

# WHAT PROCESS DO DISPUTANTS WANT? AN EXPERIMENT IN DISPUTANT PREFERENCES

PETER CONDLIFFE\* AND JOHN ZELEZNIKOW\*\*

*A unique empirical study into the high density housing sector was used 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 was empirically tested on two hundred and fifty-two participants at three levels. These levels were their preferences, their perceptions of justice and some elements of efficiency. Each of these levels was tested in relation to three processes: mediation followed by arbitration conducted by the same person ('Med/Arb.Same'); mediation followed by arbitration conducted by a different person ('Med/Arb.Diff'); and arbitration followed by mediation conducted by the same person ('Arb/Med'). This article describes that area of the research concerned with preferences.*

*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. The study is important because of the rudimentary state of knowledge in this area and addresses two important questions: First, how do disputants make procedural preferences? Second, will these preferences impact on their perception of fairness of the process actually used?*

*The findings demonstrated that participants preferred the Med/Arb procedure over Arb/Med. Med/Arb.Same was by far the most preferred process. This was highly consistent across the experimental conditions. That is, the ability to mediate a matter first to potentially deny the imposition of the arbitration option was highly preferred. Participants' reasons for these preferences could be explained by reference to their need for control rather than what was more just or fairer. However, their subjective rationales for choosing a particular process were largely based upon fairness perceptions. Party role, gender, or status of residence seemed to have little impact upon the preferences made or the reasons for those preferences.*

*Empirical findings with respect to preferences are especially important given that courts and tribunals in Australia are currently experimenting and trialling various ADR processes in order to meet the policy directions of government or to improve their case management practices. Implications for dispute system design are discussed.*

\* Barrister and Mediator, Victorian Bar.

\*\* Professor of Information Systems, Laboratory of Decision Support and Dispute Management, College of Business, Victoria University.

## I INTRODUCTION

The question: ‘What process do disputants prefer?’ is one that has been of interest for both theorists and practitioners in alternative dispute resolution (ADR) for a considerable time.<sup>1</sup> It is of some importance because the general utility of ADR 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* (Vic), 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 for the resolution of legal disputes.<sup>2</sup> Similarly, the *Civil Dispute Resolution Act 2011* (Cth) enacted by the federal Parliament provides for an even wider range of strictures on dispute resolution behaviour once a dispute reaches the legal sphere. Likewise, the recent introduction of legislation

- 1 See, eg, Cem Şafak Çukur and Cansel Özbayrak, ‘Analyses of Procedural Justice Preferences and Judgments for Adjudicative Dispute Resolutions in Turkish Context’ (2007) 22(59) *Türk Psikoloji Dergisi* 113; Morton Deutsch, ‘Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis for Distributive Justice?’ (1975) 31(3) *Journal of Social Issues* 137; Robert Folger and Edward Elyahu Kass, ‘Social Comparison and Fairness: A Counterfactual Simulations Perspective’ in Jerry Suls and Ladd Wheeler (eds), *Handbook of Social Comparison: Theory and Research* (Kluwer Academic, 2000) 423; Stephen M Garcia and Dale T Miller, ‘Social Categories and Group Preference Disputes: The Aversion to Winner-Take-All Solutions’ (2007) 10 *Group Processes & Intergroup Relations* 581; 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* (Lawrence Erlbaum Associates, 1993) 79; Edward Kass, ‘Interactional Justice, Negotiator Outcome Satisfaction, and Desire for Future Negotiations: R-E-S-P-E-C-T at the Negotiating Table’ (2008) 19 *International Journal of Conflict Management* 319; Gerald S Leventhal, ‘The Distribution of Rewards and Resources in Groups and Organizations’ (1976) 9 *Advances in Experimental Social Psychology* 91; Gerald S Leventhal, Jurgis Karuza and William Rick Fry, ‘Beyond Fairness: A Theory of Allocation Preferences’ in Gerold Mikula (ed), *Justice and Social Interaction: Experimental and Theoretical Contributions from Psychological Research* (Hans Huber Publishers, 1980) 167; E Allan Lind et al, ‘Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic’ (1993) 38 *Administrative Science Quarterly* 224; Donna Shestowsky, ‘Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea’ (2004) 10 *Psychology, Public Policy, and Law* 211; Tom R Tyler and E Allan Lind, ‘A Relational Model of Authority in Groups’ (1992) 25 *Advances in Experimental Social Psychology* 115.
- 2 This followed several comprehensive consultations and reports by Victoria’s Department of Justice: see Department of Justice, ‘New Directions for the Victorian Justice System 2004–2014’ (Attorney-General’s Justice Statement, May 2004); Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008). At the federal level, the immediate precursor to the introduction of the Civil Dispute Resolution Bill 2010 (Cth) was the report: National Alternative Dispute Resolution Advisory Council, ‘The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction’ (Report to the Attorney-General, September 2009). See also Access to Justice Advisory Committee, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Access to Justice: An Action Plan*, 2 May 1994; Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (1997); Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999); Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR — Its Role in Federal Dispute Resolution*, Issues Paper No 25 (1998); Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report No 75 (1995).

