferred.<sup>181</sup>

One of the favoured explanations of why the results of these studies have been so disparate has been that the “legal context” of many of the early studies biased the results towards adversarial or adjudicative preferences. That is the disputes studied

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<sup>176</sup> See, e.g., Stephen Latour et al, “Some Determinants Of Preference for Modes Of Conflict Resolution” (1976) 20(2) *Journal of Conflict Resolution* 319; Pauline Houlden et al., “Preference For Modes of Dispute Resolution as a Function Of Process And Decision Control” (1978)14(1) *Journal of Experimental Social Psychology*13, 29; Allan Lind, Susan Kurtz, Linda Musante, Laurens Walker and John Thibaut, “Procedure And Outcome Effects On Reactions To Adjudicated Resolution Of Conflicts Of Interest” (1980) 39 *Journal of Personality and Social Psychology* 643.

<sup>177</sup> Cukur and Ozbayrak, above n 152.

<sup>178</sup> See for example Kwok Leung, “Some Determinants Of Reactions To Procedural Models For Conflict Resolution: A Cross-National Study” 53 (1987) *Journal of Personality and Social Psychology*898, 903; Robert S. Peirce, Dean G. Pruitt, & Sally J. Czaja, “Complainant-Respondent Differences in Procedural Choice” (1993) 4 (3) *International Journal of Conflict Management*. 199, 204-6; Latour et al, above n 176, 320; Larry Heuer and Steven Penrod, “Procedural Preference As A Function Of Conflict Intensity” 51 (1986) *Journal of Personality and Social Psychology* 700, 704; Lind, Thibaut and Walker, (1973) 71 “Discovery And Presentation Of Evidence In Adversary And Nonadversary Proceedings” *Michigan Law Review* 1129; William Austin, Thomas Williams, Stephen Worchel, Allison Adler Wentzel & Daniel Siegel, “Effect Of Mode Of Adjudication, Presence Of Defense Counsel, and Favorability Of Verdict On Observers’ Evaluation Of A Criminal Trial” (1981) 11 *Journal of Applied Social Psychology* 281, 297; Tom R. Tyler, *The Psychology Of Disputant Concerns In Mediation*, 1987 *Negotiation J.*367; Lind and Tyler, above n 169.

<sup>179</sup> Peirce, Pruitt, and Czaja, above n 178.

<sup>180</sup> *Ibid* 200.

<sup>181</sup> W L F Felstiner, R L Abel and A Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming” (1980) 15 *Law and Society Review*, 629; S Merry, “Mediation in Nonindustrial Societies” in K Kressel, D G Pruitt and Associates (eds), *Mediation research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, 1989) 68-90.

have been those that are usually settled by legal procedures.<sup>182</sup> Much of the research examined how people evaluated two particular procedural models: adversarial and inquisitorial trial procedures. As defined by researchers, the adversarial model assigns responsibility for the presentation of evidence and arguments at the trial to the disputants whereas the inquisitorial devolves this onto the third party.

The problem with this argument is that the preferences expressed in non-legal disputes are themselves also ambivalent.<sup>183</sup> Perhaps a more satisfactory explanation is that many of the studies where more adversarial procedures have been preferred were earlier in time than those where less adversarial processes have been preferred.<sup>184</sup> This is because the prevalence and awareness of mediation and like procedures has markedly increased in recent decades and such procedures were not available or not raised as possible and viable alternatives.<sup>185</sup>

#### 4.2.2 Other relevant factors in preference research

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<sup>182</sup> See, eg, Robert Folger, Mediation, arbitration and the psychology of procedural justice in R Lewicki, M. Bazerman and B Sheppard (eds), (1986) 1 *Research On Negotiation in Organizations* 57; William Austin, Thomas Williams, Stephen Worchel, Allison Adler Wentzel and Daniel Siegel, (1981) 11 "Effect of Mode of Adjudication, Presence of Defense Counsel, and Favorability of Verdict on Observers' Evaluation of a Criminal Trial" *Journal of Applied Social Psychology* 281, 284; Louis Kaplow and Steven Shavell, "Fairness Versus Welfare" (2001) 114 *Harvard Law Review*, 961, 1388.

<sup>183</sup> See, eg, Kwok Leung, above n 178 898, 903; LaTour et al, "Some Determinants" above n 178.

<sup>184</sup> See Kwok Leung, above n 178 898, 903; Robert S Peirce, Dean G Pruitt and Sally J Czaja, "Complainant-Respondent Differences in Procedural Choice" (1993) 4 *International Journal of Conflict Management* 199, 204-06; Shestowsky, "Procedural Preferences" above n 9.

<sup>185</sup> See Australian Law Reform Commission (ALRC), *Review of the Adversarial System of Litigation: ADR- its Role in Federal Dispute Resolution*, Issues Paper 20, 1997; (ALRC) *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Sydney, 2001. In its 1997 research report the ALRC contended that clients depend on lawyers for information and advice on dispute management options and they may not be informed of all the alternatives and be unable to counter a lawyer's preference for litigation. The ALRC found that many lawyers have a limited familiarity with or understanding of other dispute management processes. Caputo more recently reports that there is now greater awareness of alternatives, but that some lawyers are still resistant to change or consider mediation and other ADR processes as inferior to judicial dispute resolution. See C Caputo, "Lawyers' Participation in Mediation", (2007) 84 *ADR Journal*, 84 (2007); Further, it would appear clear that some lawyers use mediation as a vehicle for making their client's case or intimidating the other party as part of their negotiation strategies rather than as a means to seek settlement: see A Robertson, "Compulsion, Delegation and Disclosure – Changing Forces in Commercial Mediation" (2006) 9(3) *ADR Bulletin* 50. If this research is right then the desire of court systems to require parties to attend such programs may be more understandable.

Other relevant factors that have gained some prominence in explaining why certain preferences are made include the role and status of the parties,<sup>186</sup> conflict intensity,<sup>187</sup> and the time when the research was conducted, i.e. pre or post process.<sup>188</sup>

The “role” of the parties usually concerns their behaviour as complainants and respondents. McGillicuddy, Pruitt, Welton, Zubek, and Peirce found that complainants were found to be more aggrieved, to bring up more issues, and to expect more from a hearing than respondents. In contrast, respondents were more likely to acknowledge blame for the conflict and to engage in concession making and problem solving. They found complainants achieved more in the final agreement, probably because of the differences just mentioned.<sup>189</sup> As they state:

Our hypotheses about complainant-respondent differences were based on the observation that complainants are usually trying to create change while respondents are trying to maintain the status quo. It follows that respondents should like inaction better than do complainants because inaction protects the status quo. Respondents should also like the consensual procedures (negotiation, mediation, and advisory arbitration) because these procedures allow them to refuse to change. Complainants should like arbitration and struggle because these procedures have the greatest potential for overturning the status quo by, respectively, providing a third party to enforce potential change and by defeating the other party.<sup>190</sup>

Pierce and his colleagues supported these findings and found that arbitration and struggle were more popular with complainants than respondents, while inaction was more popular with respondents.<sup>191</sup> Their rationale for this was explained in terms of the self-interest of the parties. This explanation is supported by the results of four studies of Tyler et al showing that people arrive at pre-experience preferences for

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<sup>186</sup>See, eg, E A Lind and T R Tyler, *The Social Psychology of Procedural Justice*. (Plenum Press, 1988); R Delgado, C Dunn, P Brown, H Lee and D Hubbert, “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution” [1985] *Wisconsin Law Review* 1359: see above n 167.

<sup>187</sup> Steven Penrod and Larry Heuer “Procedural Preference as a Function of Conflict Intensity” [1986] *Journal of Personality and Social Psychology* 51.

<sup>188</sup> See Allan Lind, Bonnie E Erickson, Nehemia Friedland and Michael Dickenberger, “Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study” (1978) 22 *Journal of Conflict Resolution*, 319, 324; Susan T Kurtz and Pauline Houlden, “Determinants of Procedural Preferences of Post Court-Martial Military Personnel” (1981) 2(1) *Basic & Applied Social Psychology* 27-43; Tom R Tyler, Yuen J Huo and E Allan Lind, “The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations” (1999) 2 *Group Processes & Intergroup Relations* 99, 113-15.

<sup>189</sup> McGillicuddy et al, “Third Party and Disputant Behaviors In Mediation” in K. G. Duffy, P. V. Olczak & J. Grosch (eds), *The Art and Science Of Community Mediation: A Handbook For Practitioners and Researchers* (Guilford, 1991) 137

<sup>190</sup> *Ibid* 202.

<sup>191</sup> Peirce, Robert, Dean Pruitt, and Sally Czaja, above n 177 199-222.

decision-making procedures by choosing procedures that help them maximize self-interest. Interestingly, these studies also showed that disputants base their post-experience evaluations on the quality of the treatment received during the course of the procedure.<sup>192</sup>

Conflict intensity refers to the way in which the parties feel about their chances of winning or losing and has been used as another possible explanation of preferences. Heuer and Penrod found that people who perceived that they had a stronger case were more attracted to arbitration.<sup>193</sup> In the Peirce research, noted above, concerning a landlord-tenant dispute no effects were found for this element. They explain this discrepancy upon the basis that Heuer and Penrod's research task involved a court proceeding, which may have made their subjects sensitive to the strength of the evidence. Ross, Brantmeier and Ciriacks give the example of landlords who prefer a process maximizing disputant control than tenants who would prefer a third party to make the decision.<sup>194</sup> That is, third party procedures such as arbitration are generally perceived as favouring the weaker side. Related to this is the confidence parties have in their own skill, usually termed *self-efficacy*.

Arnold and O'Connor's research into negotiators' choice of dispute-resolution procedures and responsiveness to third-party recommendations, after an impasse, shows that high self-efficacy negotiators were more likely to choose continued negotiation over mediation where they felt they were more in control.<sup>195</sup> In addition, they found that these negotiators were more likely to reject a mediator's recommendation for settlement, even when this recommendation was even handed and met their interests. As predicted, however, the influence of self-efficacy on the acceptance of recommendations was moderated by mediator credibility. When disputants perceived that the mediator had low credibility, the pattern of effects remained unchanged. However when disputants viewed the mediator as being highly

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<sup>192</sup> Tyler Huo and Lind, above n 167, 113-5: see above n 167.

<sup>193</sup> Heuer and Penrod above n 178, 700-10.

<sup>194</sup> W Ross et al, "The Impact of Hybrid Dispute-Resolution Procedures on Constituent Fairness Judgments" (2002) 32(6) *Journal Of Applied Social Psychology*.

<sup>195</sup> J A Arnold, and K M O'Connor, "How Negotiator Self-Efficacy Drives Decisions to Pursue Mediation" (2006) 36(11) *Journal of Applied Social Psychology* 2649-69.

credible, self-efficacy had no influence on the acceptance/rejection of mediator recommendations.

Shestowsky argues that the time when the study is made can be crucial.<sup>196</sup> Most empirical studies of actual civil disputants have examined their perceptions of procedures almost exclusively after the disputes have ended. He states:

Moreover, none of the published research has assessed their perceptions both before and after experiencing a dispute resolution procedure for the same dispute. The relevant research as a whole, then, appears to disregard important ways in which disputants' perceptions might be dynamic.<sup>197</sup>

He provides two main reasons for this. First, such perceptions can guide their procedural choices. Secondly, perceptions after the procedure may have some impact upon the way in which disputants comply with the outcomes.<sup>198</sup> This, he believes, can have important ramifications for the viability and confidence in the legal system.

### **4.3 The Preferences in this Research**

In this research participants in a simulated dispute between an OC and a tenant were asked to state their preferences out of three processes: mediation/arbitration with the same person in the mediation and arbitration roles (Med/Arb Same); mediation/arbitration with a different person (Med/Arb Different); and arbitration/mediation with a different person (Arb/Med). These were not only part of the experimental condition but were part of a designed alternative to the model rules under *The Owners Corporation Act 2007* which the author had previously prepared as part of this research. The alternative procedure is described in more detail in Chapters 2 and 3.

Because the Med/Arb variants potentially provide more party control up until the point of arbitration, these are more likely to be favoured by those who may be in a perceived

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<sup>196</sup> D Shestowski and J Brett, "Disputants Perceptions of Dispute Resolution Procedures: A Longitudinal Empirical Study," (2008) 130 *UC Davis Legal Studies Research Paper Series* 1.

<sup>197</sup> *Ibid* 2.

<sup>198</sup> *Ibid* 4.

stronger position and being able to exert more control. An owner of a lot or the OC Committee may perceive themselves favouring Med/Arb more than a renter of a lot because they are more likely to have more information, access to resources and perhaps self-efficacy.<sup>199</sup> Approximately 45% of residents in OC are renters.<sup>200</sup> Ross and Conlon posit that this greater process and decision control, as well as the need to alleviate uncertainty, will move parties in a dispute towards a preference for Med/Arb rather than Arb/Med.<sup>201</sup>

Med/Arb procedures have several advantages in being perceived as just by parties. In particular, they allow for the incremental relinquishment of party control when the parties are unable to reach agreement by themselves. They are also more likely to be familiar and therefore trusted by parties.<sup>202</sup> This is also dependent upon the procedures being appropriately implemented. As the McGillicuddy research showed, there is also less likely to be inter-party hostility and more willingness to follow the directions of the mediator/arbitrator.<sup>203</sup>

#### **4.4 Findings: Preferences**

In the pre-simulation questionnaire all participants (N=252) were asked to list the order of their preferences between the three processes. This was done after they had been put into their roles as complainant, respondent, mediator, arbitrator or observer. There appeared to be a marked preference for the Med/Arb Same process across all role groups. This can be shown in a number of ways. Figure 4.1 shows the percentage of first preferences of all participants.

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<sup>199</sup> W Ross et al, above n 194; Arnold and O'Connor, above n 195 2649-69.

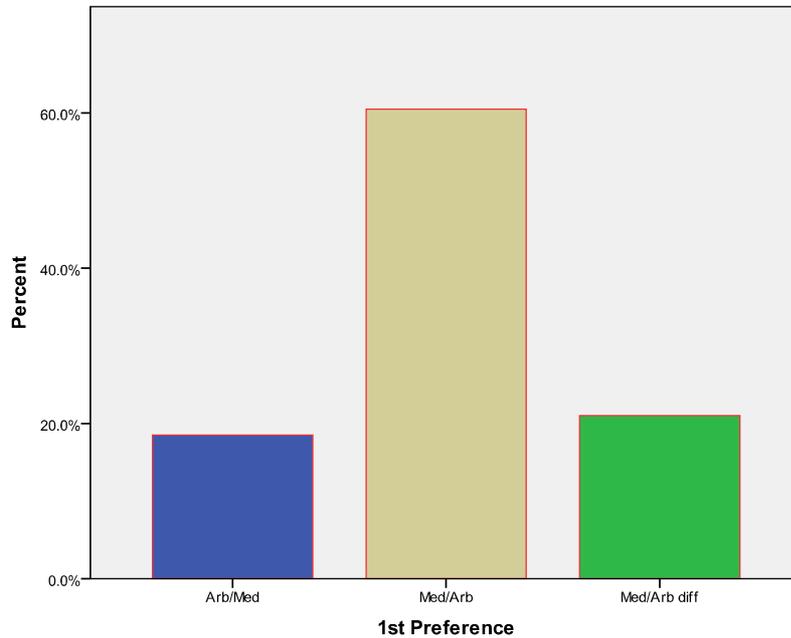
<sup>200</sup> Australian Bureau of Statistics National Census 2006, <http://www.abs.gov.au/>

<sup>201</sup> Ross and Conlon, above n 11.

<sup>202</sup> Conlon and Moon, above n 10; Ross and Conlon, above n 11.

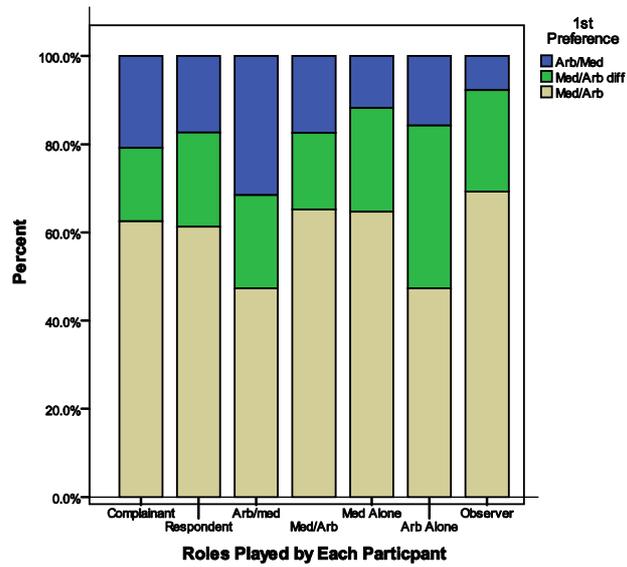
<sup>203</sup> N B McGillicuddy, G L Welton, and D G Pruitt, above n 39. McGillicuddy and his team conducted a field experiment at a community mediation centre to test the impact on behaviour in mediation of three models of third-party intervention. Third parties and disputants were randomly assigned to one of three conditions: (a) straight mediation; (b) mediation/arbitration (same); or (c) mediation/arbitration (different).

**Figure 4.1: First Preferences of Participants**



If this overall figure is broken down by role, variations can be seen in the way in which preferences flowed: see Figure 4.2. Whilst the percentage difference between complainants and respondents did not appear significant and the overall preferred preference for Med/Arb Same remained, it was apparent from this analysis that mediator/arbitrators, arbitrator/mediators and arbitrators (who were in that role in the Med/Arb Different process) would be more inclined to favour the process they were in.

**Figure 4.2: 1st Preferences by Role Played**



Tables 4.1, 4.2 and 4.3 show the relative distribution of the three preferences across the participants.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1 Arb/Med	44	17.5	18.5	18.5
	2 Med/Arb	144	57.1	60.5	79.0
	3 Med/Arb diff	50	19.8	21.0	100.0
	Total	238	94.4	100.0	
Missing	System	14	5.6		
Total		252	100.0		

<b>Table 4.2: 2<sup>nd</sup> Preferences</b>					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1 Arb/Med	67	26.6	28.4	28.4
	2 Med/Arb	64	25.4	27.1	55.5
	3 Med/Arb diff	105	41.7	44.5	100.0
	Total	236	93.7	100.0	
Missing	System	16	6.3		
Total		252	100.0		

<b>Table 4.3: 3<sup>rd</sup> Preferences</b>					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1 Arb/Med	126	50.0	53.4	53.4
	2 Med/Arb	28	11.1	11.9	65.3
	3Med/Arb diff	82	32.5	34.7	100.0
	Total	236	93.7	100.0	
Missing	System	16	6.3		
Total		252	100.0		

These variations were further explored. Using a Chi Square test for independence the relationship between the roles of participants acting as complainants or respondents and preference was explored. The test indicated no significant association between party role and preference ( $\chi^2(1, n=142) = 0.051, p = 0.78, \text{Cramers } V = 0.06$ ).

Recoding of the ‘non-party roles’ (those acting as mediators, arbitrators and observers) into one composite variable allowed a further Chi Square test to be performed comparing the difference between being a disputant party (a complainant or a respondent) and being a non-party (as a third party or observer) to the dispute. The difference between these two composite groups is shown in Table 4.4. A Chi Square

test for independence indicated that the result was not significant between party and non-parties in the simulation ( $\chi^2(1, n=238) = 0.89, p = 0.64$ , Cramer's  $v = 0.61$ ).

An exploration of the relationship between residency type, citizenship, gender and place of birth also showed no significance for preferences using these same tests. This is not to say that the characteristics of participants, such as gender or ethnicity, might not have some significant impact on aspects of the process.<sup>204</sup> Residency type was an important finding because it related to the initial theoretical analysis leading to the formulation of Hypothesis 1. The analysis of residency type involved both those actually living as an owner or renter, from demographic information obtained from the pre-simulation questionnaire, as well as from those who were playing the role of a renter (the complainant in the simulation) and an owner (the respondent in the simulation).

**Table 4.4: Cross-tabulation of Party and Non-party Roles**

		1st Preference			Total	
		1	2	3		
		Arb/Me d	Med/ Arb	Med/Arb diff		
Party and Non-Party Roles	1 Party Roles	Count	28	91	28	147
		% within	19.0	61.9%	19.0%	100.
		% within 1st Pref	63.6	63.2%	56.0%	61.8%
		% of Total	11.8	38.2%	11.8%	61.8%
	2 Non- party Roles	Count	16	53	22	91
		% within	17.6	58.2%	24.2%	100.
		% within 1st Pref	36.4	36.8%	44.0%	38.2%
		% of Total	6.7%	22.3%	9.2%	38.2%
Total	Count	44	144	50	238	
	% within	18.5	60.5%	21.0%	100.	
	% within 1st Preference	100.0	100.0	100.0%	100.	
	% of Total	18.5	60.5%	21.0%	100.	

<sup>204</sup> For a recent empirical study and review of the literature see L Charkoudian, and E K Wayne, "Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation" (2010) 28(1) *Conflict Resolution Quarterly* 23.

The conclusion of the analysis of this question is therefore in the affirmative but with the surprising result that the Med/Arb Same process was significantly preferred to Med/Arb Different. The latter process was scored only slightly ahead of Arb/Med in percentage terms. Our systems of dispute management, both legal and non-legal, are usually predicated on the presence of different persons performing the various third-party roles. Further analysis around participants rating of control in the various processes was performed to explore this further.

#### **4.5 Findings: Control**

Participants were asked to rate decision control, process control and rule control for each of the three processes to be used in the simulation on a five point Likert scale: see Appendix A2. Each was defined in the following terms in the questionnaire.<sup>205</sup>

**Decision Control** – the ability of the parties to control the final decisions and outcomes

**Process Control** – the ability of the parties to control the type of information/evidence provided

**Rule Control** – the ability of the parties to make the rules that govern the process

The total score for each element was collated and formed into three new variables called respectively *Total Control Score of Arb/Med*; *Total Control Score of Med/Arb Same*; and *Total Control Score of Med/Arb Different*. This enabled an exploration of the relationship between these control elements and preferences. The means of each of these variables is shown in Figure 4.3 below: N = 236, Arb/Med Control M = 9.00, SD = 2.64; Med/Arb Same Control M = 10.83, SD 1.68; Med/Arb Different Control M = 10.04, SD = 2.051. The instrumental model of justice would suggest that this distribution of control would reflect the preferences indicated by participants. Further analysis would seem to support this.

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<sup>205</sup> Based on Shestowsky, "Procedural Preferences" above n 9.

**Figure 4.3: Mean of Total Control Scores for the Three Processes**



A one-way between groups multivariate analysis of variance was performed to investigate the way in which those who made a first preference scored the three processes (Arb/Med, Med/Arb Same, Med/Arb Different) in terms of these control elements scored above. The collated variables mentioned above (*Total Control Score of Arb/Med; Total Control Score of Med/Arb Same; and Total Control Score of Med/Arb Different*) were used as dependant variables. The independent variable was *First Preference Choice*. Preliminary assumptions testing was conducted to check for normality, linearity, homogeneity of variances, covariance matrices and multi co-linearity with no serious violations noted.

The result was a statistically significant difference between those who made different first preference choices on the combined dependent variables,  $F(6,460) = 7.6$ ,  $p = 0.000$ . Wilks Lambda = 0.827. Partial eta squared = 0.91. When the results for the dependent variables were considered separately Total Arb/Med and Med/Arb Same were clearly significant using a modified Bonferroni adjusted alpha level of 0.017.

The Total Med/Arb Different level was 0.179 which was not significant for this variable. An examination of the mean scores of each variable indicated that those whose first preference was Arb/Med scored a mean total control for this process of 10.57 and 8.78 for Med/Arb Same and 8.22 for Med/Arb Different. Those whose first preference was Med/Arb Same (the predominant choice) scored total control for Arb/Med 8.78, for Med/Arb Same 11.16 and Med/Arb Different 10.15. Those who gave Med/Arb Different first preference gave a mean score to Arb/Med of 8.22, Med/Arb Same 10.25 and Med/Arb Different 10.33.

This preliminary analysis therefore showed a significant statistical relationship between at least two of these dependent variables and preferences. That is, perception of control was generally a factor in preference.

A one-way analysis of variance (ANOVA) was then conducted to explore the relationship between first preferences and each of the three dependent variables described above. This allowed some post-hoc comparisons of these variables.

The ANOVA for the *Total Control Score of Arb/Med* dependent variable showed there was a statistically significant difference at the  $p < 0.05$  level for first preferences.  $F(2,232) = 11.2, p = 0.00$ . The effect size was medium. Post-hoc comparisons using the Tukey HSD test indicated that the mean score for this variable for those whose first preference was Arb/Med ( $M = 10.57, SD = 2.509$ ) differed significantly from both those who first preference was Med/Arb Same ( $M = 8.78, SD = 2.513$ ) and Med/Arb Different ( $M = 8.22, SD = 2.623$ ), representing a medium to large group size effect using eta squared of 0.08.

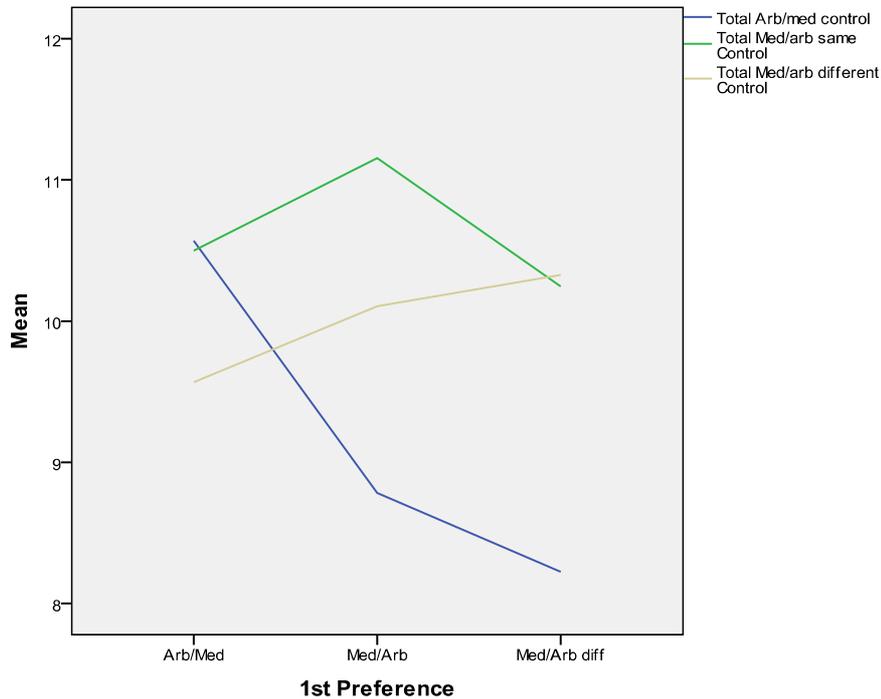
An ANOVA for the *Total Control Score of Med/Arb Same* dependent variable showed that there was a statistically significant difference at the  $p < 0.05$  level for first preferences.  $F(2,232) = 6.826, p = 0.001$ . The effect size using eta squared (0.06) was medium. Post-hoc comparisons using the Tukey HSD test indicated that the mean score for those whose first preference was Med/Arb Same ( $M = 11.15, SD = 1.572$ ) did not differ significantly from who first preference was Arb/Med ( $M = 10.57, SD = 2.509$ ) but did differ significantly from those whose preference was Med/Arb Different

(M = 10.24, SD = 1.738) In other words those who chose Arb/Med and Med/Arb Same were closer together on this measure than those whose first preference was Med/Arb Different.

For the *Total Control Score of Med/Arb Different dependent* variable there was no statistically significant difference at the  $p < 0.05$  level for first preferences.  $F(2,232) = 1.731, p = 0.179$ . Post-hoc comparisons using the Tukey HSD test indicated that the mean score for those whose first preference was Arb/Med (M = 9.57, SD = 2.161) did not differ significantly from both those who first preference was Med/Arb Same (M = 10.11, SD = 1.927) and also from Med/Arb Different (M = 10.33, SD = 2.240), representing a medium group size effect using eta squared of 0.06. In other words, those whose first preference was Med/Arb Different did not differentiate between the three control measures as those who made the other choices did, although as can be seen from the mean scores they did score the other two processes lower.

These differences can be seen clearly in a line graph below of the mean scores of each of the three variables tested: Figure 4.4. What is clearly indicated is that those who chose a process rated it consistently higher on the control measures than the other processes. Overall, as the multivariate analysis showed, there was a significant difference in these scores. At the level of the one way analysis this could be refined. It was at the significant level for Arb/Med (with both of the other variables) and partly for Med/Arb (with Med/Arb Different but not Arb/Med Same) but not for Med/Arb Different. These results generally would seem to confirm the extant theory in this area from the pioneering work of Thibaut and Walker's onwards, which became the instrumental model of justice. The perception of greater control associated with a process will tend to cause a party to prefer that process. In this research the participants overwhelmingly preferred Med/Arb Same (N=142) which enjoyed the highest overall control rating. It was perceived as affording a greater overall level of control than the other two processes. Further, those who chose each of the processes scored their own chosen first preference higher on control. What is interesting is the greater gap between the mean scores for those who chose Arb/Med than the other two processes and the relative 'flatness' of the Med/Arb Different mean scores by comparison.

**Figure 4.4: Mean Scores of Total Control Scores for Process**



A further check was made to determine if there was any correlation between role, gender, resident status and place of birth using a one-way multivariate analysis of variance test with the three dependent variables described above (*Total Control Score of Arb/Med*; *Total Control Score of Med/Arb Same*; and *Total Control Score of Med/Arb Different*). No significance was shown for party (complainant or respondent), roles, gender or resident status for these combined variables.

However the test for the *Citizenship* variable (Two Values: Citizen of Australia Yes, N=197/No, N = 35) showed an overall statistical significance using Wilks Lambda (= 0.002). But when considered separately there was only a statistically significant difference, using a Bonferroni adjustment alpha level of 0.017, for the Med/Arb Same score:  $F(1,230) = 6.364$ ,  $p = 0.12$ , partial eta squared = 0.027. The mean scores indicated a 0.77 difference between citizens (M= 10.72, SD = 1.65) and non-citizens (M = 11.49, SD = 1.72). This test was followed up with another between these dependent variables and the *Aggregate Birthplace* variable (Two Values of *Asia*, N = 42 and *Other*, N=189). This also showed overall significance (Wilks Lambda = 0.013) but with no statistical difference between the individual variable using the

Bonferroni adjustment. These results would indicate a perception among those who were non-citizens (mostly temporary visa students) that Med/Arb Same provided more party control. However, as indicated previously there was no significant difference between the first preferences between these variables. A Chi-square test for independence between *First Preference* and *Citizenship* indicated no significant relationship between preference and citizenship ( $p = 0.07$ ,  $\phi = 0.151$ ). It could be concluded that whilst non-citizens did significantly score Med/Arb Same higher on control this did not significantly impact on their preferences.

#### **4.6 Findings: Reasons for Preference**

Utilizing an integrated design methodology, qualitative data was gathered alongside the quantitative data described above so as to expand upon the analysis.<sup>206</sup> This relatively recent approach to research in this area has been used on bargaining and negotiation behaviour.<sup>207</sup> In this research the disputing parties in the role play were asked to give three reasons for the preference they gave. This is contained in Question 3 of the Pre-simulation questionnaire: see Appendix A2. This question therefore occurred before the questions relating to control. In this way these qualitative questions on reason for preferences were not ‘contaminated’ by the questions on control.

This qualitative material was then inductively explored using justice theory and then coded. Out of a possible total of 756 reasons 517 were provided. The responses were coded by using the definitions from Colquitt in validating and refining four factors in justice research (distributive, procedural, interpersonal and interactional) which are the basis of the later analysis of perceptions of justice in this thesis: see Chapter 5.<sup>208</sup>

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<sup>206</sup> For an overview of research designs utilizing qualitative and quantitative data see: Katharina Srnka and Sabine Koeszegi, "From Words to Numbers: How to Transform Qualitative Data into Meaningful Quantitative Results" (2007) 59 *Schmalenbach Business Review*.

<sup>207</sup> See Putnam and Jones, above n 31; B Jeanne, D Shapiro and A Lytle, "Breaking the Bonds of Reciprocity in Negotiations" (1998) 41 *Academy of Management Journal*; Weingart et al, above n 31.

<sup>208</sup> Colquitt, above n 8, 386-400.

As the content analysis proceeded it was clear that this four sided analysis based upon Colquitt's typology was not entirely satisfactory because it was not 'picking up' a substantial number of responses which indicated a concern with process efficiency and cost. The analysis was therefore modified to include this element and this is also reflected later in this thesis in Chapter 6: Efficiency. The coding was therefore reflective of the overall research concerns in the thesis and provided a useful further point of analysis for the analysis of preferences.