in Victoria to manage owners corporations (OCs) (previously known as ‘body corporates’) has emphasised the importance of dispute resolution processes before issuing proceedings in the Victorian Civil and Administrative Tribunal (VCAT). Strata schemes governed by an OC, also known as body corporate units or condominiums, 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 OC, whose members are the individual lot owners; and (e) day-to-day management of the OC 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 OC.<sup>3</sup> The experiment reported on in this paper 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 into OCs conducted by the authors forms part of a project funded by the Australian Research Council Linkage Grant (Project ID: LP 0882329) titled ‘Developing Negotiation Decision Support Systems that Promote Constructive Relationships Following Disputes’ (‘Project’).<sup>4</sup> The research places emphasis upon pre-experience rather than post-experience evaluations of preferences.<sup>5</sup>

Since 1981, the Australian 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>6</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 success 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 effectiveness of governance arrangements. The ageing of the housing stock itself and the demands this places upon maintenance and further investment is of particular concern. The transient nature of much of the resident population and their relations with owners and absent investor-landlords complicates the

3 Robert G Natelson, ‘Condominiums, Reform, and the *Unit Ownership Act*’ (1997) 58 *Montana Law Review* 495.

4 Research Data Australia, *Developing Negotiation Decision Support Systems that Promote Constructive Relationships Following Disputes* <<http://researchdata.ands.org.au/developing-negotiation-decision-following-disputes/62407>>.

5 See, eg, Shestowsky, above n 1, which also investigated pre-experience preferences.

6 Australian Bureau of Statistics, *Census Fact Sheet: Dwelling Structure* (19 March 2013) <<http://www.abs.gov.au/websitedbs/censushome.nsf/home/mediafactsheetsfirst>>.

management arrangements. Sherry<sup>7</sup> and Bounds<sup>8</sup> make the point that there is also an inherent imbalance of power between the residents of OCs 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>9</sup> For renters, this ability to feel in control and participate in decision-making may be a particularly acute point, reiterated by Easthope and Randolph in their review of governance arrangements in Sydney OCs. They state:

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, 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>10</sup>

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

## II DISPUTES IN OWNERS CORPORATIONS

Disputes in OCs are a form of 'neighbourhood disputing' that can be divisive and damaging to the individuals and communities concerned.<sup>11</sup> The first research in Australia to indicate the extent of neighbourhood disputes and the problems

7 Cathy Sherry, 'Long-Term Management Contracts and Developer Abuse in New South Wales' in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds), *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010) 159.

8 Michael Bounds, 'Governance and Residential Satisfaction in Multi-Owned Developments in Sydney' in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds), *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010) 145.

9 Ibid 146.

10 Hazel Easthope and Bill Randolph, 'Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia' (2009) 24 *Housing Studies* 243, 253 (emphasis altered) (citations omitted).

11 Scott E Mollen, 'Alternate Dispute Resolution of Condominium and Cooperative Conflicts' (1999) 73 *St John's Law Review* 75.

of managing them was reported in the Australian Household Dispute Study.<sup>12</sup> This study:

sought to provide an analysis of the legal and non-legal processes in Victorian society and their respective consequences. Interviews with 1019 homes were conducted ... The survey found that the extent of neighbour-related problems (such as occurred over animals, noise, trees, smoke, and so on) was far beyond any other single category of grievance with 39 per cent of households interviewed having experienced one or more neighbourhood grievances within the preceding three-year period. Of these, 35 per cent reached a dispute level, ie one or both neighbours approached each other or a third party about the matter. ...

The study also showed that ... grievances that reached the dispute level are much more likely to result in a damaged or destroyed relationship ... lower income groups are more likely to have unresolved grievances which they do not act upon; and ethnic groups tend not to 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 the majority of cases. Satisfaction with the role of all third parties was found to be low amongst those surveyed with over half the respondents claiming that their dispute had received no outcome or only part of one ... approximately 30 per cent of third parties attempt or suggest the use of force or threat to resolve the dispute. In only 7 per cent of cases were third parties perceived as acting to facilitate an agreement between the disputants in a conciliatory way.<sup>13</sup>

A more recent 2007 survey, also in Victoria, found that 5 per cent of disputes reported were between neighbours, just behind disputes about the supply of essential services (gas and water at 8 per cent) and with family (6 per cent).<sup>14</sup> Most of the total reported disputes (65 per cent) were resolved without any 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

12 Jeffrey Fitzgerald, 'A Comparative Empirical Study of Potential Disputes in Australia and the United States' (Working Paper 1982-84, Disputes Processing Research Program, University of Wisconsin Law School, 1982).

13 David Bryson, 'Victoria's Neighbourhood Mediation Centres Project' (1987) 12(3) *Legal Service Bulletin* 108, 109-10.

14 Graeme Peacock, Preslav Bondjakov and Erik Okerstrom, 'Dispute Resolution in Victoria: Community Survey 2007' (Survey prepared by Ipsos for Department of Justice, 4 June 2007) 3-4.

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 association. The majority (63 per cent) of those that have used a third party to resolve their disputes with family, neighbourhood and association 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>15</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>16</sup> Most OC conflict falls into two categories: quality of life or financial disputes.<sup>17</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 OCs 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.

Grosberg posits that there is an increasing correlation between the number of OC lot owners and the incidence of conflict.<sup>18</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>19</sup> Mollen and McKenzie both argue that, because decisions in OCs 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>20</sup> Toohey and Toohey summarise the particular context of OC disputes, referred to as 'community titles' in Queensland, as follows:

15 Ibid 35.

16 Mollen, above n 11, 76–7.

17 Ibid 80.

18 Lawrence M 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* 129, 133–4.

19 Ibid 135.

20 Mollen, above n 11, 80–1; Evan McKenzie, 'Emerging Regulatory Trends, Power and Competing Interests in US Common Interest Housing Developments' in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds), *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010) 53, 54.

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>21</sup>

### III THE DISPUTE MANAGEMENT REGIME IN VICTORIA

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>22</sup> Disputes in OCs are now governed in Victoria by the procedures of the *Owners Corporations Act 2006* (Vic) ('OCA'). Under the previous legislation, the *Subdivision Act 1988* (Vic), persons with a body corporate dispute (the previous name applied to OC) 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 scheme was perceived by many

21 Lisa Toohey and Daniel Toohey, 'Achieving Quality Outcomes in Community Titles Disputes: A Therapeutic Jurisprudence Approach' (Research Paper No 10–11, TC Beirne School of Law, University of Queensland, 2010) 7 (citations omitted), citing Christopher Guilding and Graham Bradley, *Settling in to Strata Titled Housing: A Study of the Psychosocial Challenges Arising for a Move to Large Scheme Body Corporate Living* (Queensland Development Research Institute, 2008) 8.

22 See Consumer Affairs Victoria, 'Final Report of the Body Corporate Review' (Report, 2006).

to be too limited, expensive and inaccessible, resulting in the legislative reforms that lead to the introduction of the *OCA*.<sup>23</sup>

The *OCA* 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 VCAT. The third tier is VCAT itself, which was originally designed to adjudicate cases involving more complex technical and legal issues relating to the operations of OCs.

The *OCA* also provides that legislated model rules ('Rules') will apply if the OC does not have its own internal rules in place.<sup>24</sup> These model rules are very broad and require, amongst other things, that a written notification of disputes must be made to the OC and that the parties in dispute, along with the OC, must meet to discuss the matter.<sup>25</sup> This legislative scheme provides the context for this research.