The next stage in the analysis of the qualitative data was to provide for independent evaluations of the data to both further check the categories and provide independent judgment of the units of analysis and in coding them so as to further reliability. An independent coder was trained in the use of the five terms and given access to the specific data in Question 3 to code. An intercoder consistency-matrix was then utilized so that the codes could be checked across the results from the coders.<sup>209</sup> The coders, one was the author, then conferred and checked their results, changing some. The corrected data was then inputted into the SPSS software and a Cohen's' Kappa Measure of Agreement analysis performed to check how consistent the two coders ratings were. This showed an intercoder consistency rate of 80.5% with a Kappa value of 7.09, indicating good to very good agreement between the coders.<sup>210</sup>

The Table and Pie Chart below show the total percentage of the reasons provided for each of the coded categories. They clearly indicate the preponderance (68.8%) given to procedural justice in the reasons given. Further analysis of this data showed that there was no significant difference between the way in which complainants and respondents justified their preferences and between those who chose the different processes as a first preference. This analysis was aided by collating the number of preference reasons for each category, (distributive (DJ), procedural (PJ), interpersonal (IJ) and interactional justice (IntJ)) and efficiency, into separate variables to enable Chi square tests for independence between these and possibly associated variables to be made. Chi-square tests for independence indicated no significant association

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<sup>209</sup>See Srnka and Koeszegi, above n 206, 39.

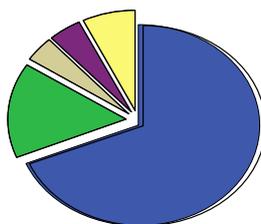
<sup>210</sup> M Lombard, J Snyder-Duch, C Campanella Bracken, "Content Analysis in Mass Communication: Assessment and Reporting of Intercoder Reliability" (2002) 28(4) *Human Communication Research*.

between party roles (complainant and respondent) or between first, second or third preferences and reasons given for preference ( $p = .776; .073; .445; \text{ and } .517$  respectively). Nor was any significant association found for other variables with reasons for preferences using this test, including role played, gender, place of birth, citizenship and residential status. It can therefore be confidently concluded that whilst there was an overwhelming reason for justifying the pre-simulation preferences (procedural justice) this was not predicated upon role or other identifying variables used in this research.

Table 4.5: Preference Reason 1					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1 Procedural Justice	152	60.3	68.8	68.8
	2 Distributive Justice	34	13.5	15.4	84.2
	3 Interpersonal justice	9	3.6	4.1	88.2
	4 Informational Justice	10	4.0	4.5	92.8
	5 Efficiency	16	6.3	7.2	100.0
	Total	221	87.7	100.0	
Missing	System	31	12.3		
Total		252	100.0		

**Figure 4.5: Percentages of Each Preference Reason**

Procedural Justice 60.3% ■ Distributive Justice 13.5% ■  
 Interpersonal Justice 3.4% ■ Informational Justice 4.0% ■ Efficiency 6.3% ■



## 4.7 Discussion

As expected participants preferred the Med/Arb procedures over Arb/Med. Med/Arb Same was by far the most preferred process. This was highly consistent across the experimental conditions. The ability to mediate a matter first to potentially deny the imposition of the arbitration option was highly preferred. This is likely to be explained by the fact that, as previously mentioned, participants are likely to be more familiar with a process which proceeds from mediation to arbitration than the other way around.<sup>211</sup> It is also consistent with the more recent research which shows that parties prefer processes that are less adjudicatory and more facilitative in their orientation. The familiarity of contemporary students with mediation processes is perhaps considerably higher than it was previously and this may also be reflected in the results.

What was not expected in the results was the preponderance given to Med/Arb Same over Med/Arb Different. The presence of a different third party between the two processes of mediation and arbitration seemed to be something the parties found less appealing. Med/Arb Different was deemed to afford less control and those who chose this process as their first preference did not differentiate between control factors as much as those who chose the other two processes. It could be seen as a 'middle position' between the other two and therefore did not provide the same level of differentiation. It was not rated significantly differently in terms of reasons for preferences, including efficiency, than the other two processes. Even though it is a configuration that is most common in our legal and organizational systems, and therefore perhaps could be more familiar and understandable to the participants, it was clearly less preferred. There is no clear research on this question and further exploration of this aspect is warranted. It is a significant finding however for those planning and implementing dispute systems.

The participants clearly distinguished between the three processes in terms of control elements in the experimental conditions. Arb/Med predictably rated lowest on the control measures which seems to indicate that the presence of a more adjudicatory

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<sup>211</sup> Conlon and Moon, above n 10.

process in the initial stages of a third party process does diminish the sense of party control, at least before the intervention has occurred. This is despite the fact that the third party is not going to announce their decision until after the parties have attempted mediation. There appeared to be a direct causal link between preference and the perceived level of control afforded by the process. Of all the elements in the research this was pertinent to the preferences made and supports the available research findings. Ross and Conlon's conclusion that greater process and decision control will move participants towards a preference for Med/Arb rather than Arb/Med seems to be borne out by these results.<sup>212</sup> This is crucial when designing and implementing procedures because their utility will rise and fall on such questions. What these results show is that the design of a dispute system, as in this research, around a hybrid process where the same person performs a number of roles would be an element that disputants would tend to see as enhancing their control and thus increasing their potential acceptance of it. In the alternative model trialled in this research disputants would presumably favour the Med/Arb Same variation over the Med/Arb Different process.

Neither party role, gender nor status of residence seemed to have any impact upon the preferences made or the reasons for those preferences. Minor differences were indicated for citizenship and place of birth on control measures but not such as to change overall preferences. It was expected that those in respondent roles may prefer a process where they would have more freedom to negotiate an outcome (the Med/Arb configurations) but this was not so. Also, those who actually lived in OCs as owners might have been expected to prefer this in relative terms. However there were no significant differences after analysis of the effects.

The qualitative data showed an overwhelming justification for the preferences was based upon procedural justice concerns. By comparison the other reasons given were minor. This will be explored further in Chapter 5. Of interest here is that there seemed to be no relationship between these reasons and preference decisions. This may indicate that participants stated reasons for their preferences bore little relationship to

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<sup>212</sup> Ross and Conlon, above n 11, 416-27.

differentiating between the three processes available. They seemed not to favour one process over the others on these rationales. This is again an area for further research to attempt to explore the link between the reasons or rationale of participants in dispute and the processes they prefer.

## **CHAPTER 5: JUSTICE AND FAIRNESS: HOW DO DISPUTANTS WHO RECEIVE WORSE OUTCOMES THAN OTHERS OR WHO OCCUPY CERTAIN ROLES PERCEIVE THESE ELEMENTS?**

### **5.1 Introduction**

In this Chapter I will consider the following two hypotheses which formed part of the initial research structure.

**Hypothesis 2:** Would disputants who are owners of OC lots rate higher the distributional, procedural, interpersonal and interactional justice elements of Med/Arb.Same and Med/Arb.Diff than the same aspects of Arb/Med compared to disputants who are renters of lots?

**Hypothesis 4:** Is there a correlation between the “different types” of justice so that parties who give a higher rating to distributive justice elements after arbitration regard the process to be procedurally, interpersonally and informationally more just than those who give lower ratings to the same distributive justice elements after receiving an arbitrated ruling but not before?

These are fundamental questions reflected in the research literature in various ways and critical to considerations of dispute system design, implementation and analysis.

My major concern in examining Arb/Med, Med/Arb Same and Med/Arb Different, within the context of OC disputes, is upon the procedural, distributive, informational, and interpersonal fairness or justice judgments of the participants. Judgements regarding the fairness of outcomes or allocations have been termed ‘distributive justice.’<sup>213</sup> This is usually judged by assessing if rewards are proportional to costs, whether outcomes align with expectations,<sup>214</sup> and if outcome/input ratios match those

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<sup>213</sup> G Homans, *Social Behaviour: Its Elementary Forms* (Routledge & Kegan Paul 1961).

<sup>214</sup> P Blau, *Exchange and Power in Social Life* (Wiley, 1964).

of a comparison other.<sup>215</sup> Judgements regarding the fairness of process elements are termed ‘procedural justice.’ This is usually assessed and is judged by determining if procedures are accurate, consistent, unbiased, and correctable as suggested by Leventhal, and open to disputant input or ‘voice’ as suggested by Thibaut and Walker.<sup>216</sup> Judgements regarding the fairness of interpersonal interactions are termed ‘interactional justice.’ Interactional justice has more recently been divided into two parts: ‘interpersonal justice’ and ‘informational justice.’<sup>217</sup> The former is still concerned with the fairness of interpersonal interactions, principally concerning the sincerity and respectfulness of authority communication by the third party. Informational justice is more concerned with the quality and fairness of the information being conveyed, particularly their honesty and adequacy.

The National Alternative Dispute Advisory Council (NADRAC), an advisory body to the Federal Government, in its “A Framework for ADR Standards” identified three core objectives of ADR:

- To resolve or limit disputes in an effective and efficient way;
- To provide fairness in procedure; and
- To achieve outcomes those are broadly consistent with public and party interests.<sup>218</sup>

There is therefore recognition that the usefulness or appeal of ADR programs goes beyond simple measures of efficiency towards broader measures of social surplus.<sup>219</sup>

In Chapter 4 the research findings indicated that participants in the simulation gave their preferences to those processes they also rated most highly on control measures.

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<sup>215</sup> J S Adams, “Inequity in Social Exchange” in L Berkowitz (ed) *Advances in experimental social psychology* (Academic Press, 1965) vol 2, 267.

<sup>216</sup> G Leventhal, “What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships” in K Gergen, M Greenberg and R Willis (eds) *Social Exchange: Advances in Theory and Research* (Plenum Press, 1980) 27; Thibaut, J, and L Walker, above n 11, 541.

<sup>217</sup> Colquitt et al, “Justice at the Millennium” above n 12, 425-45.

<sup>218</sup> National Alternative Dispute Advisory Council (NADRAC), *A Framework for ADR Standards* Commonwealth of Australia (2001).

<sup>219</sup> For a recent example of an analysis which attempts to reduce or simplify the attraction of ADR programs to just such a variable see M Heise, “Why ADR Programs Aren’t More Appealing: An Empirical Perspective” (2010) 7(1) *Journal of Empirical Legal Studies* 64.

Reasons or rationale coded into the four justice categories, along with efficiency, were not significant, along with a range of other variables including gender, citizenship, place of birth and residency status. In this Chapter I will examine how the outcome to the experimental dispute changed the perceptions of fairness that the participants had. It will draw upon a long line of enquiry examining this question, much of it in organizational research.<sup>220</sup> These questions are intimately related to process preference for parties. This is crucial when designing and implementing procedures because their utility will rise and fall on such questions. What this experiment shows is that outcomes do have an impact on justice perceptions and judgements, particularly for the 'losing' party. However, other elements such as type of process, role and demographic characteristics did not.

## 5.2 Justice Research Relevant to this Research

Bingham identifies twenty-nine 'types' of justice in her review of the justice research.<sup>221</sup> She states:

There are many different forms, names, definitions, and varieties of justice depending on context: a sampling includes corrective, substantive, distributive, social, procedural, organizational, interactional, interpersonal, communicative, communitarian, restorative, and transitional justices. Even within this sampling, there are multiple definitions for a given term. For example, procedural justice has a variety of meanings, depending on whether you examine the term from the perspective of social psychology or jurisprudence.<sup>222</sup>

Whilst it is important to understand and recognize this variety of terminology and meanings, in this study the emphasis is on the major groupings used in empirical

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<sup>220</sup> See for example: R Bies, and J F Moag, above n 12,43; R J Bies, "Are Procedural Justice and Interactional Justice Conceptually Distinct?" in J Greenberg and J A Colquitt (eds), *Handbook of Organizational Justice* (Lawrence Erlbaum, 2005) 85-112; Yochi Cohen-Charash, Paul E Spector, "The Role of Justice in Organizations: A Meta-Analysis" (2001) 86(2) *Organizational Behavior and Human Decision Processes* 278-321; Colquitt et al, "Justice at the Millennium" above n 12 425-45; Conlon and P Fasolo, above n 160; Cropanzano et al, "Moral Virtues" above n 173, 164; R Folger, "Fairness as a Moral Virtue" in M Schminke (ed) *Managerial Ethics: Moral Management of People and Processes* (Erlbaum, 1998) 13-34; Kass, above n 152; Leventhal, "The Distribution" above n 12.; Leventhal, "What Should Be Done" above n 216; E A Lind, "Justice and Authority Relations in Organizations" in R Cropanzano and K Kacmar (ed) *Organizational Politics, Justice, and Support: Managing the Social Climate of the Workplace* (Quorum Books, 1995) 83-96; Ross, Brantmeier and Ciriacks, above n 11.

<sup>221</sup> L Bingham, "Designing Justice: Legal Institutions and Other Systems for Managing Conflict" (2008-2009) 24(1) *Ohio State. Journal on Dispute Resolution* 28-31.

<sup>222</sup> *Ibid*, 28.

research over the preceding half century: distributive, procedural, interpersonal and informational justice.

Greenberg and Colquitt construe the development of theory in this field as consisting of three overlapping ‘waves’:

1949 - 1975	Focus on Distributive Justice <sup>223</sup>
1975 – 1995	Focus on Procedural Justice <sup>224</sup>
1980s – to present	Focus on Interactional Justice (Interpersonal and Informational Justice). <sup>225</sup>

Greenberg, in an earlier commentary, had usefully conceptualized the move in focus from distributive and procedural justice to interactional elements of justice as a move from the ‘structural’ (defined as the ‘...mechanisms by which distributive and procedural justice are accomplished.’) to the ‘social’ (defined as the ‘...the quality of interpersonal treatment one receives...’).<sup>226</sup> Thibaut and Walker’s research indicated that a principal reason people care about procedural justice is that it maximizes the expected fairness of outcomes (distributive justice).<sup>227</sup> In other words parties assess that fair procedures are more likely to yield fairer outcomes than unfair procedures

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<sup>223</sup> Based principally upon social equity theory this posits that an allocation is equitable when outcomes are proportional to the contributions of group members. This suggests that satisfaction is a function of outcome, specifically the fact and content of a settlement or resolution. In theory, participants are more satisfied when they believe that the settlement is fair and favourable. Classic expositions of this approach include D G Pruitt, *Negotiation Behaviour* (Academic Press, 1981); H Raiffa, *The Art and Science of Negotiation*, (Harvard University Press, 1982); and D G Pruitt, and JZ Rubin, *Social Conflict: Escalation: Stalemate and Settlement* (Random House, 1986).

<sup>224</sup> Within jurisprudential theory procedural justice tends to focus on those procedures that will result in a just outcome, but in the social science field the focus is upon the perception of fairness of the participants in the dispute which is also the focus of this research. See for example J Rawls, *A Theory of Justice* (Harvard University Press, 1971) 100, for an influential description of the jurisprudential approach and Tyler and Lind, "A Relational Model" above n 152, 115-9, for a classic description of the social science approach.

<sup>225</sup> Greenberg and Colquitt, above n 12, 6-7. Informational justice focuses on the enactment of decision making procedures. Research suggests that explanations about the procedures used to determine outcomes enhance perceptions of informational justice. Interpersonal justice reflects the degree to which people are treated with politeness, dignity, and respect by authorities. The experience of interpersonal justice can alter reactions to decisions, because sensitivity can make people feel better about an unfavourable outcome.

<sup>226</sup> Greenberg, "The Social Side of Fairness" above n 12, 79-80.

<sup>227</sup> Thibaut and Walker, above n 11, 541; In the ADR literature, the terms substantive and distributive justice tend to be used interchangeably to reflect the justice of an outcome produced by a decision process. Most significantly Rawls distinguishes between substantive justice, reflected in the assignment of fundamental rights and duties and the division of advantages from social cooperation and formal justice, which is regularity of process. However, substantive justice is also related to social justice and is related to the way in which a society organizes itself. Distributive justice generally pertains to the distribution of outcomes which Rawls would describe as ‘allocative justice.’ Rawls refers to it in connection with the distribution of advantages in a society: See J Rawls, *Theory of Justice* (Harvard University Press, 1971) 58.

even if fair procedures can sometimes produce unfair outcomes. Disputants expect fairer outcomes from someone who treats them fairly (both the third party, if there is one, and the other disputants) than from someone who treats them unfairly. Therefore, procedural justice perceptions usually show a strong relationship with distributive justice perceptions. There would also appear to be a proven relationship between the other justice variables as well.

Colquitt et al's meta-analysis of the research in this field estimates the average corrected correlations among the various types of justice as ranging from 0.42 to 0.66, with four of the six correlations being 0.57 or above indicating that as one rises the other will also rise.<sup>228</sup> Although the types of justice therefore seem strongly related to one another, the research reveals that they do seem distinguishable to the participants studied and do have different relations with other variables. Typically, distributive justice is more strongly related to attitudes about outcomes while interpersonal, informational and procedural justice perceptions are more strongly related to attitudes towards the other party. Research has generally focused on the main effects of the outcome and procedural variables. A number of studies have shown that distributive justice is more influential than procedural justice in determining individuals' satisfaction with the results of a decision, whereas the latter is more important than the former in determining individuals' evaluations of the system or organization that made the decision.<sup>229</sup>

At the present point in time, justice researchers tend to construct their work using two content theories: the instrumental model and the relational model.<sup>230</sup> The instrumental model was outlined in Chapter 4 and is principally concerned with the distribution of control in intervention processes. Relational models, including the group-value model,<sup>231</sup> propose that justice decisions lead to conclusions about one's self-identity

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<sup>228</sup> Colquitt et al, "Justice at the Millennium" above n 12, 425-45.

<sup>229</sup> See Joel Brockner and Batia M. Wiesenfeld, "An Integrative Framework for Explaining Reactions to Decisions: Interactive Effects of Outcomes and Procedures" (1996) 120(2) *Psychological Bulletin* 189, 189-90; See also Cropanzano and Folger, above n 12, 131-34; J Greenberg, "Organizational Justice: Yesterday, Today, and Tomorrow, (1990) 16 *Journal of Management* 399-432; Lind and Tyler, above n 186; Tyler and Lind, "A Relational Model" above n 152.

<sup>230</sup> For an overview of the research in this field see in particular: Cropanzano et al, "Moral Virtues", above n 173, 164; Colquitt et al, "Justice at the Millennium" above n 12, 425-45; Greenberg, J, and J. A. Colquitt, eds. *Handbook of Organizational Justice*. Mahwah, NJ: Lawrence Erlbaum Associates, 2005.

<sup>231</sup> Lind and Tyler, above n 169.

and self-esteem and how needs around these are met.<sup>232</sup> ‘Outcomes’ in the relational model tend to be concerned with how these needs are affected. Lind, for example, has suggested that interactions characterized by fair treatment may reduce people’s concern for their immediate outcomes.<sup>233</sup> In this way both models can be seen as being principally concerned with ‘self-interest’ with an emphasis upon different sorts of outcomes, as Folger has argued.<sup>234</sup> Folger developed the idea of what is termed a ‘moral virtues model’ which attempts to challenge this premise of dominant self-interest involving economic benefits or group needs, arguing that we care about justice because of a basic respect for human dignity, worth and justice.<sup>235</sup> This concept has been quite influential in the development of mediation practice and related theory.<sup>236</sup>

The relational model holds that people are concerned about their treatment by others because it provides self-esteem and identity information. It does this in principally two ways: through the group value<sup>237</sup> and fairness heuristic models<sup>238</sup> The former relates to how one is considered as a valued member of the group through a process of comparison (particularly relevant in organizational contexts) whilst the latter posits that in the absence of social comparison information, individuals are more likely to infer the quality of their outcomes from their perceptions of their treatment using readily available information.<sup>239</sup> These fairness judgments are made through a psychological shortcut or rather automatic (thus heuristic) process often related to

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<sup>232</sup> Tyler and Lind, "A Relational Model" above n 152; Kass, above n 152.

<sup>233</sup> E Allen Lind, "Thinking Critically About Justice Judgments" (2001) 58(2) *Journal of Vocational Behavior* 220-26.

<sup>234</sup> R Folger, "Fairness as a Moral Virtue" in M Schminke (ed), *Managerial ethics: Moral management of people and processes* (Erlbaum, 1998) 13-34; Folger develops here what has been termed the *moral virtues model*. In this model concern about justice is related to a basic respect for human dignity and worth. Many of us are motivated by this aspect and in this article Folger reviewed evidence suggesting that people care about justice even when doing so offers no apparent economic benefit and involves strangers. Folger noted that there are times when "virtue [serves] as its own reward" (Folger, 1998, 32).

<sup>235</sup> Ibid.

<sup>236</sup> See R Bush, A Baruch and J Folger, *The Promise Of Mediation: Responding To Conflict Through Empowerment And Recognition* (Jossey-Bass, 1994).

<sup>237</sup> Tyler and Lind, "A Relational Model" above n 152, 115-19; R Cropanzano, C A Prehar and P Y Chen, "Using Social Exchange Theory to Distinguish Procedural from Interactional Justice" (2002) 27(3) *Group & Organization Management* 324-51.

<sup>238</sup> Folger and Kass, above n 152.

<sup>239</sup> D E Conlon, AE Lind and RI Lissak "Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments" [1989] *Journal of Applied Social Psychology* 1085-99.

what ‘would’, ‘could’ or ‘should’ have happened.<sup>240</sup> That is, expectations are established as a cognitive process to enable judgements to be made in an efficient although not necessarily the most accurate way. A good example of the combination of these approaches is Folger and Kass’s 2000 analysis.<sup>241</sup> They argued that procedural and interactional justice perceptions recruit counterfactuals (alternative comparisons that may be either positive or negative, often referred to as ‘upward’ or ‘downward’ counterfactuals respectively) that are used as referents for judging one’s obtained outcomes. They emphasize that most people expect to be treated fairly in most situations and thereby achieve better outcomes. Unfair treatment may lead therefore to counterfactuals on the basis of the perception that a better result could have been achieved in a fairer or better process. Fair process therefore would make it more difficult to perceive a better outcome and thereby develop negative counterfactuals. The relational model provides an approach that suggests that unfair treatment is likely to engender negative counterfactuals. In their view, fair treatment signals that the other party holds one in high regard, sees one as a valued member of the group, and cares about one’s well-being. Therefore they suggest that procedural and interactional processes (in this research this is divided into informational and interpersonal aspects) act as a simple heuristic to make fairness judgements.

In the experiment in this research the procedural and interactional justice perceptions were not manipulated but the outcome heavily favoured one party, reflecting the actual decisions in the cases they were based upon.<sup>242</sup> The opportunity to develop these negative counterfactuals from the process and interactions by comparison was therefore limited, and emphasis could thus be focused upon the impact of the outcome itself and the simple individual heuristic of the fairness of this outcome. That is, judgements concerning procedural and interactional fairness judgements could be isolated for analysis.

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<sup>240</sup> These concepts are based upon what has been variously termed ‘fairness theory’ or ‘referent cognitions theory’ and underlie the fairness heuristic approach: see Cropanzano et al, “Moral Virtues” above n 173, 164.

<sup>241</sup> Folger and Kass, above n 152.

<sup>242</sup> See *Rossetto v Owners Corporation SP 71067 (Strata & Community Schemes) [2008] NSWCTTT 859* (29 February 2008) and *Tanner v OC SP 21409 (Strata & Community Schemes) [2008] NSWCTTT 806* (23 January 2008).

This approach, which is reflected in Hypothesis 4, above, is generally consistent with the available research findings. That is that good outcomes are more likely to result in perceived fairness, whereas unfavourable outcomes are more likely to engender perceived unfairness.<sup>243</sup> Importantly for this research the effect is more likely to be significant if the loss is regarded as relatively large and seen as a 'loss' rather than failure to make a gain.<sup>244</sup> The pre-prepared arbitration decision, given to the arbitrators before they made their decision, heavily favoured the respondent with the complainant losing on all issues. This is important for a number of reasons not least because there is some evidence that once formed, justice perceptions are difficult to change.<sup>245</sup>

### 5.3 Fairness Judgments in this Research

In this research the disputant parties were randomly placed in one of three processes previously described. If the procedure did not result in an agreed outcome at the end of the mediation phase then an arbitration was held where the arbitrators at the end of the procedure provided the parties with a prewritten agreement. Unbeknown to the participants, it had been decided beforehand that the arbitration outcome would heavily favour the respondent in the roleplay. It did in fact accurately represent the actual decision made in those cases from which the roleplay was derived as previously mentioned.<sup>246</sup>

This manipulation of the process was designed to allow a comparison of the parties' perception of justice at the conclusion of both processes, as well as a comparison of the way in which outcomes affected them. The disputants were asked to complete an identical questionnaire at the end of each process to measure this; see Appendix A11 and A12. It was expected that the respondents would give a higher score to distributive

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<sup>243</sup> See, eg. D Conlon and H Moon, "Putting the Cart before the Horse: The Benefits of Arbitrating before Mediating" (2002) 87(5) *Journal of Applied Psychology* 978; D Conlon and W H Ross, "Influence of Movement toward Agreement and Third Party Intervention on Negotiator Fairness Judgments" (1992) 3(3) *The International Journal of Conflict Management* 207; D Conlon, A E Lind and R I Lissak, "Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments" [1989] *Journal of Applied Social Psychology* 1085; L E Allan, "Justice and Authority Relations in Organizations" in R Cropanzano and K M Kacmar (eds) *Organizational Politics, Justice, and Support: Managing the Social Climate of the Workplace* (Quorum Books, 1995); J Thibaut, and L Walker, "A Theory of Procedure" (1978) 66(3) *California Law Review* 541

<sup>244</sup> As reported by Cropanzano et al, "Moral Virtues", above n 173, 174.

<sup>245</sup> Cropanzano et al, "Moral Virtues", above n 173, 172.

<sup>246</sup> See above n 225.

justice elements on the questionnaire compared to complainants. Of more interest would be if they gave a higher score also to the other justice elements, and then to compare this with the results at the end of the mediation part of the process. The effect of outcomes upon perception of the process could then be gauged. Hypothesis 4 summarizes this goal.

There is some considerable research which indicates that outcomes and perceptions of process do inter-relate and there has been a lively discussion in the literature among procedural justice researchers concerning the relative importance of outcomes as determinants of fairness judgments. In a well-known experiment, Lind and Lissak found that individuals evaluated the process as less fair when the outcome was unfavourable, than when it was favourable.<sup>247</sup> Generally however the effect is usually small and inconsistent.<sup>248</sup> Lind and Tyler had earlier argued that because process evaluations are made before outcome evaluations these are more likely to be 'held onto.'<sup>249</sup> In their view the former will be stronger than the latter. These findings reflect the ongoing tension between those who regard process as the dominant variable and those who regard outcomes as more important.<sup>250</sup> Others have argued that those who emphasize self-interest explanations are probably more likely to believe that outcomes will be the dominant element and that procedural concerns play a relatively minor role in the acceptance of decisions.<sup>251</sup>

Lind helpfully hypothesizes that outcomes and procedural justice perceptions could correlate in two principal ways. First, there could be those who have an egocentric bias: disputants think that part of what it means for a procedure to be fair is that the procedure yields a favourable outcome for them. Second, outcomes are regarded as information and disputants feel that the outcome tells them something about the

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<sup>247</sup> E A Lind and R I Lissak, "Apparent Impropriety and Procedural Fairness Judgments" (1985) 21 *Journal of Experimental Social Psychology* 19-29.

<sup>248</sup> As surveyed by Cropanzano et al, "Moral Virtues", above n 173, 164, 191-2.

<sup>249</sup> Lind and Tyler, above n 169, 228.

<sup>250</sup> For a good overview of this debate see Conlon, Lind and Lissak, above n 239, 1085-99.

<sup>251</sup> For a useful overview of the literature in respect to this see E A Lind "Justice and Authority Relations in Organizations" in R Cropanzano and K M Kacmar (eds) *Organizational Politics, Justice, and Support: Managing the Social Climate of the Workplace* (Quorum Books, 1995) 225-8. Lind himself argues the importance of considering the fairness heuristic and procedural justice judgments in explaining the effects of outcome and process on acceptance of authoritative decisions.

fairness or otherwise of the procedure.<sup>252</sup> Brockner and Wiesenfeld, who offer a comprehensive review of the literature in this field up until the time of their study, take the view that whereas perceived outcome favourability differs from individuals' perceptions of procedural fairness, their impact cannot be studied in isolation from one another.<sup>253</sup> They state:

The effects of procedural justice on individuals' reactions to a decision depend on the level of outcome favorability; similarly, individuals' reactions to outcome favorability depend on the degree of procedural fairness with which the decision is planned and implemented. As Cropanzano and Folger (1991) suggested, "outcomes and procedures work together to create a sense of injustice. A full understanding of fairness cannot be achieved by examining the two constructs separately. Rather, one needs to consider the interaction between outcomes and procedures."<sup>254</sup>

They conceptualize an 'interaction effect' between procedural and distributive justice. They posit that people expect and want procedures to be fair and they expect and want their outcomes to be favourable. For example, they argue that when procedures are unfair or outcomes are unfavourable people go into 'a sense-making mode' where external cues that address their informational needs can be particularly influential. Therefore when procedures are unfair, the degree of outcome favourability may have high informational value. Unfair procedures may lead people to believe that the receipt of favourable outcomes in the future is not ensured, thereby heightening the effect of the current outcome on their reactions to a decision. Similarly, when current outcomes are unfavourable the level of procedural fairness should be highly informative. For example, unfavourable outcomes may lead people to scrutinize the procedures that gave rise to those outcomes, thereby increasing the effect of procedural fairness on their reactions to the decision.<sup>255</sup> This is especially so if the outcome is unexpected as unfavourable outcomes often are.<sup>256</sup> This research will allow a further examination of this debate.

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<sup>252</sup> Ibid 248.

<sup>253</sup> Brockner and Wiesenfeld, above n 229.

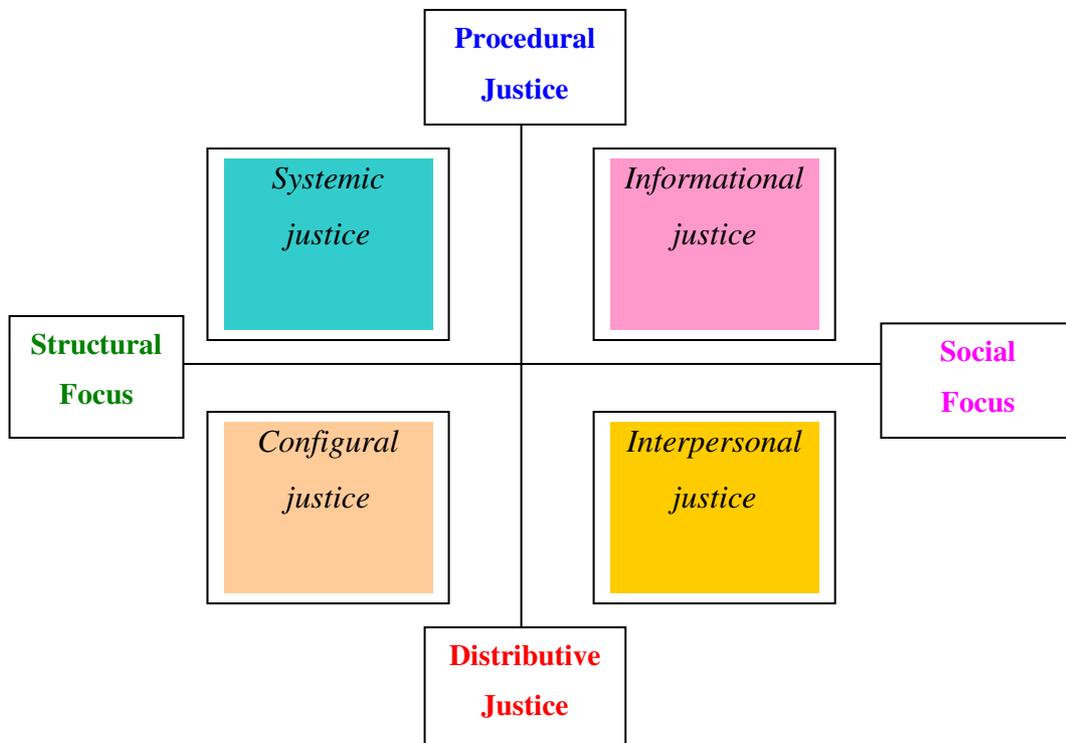
<sup>254</sup> Ibid 190.

<sup>255</sup> Ibid 201-2.

<sup>256</sup> See summary of the research in this area at Brockner, Ibid, 202-3.

The questionnaires used to obtain the justice data were based on Colquitt's validated justice measures of 2001.<sup>257</sup> These measures were developed within the field of organizational research and built upon a four factor model developed in 1993 by Greenberg.<sup>258</sup> Greenberg had created his taxonomy by intersecting two independent categories of justice (procedural and distributive) with two focal determinants (structural and social). This then created four classes of justice *systemic justice*, *configural justice*, *informational justice* and *interpersonal justice*: see Figure 5.1.

**Figure 5.1: Greenberg's Four Factor Model**



Systemic justice is achieved, according to Greenberg, by obtaining procedural justice through structural change or means. Configural justice is a way of achieving distributive justice through structural change or means. Informational justice is a way of achieving procedural justice through social determinants. Interpersonal justice is a way of achieving distributive justice by way of social determinants. Influenced by this analysis Colquitt then explored the dimensionality of organizational justice, and after

<sup>257</sup> Colquitt, above n 8.

<sup>258</sup> Greenberg, above n 12, 79-83.

an analysis of the key research studies over the last fifty years developed the four justice factors - distributive, procedural, interpersonal and informational. He validated the construction of the four dimensions by conducting two independent studies which provided strong support for his taxonomy. The questionnaires can be viewed at Appendix 11 and Appendix A12.