In general, this research project aimed to develop negotiation support systems that accord with notions of equity and fairness. The research centred 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, organisational, environmental and political disputes, no academic studies exist in the area of OC disputes.<sup>26</sup> A variation on Shestowsky's preference scales for each dispute intervention type was used to measure preference.<sup>27</sup>

The research compared three types of third-party intervention in a simulated OC dispute. These types of interventions were based upon different combinations of mediation and arbitration, which have been the subject of similar research.<sup>28</sup> Mediation and arbitration have been defined as follows:

**Arbitration:** A process in which the participants to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.

23 Consumer Affairs Victoria, 'Review of the Effectiveness and Efficiency of the *Subdivision Act 1988* as It Relates to the Creation and Operation of Bodies Corporate' (Issues Paper, 2003).

24 *OCA* s 139.

25 *Owners Corporations Regulations 2007* (Vic) sch 2.

26 See, eg, Peter J Carnevale and Carsten K W De Dreu, 'Laboratory Experiments on Negotiation and Social Conflict' (2005) 10 *International Negotiation* 51; Donald E Conlon, Henry Moon and K Yee Ng, 'Putting the Cart Before the Horse: The Benefits of Arbitrating before Mediating' (2012) 87 *Journal of Applied Psychology* 978; John Thibaut and Laurens Walker, 'A Theory of Procedure' (1978) 66 *California Law Review* 541; Peter J D Carnevale and Marya L 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 Psychological Association, Los Angeles, California, 23–27 August 1985); William H Ross, Cheryl Brantmeier and Tina Ciriacks, 'The Impact of Hybrid Dispute-Resolution Procedures on Constituent Fairness Judgments' (2002) 32 *Journal of Applied Social Psychology* 1151; William H Ross and Donald E Conlon, 'Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration' (2000) 25 *Academy of Management Review* 416.

27 Shestowsky, above n 1.

28 See, eg, Ross, Brantmeier and Ciriacks, above n 26.

**Mediation:** A process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.<sup>29</sup>

## A Methodology

The hypotheses posed in this research 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.

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, was 3.6, which equates to being in the range ‘somewhat plausible’ to ‘extremely plausible’.<sup>30</sup>

The simulation scenario was based upon two cases that had been tried before the New South Wales Consumer, Trader and Tenancy Tribunal.<sup>31</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 the simulation, the parties were advised by the OC that they had one of three choices under the OC’s internal dispute resolution rules if they could not settle the matter directly with the other party. These choices combine the processes of mediation and arbitration in different ways.

29 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) Attorney General’s Department <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>>.

30 The Likert scale was 1 = not plausible; 3 = somewhat plausible; 5 = extremely plausible. See Peter Condliffe, *Conflict in the Compact City: Preferences and the Search for Justice* (PhD Thesis, Victoria University, 2012) app A2, 175.

31 *Rossetto v Owners Corporation SP 71067 (Strata & Community Schemes)* [2008] NSWCTTT 859 (29 February 2008); *Tanner v Owners Corporation SP 21409 (Strata & Community Schemes)* [2008] NSWCTTT 806 (23 January 2008).

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.

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

**Choice 1: Arbitration followed by mediation (Arb/Med).** This is a process where a fictional Committee of Management appoints an arbitrator. The parties presented information and arguments orally and/or in writing to the arbitrator who made a decision but did not initially reveal it to them. Instead the arbitrator placed his/her decision in a sealed envelope only to be opened if the parties were subsequently unable to settle the matter. After sealing the decision in an envelope the arbitrator changed to the role of a mediator, and used that process to try and help the parties reach a settlement. If the parties are unable to settle the matter in a reasonable time the arbitrator/mediator then reverted to the role of arbitrator, opening the sealed envelope to deliver the previously prepared decision.

**Choice 2: Mediation followed by arbitration by the same person (Med/Arb. Same).** This was a process where the mediator helped the parties to reach their own decision. If they could not reach a decision within a reasonable time the mediator would then bring the mediation to a close and commence arbitration. The parties were able to present arguments and information to the arbitrator.

**Choice 3: Mediation followed by arbitration by a different person (Med/Arb. Diff).** This is similar to Med/Arb.Same, except that if the parties could not reach agreement at the mediation phase a different person to the mediator would be appointed to arbitrate the matter.

Experimentation with alternative methods in managing neighbourhood, housing and construction disputes similar to those in the research study has of course been going on for hundreds of years.<sup>32</sup> The traditional two-step process involving expert advice or determination followed by arbitration has been a cornerstone of such a process since at least the 19<sup>th</sup> century.<sup>33</sup> The shortcomings of this approach

32 Peter Condliffe, 'Arbitration: The Forgotten ADR?' (2004) 78(8) *Law Institute Journal* 42; Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2012) 113–47.