Hypothesis 2 is concerned with the way in which role can impact on justice perceptions. In particular it is concerned with the way in which renters (the complainants in this experiment) differ from owners (the respondents) in their preferences. This was a question examined also in relation to preferences in Chapter 4 where it was shown that these two groups did not prefer one process over another. In this Chapter we shall examine the way in which these two groups score the justice measures of the two Med/Arb processes compared to the Arb/Med process. Research in this field is usually centred on the disputants' behaviour as complainants and respondents.<sup>259</sup> For example Pierce et al found in two experiments that respondents favoured inaction and disliked arbitration compared with complainants.<sup>260</sup> Their hypotheses about complainant-respondent differences were based on the observation that complainants are usually trying to create change while respondents are trying to maintain the status quo. Respondents should also like the more consensual procedures (negotiation, mediation, and advisory arbitration) because these procedures allow them to refuse to change. Complainants should like arbitration and struggle because these procedures have the greatest potential for overturning the status quo by, respectively, providing a third party to enforce potential change and by defeating the other party. Ross, Brantmeier and Ciriacks give the example of landlords who prefer a process maximizing disputant control than tenants who would prefer a third party to make the decision.<sup>261</sup> In this research, the parties have a choice between the Med/Arb sequence with the same or different third parties and an Arb/Med process with the same person. The latter process would presumably provide the respondents with less ability to avoid and delay a consideration of the issues presented by the situation as they have to explain them and try to persuade the arbitrator/mediator in the first instance. This would then provide them with less ability to control the process.

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<sup>259</sup>See, eg, Delgado et al, above n 186; McGillicuddy et al, above n 189; Tyler, Huo and Lind, above n 167, 113-15.

<sup>260</sup> Peirce, Pruitt Czaja, above n 178, 199-222.

<sup>261</sup> Ross, Brantmeier and Ciriacks, above n 11, 1151-88.

However the results as outlined in Chapter 4 did not indicate any preference for the Med/Arb sequenced processes. In this Chapter, this question will be explored further and in a different way with a consideration of the justice perceptions of respondents and complainants in these types of processes. Would these two groups have a different perception of these aspects? Further, researchers into fairness have also considered a number of demographic factors including gender, ethnicity and age, which might be related to fairness perceptions.<sup>262</sup> In Chapter 4 the findings did not show any relationship between preferences and these factors. Although not part of the research questions, a consideration of these factors is further considered to deepen the overall analysis.

#### 5.4 The Results

The scores for the four justice elements (distributive, procedural, interpersonal and informational scales in the questionnaire to complainants and respondents: see Appendix A11 and A12) were collated to obtain a total score for these at both the post-mediation and post-arbitration stages. There were 19 questions in each of the post-mediation and post-arbitration questionnaires, each question consisting of a five point Likert scale giving a total possible score of 145. This then enabled a comparison of the overall results at these two different times and also across the three processes. The means of the total justice scores were then compared. Table 5.1 shows the results of a comparison of the total means for the justice measures for each of the three processes at the end of the mediation phase of the three processes.

This respondents overall scored slightly higher on their total justice scores than complainants. Interestingly Med/Arb Same (the most preferred process) scored lowest in this phase, principally because respondents scored this considerably lower than the other two processes. Figure 5.2, below, describes this well. As can be seen from this

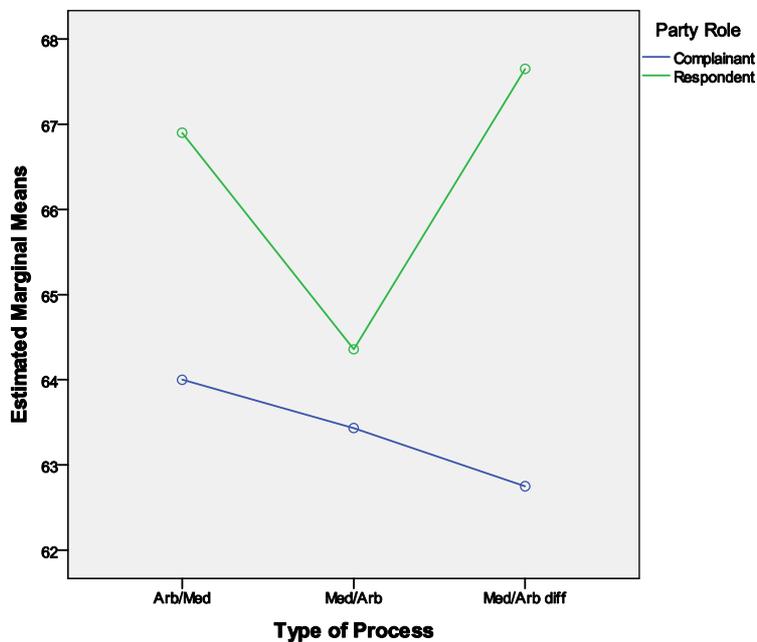
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<sup>262</sup> C Kulik, E A Lind, R J MacCoun, and M Ambrose, "Gender and Procedural Justice: Similarities and Differences in Procedural and Distributive Justice Judgments" (In Press) *Social Justice Research*; E A Lind, and P E Earley, "Procedural Justice and Culture" (1992) 27 *International Journal of Psychology*, 227-42; E A Lind, Y J Huo and T R Tyler, " ...and justice for all: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures" (1994) 18(3) *Law and Human Behavior*, 269-290.

Figure, the complainants were overall more even in their responses than respondents across the processes.

Table 5.1: Post-mediation Justice Scores <sup>263</sup>				
Party Role	Type of Process	Mean	Std. Deviation	N
1 Complainant	1 Arb/Med	64.00	12.013	20
	2 Med/Arb	63.43	9.737	30
	3 Med/Arb diff	62.75	7.813	20
	Total	63.40	9.830	70
2 Respondent	1 Arb/Med	66.90	13.618	20
	2 Med/Arb	64.36	9.362	28
	3 Med/Arb diff	67.65	9.466	20
	Total	66.07	10.747	68
Total	1 Arb/Med	65.45	12.760	40
	2 Med/Arb	63.88	9.485	58
	3 Med/Arb diff	65.20	8.919	40
	Total	64.72	10.342	138

Figure 5.2: Marginal Means of Post Mediation Justice Scores



<sup>263</sup> Note that distributive justice scores were only available from those post-mediation cases where a settlement had been reached. (N = 31; Range = 3 to 15; Mean 11.65).

A two-way between-groups analysis of variance was undertaken to explore these differences between processes and party role (complainant and respondent) on the level of total justice scores using the Colquitt measures. The interaction effect between process and party role was not significant,  $F(2,132) = .437, p = .647$ . There was no statistically significant main effect for process  $F(1,132) = .324, p = .724$  or party role  $F(2,132) = 2.621, p = .108$ .<sup>264</sup>

After the arbitration phase (applied in those cases where the matter had not been settled at mediation) the results show an increased difference in scores between the complainants and respondents across all processes. The complainants scored the Med/Arb Different process lowest, as did the respondents. Table 5.2 shows this in detail.

**Table 5.2: Post-arbitration Justice Scores**

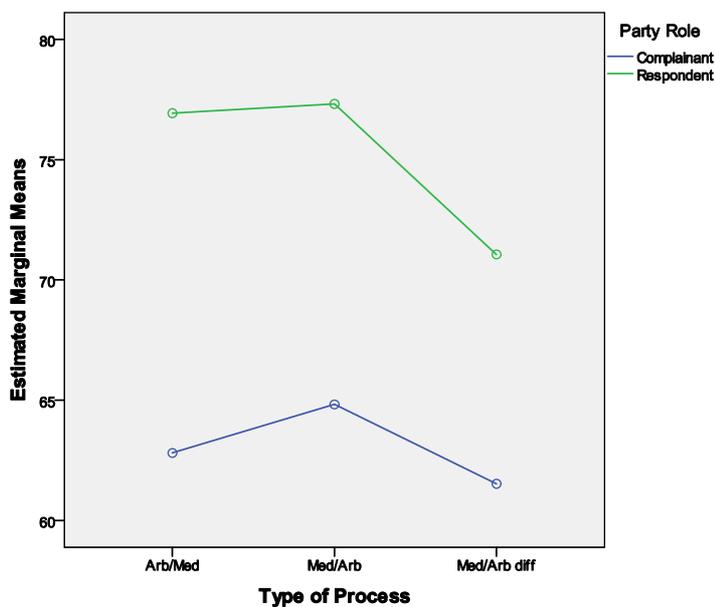
Party Role	Type of Process	Mean	Std. Deviation	N
1 Complainant	1 Arb/Med	62.81	11.415	16
	2 Med/Arb	64.83	12.089	23
	3 Med/Arb diff	61.53	7.592	17
	Total	63.25	10.619	56
2 Respondent	1 Arb/Med	76.93	12.731	15
	2 Med/Arb	77.32	11.604	25
	3 Med/Arb diff	71.06	13.264	17
	Total	75.35	12.509	57
Total	1 Arb/Med	69.65	13.865	31
	2 Med/Arb	71.33	13.302	48
	3 Med/Arb diff	66.29	11.689	34
	Total	69.35	13.060	113

What can be seen here by a comparison of means is that the process differences are not as marked as the difference between parties. This was confirmed by a further two-way between-groups analysis of variance to explore the impact of the different processes

<sup>264</sup> The “F-Test” compares how much groups differ from one another, compared to how much variability is in each group.

and party role (complainant and respondent) on the level of total justice scores using the Colquitt measures after this phase. The interaction effect between process and party role was not significant,  $F(2,107) = .333, p = .718$ . There was a statistically significant main effect for party roles,  $F(1,107) = 29.375, p = .000$ . The effect size was large (partial eta squared = .215). Post-hoc comparisons using the Tukey HSD test showed that there was no significant difference between the three processes used. There was no statistically significant main effect for process ( $F(2,107) = 1.738, p = .181$ ). Figure 5.3 indicates the level of difference between the post-arbitration scores for the parties.

**Figure 5.3: Marginal means of Post-arbitration Justice Scores**



A breakdown of the mean scores for each of the justice elements shows that complainants and respondents were very close on these scores at the completion of the mediation. These post-mediation scores were compiled from those parties who had reached an agreement in that phase. The respondents then, as a group, scored the distributive justice measure at a slightly higher rate after the arbitration than after the mediation. However, the complainants score on this measure was almost halved at the completion of the arbitration: see Table 5.3.<sup>265</sup>

<sup>265</sup> There were three questions relating to distributive justice fairness giving a range of scores from 3 to 15.

<b>Table 5.3: Comparison of Post-mediation and Post-arbitration Distributive Justice Scores</b>			
<b>Party Role</b>	<b>Mean</b>	<b>N</b>	<b>Std. Deviation</b>
<b>Total Post-mediation Distributive Justice Scores</b>			
1 Complainant	11.67	15	1.952
2 Respondent	11.63	16	2.277
Total	11.65	31	2.090
<b>Total Post Arbitration Distributive Justice Scores</b>			
1 Complainant	6.85	55	2.512
2 Respondent	11.82	57	2.885
Total	9.38	112	3.674

This would most likely be due to the arbitration decision being so heavily biased in favour of the respondent, the condition that was most significantly manipulated in the experiment. The question posed in Hypothesis 4 is whether the other three justice variables (procedural, interpersonal and informational) were similarly affected, and if so was this significant?

A one-way between-groups multivariate analysis of variance (MANOVA) was performed to investigate the perception of justice elements at both the end of the mediation phase and the end of the arbitration phase in all three different processes. Preliminary assumption testing was conducted to check for normality, linearity, univariate and multivariate outliers, homogeneity of variance-co-variance matrices, and multicollinearity, with no serious violations noted. Six variables were used throughout both tests: post-mediation/arbitration procedural justice; post-mediation/arbitration interpersonal justice; and post-mediation/arbitration informational justice. Distributive justice was not included because those who did not reach an agreement in the mediation phase had not, of course, completed that part of the questionnaire. The independent variable was Party Role: Complainant and Respondent.

For the post-mediation test the result was that there was no statistical difference between Complainants (N=70) and Respondents (N=67) on the combined dependent

variables,  $F = (1,135) 1.603$ ,  $p = .192$ , Wilks' Lambada = .965; partial eta squared = .035. The closeness of the relative means on these measures can be seen in Table 5.4.

<b>Table 5.4: Descriptive Statistics for Post-mediation (PM) Justice Measures</b>				
	Party Role	Mean	Std. Deviation	N
Total PM PJ	1 Complainant	25.03	3.405	70
	2 Respondent	26.01	4.305	67
	Total	25.51	3.888	137
Total PM Interpersonal J	1 Complainant	16.83	3.579	70
	2 Respondent	17.58	2.748	67
	Total	17.20	3.210	137
Total PM Information J	1 Complainant	19.04	3.272	70
	2 Respondent	20.30	3.593	67
	Total	19.66	3.478	137

For the post-arbitration MANOVA test the results were quite different. Table 5.5 shows the relative means between the justice measures.

<b>Table 5.5: Descriptive Statistics for Post-arbitration (PA) Justice Measures</b>				
	Party Role	Mean	Std. Deviation	N
Total PA PJ	1 Complainant	21.96	4.978	55
	2 Respondent	25.46	5.179	57
	Total	23.74	5.354	112
Total PA Interpersonal J	1 Complainant	16.44	3.532	55
	2 Respondent	17.67	2.812	57
	Total	17.06	3.231	112
Total PA Informational J	1 Complainant	18.49	3.810	55
	2 Respondent	20.42	4.057	57
	Total	19.47	4.038	112

The result was a statistically significant difference between complainants (N=55) and respondents (N = 57) on the combined variables,  $F = (1,110)4.46$ ,  $p = .005$ , Wilks' Lambada = .890; partial eta squared = .110. When the results for the dependent variables were considered separately there was a statistically significant difference for

procedural and informational justice, but not for interpersonal justice, using a Bonferroni adjusted alpha level of .017. These results are summarized in Table 5.6.

<b>Table 5.6: Summary of Between Subjects Effects on Post-Arbitration Test</b>			
Dependent Variable	F	Sig (P)	Partial Eta Squared
Total Post Arb PJ	13.224	.000	.107
Total Post Arb Interpersonal J	4.175	.043	.037
Total Post Arb Informational J	6.725	.011	.058

Importantly, there was a large group effect for the procedural justice dependent variable and a medium effect for informational justice in the post-arbitration phase, but only a small group effect for interpersonal justice, as shown by the Partial Eta Squared results in this table.

To extend this analysis further a MANOVA was conducted on those participants who had reached an agreement at the end of the mediation phase compared with those who had not reached agreement and were thus required to go onto the arbitration with the results shown above. The dependent variables were the total scores for procedural, interpersonal and informational justice scores at the end of the mediation process. (Distributive justice scores were not included because only those who reached agreement completed these.) The independent variable was reaching an agreement. What the results showed was that there was no statistically significant difference between those who reached an agreement and those who did not reach an agreement in the mediation on the dependent variables,  $F(3,129) = .45$ ,  $p = .72$ , Wilks Lambda = .99. Table 5.7 shows how close the means were for each of these dependent variables.

<b>Table 5.7: Mean Scores for Post-Mediation Justice Scores Excluding Distributive Justice</b>					
	Was agreement reached at mediation?		Mean	Std. Deviation	N
Total PM Procedural J	1	Yes	25.75	3.284	28
	2	No	25.54	4.007	105
		Total	25.59	3.856	133
Total PM Interpersonal J	1	Yes	17.18	2.957	28
	2	No	17.21	3.269	105
		Total	17.20	3.195	133
Total PM Information J	1	Yes	19.29	3.125	28
	2	No	19.84	3.582	105
		Total	19.72	3.487	133

It can therefore be reasonably surmised that the making of a mutual agreement at mediation had little impact on the relative justice scores of parties.

Further, a one-way between analysis of variance was conducted to examine the impact on the distributive justice scores of the different hybrid processes. There was no statistically significant difference at the  $p < .05$  level in distributive justice scores for the three processes:  $F(2, 28) = 1.8, p = .18$ . That is, parties in the three processes did not rate the fairness of the outcomes as significantly different.

To summarize, these results show that although respondents did rate the overall justice of the processes more highly at both the end of the mediation phase and the arbitration phase, the difference only became significant in the latter. The making of an agreement in the mediation phase did not appear to have an impact on these justice scores. It was expected that the distributive justice measure would be impacted by the decision in the arbitration phase, given the intended impact of the adverse decision on the complainants. The relative negative impact on the other justice measures is more interesting and may indicate that the lower score on distributive justice measures for complainants has 'infected' these other justice scores to a significant level. These results indicate that the parties' perception of the overall justice of the procedure was

influenced by the outcome, particularly in relation to procedural and informational justice.

The next point of analysis is the change between the mediation and arbitration phases of the justice measure scores for the parties. To do this a series of one-way between-groups analysis of covariance (ANCOVA) was conducted to compare the way in which the manipulation of the arbitrated outcome effected the parties' perceptions of fairness using the Colquitt questions. The independent variable was party role (respondent and complainant) assigned randomly to participants. The dependent variable was initially the total score of all justice measures at the end of the arbitration after the decision had been given to the parties. The complainants total justice scores on the same measure at the end of the mediation was used as the initial covariate in this analysis. After this initial analysis further ANCOVA tests were performed using each of the individual justice measure scores (procedural, distributive, informational and interpersonal) and the type of process involved (Arb/Med, Med/Arb, Med/Arb Same) to analyse the impact of each of these.

Preliminary checks were conducted to ensure that there was no violation of the assumptions of normality, linearity, homogeneity of variances and regression slopes, and reliable measurement of the covariate. After adjusting for the scores at the post-mediation phase on the Colquitt test, there was shown to be statistically significant differences on all measures at both the overall total levels of justice and the individual measures. The results of these tests are shown in detail below in Table 5.8. The descriptors in blue down the left-hand side of the first column show the four covariate measures for each type of justice variable.

**Table 5.8: Between-Subjects Effects of ANCOVA Tests on Post-mediation and Post-Arbitration Justice Measures**

Source	&	df	F	Sig.	Partial Eta Squared
<u>Total PM Justice</u>		1	6.583	.012	.056
Party		1	30.038	.000	.214
<u>Total PM PJ</u>		1	10.255	.002	.086
Party		1	12.609	.001	.104
<u>Total PM DJ</u>		1	14.427	.000	.117
Party		1	107.517	.000	.497
<u>Total PM Inter'l J</u>		1	23.506	.000	.176
Party		1	4.654	.033	.041
<u>Total PM Inf J</u>		1	4.419	.038	.039
Party		1	5.976	.016	.052

For the total scores of all the four variables (Total PM Justice) the effects size is large (.214) and this is replicated for procedural and distributional justice variables (.104 and .497 respectively). Informational and interpersonal justice variables show a small-medium effect. These figures are highlighted in green. By converting this data to a percentage we can see that overall over 21 per cent of the variance in the measures can be explained by the independent party variable. This varies as shown between the other measures. The influence of the covariates (the post-mediation measures) shows across all measures a significant relationship between the covariate and the dependent variable (the post-arbitration measures). These figures are highlighted in yellow.

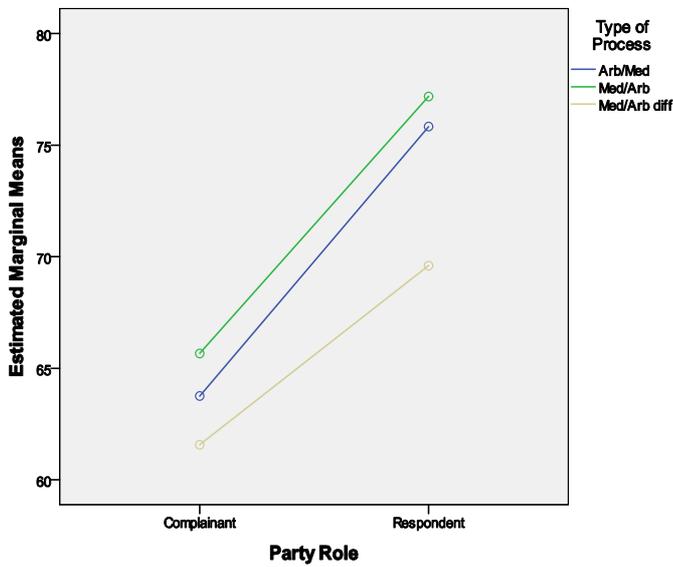
The other aspect of interest here is the interaction between the complainant and respondent groups and the three types of process used. To explore this further an ANCOVA test was performed. Table 5.9 shows the relative means of the total justice scores at the end of the arbitration phase for each process.

<b>Table 5.9: Total Justice Scores by Process at the Completion of the Arbitration</b>					
Party Role	Type of Process	Mean	Std. Deviation	N	
1 Complainant	1 Arb/Med	62.81	11.415	16	
	2 Med/Arb	64.83	12.089	23	
	3 Med/Arb diff	61.53	7.592	17	
	Total	63.25	10.619	56	
2 Respondent	1 Arb/Med	76.93	12.731	15	
	2 Med/Arb	76.92	11.673	24	
	3 Med/Arb diff	71.06	13.264	17	
	Total	75.14	12.523	56	
Total	1 Arb/Med	69.65	13.865	31	
	2 Med/Arb	71.00	13.242	47	
	3 Med/Arb diff	66.29	11.689	34	
	Total	69.20	13.010	112	

The independent variables were party role (respondent and complainant) and process. The dependent variable was initially the total score of all justice measures at the end of the arbitration after the decision had been given to the parties. The complainants total justice scores on the same measure at the end of the mediation was used as the initial covariate in this analysis. After adjusting for the total justice score at the end of the mediation phase there was found to be no significant interaction effect,  $F(2,105) = .355$ ,  $P = .702$  with a small effect size (partial eta squared = .007). The main effects therefore have to be examined and the party effect ( $p = .000$ ) was statistically significant with a large effect size (.093), but not process ( $p = .060$ ) with a medium effect size (.052). The full measures of these are respectively  $F(1,105) = 25.135$ ; and  $F(2,105) = 2.894$ . These results suggest that parties do not respond differently between the three processes.

Complainant's justice scores declined in the arbitration phase and the respondents scores marginally increased, but this was not significantly affected by process. Figure 5.4 shows the marginal means between the three processes at the end of the arbitration phase and clearly shows that there is little interaction between the three processes, particularly Arb/Med and Med/Arb.

**Figure 5.4: Marginal Means of the Three Processes by Role**



Covariates appearing in the model are evaluated at the following values: Grand Total PMJ = 63.15

Nor did other significant characteristics of the participants appear to have any significant effect. To confirm this, ANOVA tests on gender, place of birth, residency status and age were conducted and also did not show any statistical significance in either the mediation or arbitration phases of the processes. The results are outlined in Table 5.10.

**Table 5.10: ANOVA Results for Post-mediation(PM) and Post-arbitration(PA) Justice Measures on Gender, Place of Birth, Residency Status and Age**

		Sum of Squares	df	Mean Square	F	Sig.
<b>Gender</b>						
Between Groups	PM	15.666	1	15.666	.151	.699
Between Groups	PA	12.271	1	12.271	.069	.793
<b>Place of Birth</b>						
Between Groups	PM	298.839	1	298.839	2.956	.088
Between Groups	PA	326.310	1	326.310	1.893	.172
<b>Residency Status<sup>266</sup></b>						
Between Groups	PM	211.433	1	211.433	2.906	.100
Between Groups	PA	561.404	1	561.404	2.107	.165
<b>Age</b>						
Between Groups	PM	2408.522	26	92.635	.898	.610
Between Groups	PA	5571.367	25	222.855	1.569	.070

## 5.5 Discussion

Disputants who are owners of OC lots do not rate higher the distributional, procedural, interpersonal and interactional justice elements of Med/Arb.Same and Med/Arb.Diff than the same aspects of Arb/Med compared to disputants who are renters of lots. Hypothesis 2 is answered in the negative because there were no significant differences between the owners (the respondents) and the renters (the complainants) in their response to different processes and their perception of fairness across the various measures. Indeed, they seemed not to differentiate between the processes in terms of the justice judgements made, although there was a clear preference, as shown in

<sup>266</sup> Residency Status relates to those participants who either owned or rented an OC in their real life.

Chapter 4, for the Med/Arb process. Table 5.1 shows that the respondents rated all processes, on the post-mediation scores, more highly than the complainants rather than rating the Med/Arb processes over Arb/Med as hypothesized. It would therefore appear that the respondents did not perceive that these types of processes, where mediation preceded the arbitration, would be fairer to them as a group.

With regard to Hypothesis 4 it would appear to be answered in the affirmative in relation to the overall justice measures. It is tempting to suggest that if the decision in the arbitration had heavily favoured the complainant that this result would have been reversed. It can be hypothesized with some confidence that the outcome did effect the justice perceptions of the parties but that being a respondent or complainant per se did not. Nor did the type of process employed have any effect on the relative scores of the parties either in general or relative to their roles. Interestingly, there was little impact on the post-mediation justice scores because of the making of a mutual agreement in the mediation.

A close analysis of the impact of the post-arbitration outcome for the parties showed that the respondent's justice scores slightly increased but that complainant's scores dropped considerably: see Table 5.3. This was at significant levels for both procedural and informational justice. Therefore, the change appeared to be due to the loss more than for the win. Those who received a better outcome did not appear to view the process as more fair. Moreover the MANOVA tests showed a large effect overall replicated for the procedural justice element and a medium effect size for informational justice, whilst the ANCOVA tests showed a large effect size overall replicated in the procedural justice and distributive justice elements whilst informational and interpersonal justice elements showed a small-medium effect.

The questionnaires were administered immediately at the conclusion of the arbitration with little time to reflect upon the outcome. Fairness heuristic theory proposes that individuals care about fairness because it helps them deal with uncertainty in a cognitively efficient way.<sup>267</sup> This is done by using information about fairness as

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<sup>267</sup> Lind, "Thinking Critically About Justice Judgments" above n 233, 220-26; D A Jones and M L Martens, "The Mediating Role of Overall Fairness and the Moderating Role of Trust Certainty in Justice-Criteria Relationships:

cognitive shortcuts, called fairness heuristics, to resolve uncertainty especially in relation to decisions by authority figures. This theory suggests that perceptions of overall fairness form quickly during a “judgmental phase” in which justice-relevant information encountered earlier is weighted most heavily. Once these perceptions of overall fairness are formed, they tend to remain stable, only shifting if something violates the existing expectations.<sup>268</sup> The complainants, as a group, appeared to be using a simple heuristic to judge the fairness of the process overall. That is that a poor outcome meant not only that the outcome was less fair, but that other aspects of the process were less fair as well. It would therefore appear that there was an almost automatic response to the conclusion that because the outcome was less fair then the procedural, interpersonal and informational aspects of the process were also not as fair. The opportunity to develop negative counterfactuals from the process and interactions was limited and emphasis focused upon the impact of the outcome itself and the simple individual heuristic of the fairness of this outcome. That is procedural, interpersonal and informational fairness judgements could be isolated for analysis.

The outcome would therefore seem to have a significant impact upon the perception of process, but more so on the loser than the winner. In fact the mean procedural justice score for respondents was slightly less after the arbitration than after the mediation. The ANCOVA tests clearly showed that this change in justice scores between the mediation and arbitration phases of the process were significant for respondents and complainants groups, but not for type of process or other demographic characteristics of the parties. Because it was unfavourable it was probably unexpected and pushed the complainants to an explanation based on the procedural, interpersonal and interactional aspects of the intervention procedures. As Brockner and Wiesenfeld argue, when current outcomes are unfavourable the level of procedural fairness becomes highly informative and scrutinized, thereby increasing the effect of the interaction between outcomes and process variables.<sup>269</sup>

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The Formation and Use of Fairness Heuristics in the Workplace" (2009) 30(8) *Journal of Organizational Behavior* 1025-51.

<sup>268</sup> Ibid.

<sup>269</sup> Brockner and Wiesenfeld, above n 229, 189.

After the receipt of the outcome in the arbitration this effect was apparent. The complainant's significant drop in perception of distributive justice (see Table 5.3) appears to have had a significant impact on the other justice perceptions, not only relative to the respondents, but also to their previous score at the end of the mediation. In the mediation phase of the processes it was clear that there was no significant difference between the respondents and complainants in their justice judgements with or without an agreement being reached.

In Chapter 6 the question of 'efficiency' shall be explored using the data generated by the experiment. Finally, in Chapter 7 the "threads" of the results shall be summarised and further analysed and related back to the main questions asked.

## CHAPTER 6: EFFICIENCY

### 6.1 Introduction

In this Chapter Hypothesis 3 is considered:

Would Arb/Med be more efficient in terms of length of process and result in more mediated settlements than Med/Arb.Diff and Med/Arb.Same?<sup>270</sup>

Whilst efficiency is not the major focus of this research this question is a vital one to policy makers, service providers and practitioners in the ADR field. Efficiency is an element of dispute system design<sup>271</sup> which is seen as fundamental to delivering fair and timely outcomes.<sup>272</sup> It is a multifaceted concept involving a range of different measures and outcomes.<sup>273</sup> It was therefore useful to include efficiency as a part of the the elements to be measure in the experiment that was developed in this research. However, a review of the literature shows that overly focusing on efficiency alone can be misleading and limiting. A focus on justice suggests the need to build fairness into an analysis of costs.

It would have been expected, from the evidence of previous research, that the Arb/Med process would provide a higher percentage of settlements than the other two processes.<sup>274</sup> This was indeed the case but not at a statistically significant level. The results indicate the need for a more in-depth and systematic examination of the various elements of what may make a process more efficient than another.

### 6.2 Efficiency

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<sup>270</sup> The question is designed to measure the settlement rates at the end of the mediation phase of these three hybrid processes and the time (in minutes) of each.

<sup>271</sup> Dispute system design is a term created by William Ury, Jeanne Brett, and Stephen Goldberg to describe the purposeful creation of an ADR program in an organization through which it manages conflict through a series of steps or options for process: see Ury, Bret and Goldberg, above n 140.

<sup>272</sup> See Condliffe, *Conflict Management* above n 48, 285-287.

<sup>273</sup> Sourdin, "Mediation in the Supreme and County Courts of Victoria" above n 16, 128.

<sup>274</sup> Conlon and Moon, above n 10 978-84.

In 1997 the Australian Competition and Consumer Commission established benchmarks for industry practice for complaints and dispute systems and listed efficiency as one of their key ingredients.<sup>275</sup> Most Australian dispute system standards have included it since. In 2001 NADRAC recommended that efficiency should be a “common objective” for most parties, practitioners, service providers, government and the community at large. In Chapter 5 efficiency was stated to be one of the three core objectives of ADR.<sup>276</sup> Sourdin, in a study of consumer credit processes, points out the inherent relationship between perceptions of fairness and the time it takes to manage cases through a dispute system.<sup>277</sup> Efficiency has therefore been widely used and is clearly established as a key ingredient for the design and assessment of dispute systems.<sup>278</sup> This has been given some emphasis in reforms to the Australian legal system.<sup>279</sup>

In an evaluation of court processes in Victoria Sourdin notes the complexity of the concept of efficiency, but advocates a broad interpretation which can encompass such elements as long term gains, rates of compliance and the broader costs of unresolved conflict.<sup>280</sup> She concludes that:

Using these broader notions of efficiency, many ADR processes may arguably meet efficiency objectives more readily than conventional litigation or non-integrative processes<sup>281</sup>.

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<sup>275</sup> ACCC, "Benchmarks for Dispute Avoidance and Resolution", AGPS, Canberra, 1997.

<sup>276</sup> NADRAC, "A Framework for ADR Standards" Commonwealth of Australia, 2001, 12.

<sup>277</sup> Sourdin, "Dispute Resolution Processes for Credit Consumers" above n 16.

<sup>278</sup> For a good example see, B Adell, M Grant, A Ponak, *Strikes in Essential Services* (Queen's IRC Press, 2001). They propose four essential elements for the evaluation of processes to manage strikes in essential services. These are: preserving essential services; bargaining efficiency; voluntary and peaceful settlements; and acceptability of outcomes.

<sup>279</sup> See, eg, Senate Standing Committee On Legal And Constitutional Affairs Access To Justice Advisory Committee, *Access to Justice: an Action Plan*, AGPS, Canberra, 1994; Australian Law Reform Commission, Issues Paper 20, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Sydney, 1997; Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62, Sydney, 1999; Australian Law Reform Commission, *Review Of The Adversarial System Of Litigation ADR - Its Role In Federal Dispute Resolution Issues*, Paper 25, Sydney, 1998; Australian Law Reform Commission, *Costs Shifting - Who Pays For Litigation*, ALRC Report 75, Sydney, 1995; Victorian Law Reform Commission, *Civil Justice Review*, Melbourne, 2007; Victorian Law Reform Commission, *Civil Justice Review Report*, Melbourne, 2008.

<sup>280</sup> Sourdin, "Mediation in the Supreme and County Courts of Victoria" above n 16, 128.

<sup>281</sup> *Ibid.*

The Australian Law Reform Commission (ALRC) has commented that when considering dispute resolution processes and their objectives, efficiency can be viewed from a number of perspectives including:

- The need to ensure appropriate public funding of courts and dispute resolution processes that avoid waste;
- The need to reduce litigation costs and avoid repetitive or unnecessary activities in case preparation and presentation; and
- The need to consider the interests of other parties waiting to make use of the court or other dispute resolution process.<sup>282</sup>

Underpinning much of this debate about court efficiency is the concept of “proportionality.”<sup>283</sup> That is that the costs incurred by the parties and by the public in the provision of court resources should be ‘proportional’ to the matter in dispute. This principle was central to the most significant recent reforms in the English system of civil procedure enacted following the *Woolf Reports*.<sup>284</sup> According to Lord Woolf’s Final Report, “...the achievement of the right result needs to be balanced against the expenditure of time and money needed to achieve that result”.<sup>285</sup> The Victorian Government’s Justice Department has identified as one of its eight principles for dispute management systems the concept of proportionality.<sup>286</sup> However, as the Victorian Law Reform Commission noted, there are “...numerous dimensions to the civil justice debate about proportionality”, including the way in which attempts to limit parties to proportionate expenditures may impact on the quality of justice.<sup>287</sup> The Commission noted the problem not only of “low value” disputes receiving

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<sup>282</sup> Australian Law Reform Commission, *Issues Paper 25: Review of the Adversarial System of Litigation. ADR – Its Role in Federal Dispute Resolution*, ALRC, Sydney, June 1998, 27.

<sup>283</sup> See, eg, C Hanycz, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 1(98) *Civil Justice Quarterly* 106; R Goldschmid, *The Major Themes of Civil Justice Reform* (Discussion Paper Prepared for the British Columbian Ministry of the Attorney General’s Civil Justice Reform Working Group), London, HMSO, 2006; Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, London, HMSO, 1996; Victorian Law Reform Commission *Civil Justice Review Report* Melbourne, 2008 91.

<sup>284</sup> *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Lord Chancellor’s Department, June 1995; *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, London, HMSO, 1996.

<sup>285</sup> *Ibid* 17.

<sup>286</sup> Department of Justice, *New Directions for the Victorian Justice System 2004-2014* Melbourne, 2004; The others were fairness, timeliness, choice, transparency, quality, efficiency and accountability.

<sup>287</sup> Victorian Law Reform Commission, *Civil Justice Review Report* Melbourne, 2008, 91.

disproportionate amounts of public funding but that of purely commercial disputes between well-resourced litigants (who can afford private ADR processes) also receiving such assistance.<sup>288</sup> Hanycz, in her review of the Canadian drive towards more efficient court processes, articulates this concern about the increasing demands to be efficient and the effect this will have on the delivery of just outcomes, noting that:

Assumptions underlying the principle of proportionality hold that high costs and delays in the litigation process discourage disputants from accessing the courts as a means to resolving disputes. By achieving proportionality, it is assumed that [in] the interests of justice, accurate outcomes are balanced with efficient cost-effectiveness, thereby enhancing meaningful access to justice.<sup>289</sup>

She believes that these assumptions may be misplaced and are often based upon narrow conceptions of efficiency based on reductionist and utilitarian approaches in legal and economic theory.<sup>290</sup> Moreover she takes the view, from a review of the literature, that most commentators have not taken into account the effect upon justice of the focus on efficiency.<sup>291</sup> In other words she is sceptical that increased efficiency can be balanced with more just outcomes. Further, she indicates this is not necessarily balanced by empirical studies showing increased satisfaction amongst users of the court system.<sup>292</sup>

A 2007 survey of those using courts in Australia reported that 78 per cent of them did not have confidence that the process would be completed within a reasonable time

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<sup>288</sup> Ibid 91-2; The Commission stated:

There is also an important question about whether the ‘imposition’ of ‘proportionality’ in certain contexts may favour certain litigants, including those with disproportionately greater resources. In some cases a well-resourced or determined litigant may be prepared to incur costs which are disproportionate to the amount in dispute for a variety of commercial or forensic reasons. This may seek to deter the other party to the proceedings, or other persons with similar claims, from pursuing what may be meritorious claims.

However, in many contexts, the desire to ensure that only a ‘proportionate’ amount of resources can be deployed in the conduct of the litigation may lead to constraints on discovery and the use of interlocutory procedures, which may disadvantage particular litigants and impair the quality of justice delivered.

Moreover, the concept of ‘proportionality’ is not as readily applicable to proceedings where the outcome is not quantifiable in economic terms, including cases which may have important ‘public interest’ dimensions. In such cases, whether the likely legal costs are ‘proportionate’ to the importance and complexity of the issues in dispute will inevitably involve value judgments and subjectivity.

<sup>289</sup> Hanycz, above n 284,106.

<sup>290</sup> Ibid 102-3.

<sup>291</sup> Ibid 106.

<sup>292</sup> Ibid 103-4.

whilst there was almost an even split between those who thought the courts would deal with them fairly.<sup>293</sup> As Anleu and Mack conclude:

These findings might stem from different views about what constitutes fairness, such as differences in emphasis on procedural fairness, the equitable application of law, and just substantive outcomes.<sup>294</sup>

As well, courts face the issue of an increasing number of self-represented litigants, whose perceptions of fairness can conflict with the judicial perception.<sup>295</sup>

Also, those seeking to introduce ADR into existing dispute, complaint and adjudication systems have realised that such processes may require a relatively substantial investment of time on the part of the parties and mediators, are not necessarily cheaper and may, if not implemented correctly, exacerbate existing power imbalances between the parties.<sup>296</sup> This is particularly so in the domains of small claims, neighbourhood and workplace disputes where the existing systems may be quite efficient in terms of time and process as well as delivering binding outcomes.<sup>297</sup> In addition, there are considerable contextual differences across the various programs that have implemented mediation focused reforms.<sup>298</sup> Furthermore, the type of dispute will have a bearing on the way in which disputing systems reach settlement. As Colbran et al conclude:

Nonetheless, the figures highlight the importance of formal and informal pre-trial procedures as the basis for the disposition of cases. The vast majority of cases are 'settled' by some means or other – possibly by agreement, possibly by unilateral default. Settlements are, however, more likely in some kinds of cases than others. While the overall settlement rate is in the 90-95 per cent range, possession and debt cases seem far more likely to settle than damages cases.<sup>299</sup>

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<sup>293</sup> S R Anleu and K Mack, "The Work of the Australian Judiciary: Public and Judicial Attitudes" (2010) 20(3) *Journal of Judicial Administration*, 3.

<sup>294</sup> *Ibid* 8.

<sup>295</sup> R Moorhead, "The Passive Arbitrator: Litigants in Person and the Challenge to Neutrality" (2007) 16(3) *Social & Legal Studies* 405, 414.

<sup>296</sup> For an early analysis of this issue see H J Folberg et al, "The Use of Mediation in Small Claims Courts" (1993) 9(1) *Ohio State Journal on Dispute Resolution*; for an overview of the Australian literature see Condliffe, *Conflict Management* above n 48, 198-201; See also Sourdin and Matruggio, "Evaluating Mediation" above n 16.

<sup>297</sup> See Sourdin, "Dispute Resolution" above n 11.

<sup>298</sup> See, eg, N Waters and M Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?* (7 January 2006) Papers Presented at 1st Annual Conference on Empirical Legal Studies, SSRN: <http://ssrn.com/abstract=913320>.

<sup>299</sup> S Colbran et al, *Civil Procedure: Commentary and Materials* (LexisNexis Butterworths, 2005) 902-3.

Many factors are therefore relevant in terms of how to measure ‘success’ in dispute systems.<sup>300</sup> Unfortunately the available research does not give us a really clear picture of how ADR programs impact on court processes and vice versa.

For example, Sourdin comments on the lack of adequate data on the mediation of disputes in the County and Supreme Courts of Victoria.<sup>301</sup> Colbran et al, in a review of the available superior court reports over the last twenty years in Australia, finds that whilst there are a low percentage of cases that end in trial, ascertaining the way in which they were disposed of is problematic.<sup>302</sup> This is because of the way in which they are reported across the various jurisdictions. As Bingham states, “we need more and better research data to examine how design variables affect disposition time, trial rates, and substantive outcomes.”<sup>303</sup> She indicates that we need a more systematic and standardized set of protocols for evaluating court based ADR programs and provides an extract of the American Bar Association’s “Top Ten Data Fields for Court Programs” as an example that could be used.<sup>304</sup>

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<sup>300</sup> Barendrecht provides a very useful summary of the various elements involved in dispute systems and maintains that these can be summarised into five elements that constantly interact with each other.<sup>300</sup> These are to meet, talk, share, decide and stabilize: M Barendrecht, "In Search of Microjustice: Five Basic Elements of a Dispute System" *SSRN eLibrary* (2009).

<sup>301</sup> See, eg, Sourdin, "Mediation in the Supreme and County Courts of Victoria" above n 16, 131.

<sup>302</sup> S Colbran et al, above n 299, 901-3.

<sup>303</sup> L Bingham, T Nabatchi, J Senger and M Jackman "Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes" (2008-2009) 24 *Ohio State Journal on Dispute Resolution* 225, 261.

<sup>304</sup> Ibid 261-262; The American Bar Association Section of Dispute Resolution has proposed ten indicators or “data fields” for courts to collect so that the researchers and policy makers can systematically assess differences in the impact of ADR programs nationally. These include:

1. Was ADR used for this case? (yes/no)
2. What ADR process was used in this case? (Mediation, early neutral assessment, non-binding arbitration, fact-finding, mini-trial, summary jury trial, other)
3. Timing Information (the date the claim was docketed; the date of referral to ADR; the date of first ADR session; the date of close of ADR referral period; at what point in the docket duration did ADR occur (Before suit, after filing suit, before discovery, just before trial); the final disposition date of the case; the date of post-trial motions).
4. Whether the case settled because of ADR. If settled, whether the case settled in full or settled in part.
5. What precipitated the use of ADR? (Court order sua sponte; party consent to the process; party motion with one or more parties opposed and a court order for ADR following; automatic referral per court rule due to kind of case)
6. Was there a settlement without ADR? (yes/no) If so, how was the case terminated-e.g., dispositive motion, settlement in ADR, settlement by some other process, during or after trial, removal to another court, etc.
7. Case type (general civil, criminal, domestic, housing, traffic, small claims)
8. The cost of the ADR process to the participants
9. Did the disputants use more than one form of ADR? If so, which?
10. Satisfaction data: How satisfied are the participants with the process, the outcome, and the neutral? See Memorandum from American Bar Association Section of Dispute Resolution Task Force on Research and

Also, as the reliance on ADR grows the ability of courts and tribunals to control outcomes is correspondingly lessened. And whereas legal systems have as their principal goal the delivery of just outcomes, no such guarantee can be as assuredly given for other dispute management systems. Proponents of ADR, such as Galanter and Cahill, provide a persuasive and often cited argument why settlement between the parties is preferable and fair even if their emphasis is on party self-determination allied with efficiency rather than ‘justice.’<sup>305</sup> In Table 1 (see Table 6.1 below) of this 1994 article they summarize their arguments.

Bingham makes the point that whilst this analysis does not refer to ‘justice’ it however could be framed as being about the ‘administration of justice.’<sup>306</sup> Whatever the merits of this argument this analysis by Galanter and Cahill clearly signposts the inherent tension between traditional legal systems, with their emphasis on objective rights, and the approach of modern reform movements informed by the social sciences and a concomitant emphasis on self-determination. Bingham would propose that the way to manage this tension is to ensure transparency in the ADR processes and a level of ongoing oversight by the court system.<sup>307</sup> This is similar to Waters’ more recent call for appellate courts to have more control over ADR processes to ensure they work efficiently.<sup>308</sup> How this would be operationalized is difficult to imagine, especially given the confidentiality provisions and privacy concerns which have invigorated recent debates and caused concern within the Australian legal and mediation communities.<sup>309</sup>

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Statistics (Oct. 11,2005), available at <http://www.abanet.org/dch/committee.cfm?com=DR014500>, follow "Top Ten Data Fields for Court Programs" hyperlink under "Related Resources".

<sup>305</sup> M Galanter and M Cahill, “Most Cases Settle: Judicial Promotion and Regulation of Settlements” (1994) 46 *Stanford Law Review* 1339-50.

<sup>306</sup> Bingham, above n 221, 28.

<sup>307</sup> *Ibid* 29.

<sup>308</sup> Waters and Sweikar, above n 298.

<sup>309</sup> These concerns have been focused on the possible implications of the new *Uniform Evidence Act* and its impact on the confidentiality of mediation processes: see *Evidence Act 1995*, s. 131; see also M Dewdney, "The Partial Loss of Voluntariness and Confidentiality in Mediation" (2009) 20(17) *Australasian Dispute Resolution Journal*; A Nolan, M O'Brien, "Confidentiality in Mediations: A Work in Progress" (Melbourne, 2010) 1-28; Issues around this issue were highlighted by a reference in December 2009 by the Federal Attorney-General to NADRAC to advise him on :

“The legislative changes required to protect the integrity of different ADR processes including issues of confidentiality, non-admissibility, conduct obligations for participants and ADR practitioners and the need, if any, for ADR practitioners to have the benefit of a statutory immunity”.

**Table 6.1: Reasons to think Settlements are Good**

**A. The Party-Preference Arguments**

1. Party pursuit: Settlement (rather than adjudication) is what the parties seek. In other words, they "vote with their feet."
2. Party satisfaction: Settlement leads to greater party satisfaction.
3. Party needs: Settlement is more responsive to the needs or underlying preferences of parties.

**B. The Cost-Reduction Arguments**

4. Party savings: Settlement saves the parties time and resources, and spares them unwanted risk and aggravation.
5. Court efficiency: Settlement saves the courts time and resources, conserving their scarce resources (especially judicial attention); it makes courts less congested and better able to serve other cases.

**C. The Superior-Outcome Arguments**

6. Golden mean: Settlement is superior because it results in a compromise outcome between the original positions of the parties.
7. Superior knowledge: Settlement is based on superior knowledge of the facts and the parties' preferences.
8. Normative richness: Settlement is more principled, infused with a wider range of norms, permitting the actors to use a wider range of normative concerns.
9. Inventiveness: Settlement permits a wider range of outcomes, greater flexibility in solutions, and admits more inventiveness in devising remedies.
10. More compliance: Parties are more likely to comply with dispositions reached by settlement.
11. Personal transformation: The process of settlement qualitatively changes the participants.

**D. Superior General Effects Arguments**

12. Deterrence: Information provided by settlements prevents undesirable behaviour by affecting future actors' calculations of the costs and benefits of conduct.
13. Moral education: Settlements may influence estimations of the rightness or feasibility of various sorts of behaviour.
14. Mobilization and demobilization: By defining the possibilities of remedial action, settlements may encourage or discourage future legal actors to make (or resist) other claims.
15. Precedent and patterning: Settlements broadcast signals to various audiences about legal standards, practices and expectations.

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See NADRAC, "The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction." Canberra: Commonwealth of Australia, 2009; Note that Section 92 of the *VCAT Act* provides:

"Evidence of anything said or done in the course of mediation is not admissible in any hearing or before the Tribunal in the proceeding, unless all parties agree to the giving of the evidence."

Furthermore, the push to more effective ADR programs and court efficiency could lead to unexpected outcomes and points to the complexity of the relationship between these two elements. Colbran et al give the example that if settlement rates suddenly decreased, so that cases were more efficiently disposed of, some litigants might opt for trial rather than settlement.<sup>310</sup> Echoing some of the concerns expressed by Galanter and Cahill in 1994 they suggest that there may also be ‘social costs’ associated with high settlement rates particularly concerning lack of information about ‘going rates’ where “.....decision makers lack external cues and where decisions are basically unreviewable.”<sup>311</sup> They indicate how complicated the path to settlement is by illustrating the difficulties parties have in assigning value to their cases. They state:

To begin with, note that at any given time, a party’s case will have a value:  $V_p$  (for plaintiffs) and  $V_d$  (for defendants). The value will reflect both the value attached to possible outcomes, and their likelihood. If litigants were rational economic decision-makers, the value of their cases would equal their ‘expected value,’  $E_x$ , where  $E_x = \sum p_i \times V_{ix}$  where  $p_i$  is the subjective probability of an outcome with value  $V_{ix}$  to party  $X$ .  $\sum p_i$  always =1. Thus if a party considered there was an 0.4 chance of total failure, and a 0.6 chance of winning \$100,000, the ‘expected value’ of its case would be \$60,000 ((0.4 x \$0) + (0.6 x \$100,000)). An offer to settle it for \$70,000 would therefore be very attractive. An offer to settle for \$50,000 would not. While  $V_x$  will bear a rough relationship to  $E_x$ , the two will not necessarily coincide; litigants and lawyers are not always particularly good at handling probabilities.<sup>312</sup>

As the authors state these types of econometric calculations are rarely ever satisfied. This is because parties make different assessment to their own case as against the other sides; are overly optimistic; attach different values to different outcomes; have different levels of risk aversion; have different levels of emotional involvement; have different views about the impact of the case on reputation and its precedent value; have different resources and; may be represented by lawyers with different interests.<sup>313</sup> In other words parties and their lawyers are not always rational so as to be able to dispassionately apply these calculations objectively.

Overly focusing on efficiency can also be misleading. The immediate issue with this approach, apart from an assumption of disputant rationality, as indicated above, is

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<sup>310</sup> Colbran et al, above n 300, 903.

<sup>311</sup> Ibid; see Galanter and Cahill, above n 306..

<sup>312</sup> Ibid 904.

<sup>313</sup> Colbran et al above n 300, 904-8.

readily apparent.<sup>314</sup> That is that ADR processes may not be favoured simply because they produce the more efficient “surplus”. Even in zero-sum or ultimatum games research, where one party can offer the other party as much as they like but the other party only has the option of accepting or refusing, the results show that disputants will put a value on the fairness of such offers. Disputants will reject an offer they do not consider fair even if this means they get nothing. The person making the offer knows this and accordingly is more inclined to make a fairer offer than their self-interest would presuppose.<sup>315</sup> As Carraro, Marchiori and Sgobbi argue:

‘Traditional models of negotiation have focused almost exclusively on the efficiency properties of both the process and the outcomes. Yet, as every day experience indicates, considerations other than efficiency play a crucial role in selecting which agreement will be reached – if any at all – and through which path. The theory of fair division focuses on processes and strategies that respond not only to Pareto efficiency, but also to equity, envy-freeness, and invulnerability to strategic manipulation.’

Disputants may therefore rationally choose a process for reasons other than efficiency.

Taking a limited purview centred on elements of efficiency can therefore be useful for research purposes but misleading in other contexts.<sup>316</sup> Boulle suggests that in the practice of mediation, demands of efficiency may place pressure on what he calls “the process/substance distinction.”<sup>317</sup> He argues that overemphasizing short-term quantitative factors (such as time and cost) may not accommodate other more qualitative factors which assist to determine effectiveness such as client satisfaction, and impact on behaviour and compliance.

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<sup>314</sup> R Kiser, M Asher and B McShane, ‘Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations’, (2008) 5(3) *Journal of Empirical Legal Studies* 551-591.

<sup>315</sup> For a recent interesting analysis of this approach see C Carraro, C Marchiori, A Sgobbi, "Advances in Negotiation Theory: Bargaining, Coalitions and Fairness" in *World Bank Policy Research Working Paper* (The World Bank, 2005) 2.

<sup>316</sup> NADRAC, "A Framework for ADR Standards" Commonwealth of Australia, 2001. This report identified three core objectives of ADR: 1) To resolve or limit disputes in an effective and efficient way; 2) To provide fairness in procedure; and 3) To achieve outcomes that are broadly consistent with public and party interests.

<sup>317</sup> L Boulle, “Minding the Gaps - Reflecting on the Story of Australian Mediation” (2000) 5 *Bond Dispute Resolution News*.

There is some recognition therefore that the usefulness or appeal of ADR programs goes beyond simple measures of efficiency.<sup>318</sup> As Levy states in relation to the court system in New York:

...the purpose of ADR is not simply to ease congestion. Quite to the contrary, its primary goal is to offer litigants fair, inexpensive, and efficient means of settling a dispute that they were unable to solve on their own.<sup>319</sup>

One of the reasons stated for the introduction of the *Owners Corporations Act 2006* (the *Act*) in Victoria was that the previous legislation, *The Subdivision Act 1998*, was perceived by many to be too limited, expensive and inaccessible.<sup>320</sup> A review of the legislated response and a comparison of interstate and international jurisdictions do show that most legislated OC reforms have relied upon a hybrid dispute regime involving mediation (or conciliation) along with adjudication.<sup>321</sup> Planners appear to have tried to balance the needs for efficiency with other considerations relating to party involvement and self-empowerment as well as fairness.

The impact on disputants and the third party interveners of these differing procedures may vary. The results from research by McGillicuddy indicated that disputants in Med/Arb.Same engaged in more problem solving and were less hostile and competitive than were disputants in straight mediation, with Med/Arb.Diff intermediate on these dimensions.<sup>322</sup> Also, third parties in Med/Arb.Diff were less involved throughout the session than were third parties in the other two conditions.<sup>323</sup>

Furthermore, the role of arbitration type processes in such schemes can be controversial because of all the alternative processes it leaves the parties with less

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<sup>318</sup> For a recent example of such an analysis based upon an economic analysis see M Heise, "Why ADR Programs Aren't More Appealing: An Empirical Perspective" (2010) 7(1) *Journal of Empirical Legal Studies* 64.

<sup>319</sup> R Levy, "The ADR in Federal Court: The View from Brooklyn" (2005) 26(3) *Justice System Journal* 343.

<sup>320</sup> Consumer Affairs Victoria, (2006) "Final Report of the Body Corporate Review" (CAV, 2006).

<sup>321</sup> See Chapter 3.

<sup>322</sup> McGillicuddy, Welton and Pruitt, above n 39.

<sup>323</sup> A good example of the practical use of such procedures was the response to a crisis in the construction of condominiums by the Washington (USA) state legislature due to prolific litigation concerning water leakage. The legislation it introduced was based upon a mandatory conciliation and arbitration procedure. These reforms were accompanied by requiring the initiating party to advance the costs of the arbitration or conciliation but allowing for these costs to be awarded to the party that "wins" the case: see A Faith, "'Leaky Condo' Dispute Resolution" [2000] *UBC Dispute Resolution Program*, Faculty of Law, University of British Columbia [http://www.law.ubc.ca/drcura/pdf/construction\\_LeakyCondoPaper\\_RevisedV.pdf](http://www.law.ubc.ca/drcura/pdf/construction_LeakyCondoPaper_RevisedV.pdf)

autonomy, and when it is not managed properly within the framework of a dispute management process it can be both unwieldy and costly. Miskin described the deleterious effects of the introduction of mandatory mediation and arbitration on Ontario condominium disputes after the proclamation of the *Condominium Act* 1998.<sup>324</sup> In this scheme when mediation fails arbitration becomes mandatory. At that point each side usually obtains the services of a lawyer and sometimes a counterclaim is added. The lawyers will then spend time preparing the case and negotiating to agree on an arbitrator. According to Miskin the arbitrator usually awards full costs that are more than the Court normally awards. He reports that an average small arbitration case could cost a losing party in the range of \$15,000 for their own lawyer, the full bill of the arbitrator and that of the other party's lawyer. These costs multiply if the award is appealed. He concluded that whilst mediation allows for sensible resolution of the type of disputes that arise in condominiums, arbitration is an all or nothing gamble that is not much better than court. These misgivings have been identified in a number of studies in a range of jurisdictions. For example, Chau sees the modern arbitration process as emulating the litigation proceeding, leading to delay and cost escalation. He examines the Hong Kong Government implementation of a mediation scheme as an alternative mode for settlement of construction disputes. He assesses the shortcomings of this new system and suggests that the success of adjudication (rather like an abbreviated arbitration) now practiced in the United Kingdom may indicate a place for this process of dispute resolution so as to help improve the situation.<sup>325</sup> Van der Merwe's comparison of a scheme in South Africa, where private arbitration processes had been recently introduced, with that of the tribunal based processes in Singapore and New South Wales, indicated that the inherent qualities of such a process may encumber the parties with unnecessary delays and costs. As well, the private nature of such arbitrated arrangements militates against the establishment of public precedents to guide disputants.<sup>326</sup> Recent research by Deck et al has also indicated that adapting conventional arbitration by adding final offer and other variations offers only weak support for improving outcomes from the process.<sup>327</sup>

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<sup>324</sup> Miskin, above n 3.

<sup>325</sup> See Chau, above n 137

<sup>326</sup> C Van der Merwe, "Sectional-Title Courts as an Alternative to Arbitration for the Settlement of Disputes in a Sectional-Title Scheme" (1999) 116 *South African Law Journal* 624.

<sup>327</sup> Deck, Farmer and Zeng, above n 174.

There is also the so-called “chilling” or “narcotic effect” of arbitration to be considered.<sup>328</sup> This happens because arbitration is an adversarial procedure that may cause the parties to become more competitive and therefore less likely to be cooperative and open. Moreover, there are problems with Med/Arb. Same because it may be difficult for an arbitrator who has previously acted as a mediator to maintain an impartial stance because of what s/he has heard in the mediation. In Australia section 27D of the Uniform Commercial Arbitration Acts allows for such a process but there has been extreme reluctance to use it because of due process or ‘natural justice’ concerns.<sup>329</sup>

The use of arbitration can therefore potentially lead to improved efficiencies and certainty in the process but only if properly managed.<sup>330</sup> Conlon and Moon’s study is instructive in this regard.<sup>331</sup> These authors examined the impact of two hybrid dispute resolution procedures (Med/Arb and Arb/Med) and three disputant dyadic structures (individual vs. individual, individual vs. team, and team vs. team) on various dispute outcomes. The authors found that disputants in the Arb/Med procedure: (a) settled in the mediation phase of their procedure more frequently; and (b) achieved settlements of higher joint benefit than did disputants in the Med/Arb procedure. They stated:

Collectively, our results suggest that the contexts in which arb-med may be a useful dispute resolution procedure are more widespread than what Ross and Conlon (2000) initially had thought. However, we also see at least three environments in which med-arb might still be preferable to arb-med. The first is when there is significant time pressure because disputes under arb-med did take significantly longer to resolve. The second situation is when the financial costs of paying for a third party need to be minimized. A third situation might be when there is considerable hostility between disputants. Perhaps under this situation, beginning with the more adversarial arbitration phase is unwise because it may further heighten animosity between the parties, making it unlikely that mediation will be successful.<sup>332</sup>

These results were also broadly supported by a study of online disputing which found the use of final offer arbitration advantageous in website related disputes and may

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<sup>328</sup> Carnevale and Leatherwood, above n 11; Conlon and Moon, above n 10; Pruitt and Carnevale, above n 15; Wheeler, above n 174, 11-120.

<sup>329</sup> Condliffe, "Arbitration: The Forgotten ADR" above n 149.

<sup>330</sup> Ibid.

<sup>331</sup> Conlon and Moon, above n 10, 978-84.

<sup>332</sup> Ibid 983.

indicate that Arb/Med may be a dispute resolution procedure with some potential.<sup>333</sup> It is also of note that the operation of the Uniform Commercial Arbitration Acts in Australia allows for potential procedural irregularities to be addressed and ensures that impartial professional skills can be brought to bear on the dispute.<sup>334</sup> The inclusion of a similar process (adjudication) in the Queensland scheme to manage OC disputes, and in many overseas schemes, perhaps also reflects this.<sup>335</sup> Sanchez's study of disputing systems in Anglo-Saxon cultures would also point towards a long history of multi-layered approaches (the precursor to the so-called 'multi-door courthouse') to managing disputes including negotiations, mediation and arbitration.<sup>336</sup>

### 6.3 The Context: How to combine efficiency with justice?

OC disputes, like family, employment and community disputes are contextualized by relatively long term relationships. Williamson, in an institutional economic analysis<sup>337</sup> of private ordering, characterizes these long term relationship contexts as having three types of governance issues:<sup>338</sup>

1. Limited foreseeability – it is impossible to include in the initial arrangements for these types of relationship all that may happen in the future leading to incomplete contracts and a need for constant adaptability and flexibility on the part of the parties involved. This leads to a series of ongoing informal contracting and negotiation over rules.
2. The problem of opportunism – parties in these arrangements have to live up to certain expectations and take on certain obligations which are often difficult to maintain in the longer term.

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<sup>333</sup> See J Ring, "Fair Reputations: A Game Theoretic Mechanism for E-Commerce Disputes" in *International Conference on Artificial Intelligence and Law* (Barcelona 2009).

<sup>334</sup> Butler, above n 106.

<sup>335</sup> Chau, above n 137; Peter Condliffe, *Conflict in the Compact City: Dilemmas and Issues in High Density Dispute Management* paper presented at the Institute of Arbitrators and Mediators Conference, Melbourne, Australia, 29-31 May 2009.

<sup>336</sup> V Sanchez, "Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today" (1996) 11 *Ohio State Journal on Dispute Resolution* 1.

<sup>337</sup> Institutional or organizational economics focuses upon the microeconomic forces that shape organizations. Many of these relate to the concept of transaction costs. Transaction costs consist of searching, bargaining, monitoring, enforcement, and other costs not directly related to the production of goods or services. Usually such costs are attributed to difficulties in measurement (the metering problem) or difficulties in redeploying assets to alternative uses (asset specificity) See Bryan W Husted and R Folger, "Fairness and Transaction Costs: The Contribution of Organizational Justice Theory to an Integrative Model of Economic Organization" (2004) 15(6) *Organization Science* 719-29.

<sup>338</sup> Oliver Williamson, "The Economics of Governance" (2005) 95(2) *The American Economic Review* 1-18; Quoted in Barendrecht, "In Search of Microjustice", above n 301, 12.

3. Bilateral dependency – parties in these long term relationships make certain investments in the arrangements and thereby come to depend upon each other and must, if a dispute arises, negotiate with each other to manage the matter.

This analysis indicates the complexities of the relationships involved and the need for governance arrangements to take them into account. Also, these relational dependent systems can disadvantage the less well-resourced because they raise transaction costs.<sup>339</sup> For less complex one-off or transitional relationships Barendrecht posits that market transactions can be most efficiently backed up by threats of enforcement and by a mechanism for establishing the extent of rights or obligations.<sup>340</sup> These rights and obligations have usually been demarcated by contracts or default rules of private law. In his view most disputes can be resolved by applying these rules to the case. In practice, dispute management in this area is mostly a matter of fair complaint handling, resolving quality disputes efficiently, and ensuring payment. He calls this bundle of processes “enforcement rights.” However, in more complex and longer term relational systems there is a need for a more nuanced approach which takes account of the complexities of the relationships involved.<sup>341</sup> Because of these three dynamics Barendrecht, building on the work of Williamson<sup>342</sup>, suggests that ‘trilateral governance’, which he defines as a ‘neutral arbitration mechanism’, is needed.<sup>343</sup> The parties in these more complex relationships are therefore, on this view, likely to come to negotiate in the shadow of ‘hierarchy’, or as Mnookin and Kornhauser termed it, the ‘shadow of the law’, and accordingly relatively more difficult to make efficient.<sup>344</sup> In his attempt to develop general principles of design for institutions to better manage conflict Shariff also supports this notion of the need for a centralized processing of information to manage these types of relational disputes.<sup>345</sup> As well as recognizing the

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<sup>339</sup> For a seminal analysis see, M Galanter, "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law & Society Review* 95.

<sup>340</sup> Barendrecht, "In Search of Microjustice", above n 301,12.

<sup>341</sup> Ibid.

<sup>342</sup> See Williamson, above n 341, 1-18.

<sup>343</sup> Barendrecht, "In Search of Microjustice" above n 301, 7.

<sup>344</sup> R H Mnookin and L Kornhauser. "Bargaining in the Shadow of the Law" (1979) 88 *Yale Law Journal* 950-997; M Galanter, "Worlds of Deals: Using Negotiation to Teach About Legal Process" (1984) 34 *Journal of Legal Education* 268.

<sup>345</sup> K Z Shariff, "Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization" (2003) 8 *Harvard Negotiation Law Review* 133.

different contexts of disputing, some justice theorists are also beginning to attempt to integrate economic theory with their own.

In a recent analysis which attempted to integrate institutional economic theory with the justice literature, Husted and Folger argued that governance forms should not only allow for participation of the parties but that perceptions of justice would affect the transaction costs.<sup>346</sup> They suggested that ‘... governance design will fail if it does not take into account the relationship between informal norms like justice and formal structures.’<sup>347</sup> Not only should a system be designed as fair but perceived as fair through its implementation. They state:

Justice theorists, however, recognize that being fair is not enough. A transaction or procedure must be perceived as fair. Justice theory is thus more concerned with the acceptance of a particular mechanism by the transactors. Simply designing the mechanism does not suffice because the perceptions of fairness are influenced not only by design, but also by its implementation.<sup>348</sup>

They build upon earlier work by Ouchi who connected justice theory (he used equity theory), and the institutional economics literature.<sup>349</sup> Ouchi argues that the attempt to achieve the perception of equity or distributive justice (fairness in exchange outcomes) creates transaction costs. Husted and Folger critique those approaches based on an analysis of transaction costs.<sup>350</sup> They give three reasons why this type of analysis may be unduly limiting. First, transaction costs analysis often fails to distinguish between different sorts of conflicts and for this reason may implement the wrong process. They make the distinction between ‘cognitive conflicts’ (conflicts which depend on disputes of fact) and ‘interest based conflicts’ (conflicts which depend upon a search for different goals or outcomes), which are not recognized in economic analysis. Justice theorists generally recommend an adjudicative process for the former and a process with more decision control in the parties for the latter to maximize perceptions of fairness. They give the example of the difference between cognitive (issues around perceptions of fact) and interest based (issues around goals and preferred outcomes)

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<sup>346</sup> Husted and Folger, above n 340, 719-29.

<sup>347</sup> Ibid 719.

<sup>348</sup> Ibid 719, 723.

<sup>349</sup> W Ouchi, "Markets, Bureaucracies, and Clans" (1980) 25 *Administrative Science Quarterly* 125-41.