33 J Richard Cheeks, 'Multistep Dispute Resolution in Design and Construction Industry' (2003) 129 *Journal of Professional Issues in Engineering Education and Practice* 84.

became apparent in the latter part of the 20<sup>th</sup> 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 in 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>34</sup>

This reflects many of the developments described in the organisational 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>35</sup> Empirical findings with respect to preferences are therefore especially important given that courts and tribunals in Australia are currently experimenting and trialing various ADR processes in order to meet the policy directions of government or to improve their case management practices.<sup>36</sup>

#### IV TRIBUNALS AND THEIR RESPONSIVENESS

Courts and tribunals should 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 from adapting and applying the processes they are using in more systematic and perhaps sensitive ways.<sup>37</sup> Also, and importantly in the context of this research, the preferences

34 Ibid 87–90.

35 In *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 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 that in dealing with such matters the court should have regard to the public interest and the efficient use of limited court resources: cited in *Tinworth v W V Management Pty Ltd* [2009] VSC 552 (2 December 2009) [27] (Forrest J).

36 The trial of 'early neutral evaluation' in the Magistrates' Court of Victoria is a good current example. Parties are 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 a binding determination: see Peter Lauritsen, 'Early Neutral Evaluation Program in the Magistrates' Court' (Seminar presented at Continuing Professional Development Program, Law Institute of Victoria, Melbourne, 8 December 2010). Other 'experiments' in Victoria include: the establishment of the 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, see Department of Justice, 'New Directions', above n 2; Victorian Law Reform Commission, above n 2.

37 Shestovsky, above n 1, 213.

that disputants have for ADR processes is intimately related to their perceived fairness or justice.<sup>38</sup>

According to Tyler and Lind, individual choice and preference are important elements of procedural justice.<sup>39</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 greatly recognised and it is disputant 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 recognise and understand this to ensure continued confidence in their use and governance. It is implicit, for example, in the Practice Standards that guide the conduct of accredited mediators under the National Mediator Accreditation System.<sup>40</sup> Paragraph 2.5 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>41</sup>

38 See Jason A Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 *Journal of Applied Psychology* 386; Jason A Colquitt et al, 'Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research' (2001) 86 *Journal of Applied Psychology* 425; Donald E Conlon and Peter M Fasolo, 'Influence of Speed of Third-Party Intervention and Outcome on Negotiator and Constituent Fairness Judgments' (1990) 33 *Academy of Management Journal* 833; Donald E Conlon and William H Ross, 'Influence of Movement toward Agreement and Third Party Intervention on Negotiator Fairness Judgments' (1992) 3 *International Journal of Conflict Management* 207; Daniel Druckman and Cecilia Albin, 'Distributive Justice and the Durability of Peace Agreements' (2011) 37 *Review of International Studies* 1137; Thibaut and Walker, above n 26; Tania Sourdin, 'Dispute Resolution Processes for Credit Consumers' (Report, March 2007); Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Report, Department of Justice, Victoria, 1 April 2009); Ofir Turel, Yufei Yuan and Joe Rose, 'Antecedents of Attitude Towards Online Mediation' (2007) 16 *Group Decision and Negotiation* 539; John Zeleznikow and Emilia Bellucci, 'Family Mediator — Adding Notions of Fairness to Those of Interests' in Tom M van Engers (ed), *Legal Knowledge and Information Systems — JURIX 2006: The Nineteenth Annual Conference* (IOS Press, 2006) 121.

39 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, 115–17.

40 Mediator Standards Board, *National Mediator Accreditation Standards* (March 2012) <<http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>>.

41 *Ibid.*

Experimental research on disputant preferences began in the 1970s.<sup>42</sup> Such research has been most frequently used in organisational psychology and management.<sup>43</sup> Save for Webster's PhD thesis, however, in Australia 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. Therefore, the findings here are not necessarily generalisable to post-experience evaluations.<sup>44</sup> However, this research does provide some useful information about why people make procedural preferences and is an initial first step for further research.

The psychological perspective on procedural preferences builds on the research of Thibaut and Walker.<sup>45</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. That is, they were concerned about what would follow after any settlement. They maintained that this was ascertained by the 'distribution' of control that the procedures offered. That is, disputants are motivated to seek control.