<sup>350</sup> Husted and Folger, above n 340.

disputes where the perceptions of procedural fairness can be quite different. Second, because economists do not take into account fairness they may recommend the right process but for the wrong reason. That is whilst a process that ensures efficient low cost processes may seem best in certain situations, it may not in fact meet the needs of the parties involved. Third, because economic analysis is derived from an 'equilibrium orientation' it tends to discount the dynamic inherent in the nature of disputing systems where perceptions of fairness can change over time. This contrasts with the socio-psychological approach, which dominates the justice literature, that tends to and is comfortable with a more dynamic approach where perceptions of fairness can be quite unstable.

From their analysis Husted and Folger believe there is a 'fairness-response' transaction cost based mainly on interactional justice elements (in this research this has been separated into two parts termed *interpersonal* and *informational* justice) which can enhance transaction cost analysis. These elements are trust, truthfulness, respect, propriety of questions and sufficiency of justifications.<sup>351</sup> In other words, if these conditions are not present then the likelihood of parties engaging in maladaptive behaviour increases and so do costs.

A further development of the attempt to analyse justice systems by incorporating cost factors is provided by the Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO).<sup>352</sup> The TISCO analysis is based upon a review of the various attempts, across various disciplinary perspectives, to measure the components or elements important to the access of justice so as to create and adapt a more systematic approach.<sup>353</sup> They use Genn's well-known metaphor, that the process of access to justice can be seen as a 'path' that is travelled by a person who experiences a problem in his relation to some other individual.<sup>354</sup>

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<sup>351</sup> Husted and Folger, above n 338, 719,725.

<sup>352</sup> Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems, "A Handbook for Measuring the Costs and Quality of Access to Justice" (Maklu, 2009) [http://test1.uvt.nl/wp-content/uploads/2011/03/Handbook\\_v1.pdf](http://test1.uvt.nl/wp-content/uploads/2011/03/Handbook_v1.pdf); see also <http://www.measuringaccesstojustice.com>; see also Gramatikov and Laxminarayan, above n 26.

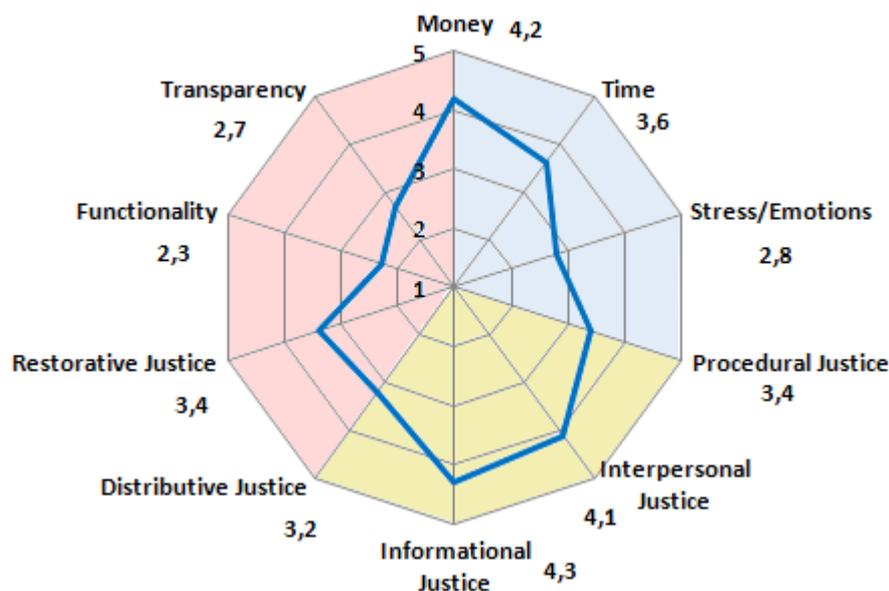
<sup>353</sup> M Barendrecht, J Mulder and I Giesen, "How to Measure the Price and Quality of Access to Justice" (2006), SSRN: <http://ssrn.com/abstract=949209> 5.

<sup>354</sup> H Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart, 1999).

The TISCO team developed and use a range of research instruments to collate what they term ‘the basic indicators’ - costs, quality of the procedure, and quality of the outcome: see Figure 6.1 below.<sup>355</sup> They develop a five point measure for the component parts of each of these three indicators based on the perspectives of the users of the justice system under study. They then use this to diagrammatically indicate the ‘paths to justice’ of parties. As an example, the measure for each element is traced by the blue line in Figure 6.1. This technique enables them to quickly compare results from different studies.

The costs in the TISCO model include actual out of pocket, intangible and opportunity costs. Quality of the procedures refers to procedural, interpersonal, informational and restorative justice. The outcomes measures they use have three dimensions - distribution, functionality, and transparency. At the next level, the authors aggregate the information on costs, quality of the procedure and quality of the outcome into one composite figure. This single value, which they call the ‘Access to Justice Index’, can, in their view, provide focused information about the measured paths to justice across different systems and jurisdictions.<sup>356</sup>

**Figure 6.1 The TISCO Evaluation of the Paths to Justice – Aggregated Indicators**



<sup>355</sup> Ibid 20.

<sup>356</sup> Gramatikov and Laxminarayan, above n 26, 7.

They state:

Normally, one study measures a single path to justice at a given time. However, more than one path could be measured at once. A donor might want to assess the accessibility of a given legal system. In such a case, the most pressing and frequent paths to justice might be measured in order to evaluate the costs and quality of the basic justice processes that the people need. Or, a policy maker may want to compare two complimentary or alternative paths to justice. An example could be the comparison of mediation and arbitration as dispute resolution procedures. Another example could be the measurement of the performance of multiple providers who provide the same path to justice – i.e. similar types of court cases adjudicated by different courts.

For most of the measurement needs, a survey of the status quo will suffice. A single measurement of a path to justice could provide sufficient information and knowledge regarding the costs, the perceived quality, and its accessibility. Sometimes the measurement need could be focused on the dynamic of a path to justice. For instance, a policy maker could be interested in how an amendment in the law impacts the users' perspective on the path. Then, a baseline measurement carried out before and after the event could shed light on the efficiency of the policy measure.<sup>357</sup>

The methodological issues in this attempt to integrate these measures are considerable particularly in relation to estimating costs.<sup>358</sup> However the advantages of proceeding in this way are, in these authors view, considerable, including principally what they refer to as 'integration.'<sup>359</sup> That is that '...the sum of the parts provides more information than the individual parts.'<sup>360</sup> By carefully weighting the individual elements, that is assigning different levels of importance to the quality of justice by the users of justice, they believe the likelihood of an accurate measurement is improved.<sup>361</sup>

They state:

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<sup>357</sup> Ibid 40.

<sup>358</sup> Ibid 50. The authors state:

Two of the indicators of the paths to justice - quality of the procedure and the quality of the outcome - are measured on a 5-point Likert scale. Thus, more challenging are the costs of justice. Estimating in advance the possible range of costs on a particular path to justice is a prerequisite for the usability of the collected data. By not using unadjusted measurement units, one runs the risk of responses that concentrate on one category, thus concealing the dispersion of the particular cost. An example could be a path to justice, i.e. a dispute over social benefits, in which the respondents have 3 possible options (up to 100, 100-200, 200-300) to answer the question: How much money was spent on travel? If the actual spending has a mean of 30 and a normal distribution, the researcher will see most of the answers in this first category. In this scenario, those who paid very little and those who paid significantly (in the context of the particular path to justice) will place their answers in the same group. Very little information could be extracted from such a distribution.

<sup>359</sup> Ibid 68.

<sup>360</sup> Ibid.

<sup>361</sup> For a full description of the indicators and how they are weighted in the research see M Gramatikov, M Laxminarayan, "Weighting Justice: Constructing an Index of Access to Justice " *Working Paper No. 18/2008* (2008), <http://ssrn.com/paper=1344418>

For example, some users may find decision control more important, while others are more interested in being treated fairly. Furthermore, the treatment during the procedure may be of similar significance when compared with the outcome.<sup>362</sup>

From the questions developed by this research team it should be possible to obtain, in the future, some useful analysis of the interaction between cost and justice elements as Husted and Folger outlined.

This move to try and incorporate theories of justice into institutional analysis and its relevance to dispute system design is summarised by Bingham in her recent survey of the literature. She states:

What institutional analysis does not bring to the conversation is the normative concept of justice. Institutional analysts are examining the performance and outcomes of an institution from the standpoint of how they affect relevant public policy. This form of analysis is essential for the field of DSD [dispute system design]; however, it is not sufficient. In addition to using institutional analysis, DSD analysts should be examining the performance and outcomes of a particular design in relation to its impact on some conception of justice.<sup>363</sup>

She gives the example of mandatory arbitration in many workplace contracts as an example of an imposed dispute system which may lack elements of distributive justice.<sup>364</sup> Similarly, van Gramberg in a study of workplace mediation schemes in Australia found that justice for disputants often came second to the needs of the employing organization.<sup>365</sup> Indeed there has been unease amongst a number of Australian commentators about aspects of ADR and its relative fairness since Ingleby's critique of 1991.<sup>366</sup> The *Australian Dispute Resolution Journal* has run a continuing series addressing these issues since then.<sup>367</sup> The needs of the system can and have therefore been juxtaposed against the fairness of processes and outcomes for those who live in, work in or use them.

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<sup>362</sup> Ibid.

<sup>363</sup> Bingham, above n 221, 33.

<sup>364</sup> Bingham, above n 221, 23-25; for a more recent analysis with some description of the alternative to dispute system designers in employment disputes, see L Bingham et al, "Mediation in Employment and Creeping Legalism: Implications for Dispute Systems Design" (2010) 1 *Journal of Dispute Resolution* 129.

<sup>365</sup> B Van Gramberg, "The Rhetoric and Reality of Workplace Mediation" *Working Paper* (Victoria University, 2003); [http://eprints.vu.edu.au/138/1/wp1\\_2003\\_vangramberg.pdf](http://eprints.vu.edu.au/138/1/wp1_2003_vangramberg.pdf); B Van Gramberg, *Managing Workplace Conflict: ADR in Australian Workplaces* (Federation Press, 2006).

<sup>366</sup> R Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (Australian Institute of Judicial Administration Incorporated, 1991).

<sup>367</sup> For an overview see Condliffe, *Conflict Management* above n 48, 198-201.

At least two questions emerge from this analysis. The first relates to the relative fairness of internal dispute management systems as compared with more centralized external systems. This research began with the idea of developing an alternative to the system provided for in the *Act*. In effect this would be an internal system rather than a centralized statutory scheme. How this internal scheme would be perceived and compared with the statutory scheme is, however, beyond the scope of this research but does indicate an area for future investigation and would examine the dilemmas posed by Bingham, Van Gramberg and others who have looked at how organization based or internal dispute systems operate in terms of fairness. The second question relates to the propensity or inclination of disputing OC parties to use the centralized statutory system imposed.

#### **6.4 The Propensity to Use the Dispute System**

This tension between the needs of the individual and those of the institution or organization can be seen in the development of dispute systems for OC previously outlined in Chapter 3. For those living in OC in Australia formalized dispute systems are part of the governance structure for these entities and is provided for in the various polyglot State based legislation. All of these jurisdictions provided for a centralized process for managing disputes.

In Victoria disputants, unless they choose to ignore or to put up with a conflict without doing anything, must usually meet with each other, negotiate or appear at VCAT. These processes seem to fulfil the prediction of institutional economists like Williamson and Barendrecht that there would, *prima facie*, seem to be a proclivity or need, in these types of relational systems, to have a centralized scheme as a necessary support.

Generally parties to a dispute must have sufficient reasons to use a dispute system compared with the alternatives of not using them. This always involves a trade-off

between different options or ways to resolve the dispute.<sup>368</sup> For example, a recent community wide survey of dispute behaviour in Victoria found that help from a third party was sought by approximately 15% of respondents.<sup>369</sup> External help from a third party was more likely to be sought in disputes that related to business and government rather than disputes involving family, neighbours or associates. However, most disputes (65%) were resolved without assistance. Nearly one-quarter (24%) of all disputes were not resolved at the time of the survey indicating a high level of ongoing conflict. One of the methodological research difficulties with these findings is the high level of recourse to informal means of dispute resolution including seeking help from friends, families and neighbours.<sup>370</sup> These arrangements are difficult to both identify and measure.

This Victorian research is consistent with overseas research which shows that avoiding, 'lumping it' (putting up with it) and informal negotiation were by far the most common forms of managing disputes. These typically lead to high rates of unresolved disputes being reported. The usual reasons given for the high rate of unresolved matters is to do with the expected high costs (including such transaction costs as time spent in negotiating and awaiting outcomes from third parties) of pursuing the matter further. It is generally noted that there is a decreasing amount of disputes that go to the traditional court hearing and trial.<sup>371</sup> Litigation is generally regarded as the last resort and cases are rarely fought to the bitter end.<sup>372</sup> The Victorian Law Reform Commission recently concluded that the civil justice system is only functional because most matters did not go to a hearing and were settled beforehand by the parties themselves, including through ADR processes.<sup>373</sup> In Victoria the *Act*

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<sup>368</sup> Ury, Bret, and Goldberg, above n 140.

<sup>369</sup> Peacock, Bondjavov and Okerstrom, above n 74. The survey found that 5 % of disputes reported were between neighbours, just behind the number of disputes concerning the supply of essential services (gas and water at 8%) and with family (6%).

<sup>370</sup> See Gramatikov and Laxminarayan, "Methodological Challenges", above n 26.

<sup>371</sup> Figures from a survey in the Netherlands illustrate this statement. Around 48% of all disputes were settled before court and just 4% is decided by trial or hearing. In an early study in the United States, Williams notes that whilst the figures may vary in different jurisdictions, of all the cases listed before the courts only about 5% of the cases are ever heard by the court and only 1% of the cases result in judicial decision-making: B C J Van Velthoven, and M J Ter Voert, *Geschildbeslechtingdelta 2003* (WODC/Boom, 2004); G R Williams, *Legal Negotiation and Settlement* (West Publishing Co, 1983) see also M Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1(3) *Journal of Empirical Legal Studies* 459-570; G K Hadfield, "Where Have All the Trials Gone? Settlements, Nontrial Adjudications and Statistical Artefacts in the Changing Disposition of Federal Civil Cases" (2004) 1(3) *Journal of Empirical Legal Studies* 705-34.

<sup>372</sup> Colbran et al, above n 299, 901.

<sup>373</sup> Victorian Law Reform Commission, *Civil Justice Review Report*, Melbourne, 2008, 89.

encourages OC disputants to meet and if they cannot manage or resolve the issue make an application to VCAT.

Economists have estimated that to ensure parties have sufficient incentives to use a neutral third party adjudicator the expected costs of litigating (usually referred to as decision or transaction costs) should be relatively small compared to the value at stake.<sup>374</sup> The *Act* provides for relatively easy and inexpensive access for OC disputants to an adjudication process at VCAT as outlined in Chapter 3.

The main argument against such low cost regimes is that they will attract cases that would otherwise settle.<sup>375</sup> That is disputants will resort to the third party neutral without attempting or giving only limited attention to settling directly with the other side. Certainly, the \$37 application fee to take an OC case to VCAT and the limitations on costs orders (parties usually bear their own costs) would clearly indicate that this is a low cost jurisdiction.<sup>376</sup> If the costs of adjudicating were higher it could

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<sup>374</sup> Barendrecht, "In Search of Microjustice" above n 300, 18; M Gramatikov, A Framework for Measuring the Costs of Paths to Justice (2008) SSRN; Macey-Dare, R "Litigation Cost Strategies, Settlement Offers and Game Theory" in *Working Paper* (Oxford University, 2007).

<sup>375</sup> J B Rose and M Piczak, "Settlement Rates and Settlement Stages in Compulsory Interest Arbitration" (1996) 51(4) *Relations Industrielles* 643-64.

<sup>376</sup> There are a number of cases involving OC disputes which have considered this issue. The Power to Award costs is contained in section 109 of the *VCAT Act* and states as follows:

109. Power to award costs

(1) Subject to this Division, each party is to bear their own costs in the proceeding.

(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.

(3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to-

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as-

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis

in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

be argued that there would be greater incentives for parties to try other alternatives including ADR.<sup>377</sup> There is, however, no prohibition on lawyers attending although the ability of parties to use other advocates would appear to be limited.<sup>378</sup> As noted in Chapter 3, in the first full year of operation of the *Act* (2008-2009), VCAT reported 1698 applications in relation to OC disputes, a number which has been steadily rising since.<sup>379</sup> As noted most of these were concerned with fee disputes and only a small

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(4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.

(5) Before making an order under subsection (4), the Tribunal must give the representative a reasonable opportunity to be heard.

(6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.

In *Owners Corporation PS 414106B v Victorian Managed Insurance Authority Ors* (Domestic Building) [2009] VCAT 1193 (16 July 2009) the Tribunal was asked by one of the parties to provide reasons why it ordered each party to bear its own costs at an earlier directions hearing. The case involved a dispute over building works and, in an amended statement of claim, the OC applicant had made some claims about a leaky swimming pool for the very first time. This then raised various issues, including those about the joinder of the pool installer and manufacturer, which were argued before the Tribunal. While this was proceeding the OC and the pool manufacturer reached an agreement so that the claim about it was no longer relevant to the overall claims. This resulted in a Further Amended statement of claim being prepared. One of the aggrieved respondents sought costs against the applicant OC because of this, but this was turned down by the Tribunal which adhered to the general principle that parties bear their own costs. At paragraph 8 of the decision the Tribunal stated the general position following a submission of one of the parties as follows:

.....as emphasised by the Supreme Court in *Vero Insurance Ltd v Gombac Group [2007] VSC 117*, the Tribunal should approach the question of whether a party is entitled to costs on a step-by-step basis:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal should make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

See also *Ryan Ors v Bar Um Storage Pty Ltd Ors* (Civil Claims) [2009] VCAT 610 (6 April 2009)

<sup>377</sup> Maurits Barendrecht, "Growing Justice: Justice Policies and Transaction Costs" *SSRN eLibrary* (2009).

<sup>378</sup> The question of who could represent an OC was extensively considered by the Tribunal in *Owners Corporation 6514 v Carlson* (Civil Claims) [2009] VCAT 889 (15 May 2009). The Tribunal applied a narrow view of who could be a "professional advocate" under the *Act*. In an action for recovery of fees an OC was represented by a property manager. The Respondent was not represented and the Tribunal ordered the repayment of the fees. It then had to consider the question of costs including to the property manager for his appearance. To do so he had to convince the Tribunal that he was a 'professional advocate' within the meaning of section 62(8)(d) of the VCAT *Act*. This is because, as the Tribunal noted, the Tribunal has often held that costs are confined to money paid or liabilities incurred for professional legal services. This approach follows the High Court of Australia decision in *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403.

<sup>379</sup> VCAT *Annual Report 2008-2009* Victorian Government, Melbourne, 28; VCAT *Annual Report 2009-2010* Victorian Government, Melbourne 32.

proportion were mediated.<sup>380</sup> The figures reported would seem to indicate that the substantial percentage of matters go through to a hearing.<sup>381</sup>

There are good social policy grounds for ensuring a low cost process for OC disputes given that a sizable percentage of residents are low income, recent immigrants or students.<sup>382</sup> Galanter's early research into the disadvantage suffered by litigants with fewer resources, and follow up studies, would indicate that to moderate the behaviour of better resourced disputants requires access to low cost and accessible disputing processes.<sup>383</sup> In high cost systems it is more likely that such disadvantaged disputants will receive early unfair offers and the better resourced will get more favourable results.<sup>384</sup> The ability to settle matters quickly between the parties is an important factor in such costs considerations and an important goal of any disputing system. The relevance of costs is likely to be greater for small claims, as occurs in the OC jurisdiction relative to other jurisdictions, where the amount at stake may be higher. This is because the ratio of costs to the amount at stake decreases as the stake increases.<sup>385</sup> It is against this backdrop of a seemingly inexpensive, proportional and accessible statutory scheme that any alternative must be weighed.

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<sup>380</sup> VCAT *Annual Report 2009-2010* Victorian Government, Melbourne 28-32; At page 28 it is reported that only twenty-two OC cases were reported as being mediated in the Civil Claims List (11% of this list was OC cases) and four cases were reported as being mediated in the OC list. The settlement rates for these twenty-six OC matters was reported as being 57% which is exactly the same as its overall settlement rate for mediations across all of its lists. The settlement rates 'at the door' of the Tribunal between the parties themselves are unreported, although the number of settlements between the parties before mediation occurred was recorded as zero in 2009-2010 in the OC list.

<sup>381</sup> The VCAT reports use the term 'finalisation' to indicate the completion of matters although it is not clear from the Reports if these matters are the result of a hearing or settlement negotiations between the parties. In a meeting with the VCAT member in charge of the OC list on 4 May 2011 the inability to precisely determine the number of matters settled by the parties themselves (through consent orders or private agreements) as against those determined by the Tribunal itself was acknowledged. A program is now underway in VCAT to address these issues. The Reports do not provide an estimate of the number of hearings in relation to applications made.

<sup>382</sup> B Randolph, "Delivering the Compact City in Australia: Current Trends and Future Implications" (2006) 4 *Urban Policy and Research* 473; Wulff, Healy and Reynolds, above n 58; see also Australian Bureau of Statistics National Census 2006, <http://www.abs.gov.au/>

<sup>383</sup> Galanter, "Why the Haves Come Out Ahead", above n 340, 95; H M Kritzer and S Silbey, *In Litigation: Do the Haves Still Come out Ahead?* (Stanford University Press, 2003).

<sup>384</sup> Ury, Bret and Goldberg, above n 140.

<sup>385</sup> Colbran et al, above n 300, 907.

## 6.5 Measuring Effectiveness

In their 1992 study Carnevale and Pruitt argued that the most important criterion in assessing the effectiveness of mediation is whether a voluntary agreement is reached, whilst Sourdin describes it as “the first question.”<sup>386</sup> Conlon and Moon’s experiments in 2002 on the effectiveness of two hybrid procedures demonstrated that the Arb/Med procedure produced a statistically significantly greater number of settlements in the mediation phase than did Med/Arb.<sup>387</sup> The Med/Arb and Arb/Med processes described were largely identical to the processes used in this research excepting that they used the same person as arbitrator and mediator and used a number of team and three disputant ‘dyadic structures’: individual vs. individual, individual vs. team, and team vs. team. Conlon and Moon used a dispute scenario based upon the merger of two companies and the need to negotiate the settlement of certain policies. Their research indicates that settlement rates are greater when arbitration follows mediation than mediation alone, although not to the same extent as Arb/Med, as Pruitt and Carnevale suggested in 1993.<sup>388</sup> They concluded however that there were at least three environments in which Med/Arb might still be preferable to Arb/Med.<sup>389</sup>

The first is when there is significant time pressure, because disputes using Arb/Med did take significantly longer to resolve than those using Med/Arb. The second situation is when the financial costs of paying for a third party need to be minimized. A third situation might be when there is considerable hostility between disputants. They thought that under this condition, beginning with the more adversarial arbitration phase is perhaps unwise because it may further heighten animosity between the parties, making it unlikely that mediation will be successful.

The theoretical underpinning of Conlon and Moon’s experiment is control theory, noting that disputants would first seek to retain decision control because it gives them veto power over any third-party solution that provides unacceptable outcomes (thereby

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<sup>386</sup> P J Carnevale and D G Pruitt, "Negotiation and Mediation" (1992) 43 *Annual Review of Psychology* 531-82; Sourdin, "Mediation in the Supreme and County Courts of Victoria" above n 16, 130.

<sup>387</sup> Conlon and Moon, above n 10, 978-84

<sup>388</sup> Pruitt and Carnevale, above n 15.

<sup>389</sup> Conlon and Moon, above n 10, 978, 983.

protecting their self-interest).<sup>390</sup> Second, disputants also seek to maintain process control because it is viewed as a form of indirect influence over the outcome. Third, disputants would tend to avoid situations in which outcomes cannot be determined in advance (uncertain situations) or when the probability of obtaining a favourable outcome is low. They argued that because in Med/Arb disputants retain decision and process control during the mediation phase of the procedure this would be preferred. It is only at the end of the entire procedure (in arbitration) that they relinquish decision control.

In Arb/Med, by contrast, disputants have only one chance to influence the third-party's binding decision - at the initial arbitration hearing. Then because they recognize that a binding decision has already been determined (although not implemented) they again realize that any further impression management or evidence presentation attempts aimed at the third party are pointless. The early forfeiture of decision control is thus salient throughout the mediation phase of Arb/Med, and combined with the uncertainty over what types of outcomes will be received would lower disputants expectations of reaching a voluntary settlement during the mediation phase. Building on a line of research into final offer arbitration (sometimes called 'baseball arbitration'), Conlon and Moon suggest that disputants would prefer the certainty inherent when they reach a voluntary settlement to the uncertainty of the arbitration decision that has been made but not yet revealed.<sup>391</sup> Similarly, Curry and Pecorino report a "flurry" of negotiation activity and settlement offers just prior to the final arbitration phase of the processes described so as to avoid the decision of the third party.<sup>392</sup>

With regards to the timeliness of the process they state:

On the basis of specifics of the two procedures, med-arb can be expected to produce faster resolutions. Arb-med always includes both an arbitration phase and a mediation phase. Only if the dispute is settled in mediation does the third phase, the ruling phase, become irrelevant. However, with med-arb, neither the arbitration hearing nor the ruling phase is held if the dispute is settled in the

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<sup>390</sup> Conlon and Moon, above n 10, 978, 979.

<sup>391</sup> Conlon and Moon, above n 10, 979.

<sup>392</sup> A F Curry and P Pecorino, "The Use of Final Offer Arbitration as a Screening Device" (1993) 37(4) *The Journal of Conflict Resolution* 655; see also D G Pruitt, *Negotiation Behavior* (Academic Press, 1981).

mediation phase. Because a majority of cases are successfully mediated (Kressel & Pruitt, 1989), med-arb is likely to produce faster resolutions than is arb-med. To the extent that a third party would be paid on an hourly basis, such a finding would make med-arb a less financially costly procedure as well.<sup>393</sup>

Whilst it does have a bearing on costs issues, the arguments around time in a hearing, however, may not be as important as Conlon and Moon suggest, as the time to get to the process, rather than the time in it, may be more important.<sup>394</sup> The ALRC has, for example, said that timeliness relates to minimising:

- the delay between the commencement of proceedings and the hearing of the dispute having regard to the complexity and features of the dispute;
- the time taken to resolve the dispute once the resolution process has commenced; and
- the time which parties, their legal representatives, witnesses, judicial officers and others must devote to the process.<sup>395</sup>

This complexity highlights the methodological difficulties of taking simplified measures to assess the level of 'efficiency' in dispute resolution processes.<sup>396</sup> As Macfarlane states:

Although between 92% and 98% of legal suits commenced appear to settle before trial, what is striking is just how long settlement takes in many cases. This may be in part the consequences of the pressure game of litigation, when one side or the other refuses to make a move until the last possible minute.<sup>397</sup>

The other issue that is important in research into efficiency is concerned with compliance issues.

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<sup>393</sup> Conlon and Moon, above n 10, 978, 979.

<sup>394</sup> Waters and Sweikar, above n 297.

<sup>395</sup> Australian Law Reform Commission, Issues Paper 25 *Review of the Adversarial System of Litigation: ADR – Its Role in Federal Dispute Resolution*, ALRC, Sydney, 1998, 27.

<sup>396</sup> For an outline of some of these methodological difficulties in evaluating ADR programs, see T Matruglio, *Researching Alternative Dispute Resolution*, (Justice Research Centre, 1992); S Caspi, 'Mediation in the Supreme Court – Problems with the Spring Offensive Report' (1994) 5(4) *Australian Dispute Resolution Journal*; S Keilitz (ed), *National Symposium on Court-Connected Dispute Resolution Research – A Report on Current Research Findings – Implications for Courts and Research Needs* (State Justice Institute, 1994); National Alternative Dispute Resolution Advisory Committee (NADRAC), *Research Forum Notes* (NADRAC Research Forum, Melbourne, 2008) [www.nadrac.gov.au](http://www.nadrac.gov.au)

<sup>397</sup> J Macfarlane, "The Mediation Alternative" in J Macfarlane (ed), *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing, 1997) 5-7.

Compliance relates to the propensity of parties to adhere to the agreements they have made and is perceived as a significant advantage in mediation outcomes.<sup>398</sup> Warner suggests that compliance is harder to measure than the traditional “efficiency components” related to time and costs because they tend to be more qualitative and subjective in nature and therefore harder to access.<sup>399</sup> Longer term longitudinal studies may be of assistance in examining compliance issues (and perceptions of outcome) in the future and was not possible in this study. The studies to date are consistent in their findings that mediation processes tend to ensure better rates of compliance than those with adjudicated outcomes.<sup>400</sup> However this may vary between jurisdictions as Sourdin’s survey of mediation outcomes in the superior courts of Victoria indicated that the perception of compliance with outcomes were approximately the same for mediation and litigated outcomes.<sup>401</sup>

This research partly replicates and extends the Conlon and Moon research, referred to above, by comparing the settlement rates and time taken in each of the three processes studied.<sup>402</sup> However, it is limited by several important factors, including that participants in the research were advised that they had to settle all matters in the mediation otherwise they would have to go onto the final arbitration phase. Whilst this was useful in the research design in enabling a fuller study of the impact of the arbitrated decision, it diluted the study of the potential of the mediation phase to produce settlements. Also, there was no recording of those cases where partial settlement had occurred. Anecdotal and observed evidence would indicate that there were a substantial percentage of partial settlements. This is in the context of a complex fact situation based on the combination of two real life cases. The other limitation,

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<sup>398</sup> J Elix, *The Meaning of Success – Measuring Outcomes in Public Policy Dispute Resolution* (University of Western Sydney, November 2005) <http://lwa.gov.au/files/products/track/pn21215/pn21215.pdf>

<sup>399</sup> R Warner, "Performance Measurement Considerations for Dispute System Designers – What Gets Measured Gets Managed, What Is Managed Can Be Improved" (2007) 1 *Conflict Resolution e Journal* 21-2 [http://www.negotiationlawblog.com/uploads/file/CR%20e-Journal%20\\_June%20%202007.pdf](http://www.negotiationlawblog.com/uploads/file/CR%20e-Journal%20_June%20%202007.pdf)

<sup>400</sup> See, eg, C McEwen and R Maiman, "Mediation in Small Claims Court: Achieving Compliance through Consent" (1984) 18(1) *Law & Society Review* 11-49; W Felstiner, "Influences of Social Organization on Dispute Processing" (1974) 9 *Law & Society Review* 63; W Felstiner and Lynne A Williams, *Community Mediation in Dorchester, Massachusetts* (Government Printing Office, 1980); L Fuller, "The Forms And Limits Of Adjudication" (1978) 92 *Harvard Law Review* 353; E Goffman, *Interaction Ritual: Essays In Face-To-Face Behavior* (Doubleday and Co, 1967); A Gouldner, "The Norm Of Reciprocity: A Preliminary Statement" (1960) 25 *American Sociological Review* 161; P H Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press, 1979); Pruitt et al, above n 47, 313-30.

<sup>401</sup> Sourdin, "Mediation in the Supreme and County Courts of Victoria" above n 16, 151.

<sup>402</sup> Conlon and Moon, above n 10.

which is inherent in these types of simulation studies, including that of Conlon and Moon, is that the group itself had limited time to manage the process. All groups were limited to three hours in which to roleplay both the arbitration and the mediation. Whilst this was enough time for all groups there was pressure on the negotiation because of this. It has been shown that time pressure can be a significant element in negotiations.<sup>403</sup> Nevertheless there is a basis for comparison between the three processes within these restrictions.

The other significant element is that in both the Conlon and Moon study and this study there were limitations placed on the potential settlement arrangements. In the former participants each had “seven issues” they had to mutually agree on.<sup>404</sup> The arbitrators in that process had necessarily to limit their decision to those predetermined issues. There was no such limitation on the description of the issues in this study but the arbitrators in this study were privately provided with a pre-written decision. Both these process manipulations would necessarily have an impact on the time taken to complete the process particularly the writing of the decision of the arbitrator. It would conceivably have taken more time for the arbitrator to complete the process if time had been included to write the decision.

## **6.6 The Results**

Question 3 predicts that settlement rates will be higher using the Arb/Med procedure than the Med/Arb procedures. Whilst settlements at mediation in the Arb/Med procedure did outweigh the percentage of settlements in the Med/Arb processes, this was not at a level sufficient to be statistically significant. The percentage who settled within the Arb/Med process was 31 per cent as against 20 per cent for Med/Arb Same and 22 per cent for Med/Arb Different: see Table 6.2. Figure 6.2 shows the relationships between the three experimental processes and settlement rates using the actual number of cases.

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<sup>403</sup> Stuhlmacher, Gillespie and Matthew, above n 52, 97-116.

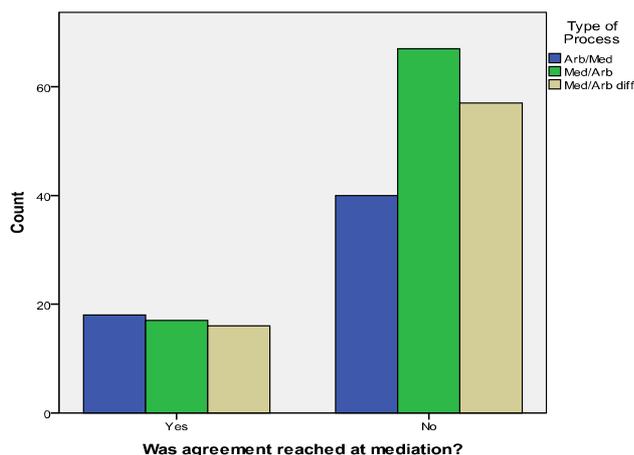
<sup>404</sup> Conlon and Moon, above n 10, 978, 981.

A Chi-square test for independence indicated no significant association between the settlement rate and type of process,  $X^2(2, N=215) = 2.4, p = .3$ . In the Conlon and Moon experiment mentioned above the respective percentages were 81 per cent for Arb/ Med and 62 per cent for Med/Arb in a simulation without the same restrictions on settlement as in this case. Conlon and Moon reported the difference to be statistically significant.<sup>405</sup> It can be therefore concluded that whilst Hypothesis 3 was answered in the affirmative this was not at a rate to be conclusive. Further testing would, perhaps without the restrictions here, be needed to obtain a more conclusive result.

		Type of Process			
		1 Arb/Med	2 Med/Arb	3 Med/Arb diff	Total
Yes	% within Process*	31.0%	20.2%	21.9%	23.7%
No	% within Process	69.0%	79.8%	78.1%	76.3%
% within Process		100.0%	100.0%	100.0%	100.0%

\* “Percentage within process” refers to the percentage in each of the three discrete processes

**Figure 6.2: Agreement Counts for Each Process**



<sup>405</sup> Conlon and Moon, above n 10, 978, 981.

In regard to timeliness the results from the Conlon and Moon study found a statistically significant difference between the time taken for Arb/Med (39.41 minutes) as against Med/Arb (32.22 minutes). This was not the case with this study which showed a relative uniformity between the times taken for each process. This difference in results is most likely because the arbitrators in this research did not have to take any time in preparing their decision as they did in the Conlon and Moon study. It is likely that if the arbitrators had to spend some time in making and writing their decision they would have taken longer. This manipulation of the process is reflected in the mean time taken for both parts of the three processes. For arbitration the average time was 15.69 minutes (N=48) and for mediations it was 26.52 minutes (N=58). Table 6.3 shows the mean time taken for each process.

<b>Table 6.3: Time Taken for Each Process</b>		
	<b>Mean</b>	<b>Std. Deviation</b>
1 Arb/Med	39.67	24.928
2 Med/Arb	42.60	22.094
3 Med/Arb diff	39.42	14.870
<b>Total</b>	40.41	19.781

A one-way between groups analysis (ANOVA) was conducted to compare the impact of process on time taken.<sup>406</sup> This showed no statistically significant difference between the three types of process and time taken,  $F(2, 66) = 0.170$ ,  $p = 0.844$ . To fully replicate the Conlon and Moon study would require a perhaps less complex case study to be selected with a number of pre-determined issues to be decided and requiring the arbitrator to prepare their own decision.

This analysis was expanded to include a consideration of the time taken for the mediation and arbitration segments of each process. Interestingly the mean time for mediation and arbitration in each process varied as can be seen in Table 6.3. Overall, as noted, the time taken by parties together in arbitration (excluding time taken for

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<sup>406</sup> The Med/Arb score for total time was calculated by pairing scores for groups and manually entering scores. In one case where there was a missing score for arbitration (#241) the mean score rounded up to 16 was included.

writing a decision which, as noted was not included in this research) took less time than mediations. However, this changed when taking into account the type of process being undertaken. In the Arb/Med process participants took more time over the arbitration while in the Med/Arb processes they took more time over the mediation. This could be explained because this was the first process the parties were exposed to in each process and therefore took more time over in presenting their respective cases. The other aspect of interest was the relatively short mean time taken (11.3 minutes) for arbitration in the Med/Arb Different process. The arbitrator had to hear the arguments again before delivering his or her decision. It would appear that the process of negotiating in the mediation and not succeeding may have dampened the parties' energy for this before a new third party. In the other two processes, however, it would seem that they may have been prepared to make a more prolonged presentation due to a more seamless transition to the next process before the same third party. Despite these differences, a Kruskal-Wallis Test revealed no statistical significance across these three levels for arbitration and mediation,  $X^2(2, n=69) = 2.75, p = .253$ .

<b>Table 6.4 Mean Times for Arbitration and Mediation</b>		
<b>Dependent Variable</b>		<b>Mean</b>
Time Taken for Arbitration	1 Arb/Med	19.688
	2 Med/Arb	16.938
	3 Med/Arb diff	11.304
Time Taken for Mediation	1 Arb/Med	21.188
	2 Med/Arb	29.750
	3 Med/Arb diff	27.435

## 6.7 Conclusion

These results show that there is no statistically significant difference between the three processes. However, there would appear to be no advantage in the Med/Arb Different process in this regard to the others. This would point to some further reasons for

entertaining the idea of the Arb/Med process in dispute system design, as attempted in certain jurisdictions, and the need for further research.<sup>407</sup>

There was also no statistically significant level of difference in regards to time taken between the three processes. It is noted that the average time spent in mediation was longer in all processes, and this may have potentially beneficial impacts on their perception of justice. However, as observed in Chapter 5, disputants in the Med/Arb processes had not rated this process fairer than disputants in the Arb/Med process at the end of the mediation phase. Nevertheless, it does perhaps indicate that those who attempted mediation first had a greater desire to reach their own conclusions before going to an arbitration decision than those disputants who had already experienced the process of arbitration. Because of the limitations on the study, however, further research is required on these questions to clarify both the relative settlement rates and particularly the relative time issues.

The research has highlighted the limitations of studies that do not treat efficiency as a multi-faceted construct but which also do not take account of other factors. Whilst the study demonstrated a relative uniformity between the three processes in terms of settlements made and time taken, it was clear that the preferred process of Med/Arb Same was no more efficient or capable of reaching settlements than the other two processes. Past research which indicates the relative tendency of Arb/Med sequenced

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<sup>407</sup> For example the *Administrative Appeals Tribunal Amendment Act 2005 (Commonwealth)*, which commenced on 16 May 2005, expanded the scope of alternative dispute resolution (ADR) processes available to the Administrative Appeals Tribunal (AAT), in section 3(1), to include:

- a. Conferencing; and
- b. Mediation; and
- c. Neutral evaluation; and
- d. Case appraisal; and
- e. Conciliation; and
- f. Procedures or services specified in the regulations

The case appraisal process as described in the Tribunal's procedural rules as:

An advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their knowledge of the subject matter, assists the parties to resolve the dispute by providing a nonbinding opinion on the facts and the likely outcomes. The opinion is an assessment of facts in dispute.

The opinion may be the subject of a written report which may be admissible at the hearing.

The Annual Report of the AAT 2009-210 reported that only 8 case appraisals had been committed in the year under review compared to 8,265 conferences, 507 conciliations and 46 mediations: see Administrative Appeals Tribunal, *Annual Report, 2009-2010* (2010)137 available at <http://www.aat.gov.au/docs/Reports/2010/AR2010.pdf>

processes to lead to a greater rate of settlements was, in part, supported but not at a statistically significant level.

Comparisons between the simulated processes in this research and the actual disposition of cases in VCAT are not possible, not only because of the limitations of this study, but because of the non-availability of clear data from the actual cases as reported. This highlights the need for better data gathering and analysis and for further research in this field.

There are many ways to proceed from this introductory reflection on the various elements that would constitute efficiency in dispute systems. As Hanycz states, this should include an examination of the “quality” of the outcomes achieved.<sup>408</sup> She asks:

Are successful claimants better off, monetarily, at the end of the day, or not? Is there a sense that courts continue to achieve acceptable rates of accuracy—of getting it right—in the wake of reforms that often mean less process in a shorter time frame, or not? How can we hope to maintain the legitimacy of the rule of law if the judgments produced in this model stray from substantive accuracy?<sup>409</sup>

While the need for efficiency is central to the work of tribunals such as VCAT these questions remain pertinent in considering how to evaluate and measure the effectiveness of reforms. In short how do we better measure justice in regimes designed to be increasingly efficient?

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<sup>408</sup> Hanycz, above n, 284, 122.

<sup>409</sup> Ibid.

## CHAPTER 7: CONCLUSION

### 7.1 Starting Out: Social, Instrumental and Experimental Contexts

The impetus for this research was essentially threefold. The first was to do with ‘social context.’ That is, to examine a policy domain of some importance and contemporary relevance to Australian society. The second was to design and develop a dispute system relevant to this domain. This was the ‘instrumental context’. The third was the ‘experimental context’ - to empirically test some of the key elements of this system. All three contexts overlapped and informed the development and understanding of each in a non-linear dynamic that kept evolving to the very end. The result was a procedurally complex plan and set of results in the tradition of post-positivism. That is, it is impossible to prove a question or theory although it may be possible to show they are not disconfirmed or falsified.<sup>410</sup> This research has hopefully improved our imperfect knowledge of some elements of all three of the above contexts.

At the outset of this study the OC sector was studied as a domain for the development of an alternative mode of dispute management. In collaboration with a professional management company of OC such a schema was developed. As part of this development a survey was made of the available and relevant literature, policy, case law and legislation. In this way a thorough exploration of the domain was undertaken. This formed the basis for the development of a simulation that would empirically test the participants on three levels. These were their preferences, their perceptions of justice and some elements of efficiency. Each of these levels were tested in relation to three processes: Med/Arb Same; Med/Arb Different and; Arb/Med.

Two content theories, the instrumental model and the relational model, help explain the experimental context and the results which it produced.<sup>411</sup> The former is

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<sup>410</sup> D Campbell and J Stanley, *Experimental and Quasi-Experimental Designs for Research* (Houghton-Mifflin, 1963).

<sup>411</sup> For an overview see T R Tyler "The Psychology of Procedural Justice: A Test of the Group-Value Model" (1989) 57(5)*Journal of Personality and Social Psychology* 830-38; T R Tyler, Yuen J Huo and E A Lind "The

principally constructed around control theory and, to some extent, social-exchange theory. Control theory in particular underpinned the preference research. Participants preferred a process that they judged gave them more control. This is related to social-exchange theory, which helped to also explain the way in which participants may value the outcomes from a process through the use of a subjective cost-benefit analysis and the comparison of alternatives. The relational model derives principally from group value theory and fairness heuristic theory. Group value theory suggests that people value fair process because it signals their value and standing within a group, and is particularly related to the neutrality of the decision-making procedure and trust in the third party. Fairness heuristic theory suggests that people use information about perceptions of fair outcome or fair process as a shortcut, or heuristic, in deciding whether a process or an authority can be trusted or is fair.

The experiment broadly replicated similar studies in the organizational and procedural justice literature. That is, its results were based upon comparative subjective judgments of fairness. In this way it is no more than a collection of subjective perceptions. However unlike much of this research, the participants were not asked to compare one process against another or to evaluate the fairness of one process as compared with another. They were simply asked to evaluate the process they were in at the end of each significant phase of that process: mediation and arbitration. Nor was it simply a matter of evaluating the outcome and rate the fairness of this. Rather the outcome of the arbitration was used to determine if other justice variables were effected and how this related to the previous phase of the process. In this way, whilst it is still limited it does address some essential issues. It does not and probably cannot address the question of the actual or objective meanings of justice because the data for this kind of analysis is lacking.

In part this is a problem not only of research design but of the lack of common categories for measuring justice. Most court and tribunal systems lack common data fields for collecting and analysing data about their systems. This however, echoes the lack of system and agreement in the theoretical and experimental data as well. It is

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Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations”(1999) 2(2) *Group Processes & Intergroup Relations* 99.

also perhaps a product of the relative newness of the field, particularly in justice settings.

A review of the developments in justice research shows a dynamic and growing body of theory with many competing threads characterized by a proliferation of terms. The result is that there are many varieties of justice which can have many meanings to many different participants in its processes. It may be that those designing dispute systems are also unclear about what sort of justice they are seeking or describing. Further, as was indicated in Chapter 6, in the discussion concerning efficiency and justice, justice is a concept not taken into account by most economic theorists and consequently does not come into contention as a possible factor in calculating ‘cost’.

The field of dispute system design is perhaps in need of some common templates of design evaluation which allow not just flexibility, but also some relevant comparisons across fields. Likewise, just as NADRAC, in this country, has standardized ADR terms, there may be a need for some similar undertakings for the term “justice.”<sup>412</sup> In other words, if a dispute system is proclaiming that it can deliver justice we need to know what sort of justice that is and how it will be determined that it has been achieved. If there is a need for us to know more about what justice is being done we need some more coherent categories for measuring and monitoring it. This is particularly pertinent in the domain of OC disputing where the *Act* imposes an obligation on VCAT to first determine if there is a dispute and then to decide that matter in a manner it considers ‘fair’.<sup>413</sup> A review of the literature and publications relating to the domain of disputing of this study – OC disputes – shows that the principal authority for their management in Victoria has an incomplete record of their processing and outcomes with no measures of satisfaction of those involved.<sup>414</sup> OC disputes and the ways in which they are managed provide a good case study of the way in which modern dispute management systems sometimes struggle to understand and measure key outcomes.

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<sup>412</sup> See NADRAC *Dispute Resolution Terms* Commonwealth of Australia, 2003.

<sup>413</sup> See Chapter 3.6 – 3.8.

<sup>414</sup> See Chapter 3.3 to 3.6.

There is little debate about this in the literature and the work of Sourdin and her colleagues in Australia points to the need for some more work to be done in the short to medium terms to improve the reporting of dispute management systems. Her study of the County and Supreme Courts in Victoria is a particularly good example of the difficulty of obtaining relevant information from disputants and mediators as well as court files.<sup>415</sup> She found that Courts currently collect little information about disputants or disputes to assist them in informing either referral decisions or their own court-connected mediation. In the County and Supreme Courts of Victoria she found that mediators routinely do not report when a mediation has been held in up to 50 per cent of matters and recommends the need for both ongoing and 'deep' research efforts.<sup>416</sup>

The Productivity Commission, the ALRC, NADRAC and the Victorian Law Reform Commission have all commented on the lack of information available about ADR use in most Australian Courts and tribunals.<sup>417</sup> Sourdin summarises these reports and suggests three reasons for the problem. These are:

- 1) Litigants and representatives may be reluctant to disclose information about ADR processes because they are concerned about confidentiality.
- 2) ADR referral may take place as a result of self-referral, that is, Courts may not be aware if litigants have used an ADR process to resolve their differences.

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<sup>415</sup> Sourdin, "Mediation in the Supreme and County Courts of Victoria" above n 16, 32-41.

<sup>416</sup> Ibid IX, X; Sourdin recommends as follows:

Monitoring, Evaluation and Periodic Review

Recommendation 17: The ICMS system needs to collect information that can assist to enable more effective referrals to take place and monitor the ongoing work in this area. Data about cases that are filed with the Courts should be collected that shows the age of the case (so that earlier referral can take place with 'younger cases') as well as demographic information that can provide information about access. The ICMS system should be adjusted to issue an alert when a mediator's report has not been forthcoming after a referral order has been made. Mediators should be required to report on an extensive range of matters which could include information about case outcomes and 'good faith' reporting. Such information should be the subject of regular ICMS reporting de-identified and made available to mediators and to the Courts so that the system can be enhanced into the future.

Recommendation 18: There are some different information needs that need to be met to ensure that mediation services are effective. This requires different evaluative approaches. For regular and ongoing monitoring, reports as to outcomes and other reporting matters (by mediators see Recommendation 17) are essential. Reporting and measuring mediation will require more effort than gathering data that can be used for ongoing monitoring and reporting. Regular surveying, perhaps for a period of one month per year is necessary to ensure that ongoing evaluation takes place. This surveying would involve gathering more information about perceptions from participants, representatives and other stakeholders and preferably using some of the same survey questions used in this research (to enable comparable reporting to take place). Deeper research strategies are also needed in the long term. Planning research reviews every five years (or more frequently) to ensure that more complex criteria are assessed (including criteria relating to cost, compliance and access) is essential in all dispute systems.

<sup>417</sup> Victorian Law Reform Commission, *Civil Justice Review Report* Melbourne, 2008, 10.

- 3) The terminology issues mean that it is difficult for Courts to collect and gather information. In any event, data collection processes within Courts are unable to collect information about ADR process use, outcomes or performance measure data....<sup>418</sup>

Therefore, even for the well-resourced researcher, the difficulties of obtaining useful empirical data can be almost insurmountable. Without this data it is difficult to understand and measure what justice is being done in these systems. The work of TISCO in developing research instruments which can be used across a range of jurisdictions and settings appears to be a real advance in practical research efforts and could be the basis of a common design template for measuring the subjective or demand side of access to justice.<sup>419</sup> There is need for a similar template on the objective or supply side as well. The work of the American Bar Association in developing its ten data fields to systematize the collection of court data is a good start in this direction.<sup>420</sup> As Bingham contends, there is a need for a ‘...dialogue about justice itself.’<sup>421</sup>

## 7.2 Preferences

The results from the preferences section of the research shows that those procedures which the party feels they will have control over are preferred. There was a significant relationship between preference and the perceived level of control afforded by a process. The participants clearly distinguished between the three processes in terms of control elements in the experimental conditions. It was apparent that the presence of a more adjudicatory process in the initial stages of a third party process (Arb/Med) does diminish the sense of party control, at least before the intervention has occurred. This supports the available research findings. This is crucial when designing and implementing procedures because their utility will rise and fall on such questions. However, whilst the element of control seemed to be important in making preferences it did not then appear to bear upon subsequent justice judgements between the three

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<sup>418</sup> Sourdin, "Mediation in the Supreme and County Courts of Victoria" above n 16, 6.

<sup>419</sup> See Chapter 6.3.

<sup>420</sup> As noted in Chapter 6.2 the American Bar Association Section of Dispute Resolution has proposed ten indicators or “data fields” for courts to collect so that the researchers and policy makers can systematically assess differences in the impact of ADR programs nationally.

<sup>421</sup> Bingham, above n 221, 48.

processes. All three processes were rated relatively evenly at the post-mediation and post-arbitration phases. That is, the most preferred procedure was not favoured in terms of justice perceptions.

What was not expected in the results was the preponderance in preferences given to Med/Arb Same (57% of first preferences) over Med/Arb Different (20% of first preferences). This is because the latter is a configuration that is most common in our legal and organizational systems and therefore perhaps could be more familiar and understandable to the participants it was clearly less preferred. There is no clear research on this question and further exploration of this aspect is warranted. It is an interesting finding for those planning and implementing dispute systems. The participants were clearly not concerned about the due process issues that have militated against the use of such procedures in the past.<sup>422</sup> These due process issues are mainly concerned with the propensity of parties to disclose information and evidence in mediation or like process and then this being subsequently used in an arbitration process where it may not have otherwise been disclosed.

Of course the choices open to participants in this study were limited to three hybrid processes. The results however support findings by Peirce et al in their study of a landlord–tenant dispute, described in Chapter 4.2.1, that mediation was the most preferred procedure involving a neutral third party in a sequential sense.<sup>423</sup> It was clear that participants preferred the mediation then arbitration sequence.<sup>424</sup> What these results show is that the design of a dispute system, as in this research, around a hybrid process where the same person performs a number of roles would be an element that disputants would tend to see as enhancing their control and thus increasing their potential acceptance of it. In the alternative dispute model developed for OC disputes as part of this research, disputants would presumably favour a Med/Arb Same variation over a Med/Arb Different type process.

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<sup>422</sup> In Australia section 27D of the Uniform Commercial Arbitration Acts allows for such a process but there has been extreme reluctance to use it because of due process or ‘natural justice’ concerns: see Condliffe, "Arbitration: The Forgotten ADR", above n 149.

<sup>423</sup> Peirce, Pruitt and Czaja, above n 178, 199, 204-6.

<sup>424</sup> Ibid: They found that the preferred sequence of procedural choices was: negotiation, mediation, advisory arbitration, arbitration and then “struggle”, which was defined as “pressure tactics”, and finally inaction, at 200.

The model rules set up under the *Act* do not provide for a choice but give the parties (usually representatives, often a professional manager or sub-committee of the OC, and the complainant) fourteen days to arrange a ‘meeting’, a term which is not defined.<sup>425</sup> The level of control that a complainant would perceive in this process would perhaps not be very high. The alternative of inaction, as suggested by Pierce et al as a common response, or proceeding directly to VCAT, would perhaps be more attractive than following the model rules.<sup>426</sup> This is especially so as section 153(3) of the *Act* provides that whilst the OC is bound to follow the process set out in the model rules, individual lot owners and tenants are not. The relatively inexpensive VCAT process perhaps makes this recourse to an adjudicated outcome even more attractive given that complainants are more likely to favour such a process over respondents and the chance of actually having to mediate the matter is relatively low.<sup>427</sup> This would then seem to fly in the face of the core dispute system design principle that disputes should be managed in a low to high cost sequence.<sup>428</sup>

Further, a disputing domain like OC disputes is difficult to plan for as the types of disputes encountered is likely to be highly polarised. That is, whilst many of the disputes will concern fees, and particularly the late payment of these, many disputes will involve ‘lifestyle’ issues which involve substantive clashes of interests and values.<sup>429</sup> Fee disputes are more likely to be ‘cognitive’ disputes involving issues around disputed facts, whereas the latter are more likely to be interest based disputes around goals and values.<sup>430</sup> It is the OC itself which is most likely to seek an order concerning fees but it is individual owners and renters who will most likely take action over lifestyle issues.<sup>431</sup> Although there has been an increase in the number of OC cases going to VCAT it is clear that most of these involve fee disputes and relatively few lifestyle disputes. It could be speculated that many lifestyle disputes are ‘lumped’ by the complainants and are therefore not acted on. The implementation of model rules by the *Act*, which fail to specify a process to follow other than having a ‘meeting,’

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<sup>425</sup> See Chapter 6.

<sup>426</sup> Peirce and Pruitt and Czaja, above n 178, 199, 200.

<sup>427</sup> See Chapter 6.4; Tyler, Huo and Lind, above n 166, 113-5; Peirce and Pruitt and Czaja, above n 177, 199, 200.

<sup>428</sup> Ury, Bret and Goldberg, above n 140.

<sup>429</sup> VCAT, *Annual Report 2008-2009* Victorian Government; VCAT, *Annual Report 2009-2010*.

<sup>430</sup> For a discussion of these different types of disputes see: Husted and Folger, above n 340, 719, 723.

<sup>431</sup> Mollen, above n 56; ABS, above n 72.

would seem to mitigate against in-house procedures to encourage direct negotiation between the parties.

The particular environment of OCs will ensure a high level of disputing.<sup>432</sup> One of the key findings of this research is that resort to an imposed decision by a third party can, in certain circumstances, lead to the effected parties viewing the process itself as less fair than they otherwise may have. In the Victorian statutory model this particular outcome may be replicated to some extent. This is because whilst the OC itself has to follow the process (however loosely) defined by the model rules in any disputes, the residents and owners are not, therefore providing a recipe for either recourse to a relatively protracted process through VCAT (most OC employ lawyers or experienced OC managers to represent them at the hearing), or inaction. If they attempt to meet as per the model rules and this results in an impasse, then there is no other recourse but to go to VCAT as the conciliation process available to disputants through CAV is rarely used.<sup>433</sup> The possibility of moving into a third-party assisted ADR process that would perhaps give a better chance of in-house settlement of the issues would therefore seem to be minimal. As we have seen in Chapter 3, the rate of referral to mediation for OC matters is small and is a point of contrast between the Victorian scheme and other legislated schemes in Australia.

The design of the NSW OC statutory scheme, as outlined in Chapter 3.3, is a good example of the use of an active multi-tiered process involving negotiation, mediation, adjudication (on the papers), and then hearing. The contrast between the NSW and the Victorian scheme, which has approximately the same number of OC in its jurisdiction, is significant. In Victoria relatively few cases are mediated with the vast majority going through to an adjudicated hearing.<sup>434</sup> CAV, which has a role in providing conciliation services for OC disputes, reported no conciliations under the *Act* in the last reporting period.<sup>435</sup> By contrast, the equivalent Department of Fair Trading in NSW runs a virtually compulsory mediation scheme which takes over 1,000 cases per

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<sup>432</sup> See Chapter 3.2.

<sup>433</sup> See Consumer Affairs Victoria, *Annual Report 2009-2010* (CAV, 2010).

<sup>434</sup> See Chapter 3.6.

<sup>435</sup> Consumer Affairs Victoria, *Annual Report 2009-2010* (CAV, 2010).

year.<sup>436</sup> Therefore, rather than having most matters proceed through to a hearing with the consequent delays and costs to the parties, a significant number of matters are settled at mediation in NSW. In Victoria the rate of hearing of OC matters is consequently approximately twice that of NSW. More importantly, it is likely that because parties who reach a settlement are likely to be more satisfied with the justice aspects of the process compared with those who 'lose' in an adjudicated outcome (as indicated by the results of this research) the long-term impact on relationships and compliance with the results is perhaps likely to be better in NSW.<sup>437</sup> The propensity of disputants to initiate an action in the formal State run system is also likely to be different although without further research it is impossible to provide any more than speculative questions.

Recent research in Queensland indicates that those who use the adjudication process in that jurisdiction are more likely to use it in the future than those who do not use it and that some OC develop a "litigious culture."<sup>438</sup> They state, "...these statistics suggest that once a dispute reaches the OBCCM (The Office of the Body Corporate Commissioner Management), the scheme involved is likely to experience multiple disputes, which anecdotally seems to be because the members of the scheme become factionalised. For the 145 most heavily disputed schemes, it seems that a highly conflictual and litigious culture emerges, in which scheme members feel a sense of entitlement to have grievances arbitrated by a third party external to the dispute."<sup>439</sup>

What these differences do squarely highlight is the way in which the design of a disputing process can have an effect on disputants and, consequently, on the wider community. These conclusions are further reinforced from some preliminary analysis of survey data from OC Managers in Victoria that the author is involved in, which indicate that the model rules under the *Act* are perceived not to be particularly useful

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<sup>436</sup> Department of Fair Trading, *The Year in Review 2009-2010* (Department of Fair Trading, 2010) 19, [http://www.fairtrading.nsw.gov.au/pdfs/About\\_us/Publications/Annual\\_reports/FT426\\_Year\\_in\\_review\\_0910.pdf](http://www.fairtrading.nsw.gov.au/pdfs/About_us/Publications/Annual_reports/FT426_Year_in_review_0910.pdf); see Chapter 3.4 and 3.6 for a fuller comparison.

<sup>437</sup> See, eg, McEwen and Maiman, above n 401, 11-49; Felstiner, above n 401, 63; Felstiner and Williams, above n 410; Fuller, above n 401, 353; Goffman, above n 401; Gouldner, above n 401, 161; Gulliver, above n 401; Pruitt et al, above n 47, 313-30; Sourdin, "Mediation in the Supreme and County Courts of Victoria" above n 16, 151.

<sup>438</sup> Toohey and Toohey, "Achieving Quality Outcomes" above n 81.

<sup>439</sup> *Ibid* 10.

and that they tend to follow their “own procedures.”<sup>440</sup> The grievance procedure set out in the model rules applies to disputes involving a lot owner, manager, an occupier or the OC. OC committees, property managers and lawyers who practice in this area may benefit from a practice or advisory note which sets out ADR strategies for different sized developments. The practice note, to carry weight, could be prepared by CAV, the government department who administer the Act, or VCAT, being the legal forum where OC disputes are run. Whilst OC have the ability to develop their own tailored rules, guidance notes from the relevant government agencies could provide important and relevant practical advice to them.<sup>441</sup>

Neither party role, gender, nor status of residence seemed to have any impact upon the preferences made or the reasons for those preferences. Minor differences were indicated for citizenship and place of birth on control measures but not such as to change overall preferences. It was expected that those in respondent roles may prefer a process where they would have more freedom to negotiate an outcome (the Med/Arb configurations) but this was not so. Also, those who actually lived in OCs as owners might have been expected to prefer this in relative terms. However, there were no significant differences after analysis of the effects. Because these disputes involve parties in continuing relationships mediated through often complex management structures, it is important that there be an appropriate dispute management system that is both flexible and formal enough to meet these demands. In this respect, the analysis by Mollen of condominium disputes in New York that concludes there is a need for a disputing system providing for negotiation then mediation then adjudication by way of a private arbitration process is attractive, despite the possible drawbacks of the latter process.<sup>442</sup> The model presently used in New South Wales where “adjudication on the papers” is used after the occurrence of mediation but before a hearing is perhaps another way to proceed.<sup>443</sup>

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<sup>440</sup> R Leshinski, A Parenyi and P Condliffe, "Appropriate Dispute Resolution for Owners Corporation Internal Disputes - a Case Study from Victoria, Australia" in *3<sup>rd</sup> World Planning Schools Congress* (Perth, 2011).

<sup>441</sup> Rebecca Leshinsky, Kathy Douglas and Peter Condliffe, “Dispute Resolution under the *Owners Corporation Act 2006* (Vic): Engaging with Conflict in Communal Living” in draft and accepted for publication in the *Property Law Review*.

<sup>442</sup> Mollen, above n 56, 76-7; Miskin, above n 3; Chau, above n 137; Van der Merwe, "Sectional-Title Courts" above n 332; Deck, Farmer and Zeng, above n 174; Carnevale and Leatherwood, above n 11; Conlon and Moon, above n 10; Pruitt and Carnevale, above n 15; Wheeler, above n 174, 11-120; Condliffe, "Arbitration: The Forgotten ADR" above n 149.

<sup>443</sup> See Chapter 3 and in particular 3.4 and 3.7.

The qualitative preferences data indicated a predominant concern for procedural justice issues.<sup>444</sup> Giving the participants a chance to include, in their own words, some rationales for their preferences was useful. The particular advantage of this approach is that the participants' answers are not structured by the questions asked. The disadvantage is that the analysis depends upon a coherent and painstaking cross verification of the categories created by the qualitative analysis which makes it a cumbersome process to use for large cohorts. The results showed that role or other characteristics of the participants did not have any significant bearing upon these stated preferences.

The qualitative data indicated that participants in the experiment were more concerned about the procedural justice aspects of each process than the other three fairness elements or efficiency. It would seem that participants saw the concept of justice in largely procedural terms when reflecting upon and rationalising the reasons for their preferences. Nor did the reasons change significantly for each of the three groupings of first choices.<sup>445</sup> That is, the reasons given were uniform across the group regardless of preference. This is important in that whilst decisions around preference may be couched in procedural or other terms, this does not necessarily relate to or cause the preference. Regardless of the configuration of the preference decisions or choices, participants were likely to give similar reasons for their decisions. This adds to and is contrasted with the research by Tyler, Huo and Lind which indicated that pre-experience evaluations were based upon self-interest and post-experience evaluations on the quality of the procedures.<sup>446</sup> This research has shown that participants would justify or evaluate their pre-experience preferences predominantly upon procedural justice grounds even if they rated their preferred preferences higher on a self-interest control measure than the less preferred. Post-experience evaluations in this research were dominated by an adverse outcome which impacted upon overall evaluation of other aspects. But even in those cases where the matter ended in a mutual settlement at mediation there appeared to be no significant bias towards procedural justice concerns in contrast to the other elements on the measures used. The research here could be

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<sup>444</sup> See Chapter 4.6.

<sup>445</sup> See Chapter 4.4.

<sup>446</sup> See Tyler, Huo and Lind above n 167.

extended by allowing participants an opportunity to answer a range of unstructured questions at the end of the mediation and arbitration aspects, and then compare the coded results with those derived from the pre-simulation questionnaire.

### **7.3 The Effect of the Adverse Outcome**

In 2001 NADRAC stated that:

Despite their methodological shortcomings, research studies appear to support some of the claims of ADR, namely that it is responsive, quick, fair and informal, and that it is cheaper than litigation. Most parties appear to value ADR, and seem capable of making distinctions between substantive satisfaction and procedural satisfaction in that, while they may be unhappy with the outcome of the dispute, they appreciate the fairness of the procedure and the competence of practitioners.<sup>447</sup>

This research raised some questions about the ability of parties to make the distinction between procedural and substantive ‘satisfaction’. Clearly, those parties who obtained an adverse outcome went on to judge, with significantly less satisfaction, the procedural, interpersonal and informational justice elements of the process. The pervasive view in the literature, that parties who receive a fair process will put up with less fair outcomes, may be right up to a point. However if the outcomes are particularly adverse then the process is likely to be considered less fair. In other words the outcomes and other elements are symbiotic and cannot be as easily separated as commentators may conclude. There may be a tendency amongst some policy makers and commentators to perhaps overstate or conflate the ability of ‘good process,’ as exemplified in ADR processes, to negate the impact of adverse outcomes. The research in the justice literature indicates a high correlation between satisfaction with outcomes and process and a lesser relationship between the former with interpersonal and informational elements. That is, as one goes up the others go up and vice versa. Whilst ‘good process’ may cause parties to rate adverse outcomes less adversely than otherwise, this may only go so far. This research clearly demonstrates that adverse outcomes have an impact upon how ‘good’ the process is perceived overall. The

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<sup>447</sup>NADRAC, *A Framework for ADR Standards* Commonwealth of Australia, 2001, 37.

complainants, as a group, appeared to be using a simple heuristic to judge the fairness of the process overall, although only the outcome had been manipulated.<sup>448</sup>

What may be useful in future research is to graduate the distributive outcomes in an experimental situation in relation to their adverse perception in the eyes of one group of participants and measure the impact this would have on their perception of the various justice elements. It would be interesting to have a more balanced outcome where one issue was decided in favour of one side and one for the other, rather than in this research where the outcomes, whilst based upon the actual outcomes of the real life cases, heavily favoured the respondents on both the major issues of dispute. This could then be varied to have more nuanced outcomes where different elements of the disputes in issue went either way in varying degrees. The differing outcomes could be rated in terms of their adversity for either side in the dispute and this then analysed in terms of the impact on fairness judgements.