## V 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

- 42 See, eg, Stephen LaTour et al, 'Some Determinants Of Preference for Modes Of Conflict Resolution' (1976) 20 *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 *Journal of Experimental Social Psychology* 13, 29; E Allan Lind et al, 'Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest' (1980) 39 *Journal of Personality and Social Psychology* 643. In Australia there are limited examples of this type of study, but see Jane Elix and Tania Sourdin, 'Review of the Financial Industry Complaints Service 2002 — What are the Issues?' (Issues Paper, Financial Industry Complaints Service, August 2002); Sourdin, 'Dispute Resolution Processes', above n 38; Sourdin, 'Mediation in the Supreme and County Courts', above n 38; Kathleen Daly et al, 'Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995–2001' (Final Report, School of Criminology and Criminal Justice, Griffith University, August 2003); Craig Jones, 'Does Forum Sentencing Reduce Re-Offending?' (2009) 129 *Crime and Justice Bulletin* 1; Michael S King, 'Problem Solving under the *Dangerous Sexual Offenders Act 2006* (Western Australia)' (2007) 14(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 32 <[http://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw\\_problem\\_solving.pdf](http://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_problem_solving.pdf)>; Julie People and Lily Trimboli, 'An Evaluation of the NSW Community Conferencing for Young Adults Pilot Program' (Legislative Evaluation No 16, New South Wales Bureau of Crime Statistics and Research, 2007).
- 43 For a useful summary of the Australian and overseas literature in organisation theory, see Penelope Janet Webster, *Why are Expectations of Grievance Resolution Systems Not Met? A Multi-Level Exploration of Three Case Studies in Australia* (PhD Thesis, University of Melbourne, 2010).
- 44 For an examination of the differences between pre- and post-experience preferences, see Tyler, Huo and Lind, above n 39. 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 maximise 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.
- 45 Thibaut and Walker, above n 26.

to their role (that is, 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).

Their research had three parties: two disputants and a third-party decision-maker (for example, 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>46</sup> Until Shestowsky extended this analysis to include ‘rule control’ in 2004, preference research was limited to

46 Other more recent research has shown that disputants can often perceive fairness in regard to how the third party treated them, which relates to social status and group inclusion: see E Allan Lind, Ruth Kanfer and P Christopher Earley, ‘Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments’ (1990) 59 *Journal of Personality and Social Psychology* 952; Nancy A Welsh, ‘Perceptions of Fairness in Negotiation’ (2004) 87 *Marquette Law Review* 753. This relates to the ‘social exchange’ or ‘group value’ theory of fairness. See E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988) 221–42. There is also the ‘fairness heuristic’ model which posits that disputants can be unsure about how to assess the fairness of an outcome and they can use their evaluation of the process as a sort of mental shortcut for assessing it: Kees van den Bos, ‘Fairness Heuristic Theory: Assessing the Information to Which People Are Reacting Has a Pivotal Role in Understanding Organizational Justice’ in Stephen Gilliland, Dirk Steiner and Daniel Skarlicki (eds), *Theoretical and Cultural Perspectives on Organizational Justice* (Information Age Publishing, 2001) 63.

these two control elements.<sup>47</sup> ‘Rule control’ refers to the ability of the parties to make rules that govern the process.<sup>48</sup>

In 2004, Shestowsky posited that some ADR procedures, such as mediation, are readily amenable to disputants choosing alternative rules, and accordingly some parties may have a preference for such procedures.<sup>49</sup> Her research reports upon three experiments that:

elaborate on previous research regarding preferences for alternative dispute resolution procedures for the resolution of legal disputes. Preferences for decision control, process control, and control over the choice of substantive rules used in the resolution process were examined. The moderating effects of social status (equal vs lower status relative to the other disputant) and role (defendant vs plaintiff) were also assessed. Relative preferences for 2 common types of mediation — evaluative versus facilitative — were also investigated. Participants generally preferred the following: (a) control over outcome, such that a neutral 3<sup>rd</sup> party would help disputants reach a mutually satisfactory resolution; (b) control over process such that disputants would 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 condition [of status and role]. [The r]esults suggest[ed] that mediation was the most preferred procedure and facilitative mediation was generally preferred over evaluative mediation.<sup>50</sup>

In a more recent field study on disputants involved in civil court proceedings by Shestowsky and Brett, the above findings were confirmed. They found a clear causative relationship between control and preferences.<sup>51</sup> They also found that parties preferred those processes over which they had more control, and that there was a causative relationship with their attitudes to subsequent adjudicatory processes. That is, those parties who had expressed a strong need for more initial control were more likely to dislike the assumption of control of the process by a third party such as a judge. This study is useful in that it was the first field study which studied parties’ perceptions both before and after the intervention in the dispute. In this latter sense, the study is similar to this empirical research.