The other aspect which was not studied in this research is the question of legal costs and their impact upon the negotiation habits and perceptions of the disputants in regards to outcomes.<sup>449</sup> If costs had also been awarded after arbitration to the 'winner' in the experimental conditions in this research, then the perception of fairness may have been further impacted. Further, if legal costs were in issue then the negotiating behaviour of the parties and the way in which the third party intervened may have changed. Because this is not a significant aspect of OC disputes management at the moment in Victoria it was not included in the research design.

The other salient aspect of the outcomes and their impact upon fairness perceptions in this research was that the fairness perceptions of the respondents who most benefitted was not significantly changed. Rather, the fairness perceptions of the complainants dropped significantly to produce the change between them and the respondents. What this demonstrates is that the loser in an arbitrated outcome is likely to have their fairness perceptions impacted adversely whereas the winner's perceptions are not positively impacted.

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<sup>448</sup> See Chapter 5.5; Lind, "Thinking Critically About Justice Judgments" above n 235, 220-26.

<sup>449</sup> For an overview see S Bibas, "Plea Bargaining Outside the Shadow of Trial" [2004] Harvard Law Review, SSRN: <http://ssrn.com/abstract=464880> or doi:10.2139/ssrn.464880; Macey-Dare, above n 381.

This is contrasted with those cases where the parties were able to reach a settlement in the mediation. In these cases the complainants and respondents were not significantly apart in their justice perceptions. Nor did those parties who did not reach agreement at the time of the mediation significantly differ in their responses on the four justice measures from those who did. What is interesting about this aspect is that the making of an agreement did not raise or lower the justice scores. It is often assumed that parties' subjective perceptions of fairness will rise with an agreement. What this research indicates is that neither at the post-mediation or post-arbitration stages of the process did the making or imposition of an agreement make any significant difference to fairness perceptions, excepting for those who 'lost' in the arbitration. Strikingly, the respondents fairness ratings remained constant between the mediation and arbitration phases, indicating perhaps that 'winners' are able to distinguish between the outcome and the other aspects of justice. Perhaps the outcome of winning is not as unexpected for disputants and therefore has less impact upon their perceptions of fairness. This would be another aspect of research that could be further explored.

Also, participants in the experiment seemed to distinguish between the preferences they had made and their fairness judgements. In fact the most preferred procedure (Med/Arb Same) scored slightly lower on the justice scores at the post mediation phase than the other procedures. However, this was not at significant levels. Therefore, the participants did not relate their fairness perceptions to their preferences which were highly correlated with perceptions of control. Whilst the reasons given for the preferences, as shown in Chapter 4.6, indicated a clear majority of participants justified their decision upon procedural justice grounds, this was not related to any one particular procedure. That is, whilst the major rationale for choosing the procedures in the way they did was based upon procedural fairness ideas, this did not seem to cause them to favour one procedure over another.

The other key aspect of the justice research was that there was no significant difference in the justice scores between the different processes. This indicates that parties were not affected by the placement of arbitration before mediation or the presence of a different third party. These differences were not based upon role types,

gender, ethnicity or housing status. For dispute system designers this information is useful.

#### **7.4 Justice and Efficiency**

This research has shown that the boundary between justice theory and transaction cost economics requires further research. Justice theory has made considerable progress in evaluating the satisfaction of disputants in regards to distributive, procedural, interpersonal and informational fairness. The integration of this learning with economic theory remains to be done. In particular the question – “Does the degree of fairness of a process relate to its efficiency in minimizing transaction costs?” – requires some further attention.<sup>450</sup> Again, the work of TISCO in integrating costs into their research instruments (these included out of pocket, intangible and opportunity costs as well as time) points a way forward in this area of research.<sup>451</sup> How transaction cost theorists respond to this research and begin to integrate justice elements into their research may be the next test. Of particular note in this research was the emergence in the qualitative data of ‘efficiency’ as a separate category.<sup>452</sup>

Over seven per cent of the responses to the question on the reasons for the preferences given related to efficiency concerns: see Question 3, Appendix A2. These included mainly concerns with costs and time. It would be useful to do some further research on this aspect to flesh out and strengthen the analysis so as to isolate and compare the different elements that make up the concept of ‘costs.’ This research could be further pursued by juxtaposing various cost measures against a range of processes to ascertain what impact this would have upon preferences and fairness decisions. For example, each process in an experiment could be ‘weighted’ with various cost factors (time, legal costs, opportunity costs etc) and then analysed with regards to the impact this would have upon preferences. This research showed no such relationship between cost factors and preferences but this may have been because it was not explicitly built into the factual scenarios.

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<sup>450</sup> For an overview of this issue see Husted and Folger, above n 338, 719-29.

<sup>451</sup> See Chapter 6.3.

<sup>452</sup> See Chapter 4.6.

In relation to the experimental outcomes of this research related to efficiency it was clear that the hybrid Arb/Med procedure delivered a higher rate of agreements than the Med/Arb processes but not, as in the Conlon and Moon study, at a significant statistical level.<sup>453</sup> The interesting question posed is why this process is more likely to produce settlements. Conlon and Moon suggest that this may be because it separates the determination from its announcement, allowing the parties to negotiate in between those two events.<sup>454</sup> However, the results in this present research did not suggest any difference in the fairness of outcomes between the three processes as suggested by the Conlon and Moon study, nor was there any conclusive evidence that the Arb/Med procedure was more efficient in terms of time taken.<sup>455</sup> This was particularly so as the arbitrators were not required to prepare and write their decisions. It can be concluded in the same way as Conlon and Moon, albeit for different reasons, that there is still some further research to undertake before we can make any definitive conclusions about the Arb/Med procedure.<sup>456</sup> What perhaps is shown is that it cannot be entirely discounted as a useful process to be considered in some situations. The limitations of this area of the study were exposed here and the reliance on students in a simulated environment highlights the importance of assessing the effectiveness of these hybrid procedures in a field setting. Alternatively, an experiment which focuses just on aspects of efficiency where participants have more time and the conditions replicate real life conditions more closely may be useful.

## **7.5 Living in the Future**

This research started out with the design and drafting of a dispute management process for an OC management company and finished with an analysis of the way in which parties in the position of those who may be involved in such a process may choose and evaluate different dispute management processes, as well as how well they may lead to settlement outcomes. The research enquiry wound its way through a multiplex of different frameworks and models which go to make up the theoretical underpinnings of dispute system design and evaluation. The research is useful because it has not been

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<sup>453</sup> Conlon and Moon, above n 10, 978-84.

<sup>454</sup> Ibid 982.

<sup>455</sup> See Chapter 6.6 above.

<sup>456</sup> Conlon and Moon, above n 10, 978, 983.

done in this way in Australia before so as to combine an experimental simulation with the antecedent real life model system and some limited objective data. It builds upon the work of those who have evaluated court, tribunal and administrative dispute design systems and poses some questions which can hopefully stimulate and lead to further analysis both experimentally and in the field. The data generated can be further explored and compared with follow up studies.

Also, the study has implications for policy makers and others who work in the housing, urban design and social policy areas. It indicates that there will be challenges to the way in which we live in the future, as housing becomes more compact, privately managed and collectivised, mainly driven by market forces. Hopefully, some of the ideas and analysis of the various State based jurisdictions in Australia will contribute to some further questioning of this complex diversity across such a relatively small population base. The statutory framework in Victoria, which was the focus of this research, was developed in a way quite different to its interstate cousins, even if the underlying statutory principles were similar. The implications this has had for disputants is of some importance, as previously noted. It also has implications for developers, planners and governments working across a multiplicity of jurisdictions. The cost of understanding and transacting these different systems is probably considerable.

The idea on the opening page of this thesis that there may be a 'revolution' going on in Australian cities due to the way we construct our housing stock is one that has energized this research and provided it with a focus and interest that it may not otherwise have had. As more Australians get used to the idea of living in compact housing and other Australians battle with and adjust to the changes to their local neighbourhoods, the way in which we dispute with each other may change as well. The home and the neighbourhood as significant domains of disputing will continue to evolve and hopefully this will be in a way which is as fair and productive as they can be in supporting and nurturing ongoing social relations.

## **APPENDIX A: HANDOUTS**

## A1 COMMON FACTS FOR BOTH PARTIES

### The Case of the Water Meter and Falling Debris: Role Play Background and Facts

#### Common Facts for Both Parties

The complainant (M. Smithy) is a tenant in an Owners Corporation (OC). She has made a formal complaint under the OC internal rules which contain a dispute resolution process. The OC Committee represents the lot owners (not renters) and has delegated to M. Marty to be its representative to manage these matters under the terms of the dispute resolution process.

M. Marty and M. Smithy have met several times but cannot agree on terms. They have therefore to rely upon the next stages in the internal dispute resolution rules adopted by the OC.

This case relates to two matters.

- a. Water metering; and
- b. Falling Debris.

#### Water Metering

The Complainant (M. Smithy) is renting her property. Under her rental agreement service charges such as water and electricity, but not rates, are paid by him/her. The landlord does not want to change the lease. S/he is seeking to have water charges for unit holders to be based on a user pays basis. The Complainant does not occupy her unit fulltime but rather it is in the nature of a holiday home for her. Lots in the Owners Corporation (OC) do not have individual water meters but rather there is one meter for the whole subdivision. Water charges made by the local council are divided between the unit holders. It is not clear if this was done according to each proprietor's unit entitlement. The Complainant's argument is that this is unfair because she only occupies her unit (and uses water) periodically. She is therefore required to pay for more water than she actually uses. A potential way to overcome this was for individual meters to be installed for each unit. According to the Complainant the cost of this was in the vicinity of \$200.00 per unit (\$12,000 overall).

Any extra cost relating to the water metres would have to be met out of funds, through a special levy, provided to the OC by owners.

The proposal for separate meters had been put to the OC Committee which had declined to adopt it.

#### Falling Debris

M Smithy is the occupier of Lot 14 in the block of units. This lot is located on the second level, being the uppermost floor of the podium level of the block of units that comprise the property. Rising above the second floor is a small residential tower building of 6 stories. Lot 14, along with a number of other lots on level 2, has access from their small garden/courtyard area to a 'roof top garden' on top of the podium. The rooftop garden is regarded as common property beyond the garden/courtyard areas of the units on that

level and all residents have access to it for enjoyment of the amenities including a bar-b-q and sitting area.

From a design perspective, the podium forms a low solid base to the residential tower. The result being balconies and windows of many of the residential lots overlook the balconies on the northern, eastern and western sides of Lot 14 and the other lots on that level. The air space above the rooftop garden and Lot 14 and those adjacent is common property.

The parties agree that occupants of residential lots above Lot 14 are disposing of unwanted items by throwing them from either balconies or windows directly above the balconies of Lot 14. From where they originate is unknown. They may be deposited in common property from lots within the mid-rise section or arrive into the respondent's common property, having been thrown into the air space of the high-rise section. These items fall onto the outdoor areas of Lot 14 and other lots as well as the rooftop garden. This is a daily occurrence of long standing. It was brought to the respondent's attention in 2006.

The items include cigarette butts, condoms, sanitary napkins, syringes, food and food packaging. They have also included a broken table and a padlock.

It might seem remarkable that there is no report of any person being injured as a result of this conduct. One explanation may be that much occurs under cover of darkness as there is reference in the evidence of the need to clean up the outdoor areas each morning.

A related issue is the protection afforded by the existing coverings. The northern edge of the outdoor garden is protected by a steel frame and mesh awning which covers some of the open area. Most of the resident's garden/courtyard areas are covered by a number of shade cloth sails.

The complainant says the danger posed to residents, especially those on her level, threatens their safety. She wants awnings sufficient to protect them from the risk of injury erected. This would involve the extension of the existing steel awning over the northern edge and replacement of the shade cloth on the garden/courtyard areas with similar steel structures.

Any extra cost relating to the steel supported awnings would have to be met out of funds, through a special levy, provided to the OC by owners.

Again the Committee of the OC has refused this request.

## **Process of Dispute Resolution**

The parties have been advised by the OC, that they have one of three choices under the Corporation's internal dispute resolution rules if they cannot settle the matter directly with the other party. These choices combine the processes of mediation and arbitration in different ways. Mediation and arbitration are defined as follows:

**Arbitration:** A process of adjudication where the parties present information/evidence and present arguments to the arbitrator who then makes a determination that the parties agree to be bound by.

**Mediation:** a facilitative process where the mediator helps the parties identify issues, develop options and consider alternatives to enable the parties to reach their own solution to the issue/s. The mediator does not offer advice on

the content of the dispute but is concerned with providing a process that enables the parties to manage the matter in their own way.

The three choices are as follows:

**Choice 1 - Arb/Med:** Arbitration followed by mediation known as Arb/Med. This is a process where an arbitrator is appointed by the Committee of Management. The parties present information and arguments orally and/or in writing to the arbitrator who will make a decision but not initially reveal it to them. Instead s/he will place his/her decision in a sealed envelope only to be opened if the parties subsequently are not able to settle the matter. After sealing the decision in an envelope the arbitrator will revert to the role of a mediator and will use that process to try and help you to a settlement. If you cannot settle the matter in a reasonable time the arbitrator/mediator will then open the sealed envelope and deliver the decision that will bind you.

**Choice 2 – Med/Arb Same:** Mediation followed by arbitration by the same person known as Med/Arb.Same. This is a process where the mediator will help the parties reach their own decision but will also have the ability to advise options which they may like to consider but which they do not have to accept. If the parties cannot reach a decision within a reasonable time the Mediator will bring the mediation to a close and will commence arbitration. The parties will be able to present arguments and information to the arbitrator who will then make a decision.

**Choice 3 – Med/Arb Different:** Mediation followed by arbitration by different persons known as Med/Arb.Diff. This is similar to Med/Arb.Same except that if the parties cannot reach agreement at the mediation phase a different person to the Mediator will be appointed to arbitrate the matter.

### **Purpose of Role-plays**

Role-plays or simulations are intended to provide "safe" and controlled environments in which to practice the various skills and techniques. They are a very useful way of 'bringing out' practice issues and dilemmas. As well, they are meant to be enjoyable opportunities to put theory into practice.

The effectiveness of role-plays as learning tools relies on the participation of the role-players.

#### ***When preparing for a roleplay:***

- Move quickly to your roleplay group and location - the quicker your group starts, the more time you will all have to practice
- Read ALL the instructions before commencing (Common *and* Confidential Information)
- Introduce yourself as your character (wear a name tag, if that makes it easier)

#### ***During the roleplay:***

- Keep track of time/ time limits will be strictly applied so as to ensure the processes are evenly applied across all groups and because of the limited time available.
- Read facts carefully and circle points you want to emphasise

- Get into the role and feel the emotions of your party.
- You need to inject some reality into the character you play so the practicing arbitrator/mediator has something to practice with. Enjoy yourself, but, please, do not go "over the top" and make the practicing arbitrator/mediators task impossible (don't be too: aggressive, histrionic, obstructive or co-operative) - try and be aware of what is happening for others
- If your role needs some emotion to be realistic, be emotive. However, don't let the emotion overtake you and/or the whole roleplay
- Observe the other role-players - think about what they are doing that you could learn from. What would you do differently and why?
- If someone in the roleplay addresses you by your real name, remind them of the name of your character - unless, of course, you have all stepped out of role for a moment
- Do not laugh or giggle.
- Do not be the client from hell or a rabid "hard bargainer". You must be prepared to modify some of your goals in the light of your risk analysis; and if you receive enough in exchange.
- Do not be passive; do not make concessions easily unless you receive some benefit in exchange.
- The trainers may interrupt and tell you to change your behaviour – eg less aggression, or more assertiveness etc. Obey.
- Try some of these for the third party neutral to work with:
  - Try to win them over to your "side"
  - Refuse to even look at the other party
  - Make early demands rather than early exploration of interests

***After the roleplay (Debriefing):***

- Take off your name tag and re-introduce yourself to the others in your roleplay group
- When discussing the roleplay, refer to characters by their character name, not their real name - people don't always want to be associated with the characters they have been playing!
- When giving each other feedback after the roleplay, remember to keep it constructive - something the practicing mediator did well, something you think s/he could have done differently, something you learnt from the roleplay. You are helping each other learn not stopping each other from ever mediating again!
- If the roleplay has had an unexpected personal effect on you, please ask one of the trainers to help your group de-brief

**If you have any queries please contact the simulation organizer.**  
**Relevant sections of the Owners Corporations Act 2006**

46. Owners corporation to repair and maintain common property.

An owners corporation must repair and maintain-  
 (a) the common property; and

- (b) the chattels, fixtures, fittings and services related to the common property or its enjoyment.

### **Owners corporation must repair and maintain services**

#### 47. Owners corporation must repair and maintain services

- (1) An owners corporation must repair and maintain a service in or relating to a lot that is for the benefit of more than one lot and the common property.

- (2) An owners corporation may, at the request and expense of a lot owner, repair and maintain a service in or relating to a lot if it is impracticable for the lot owner to repair or maintain that service.

- (3) In this section-

service includes a service for which an easement or right is implied over the land affected by the owners corporation or for the benefit of each lot and any common property by section 12(2) of the Subdivision Act 1988. Note The easements or rights that may be implied under section 12(2) of the Subdivision Act 1988 are those necessary to provide-

- support, shelter or protection;
- passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission);
- rights of way; full, free and uninterrupted access to and use of light for windows, doors or other openings; maintenance of overhanging eaves.

### **Significant alteration to common property requires special resolution**

#### 52. Significant alteration to common property requires special resolution

An owners corporation must not make a significant alteration to the use or appearance of the common property unless-

- (a) the alteration is-

- (i) first approved by a special resolution of the owners corporation; or
- (ii) permitted by the maintenance plan; or
- (iii) agreed to under section 53; or

- (b) there are reasonable grounds to believe that an immediate alteration is necessary to ensure safety or to prevent significant loss or damage.

### **Upgrading of common property**

#### 53. Upgrading of common property

- (1) An owners corporation may by special resolution approve the carrying out of upgrading works for the common property and the levying of fees on lot owners for that purpose.

(2) In this section upgrading works means building works for the upgrading, renovation or improvement of the common property where-

- (a) the total cost of the works is estimated to be more than twice the total amount of the current annual fees; or
- (b) the works require a planning permit or a building permit before they can be carried out-

but does not include works that are provided for in an approved maintenance plan or works referred to in section 4(b).

### **Care of common property**

#### 130. Care of common property

A lot owner must not use or neglect the common property or permit it to be used or neglected in a manner that is likely to cause damage or deterioration to the common property.

## A2 PRE-SIMULATION QUESTIONNAIRE

Code Number.....

Date of Questionnaire: ...../...../.....

### Pre-Simulation Questionnaire

**Instructions:** This questionnaire is designed to be completed before you have participated in a simulation (role-play) as part of a research project by the Laboratory for Decision Support and Dispute Resolution. Each question, excepting for those in the 'About You' section, has a five point scale next to it with 1 representing 'Strongly Disagree' and 5 representing 'Strongly Agree'. You can answer the questions by circling a number or answer for each question.

The results of the questionnaire will be confidential and your identity will not be disclosed. The Respondent Code Number at the top left hand corner of this page will help us do this by only identifying the answers you provide through this code as the simulation progresses.

#### Preamble

Please read the simulation scenario you have been provided with. You have been advised by the Management Committee of the Owners Corporation, which manages the block of units, that you have one of three choices under the Corporation's internal dispute resolution rules if you cannot settle the matter directly with the other party. These choices combine the processes of mediation and arbitration in different ways. Mediation and arbitration are defined as follows:

**Arbitration:** A process of adjudication where the parties present information/evidence and present arguments to the arbitrator who then makes a determination that the parties agree to be bound by.

**Mediation:** a facilitative process where the mediator helps the parties identify issues, develop options and consider alternatives to enable the parties to reach their own solution to the issue/s. The mediator does not offer advice on the content of the dispute but is concerned with providing a process that enables the parties to manage the matter in their own way.

The three choices are as follows:

**Choice 1:** Arbitration followed by mediation known as Arb/Med. This is a process where an arbitrator is appointed by the Committee of Management. You will present information and arguments orally and/or in writing to the arbitrator who will make a decision but not initially reveal it to you. Instead he will place his/her decision in a sealed envelope only to be opened if you subsequently are not able to settle the matter. After sealing the decision in an envelope the arbitrator will revert to the role of a mediator and will use that process to try and help you to a settlement. If you cannot settle the matter in a reasonable time

the arbitrator/mediator will then open the sealed envelope and deliver the decision that will bind you.

**Choice 2:** Mediation followed by arbitration by the same person known as Med/Arb.Same. This is a process where the mediator will help you and the other party/ies to reach your own decision but will also have the ability to advise options which you may like to consider but which you do not have to accept. If you cannot reach a decision within a reasonable time the Mediator will bring the mediation to a close and will commence arbitration. You will be able to present arguments and information to the arbitrator who will then make a decision.

**Choice 3:** Mediation followed by arbitration by different persons known as Med/Arb.Diff. This is similar to Med/Arb.Same except that if you cannot reach agreement at the mediation phase a different person to the Mediator will be appointed to arbitrate the matter.

### Questions

1. Identifying Data

Are you a Complainant, Respondent, Arbitrator/Mediator, Mediator/Arbitrator, Mediator, Arbitrator or Observer in the role play? *(Please circle)*

Have you included your code number in the space above? (Yes?No)

2. List in order of preference for each of the processes described above *(use the abbreviations Arb/Med;Med/Arb.Same or Med/Arb.Diff)*

First Preference: .....

Second Preference: .....

Third Preference: .....

3. On what basis are your preferences made? List at least three reasons:

Reason 1 .....

.....

Reason 2.....

.....

Reason 3.....

.....

Other .....

.....

4. How plausible do you find the simulation scenario? (Circle a number on the scale provided)

1	2	3	4	5
Not Plausible		Somewhat Plausible		Extremely Plausible

5. How would you rate the three processes in terms of these three variables?

*Decision Control:* the ability of the parties to control the final decisions and outcomes

*Process Control:* the ability of the parties to control the type of information/evidence provided

*Rule Control:* the ability of the parties to make the rules that govern the process

Decision Control – for each of these three scales circle a number next to the process to indicate your rating each of the three processes for this variable.

**Arb/Med**

1	2	3	4	5
No Control		Some Control		Full Control

**Med/Arb.Same**

1	2	3	4	5
No Control		Some Control		Full Control

**Med/Arb.Diff**

1	2	3	4	5
No Control		Some Control		Full Control

Process Control - for each of these three scales circle a number next to the process to indicate your rating of each of the three processes for this variable.

**Arb/Med**

1	2	3	4	5
No Control		Some Control		Full Control

**Med/Arb.Same**

1	2	3	4	5
No Control		Some Control		Full Control

**Med/Arb.Diff**

1	2	3	4	5
No Control		Some Control		Full Control



*Please circle your answer*                      Owner / Renter

6k) if your answer to question 6h) was 'No' could you circle one of the following:

Renting detached dwelling with parents

Renting detached dwelling with friends/group

Renting detached house alone

Renting detached house with spouse/partner

Owner/part-owner of detached dwelling

Other (*please briefly describe*) .....

7. Any other comments? .....

.....

.....

Thankyou

Peter Condliffe

### A3 QUESTIONNAIRE AND LOG FOR ARBITRATORS AND MEDIATORS

Code Number.....

Date of Questionnaire: ...../...../.....

#### Questionnaire and Log for Arbitrators and Mediators

Instructions: This questionnaire and log is designed to be completed when you have completed the simulation as a

- a. mediator/arbitrator (same)
- b. mediator (before an arbitration)
- c. arbitrator (following a mediation process)
- d. arbitrator/mediator.

It will be necessary for you to keep track of the time you started each part of the process. For example, if you are in role a. above the time you started and finished the mediation process and the arbitration process. The results of the questionnaire and log will be confidential and your identity will not be disclosed. The Code Number at the top left hand corner of this page will help us do this by only identifying the answers you provide through this code as the simulation progresses.

1. What role are you playing? a, b, c, d *(Please circle)*

2. What are the names and code numbers of the role players in your group?

...../.....

...../.....

3. What time did you start the process? .....

4. What time did you finish the process? .....

5. How long did the arbitration and the mediation phases last? If you were only doing a mediation or arbitration record this only.

Mediation .....minutes      Arbitration .....minutes

6. Did you have any issues in playing the role you had? If so what were they?.....

.....  
.....

7. If you were in roles a, b or d above did you reach an agreement at the conclusion of the mediation? Yes/No *(Circle your answer)*

8. If you were in roles a,b or d list three things you think prevented the parties settling the matter in the mediation:

i. ....

ii. ....

iii. ....

9. Having completed the process and using the attached scale do you think the process you used was fair to both parties? *(Circle a number on the scale provided)*

1

2

3

4

5

Not Fair

Somewhat Fair

Very Fair

Give up to 3 reasons for your answer:

i. ....

ii. ....

iii. ....

10. Any other comments?

.....  
.....  
.....  
.....  
.....  
.....  
.....

Thankyou

Peter Condliffe

## A4 COMPLAINANT'S FACTS

### The Case of the Water Meter and Falling Debris: Role Play Background and Facts M. Smithy: Complainant's Facts

#### General

You are pursuing these issues as you believe that renters should only have to pay for water that they use. This is especially as you are often not in residence. In relation to the issue of 'falling debris' you believe this is an ethical issue that needs to be addressed for both the amenity and safety of residents. These matters have been going on for a considerable time and are wearing you down. You are quite intense and emotional when discussing them. You want to keep residing in the area but cannot afford to buy there. You have another property which you own in the country where you spend the rest of your time tending your small cattle herd. You enjoy the amenity of the Units as they are close to the sea, reasonably priced, and you have friends in the area. When there you like to paint and draw and tend to spend quite a lot of your time in the outside garden common area or in your own garden/courtyard.

#### The Water Issue

You believe that the Owners Corporation (OC) and M. Marty, their representative, have misunderstood your argument. You say that individual meters could be installed at a cost of as little as \$150.00 per unit by a private contractor. These meters are not to be installed by the local Council or under its auspices; however, this is not to suggest they would be "illegal" or that they would not be allowed because of this reason. The OC and M. Marty have suggested that they would be illegal if not installed by the Council and would require the Council to read them.

You argue that each meter could be read by someone nominated by the OC at about the time the Council read its meter. Armed with this information the water account from the Council could be divided with regard to the water consumption by each unit. You have contacted the Council who have given oral advice that individual meters would not incur individual rates for each Unit.

You strongly believe that this is a matter of equity especially as some Unit holders use more water than others and are not 'water wise.' Putting in individual meters would improve water usage. Also, some Units have more people in them, including children, and so should have to account for their water usage. Some Units are bigger than others and should therefore have to pay more for water usage and other utilities accordingly.

#### The Falling Debris

Unit (Unit 14) is on the second level and through the back courtyard/garden looks out onto a common area 'rooftop garden' which has a bar-b-q and seating for the general use of residents. You have shade cloth over most of your courtyard/garden area but note that in places it is being burnt through by lighted cigarettes. Photographs you have taken and are prepared to produce show this to be extensive.

Your view is that the falling debris from upstairs Units represents a real danger and loss of amenity. It represents a deficiency in the construction of the building and can lead to liability of the OC for any injuries suffered. You believe it is negligent for the OC to let this situation continue and also that it represents a public nuisance. To solve this you propose a replacement of the existing awning over the rooftop common property garden area from your garden, and that of adjacent lot owners, by sturdy steel poles and strong mesh awnings and replacement of the shade cloth on the four courtyard/gardens affected with similar steel structures and awnings.

The cost of erecting awnings to shield the outdoor areas of Lot 14 and the other four Units you estimate would cost between \$150,000.00 and \$250,000. You claim they will need to be located principally in the common property above the rooftop garden and bar-b-q area and extending into the courtyard/gardens of the adjoining lot owners. This claim is based, not upon the impossibility of doing so within the individual Units or lots, but rather as it is the responsibility of the OC to provide this protection, the awnings should be constructed in common property. Also, the spreading of the cost between all Unit owners is the most equitable way to spread the cost.

You further argue that as residents and lot owners are in breach of s130 of the Owners Corporation Act that this places an obligation upon the Owners Corporation to erect the new awnings. You say that the design and construction of the building is defective in not providing common property shelter for the gardens/courtyards of Lot 14 and those adjacent exposed to the danger of falling objects. The obligation to remedy this deficiency should be that of the respondent for a number of reasons. Awnings within the lot itself would "encroach" upon its air space in the common ground and they would address a problem emanating from the building rather than from use of the lot and roof and ceiling structures are generally the responsibility of the Owners Corporation especially on the common ground itself.

You have contacted the owner of the property, M. Jordan, who has said that he has no interest in spending money on further awnings and that it should be the responsibility of the OC.

## A5 RESPONDENT'S FACTS

### The Case of the Water Meter and Falling Debris: Role Play Background and Facts

#### M. Marty: Respondents Facts

##### General

You are a resident and owner of a Unit in the Owners Corporation (OC) known as 'Ocean Views' which consist of sixty units. You have lived there for 7 years and it is part of your retirement plan to stay there for as long as possible. You sold your property in Burwood to move there and you have purchased another Unit with beach views which you rent out to holiday makers for a tidy sum. You are on the OC Committee of Management which has responsibility for overall management of the property. About a third of the property is occupied by renters most of whom are full-time permanent but with some holiday rentals and part-times making up the rest. You note with some alarm that an increasing proportion of the occupiers are renters whom you think do not look after their properties as well and who are harder to get to know.

You are suspicious why M. Smithy, a renter, is making these claims and why together? You are not allowed to commit to any expenditures by the Committee without their approval but know that what you agree to will probably be accepted by them in meeting.

You are a down to earth person (an engineer by profession) and tend to be very logical in your approach. You find M. Smith a little 'too emotional' for your liking which you think does not help the situation.

##### The Water Issue

This issue has been bubbling away for some time. Yours and the Committee's view is that the proposal for reading of individual meters is unwieldy and would require the Committee to organize it. You also think it could be illegal to set up a private meter system and think it should be done through the Council although you have no legal foundation for this view. The cost is also an issue and you think it would cost at least \$250 (inc GST) per Unit which the owners would have to bear or the Committee would have to make a special levy from owners to cover. Individual meters would, in the Committee's and your view, mean that each occupier would then be liable for individual water rates. Rates are presently paid by the OC Committee which then levies owners equally for them.

##### Falling Debris

The respondent accepts the need for such work but claims it should be undertaken and funded by the owners of the Units affected. You argue that the OC Committee is prepared to consider any request by the Complainant for an exclusive use by-law to allow the owners to construct the awnings in common property. It is not for all the owners to be responsible for this through the OC making a special levy on them for the works. You believe as the complainant is not an owner s/he cannot make this sort of complaint.

The common area in question is accessible to all residents but is mostly used by the adjoining lots on Level 2 including M. Smithy. You, as an example, hardly ever go there, preferring to bar-b-q on your own balcony with its ocean views.

Further, you do not think the OC owes a duty of care because residents throw rubbish out of their windows. The simple fact is the OC cannot control people's bad habits and therefore your responsibility does not extend to this degree. Even if harm results and is perhaps foreseeable that does not mean that the OC has a duty to erect awnings in the way suggested by M. Smithy. It is not that, in the Committee's view, the problem is with the common property but with the conduct of unknown third parties which you cannot control. Also, the OC does not want to have to go through the expense and conflict involved in extracting a special levy out of the owners to pay for these constructions to benefit a few. In your view, and that of the Committee the erection of extra awnings would not constitute a 'significant upgrade' in the terms of s53 of the Owners Corporation Act because it is not for the improvement of the common property rather the construction of new awnings for the improvement of the amenity of the adjoining lots including that of M. Smithy. Nor, is the erection of awning 'maintenance' under s46 or s47 but rather a significant infrastructure change and imposition on all lot owners.

## A6 THE ROLE OF ARBITRATOR/MEDIATOR

### The Role of Arbitrator/Mediator

**Arbitration followed by mediation known as Arb/Med.** This is a process where an arbitrator is appointed by the Committee of Management. Arguments are presented orally and/or in writing to the arbitrator who will make a decision but not initially reveal it to the parties. Instead he will place his/her decision in a sealed envelope only to be opened subsequently if the parties are not able to settle the matter in mediation. After sealing the decision in an envelope the arbitrator will revert to the role of a mediator and will use that process to try achieving a settlement. If all issues in the matter cannot be settled in the time provided the arbitrator/mediator will then open the sealed envelope and deliver the decision that will bind the parties.

When hearing the parties as an arbitrator hear the complainant first followed by the respondent. You can ask any clarifying questions.

#### Short Definitions

**Arbitration:** A process of adjudication where the parties present information/evidence and arguments to the arbitrator who then makes a determination that the parties agree to be bound by.

**Mediation:** a facilitative process where the mediator helps the parties identify issues, develop options and consider alternatives to enable the parties to reach their own solution to the issue/s. The mediator does not offer advice on the content of the dispute but is concerned with providing a process that enables the parties to manage the matter in their own way.