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 summarised above. That is, high process control, or ‘voice’, increases perceptions of fairness

47 Shestowsky, above n 1.

48 For a discussion of the limitations of the parties’ ability to manage rule control see Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2005).

49 Shestowsky, above n 1.

50 Ibid 211.

51 Donna Shestowsky and Jeanne Brett, ‘Disputants’ Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study’ (2008) 41 *Connecticut Law Review* 63.

even in the absence of decision control.<sup>52</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 to be desirable when the conflict is of high intensity<sup>53</sup> and involves face-saving.<sup>54</sup> Second, studies in relation to the preferences for different types of procedures are conflicted.

A number of studies have supported the idea that people tend to prefer more adversarial procedures to less adversarial ones.<sup>55</sup> This has also been confirmed in several cross-cultural studies.<sup>56</sup> However, results from other studies sharply contrast with this conclusion. In this second category of research studies, participants tended to prefer less adversarial procedures (such as mediation or bargaining) to more adversarial ones (such as trial or arbitration).<sup>57</sup> For example, a study which investigated procedural preferences in landlord–tenant disputes found that mediation not only was preferred to arbitration, but it was the most preferred procedure involving a neutral third party.<sup>58</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>59</sup> They also found that respondents, as compared with complainants, preferred inaction and disliked arbitration.

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,

52 For an overview, see Russell Cropanzano et al, ‘Moral Virtues, Fairness Heuristics, Social Entities, and Other Denizens of Organizational Justice’ (2001) 58 *Journal of Vocational Behavior* 164.

53 See, eg, Cary Deck, Amy Farmer and Dao-Zhi Zeng, ‘Amended Final-Offer Arbitration Over an Uncertain Value: A Comparison with CA and FOA’ (2007) 10 *Experimental Economics* 439; Hoyt N Wheeler ‘Compulsory Arbitration: A “Narcotic Effect”?’ (1978) 17 *Industrial Relations: A Journal of Economy and Society* 117.

54 Jean M Bartunek, Alan A Benton and Christopher B Keys, ‘Third Party Intervention and the Bargaining Behavior of Group Representatives’ (1975) 19 *Journal of Conflict Resolution* 532.

55 See, eg, LaTour et al, above n 42; Houlden et al, above n 42; Lind et al, ‘Procedure and Outcome Effects’, above n 42.

56 Çukur and Özbayrak, above n 1.

57 See, eg, Kwok Leung, ‘Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-National Study’ (1987) 53 *Journal of Personality and Social Psychology* 898, 903; Robert S Peirce, Dean G Pruitt and Sally J Czaja, ‘Complainant-Respondent Differences in Procedural Choice’ (1993) 4(3) *International Journal of Conflict Management* 199, 204–6; Larry B Heuer and Steven Penrod, ‘Procedural Preference as a Function of Conflict Intensity’ (1986) 51 *Journal of Personality and Social Psychology* 700, 704; E Allan Lind, John Thibaut and Laurens Walker, ‘Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings’ (1973) 71 *Michigan Law Review* 1129; William Austin et al, ‘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) 3 *Negotiation Journal* 367.

58 Peirce, Pruitt and Czaja, above n 57, 199.

59 Ibid 199–200.

has generally found that negotiation was preferred to other dispute management processes.<sup>60</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 have been those that are usually settled by legal procedures.<sup>61</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>62</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>63</sup> This is because the prevalence and awareness of mediation and like procedures has markedly increased in recent decades and such procedures were not previously available or not raised as possible and viable alternatives.<sup>64</sup>

As Shestowsky and others have concluded, the state of knowledge in this important area of research is still at a rudimentary stage and as a consequence many significant questions remain unanswered.<sup>65</sup>

## VI THE ROLE AND STATUS OF PARTIES AND OTHER RELEVANT FACTORS

Other relevant factors that have gained some prominence in explaining why disputants hold certain preferences include the role and status of the parties,<sup>66</sup>

60 William L F Felstiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980) 15 *Law & Society Review*, 631; Sally Engle Merry, 'Mediation in Nonindustrial Societies' in Kenneth Kressel and Dean G Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass Publishers, 1989) 68.