#### Things to keep in mind

1. Ensure you understand the respective roles of arbitrator and mediator. If you do not ask one of the instructors. An arbitrator is an independent neutral whose role is to listen to evidence presented by the parties and then make a decision which is then communicated to the parties. A mediator actively encourages the parties to negotiate with each other so that they can make a decision themselves. A mediator can provide some options for settlement if the parties are 'stuck'.
2. If in doubt ask an instructor for directions not one of your fellow role-players.
3. You are the time keeper and must keep the roleplay to the times provided for. No extra time will be given.
4. Time limits below are the maximum time you have for each step in the process. You can finish earlier if you have completed the element you are working on. If you cannot reach agreement in the time given this is not important.

## Suggested Sequence

Sequence
1. Read the roleplay instructions provided.
2. Set up a meeting area where the parties can talk to you and each other in relative comfort.
3. Your first role is as arbitrator where you will listen to each of the parties making sure that they do not interrupt each other.
4. After listening to the parties explain that you will make a decision based on their submissions and that this decision will be sealed and only opened if they cannot reach an agreement in the mediation to follow. Get a copy of the decision from the Instructor.
5. Now explain to them that you will act as a mediator and they will be expected to reach a decision for themselves if possible. Explain if they cannot reach a decision you will then present them with a written decision which you have already made.
6. Draft a list of issues/agenda and get the parties to agree to this as the basis of discussion. The parties can add to this list.
7. Try to get the parties to talk to each other about each issue in turn.
8. Try to get each party to consider options for resolving each issue and then agreeing to those options with each other.
9. Make a simple written agreement if possible. If you cannot reach agreement adjourn as in 11.
10. Adjourn to allow the parties to complete a questionnaire provided by the instructor – keep the parties in the meeting area whilst they are doing this.
11. If the parties are unable to reach agreement provide them with a copy of the written decision and explain to them who you have made the decision in favour of.
12. Ask the parties to complete another questionnaire provided by the instructor - keep the parties in the meeting area whilst they are doing this.
13. Complete a questionnaire provided by the instructor.
14. Finish the role-play and come back to the main class area for a debrief.



## **A7 THE ARBITRATOR'S DECISION**

**Smithy (the complainant)**

**v**

**Owners Corporation 1234 ('Ocean Shores')(the respondent)**

### **Decision of the Arbitrator Appointed under the Internal Dispute Resolution Rules of Owners Corporation 1234**

**This decision is made after hearing submissions from M. Smithy (the complainant), and M. Marty, for the respondent Owners Corporation 1234.**

**I have concluded on balance that the complainant's complaints and the suggested remedies for the issues raised cannot be supported. I therefore find, on all issues, for the respondent. The following short reasons are provided in support of this conclusion.**

#### **Water Meters: Should there be individual meters?**

1. The complainant, M. Smithy's, contentions concerning the water meters raises the issue of the process to be put in place if individual meters were installed. It is clear that some person would have to be nominated and prepared to read each individual lot meter. This would also necessitate knowing when the Council was reading its meter. Further, there may be an issue of the person gaining access to each lot to read its meter. However, when armed with the individual readings calculation of the split of the Council rate should not be an onerous or problematic task.
2. Of course, the cost of the meters and their installation must still be taken into account. I accept the complainants evidence about the cost of such installation.
3. In all the circumstances, the Owners Corporation's (the respondent) rejection of the complainant's proposal was not unreasonable. The installation of individual meters would involve some cost to the unit holders and the establishment and implementation of a meter reading scheme which could have practical issues as to the timing of meter readings and access to meters.
4. There is a real possibility that this could be a case of the cure being just as bad as the complaint and so ultimately any benefit to the unit holders would be illusory.
5. Accordingly, that aspect of the complaint is dismissed and the Owners Corporation decision affirmed.

**Does the Owners Corporation have a duty to provide shelter to protect those lawfully on Lot 14 from material falling into the lot?**

6. For the following reasons I find for the respondent owners corporation on this question:
- a) The source of the falling debris cannot be ascertained;
  - b) There is no obligation on the Owners Corporation to erect a new structure on the common property to enhance or protect it especially where, as in this case, there are a majority of lot owners opposed to this course of action;
  - c) It is not accepted that the new awnings suggested by the Complainant would 'improve' or enhance the property under s 53 of the Act. The motive to protect people is not enough to meet the requirements of s 53;
  - d) Whilst the Owners Corporation does have a duty to maintain the common property this does not mean it has to erect new awnings in the manner proposed by the Complainant;
  - e) The Owners Corporation is not responsible for the an unknown occupiers conduct (such as that of throwing rubbish out of a window) under the Act, or otherwise, even if that particular person is in breach of the Act; and
  - f) Finally, there is no convincing argument that the building is defective to the degree which requires the Owners Corporation as Respondent to address this issue at law.
7. Accordingly, the complainant's complaints are dismissed.

**The Arbitrator**

## A8 THE ROLE OF MEDIATOR/ARBITRATOR SAME

### The Role of Mediator/Arbitrator Same

Mediation followed by arbitration by the same person known as Med/Arb.Same. This is a process where the mediator will help the parties reach their own decision but the mediator will also have the ability to advise options which the parties may like to consider but which they do not have to accept. If the parties cannot reach a decision and settle all issues within a reasonable time the Mediator will bring the mediation to a close and will commence arbitration. The parties will then be able to present arguments and information to the arbitrator who will then make a decision.

#### Short Definitions

**Mediation:** a facilitative process where the mediator helps the parties identify issues, develop options and consider alternatives to enable the parties to reach their own solution to the issue/s. The mediator does not offer advice on the content of the dispute but is concerned with providing a process that enables the parties to manage the matter in their own way.

**Arbitration:** A process of adjudication where the parties present information/evidence and arguments to the arbitrator who then makes a determination that the parties agree to be bound by.

#### Things to keep in mind

1. Ensure you understand the respective roles of mediator and arbitrator. If you do not ask one of the instructors. An arbitrator is an independent neutral whose role is to listen to evidence presented by the parties and then make a decision which is then communicated to the parties. A mediator actively encourages the parties to negotiate with each other so that they can make a decision themselves. A mediator can provide some options for settlement if the parties are 'stuck'.
2. If in doubt ask an instructor for directions not one of your fellow role-players.
3. **You are the time keeper and must keep the roleplay to the times provided:** no extra time will be given.
4. Time limits below are the maximum time you have for each step in the process. You can finish earlier if you have completed the element you are working on. If you cannot reach agreement in the time given this is not important.

#### Sequence

<b>Sequence</b>
1. Read the role-play instructions provided.
2. Set up a meeting area where the parties can talk to you and each other in relative comfort.
3. Your first role is as mediator where they will be expected to reach a decision for themselves if possible. Explain if they cannot reach a decision you will then go into your role as arbitrator and will then present them with a written decision after hearing their evidence.
4. Listen to each party in turn for five minutes then draft a list of issues/agenda and get the parties to agree to this as the basis of discussion
5. Try to get the parties to talk to each other about each issue in turn.
6. Try to get each party to consider options for resolving each issue and then agreeing to those options with each other.
7. Make a simple written agreement if possible. If you cannot reach agreement adjourn as in the next step.
8. Adjourn to allow the parties to complete a questionnaire provided by the instructor – keep the parties in the meeting area whilst they are doing this.
9. Now go into your next role as arbitrator where you will explain that they can make further short submissions for up to 5 minutes each then listen to each of the parties making sure that they do not interrupt each other.
10. After listening to the parties explain that you will make a decision based on their submissions. Obtain a copy of the arbitration decision from the Instructor.
11. Present the parties with your written decision and explain it to them as best you can.
12. Ask the parties to complete another questionnaire provided by the instructor - keep the parties in the meeting area whilst they are doing this.
13. Complete a questionnaire provided by the instructor.
14. Finish the role-play and come back to the main class area for a debrief

## A9 THE ROLE OF MEDIATOR/ARBITRATOR DIFFERENT

### The Role of Mediator/Arbitrator Different

**Mediation followed by arbitration by different persons known as Med/Arb.Diff.** This is similar to Med/Arb.Same except that if the parties cannot reach agreement at the mediation phase a different person to the Mediator will be appointed to arbitrate the matter. It is a process where the mediator helps the parties to reach their own decision but who also has the ability to advise options which the parties may like to consider but which they do not have to accept. If the parties cannot reach a decision and settle all issues within a reasonable time the Mediator will bring the mediation to a close. Another person will then commence arbitration. The parties will be able to present arguments and information to the arbitrator who will then make a decision.

#### Short Definitions

**Mediation:** a facilitative process where the mediator helps the parties identify issues, develop options and consider alternatives to enable the parties to reach their own solution to the issue/s. The mediator does not offer advice on the content of the dispute but is concerned with providing a process that enables the parties to manage the matter in their own way.

**Arbitration:** A process of adjudication where the parties present information/evidence and arguments to the arbitrator who then makes a determination that the parties agree to be bound by.

#### Things to keep in mind

1. Ensure you understand the respective roles of mediator and arbitrator. If you do not ask one of the instructors. An arbitrator is an independent neutral whose role is to listen to evidence presented by the parties and then make a decision which is then communicated to the parties. A mediator actively encourages the parties to negotiate with each other so that they can make a decision themselves. A mediator can provide some options for settlement if the parties are 'stuck'.
2. If in doubt ask an instructor for directions not one of your fellow role-players.
3. You are the time keeper and must keep the roleplay to the times provided for. No extra time will be given.
4. Time limits below are the maximum time you have for each step in the process. You can finish earlier if you have completed the element you are working on. If you cannot reach agreement in the time given this is not important.

#### Sequence

### Sequence

1. Read the roleplay instructions provided.
2. Set up a meeting area where the parties can talk to you and each other in relative comfort.
3. Bring the parties you are working with into the meeting area, introduce yourself and then explain your role and the time limits. Your first role is as mediator where the parties will be expected to reach a decision for themselves if possible. Explain if they cannot reach a decision you will then go into your role as arbitrator and will then present them with a written decision after hearing their evidence.
4. Listen to each party for five minutes then draft a list of issues/agenda and get the parties to agree to this as the basis of discussion
5. Try to get the parties to talk to each other about each issue in turn.
6. Try to get each party to consider options for resolving each issue and then agreeing to those options with each other.
7. Make a simple written agreement if possible. If you cannot reach agreement adjourn as in the next step.
8. Adjourn to allow the parties to complete a questionnaire provided by the instructor – keep the parties in the meeting area whilst they are doing this. At this time another person will come in and take over as arbitrator – they have a different set of instructions to you. You can stay and observe.
9. Complete a questionnaire provided by the instructor.
10. After the roleplay is finished come back to the main class area for a debrief.

## A10 THE ROLE OF MEDIATOR/ARBITRATOR DIFFERENT

### The Role of Arbitrator following a Mediation by a Different Person

#### Arbitration followed by mediation known as Arb/Med.

You will conduct this arbitration after mediation has been conducted by another party who has unsuccessfully tried to mediate the matter between the parties. Hear the complainant first followed by the respondent. You can ask any clarifying questions. Make the process reasonably formal and make sure the parties do not interrupt each other.

#### Short Definitions

**Arbitration:** A process of adjudication where the parties present information/evidence and arguments to the arbitrator who then makes a determination that the parties agree to be bound by.

**Mediation:** a facilitative process where the mediator helps the parties identify issues, develop options and consider alternatives to enable the parties to reach their own solution to the issue/s. The mediator does not offer advice on the content of the dispute but is concerned with providing a process that enables the parties to manage the matter in their own way.

#### Things to keep in mind

1. Ensure you understand the respective roles of arbitrator and mediator. If you do not ask one of the instructors. An arbitrator is an independent neutral whose role is to listen to evidence presented by the parties and then make a decision which is then communicated to the parties. A mediator actively encourages the parties to negotiate with each other so that they can make a decision themselves. A mediator can provide some options for settlement if the parties are 'stuck'.
2. If in doubt ask an instructor for directions not one of your fellow role-players.
3. You are the time keeper and must keep the roleplay to the times provided for. No extra time will be given.
4. Time limits below are the maximum time you have for each step in the process. You can finish earlier if you have completed the element you are working on. If you cannot reach agreement in the time given this is not important.

#### Sequence

### Sequence

1. Read the roleplay instructions provided.
2. Bring the parties you are working with into the meeting area, introduce yourself and then explain your role and the time limits.
3. Your first role as arbitrator where you will listen to each of the parties making sure that they do not interrupt each other.
4. After listening to the parties explain that you will make a decision based on their submissions. Have a short break of two minutes.
5. Deliver your decision and give them a copy. Allow them to read it and ask any clarifying questions.
6. Ask the parties to complete another questionnaire provided by the instructor - keep the parties in the meeting area whilst they are doing this.
7. Complete a questionnaire provided by the instructor.
8. Finish the role-play and come back to the main class area for a debrief







## A12 Questionnaire to Measure Various Aspects of Mediation Procedures

Code Number.....

Date of Questionnaire: ...../...../.....

### Questionnaire to Measure Various Aspects of Mediation Procedures in an Owners Corporation Dispute

**Instructions:** This questionnaire is designed to be completed after you have completed mediation in the intervention processes prescribed for the research project. Each question has a five point scale next to it with 1 representing 'Strongly Disagree' and 5 representing 'Strongly Agree'. You can answer the question by circling a number for each question. The results of the questionnaire will be confidential and your identity will not be disclosed.

#### Identifying Data (Please complete):

Are you a Complainant or Respondent in the role play? (Please circle)

Have you included your code number in the space above?

Is this questionnaire completed after the completion of the mediation? (Yes/No)

What process are you involved in? Arb/Med: Med/Arb.Same: Med/Arb.Diff (please circle)

#### 1. The following items refer to the mediation procedures used to arrive at an attempted settlement of the dispute.

1.1 Have you been able to express your views and feelings about the procedures?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

1.2 Have you had influence over the possible settlement of the dispute attempted by those procedures?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

1.3 Have those procedures been applied consistently?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

1.4 Have those procedures been free of bias?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree



3.3 Has s/he treated you with respect?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

3.4 Has s/he refrained from improper remarks or comments?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

**4. The following questions refer to the mediator. To what extent:**

4.1 Has s/he been candid with you in his/her communications with you?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

4.2 Has s/he explained the procedures thoroughly?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

4.3 Were his/her explanations regarding the procedures reasonable?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

4.4 Has s/he communicated the details in a timely manner?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

4.5 Has s/he seemed to tailor his/her communications specific to individuals needs?

1                      2                      3                      4                      5  
Strongly Disagree                      Strongly Agree

**Thankyou**

## **APPENDIX B AN ALTERNATIVE MODEL SCHEME FOR OC DISPUTES**

## **Complaints and Grievances: Adopting Internal Rules for Owners Corporations**

**1. Why adopt internal dispute resolution rules?** Neighbourhood disputes can be divisive and damaging to the individuals and communities concerned. These disputes can be even more difficult within a residential complex governed by the procedures of the Owners Corporation Act 2006 (the Act). Recognising this the management of Victoria Body Corporate Services Pty Ltd has funded and actively consulted in the production of rules which will allow for the better management of disputes and differences that may arise.

**2. Under previous legislation** persons who lived in an owners corporation (formerly known as a “body corporate”) who had a dispute could apply to the Magistrates’ Court for a declaration or order determining the issue. This was often slow, difficult and expensive for parties.

**3. The new legislative framework** is designed to promote self-governance. It provides a legislative framework to owners and residents to work together and to resolve disputes through dialogue, consultation and negotiation.

**4. The Act provides for three tiers** of dispute management. The first tier is dispute prevention. The second tier provides for access to Consumer Affairs Victoria (CAV) which will provide conciliation for disputes and, as necessary, referral to the Victorian Civil and Administrative Tribunal (VCAT). The third tier is VCAT which will consider cases involving more complex technical and legal issues relating to the operations of owner corporations.

**5. The Act also provides that model rules** will apply if the owners corporation itself does not have its own rules in place. These model rules are very broad and require, amongst other things, that a written notification of a dispute must be made to the owners corporation and that the parties in dispute, along with the corporation, must meet to discuss the matter.

**6. There are a number of issues concerning the model rules** in relation to dispute resolution. First, they are quite general in approach and therefore may not meet the needs of particular owners corporations. Second, they do not specifically allow for the use of specialist third party interventions such as conciliation or arbitration. Third, for some complex disputes they could take quite a long time to resolve and involve considerable expense. Finally, the Rules could be quite difficult to implement especially because they require the “grievance committee or the owners corporation” to meet with the parties to the dispute within 14 days of notification. This could be quite difficult and put the owners corporation itself in breach of the Act if this provision is not met.

**7. The appropriate design of any alternative** process will depend the size of the corporation as well the nature of the disputes likely to be encountered. A process consistent with the Act and designed to manage a range of common conflicts and disputes likely to be encountered in owners corporations is provided on the following pages. It is designed to replace the default model rules provided for in the legislation.

**8. A sample special resolution** to go before an owners corporation committee is included so as to enable the adoption of the process.

**9. The new process** is, like that in the Act itself, a three stage process:

Stage 1: **Self –help**: the parties are encouraged to meet and talk informally using the formulation in the model rules;

Stage 2: **Conciliation**: a process similar to mediation which enables the parties to reach their own solution to the issue/s but allows the conciliator to provide a range of options if the parties agree and if appropriate in the circumstance; and

Stage 3: **Arbitration**: A process of adjudication where the parties agree to be bound by the decision of the arbitrator.

**10. The new Rules** are intended to allow the parties to present their cases without the need for legal representation. The process requires the parties to present their cases and accompanying materials to the conciliator and arbitrator.

**11. The advantages** of proceeding in the way is that they allow for the quick and efficient resolution of disputes. Also, the parties and the owners corporation can keep the dispute within a clear process where they are able to plan or predict a process with some certainty.

**12. How to implement your internal complaints and grievances process?** Three simple steps enable your owners corporation to adopt its own process of dispute management.

- i. read the model rules attached and make any modifications necessary;
- ii. present the special resolution for ratification at an owners corporation meeting;
- iii. set up a Dispute Resolution Committee; and
- iv. register the new Rules with the Registrar of Titles.

**Prepared for Victoria Body Corporate Pty Ltd. by Peter Condliffe,  
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**Rules for the Conciliation and Arbitration of Owners Corporation Disputes and Grievances Pursuant to section 138 of the Owners Corporations Act 2006**

**Rules of the .....(insert name of corporation) for the Conciliation and Arbitration of Owners Corporation Disputes and Complaints Pursuant to §138 of the Owners Corporations Act 2006**

**Preamble**

1. Section 138 of the *Owners Corporations Act 2006* provides that the an owners corporation, by special resolution, may make rules for or with respect to dispute resolution including internal grievance procedures, hearing procedures and communication procedures. These Rules are made pursuant to this section.
2. The dispute resolution and grievance procedures set out in these rules apply to disputes involving a lot owner, manager, an occupier or the owners corporation.
3. The owners corporation encourages residents to:
  - (a) communicate with each other their concerns because this can often be enough to resolve or manage the matter.
  - (b) notify the owners corporation committee or manager of concerns about the welfare and safety of people and the building including by making a written request for the matter to be discussed at the next meeting of the owners corporation.

**Initial Complaint**

4. The party initiating a dispute or grievance (*the initiator*) about a lot owner, an occupier or an owners corporation manager about an alleged breach of an obligation under the *Owners Corporations Act 2006* or *Owners Corporations Regulations 2007* or the rules, must put it in writing to the dispute resolution or grievance committee of the owners corporation (the DR Committee) or the owners corporation. **An approved form titled “Internal Complaint and Dispute Notification Form” (the notification) is attached to these Rules for this purpose.**
5. If the owners corporation decides to take no action, it must provide written reasons. If the owners corporation does take action, it must give written notice to the person/s subject to the complaint. The owners corporation must also give a copy of the notice to the lot owner (if the lot owner is not the subject of the complaint). Any breach of the owners corporation rules or the *Act* must be rectified within such other reasonable time as the Owners Corporation or DR Committee decides or within 28 days of the date of the notice if no time is specified.
6. The decision in paragraph 5 above includes:
  - (a) giving direction for one party to talk and meet with the other party or parties to the dispute with the attendance of one or more representatives of the DR Committee or owners corporation; and

- (b) giving direction for the initiator to provide better and further particulars of the dispute and/or grievance.
7. If the DR Committee or the owners corporation considers that it would be appropriate for the matter to be referred to a third party neutral for the purpose of conciliation or arbitration then the following procedures shall be used.

### **Conciliation**

8. Conciliation is a process in which the parties with the assistance of the conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.
9. Within fourteen (14) days or earlier after receipt of the notification the DR Committee or owners corporation can appoint a suitably qualified independent person as conciliator, and will advise the parties and the conciliator accordingly.
10. The Conciliator shall:
- (a) adopt procedures suitable for quick, cost-effective and fair resolution of the dispute., minimising formality as far as possible; and
  - (b) be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party; and
11. The parties shall:
- (a) do all things reasonably necessary for the quick, cost-effective and fair resolution of the dispute;
  - (b) comply without delay with any direction or ruling by the Conciliator; and
  - (c) provide to the Conciliator copies of all relevant documents or other material to the Conciliator and all other parties to the dispute.
12. The conciliation procedure will be at the discretion of the Conciliator, and may include the convening of meetings with the parties, in person, electronically or by teleconferencing, to develop possible solutions to the dispute.
13. Unless the parties otherwise agree or the Conciliator considers that it would not assist resolution of the dispute, the Conciliator can provide a written or oral report to the parties prior to the conclusion of the conciliation process containing the Conciliator's suggestions for settlement. Any suggestions for settlement by the Conciliator are not binding on the parties and are intended to assist the parties to settle the dispute.
14. If the parties settle the dispute by conciliation, the Conciliator, with the help of the parties, shall prepare a written agreement recording the settlement terms for signature by the parties. The owners corporation, if it is not a party to the conciliation, will be provided with a written notice of the outcome (settlement/non-settlement) within seven (7) days of the conclusion of the conciliation.

15. A party to the dispute may appoint a person to act or appear on his or her behalf at the meeting.
16. If the parties do not settle the dispute within twenty-one (21) days of the Conciliator's appointment (or such other time agreed in writing by the parties), the dispute may be referred to arbitration by the Conciliator. The documents previously submitted to the Conciliator shall be passed on to the Arbitrator. The Conciliator must not communicate to the Arbitrator any suggestions for settlement of the dispute or any information given in confidence by either party nor any views expressed by the Conciliator.
17. If at any stage the parties agree or the Conciliator considers that the dispute is inappropriate for continuation of the conciliation process, then the matter may be referred to arbitration under these Rules.
18. Unless jointly agreed and requested by the parties, the Conciliator shall not be appointed as Arbitrator.
19. The Conciliator shall not act as an advocate, adviser or witness for a party in the arbitration, or be required to disclose any information about any matter arising during the conciliation procedure other than as provided by these Rules.
20. The Conciliator's fees and expenses shall be paid by the parties in joint and equal shares and a portion of these in advance as required by the Conciliator.
21. Unless otherwise agreed by the parties, each party shall bear its own costs of the conciliation regardless of the outcome.

### **Arbitration Proceedings**

22. Arbitration is a process in which the parties to a dispute present arguments, information and evidence to the Arbitrator who makes a determination which the parties agree to be bound by and have agreed to be bound by pursuant to these Rules.
23. If the parties wish to proceed directly to arbitration, or if conciliation has not resolved the dispute and the Conciliator has referred the matter onto Arbitration under these Rules a written notice must be submitted to the DR Committee or the owners corporation.
24. A suitably qualified independent person shall be appointed as Arbitrator by the DR Committee or owners corporation if a conciliator has not been appointed and the parties wish to proceed directly to arbitration, and will advise the parties and the Arbitrator accordingly within seven (7) days of receiving the notification.
25. Once the Arbitrator is appointed, all communications with the Arbitrator should be in writing unless otherwise directed by the Arbitrator (in hard copy or electronic form) and should be copied to all other parties.
26. The Arbitrator shall:
  - (a) adopt procedures suitable for quick, cost-effective and fair determination of the dispute, minimising formality as far as possible; and
  - (b) be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party.

27. The parties shall:
- (a) do all things reasonably necessary for the quick, cost-effective and fair resolution of the dispute;
  - (b) comply without delay with any direction or ruling by the Arbitrator.
28. Unless otherwise agreed in writing by the parties or otherwise determined by the Arbitrator, the arbitration shall proceed in the following manner:
- (a) The initiator shall, within seven (7) days of the date on which the Arbitrator is appointed provide to each other party and to the Arbitrator a document specifying the nature and basis of the claim, the remedy sought and enclosing copies of all documents and any witness statements or expert reports relied upon in support of the claim.
  - (b) Within a further seven (7) days, any other party (respondent/s) shall serve its response to the claimant's claim, setting out what it says as to the nature and basis of the claim, the amount claimed (and how it has been calculated) and any other remedy sought, and enclosing copies of all documents and any witness statements or expert reports relied upon by the respondent in response to the claim.
  - (c) If any party other than the initiator wishes to make a counterclaim against the initiator or any other party, then it shall within the period specified in paragraph (b) serve a document setting out its counterclaim including what it says as to the nature and basis of the counterclaim and any remedy sought in the counterclaim, and enclosing copies of all documents and any witness statements or expert reports relied upon in support of the counterclaim.
  - (d) If a counterclaim is served, then, within a further seven (7) days, any respondent to the counterclaim shall serve its response to the counterclaim, including what it says as to the nature and basis of the counterclaim and any remedy sought in the counterclaim, and enclosing copies of all documents and any witness statements or expert reports relied upon in response to the counterclaim.
  - (e) If the dispute concerns issues which involve expert evidence, then if Arbitrator considers it appropriate, he or she may direct that:
    - (i) expert reports not be served but that, instead, the experts retained by the parties are to be each provided with the material otherwise served, and then jointly meet (by a time fixed by the Arbitrator) and produce a joint report or reports (by a time fixed by the Arbitrator) recording the matters on which they agree, the matters on which they disagree, and identifying the reasons for any such disagreement and their respective contentions in relation to same;
    - (ii) the experts retained by the parties attend one or more meetings chaired by the Arbitrator, so as to narrow issues in dispute, which meetings are to be held at a time and are to be conducted and recorded in a manner directed by the Arbitrator.
  - (f) The Arbitrator may make such other directions or rulings as he or she considers to be reasonably appropriate in the circumstances.
  - (g) The Arbitrator shall determine the matter based on the written material served or produced under this Rule unless the Arbitrator determines that an oral hearing is necessary to explain or resolve conflicts in that written material in relation to any one or more of the issues in dispute.

- (h) If the Arbitrator determines that an oral hearing should be held in relation to any one or more of the issues in dispute, then that oral hearing shall be conducted as soon as practicable at a time and in the manner directed by the Arbitrator, including any reasonable time limits on oral evidence and the provision of written opening addresses and final submissions.
  - (i) Any times fixed under this Rule may be varied by agreement of the parties. In the absence of such agreement, on proper cause being shown by a party, the Arbitrator may vary the times fixed on such terms as to costs or otherwise as the Arbitrator, in his or her discretion, considers reasonable in the circumstances.
  - (j) Subject to paragraph (i), if any party fails to deliver anything required under these Rules within fourteen (14) days of the date on which it is due, then:
    - (a) where a claim or counterclaim is not delivered, it shall deem to be abandoned;
    - (b) where a claim is abandoned, the arbitration will not proceed unless a counterclaim has been delivered (in which case the arbitration will proceed on the counterclaim only);
    - (c) where a counter claim is abandoned, the arbitration will proceed on the claim only;
    - (d) otherwise, the arbitration shall proceed as the Arbitrator considers appropriate in the circumstances.
29. Unless the parties otherwise agree, the law to be applied in the arbitration shall be the law of the place with the closest connection to the dispute. If the parties cannot agree on the place with the closest connection to the dispute, then the law to be applied shall be the law of the state or territory where the arbitrator ordinarily resides.
30. Within fourteen (14) days after receiving all submissions and evidence, the Arbitrator shall make a final and binding award with reasons. The Arbitrator will send a copy of the award to each party and to the DR Committee or the owners corporation.
31. Unless otherwise directed, any decision of the arbitrator shall be implemented within 14 days of dispatch of the award to the parties or such other time as the arbitrator shall determine is reasonable and/or necessary in the circumstances.
32. The Arbitrator's fees and expenses shall be paid by the parties jointly and equally unless otherwise agreed by them.
33. Unless otherwise agreed by the parties or ordered by the Arbitrator each party shall bear its own costs of the arbitration.
34. The Arbitrator may order one party to pay the whole or part of another party's costs where the first party has acted unreasonably including through unexplained delay and/or caused the other party unnecessary expense.
-

## Internal Complaint and Dispute Notification Form

This form is made pursuant to the Rules for the Conciliation and Arbitration of Owners Corporation Disputes and Grievances Pursuant to Section 138 of the Owners Corporations Act 2006

1. Name of Owners Corporation: \_\_\_\_\_

### 2. Your details

Name \_\_\_\_\_ Lot Number \_\_\_\_\_

Street address  
\_\_\_\_\_

\_\_\_\_\_ Suburb \_\_\_\_\_

Postcode \_\_\_\_\_ Telephone number \_\_\_\_\_

Mobile \_\_\_\_\_

Email address \_\_\_\_\_

Are you a (tick the box) Lot Owner  Occupier  Manager

### 3. Details of person/s you are making the complaint against

Person's Name \_\_\_\_\_

Address (include the lot number) \_\_\_\_\_  
\_\_\_\_\_

4. Details of the dispute/complaint including dates and times (if you need more space attach a separate sheet)

5. **Do you have any written documents to support your complaint? If so please list and attach copies.** (e.g. receipts, quotes, contracts, invoices or any documents you have served on the landlord/agent/manager or they have served on you)
  
6. **What outcome/remedy are you seeking – how do you want your problem to be solved?** *(if you need more space, please attach a separate sheet)*
  
7. **What has you or others done to try and manage the complaint or dispute? Describe what you have done, who you have talked to and what has been offered by you or others? What do you think the other persons concerns are?**
  
8. **What do you think the other person/s in the dispute/complaint want/expect?**

**9. Anything else to add?**

**10. Have you read the internal Rules for the Conciliation and Arbitration of Owners Corporation Disputes and Grievances Pursuant to Section 138 of the Owners Corporations Act 2006? Yes/No?**

Would you like a copy? Yes/No?

*(a copy of these will be provided to you if you have not read them and request a copy)*

**11. What happens after you make the complaint?**

The Owners Corporation and/or its Dispute Resolution Committee will consider the information provided and respond to you in writing or by telephone advising you of its decision and the next steps to be made.

Details of all complaints and decisions are required to be made at the AGM of the lot owners.

Records of the complaints must be kept for 7 years.

**12. How to lodge this complaint**

*(post or place this box in the postal box of the owners corporation or provide it to the manager of the owners corporation and keep a copy for yourself.)*

I declare that the above information is true and correct to the best of my knowledge. I agree that the information I have given in this form may be used or disclosed by the Owners Corporation to process this complaint.

Signature: \_\_\_\_\_

Date: ...../...../.....

**SPECIAL RESOLUTION OF THE** *(insert name of owners corporation)*

.....

OWNERS CORPORATION (the corporation) that the Owners Corporations Rules in the form annexed to the \*Ballot Paper / \*Notice of Meeting marked A are made (subject to the Registrar of Titles recording the making of such Owners Corporation Rules)

**PURPOSE:** The Corporation believes that the cost, complexity, and delay inherent in dispute resolution proceedings and the potential damage they can do to relationships in our residential community indicates the need for alternative means of dispute management. These Rules shall establish procedures for addressing disputes arising between the Corporation, lot owners and/or residents (and between lot owners and/or residents).

**AUTHORITY:** The Articles and Bylaws of the Owners Corporation (the corporation) and s. 138 of the Owners Corporation Act 2006

**EFFECTIVE DATE:** when approved by the Registrar of Titles.

**RESOLUTION:**

- 1) In the event of any dispute between the Corporation and lot owners and/or residents (and disputes between individual lot owners and/or residents) in situations that do not involve an imminent threat to the peace, health, or safety of the community, the Corporation and lot owner(s)/resident/s involved in the dispute shall work to resolve the dispute using the procedures set forth in the “Rules for the Conciliation and Arbitration of Owners Corporation Disputes and Grievances Pursuant to Section 138 of the Owners Corporations Act 2006”(the Rules) attached hereto and marked “A” prior to lodging a complaint or grievance to an outside body or Tribunal or initiating a legal proceeding.
  
- 2) There shall be created a “Dispute Resolution Committee” consisting of the Chair of the Corporation and two other members elected by the Corporation who will help manage and monitor grievances and disputes as outlined in the Rules. The DR Committee will be created at the time of the

passing of this resolution and shall subsequently be reconstituted and elected at every AGM of the corporation.

- 3) For each of the resolution procedures, the Corporation, lot owners and residents agree to be bound by the Rules hereby passed and further that Victorian law governs the process and the parties do not waive their right to employ legal or other assistance at their own expense to assist them.
  
- 4) That members of the Committee of the Corporation are authorized to witness the affixing of the common seal to the application to the Registrar of Titles to register the Rules and the Committee of the Corporation or Manager is authorized to lodge the application on behalf of the Corporation following execution of documents.
  
- 5) The following disputes (if any) are exempted from this policy: (list exempted disputes here)

Date of Resolution: ...../...../.....

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