61 See, eg, R Folger, 'Mediation, Arbitration and the Psychology of Procedural Justice' in Roy J Lewicki, Blair H Sheppard and Max H Bazerman (eds), *Research on Negotiation in Organizations* (JAI Press, 1986) vol 1, 57; Austin et al, above n 57, 284; Louis Kaplow and Steven Shavell, 'Fairness versus Welfare' (2001) 114 *Harvard Law Review* 961.

62 See, eg, Leung, above n 57, 903; LaTour et al, above n 42.

63 See Leung, above n 57; Peirce, Pruitt and Czaja, above n 57, 204–6; Shestowsky, above n 1.

64 Chiara-Marisa Caputo, 'Lawyers' Participation in Mediation', (2007) 18 *Australasian Dispute Resolution Journal* 84. 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 Andrew Robertson, 'Compulsion, Delegation and Disclosure — Changing Forces in Commercial Mediation' (2006) 9(3) *ADR Bulletin* <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1378&context=adr>>. If this research is accurate then the desire of court systems to require parties to attend such programs may be more understandable.

65 See Shestowsky and Brett, above n 51, 65–6.

66 See, eg, Lind and Tyler, above n 46, 221–42; Richard Delgado et al, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' [1985] *Wisconsin Law Review* 1359.

conflict intensity,<sup>67</sup> and the time when the research was conducted, ie pre- or post-process.<sup>68</sup>

The 'role' of the parties usually concerns their behaviour as complainants and respondents. Reporting on another study, Peirce, Pruitt and Czaja explained that:

Complainants were found to be more aggrieved, to bring up more issues, and to expect more from the hearing than respondents. In contrast, respondents were more likely to acknowledge blame for the conflict and to engage in concession making and problem solving. Complainants achieved more in the final agreement, probably because of the differences just mentioned.<sup>69</sup>

They went on to observe:

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>70</sup>

Pierce, Pruitt and Czaja supported these findings and found that arbitration and continued struggle were more popular with complainants than respondents, while inaction was more popular with respondents.<sup>71</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 by Tyler, Huo and Lind, showing that people arrive at pre-experience preferences for decision-making procedures by choosing procedures that help them maximise 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>72</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 the preferences of disputants. Heuer and Penrod found that people who perceived

67 Heuer and Penrod, above n 57.

68 Tyler, Huo and Lind, above n 39, 113–15. Cf E Allan Lind et al, 'Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study' (1978) 22 *Journal of Conflict Resolution* 318; Susan Turner Kurtz and Pauline Houlden, 'Determinants of Procedural Preferences of Post Court-Martial Military Personnel' (1981) 2 *Basic and Applied Social Psychology* 27.

69 Peirce, Pruitt and Czaja, above n 57, 202, citing Neil B McGillicuddy et al, 'Factors Affecting the Outcome of Mediation: Third-Party and Disputant Behavior' in Karen Grover Duffy, James W Grosch and Paul V Olczak (eds), *Community Mediation: A Handbook For Practitioners and Researchers* (Guilford Press, 1991) 137, 147.

70 Peirce, Pruitt and Czaja, above n 57, 202.

71 Ibid 208.

72 Tyler, Huo and Lind, above n 39, 113–15.

that they had a stronger case were more attracted to arbitration.<sup>73</sup> In the study by Peirce, Pruitt and Czaja, concerning a landlord-tenant dispute, no effects were found for this element. They explain this discrepancy on the basis that Heuer and Penrod's research task involved a court proceeding, which may have sensitised their subjects to the strength of the evidence. Ross, Brantmeier and Ciriacks give the example of landlords who prefer a process that maximises disputant control, as opposed to tenants who would prefer a third party to make the decision.<sup>74</sup> That is, third party procedures such as arbitration are generally perceived as favouring the weaker side. Related to this is the confidence that 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 had greater control.<sup>75</sup> In addition, they found that:

these negotiators were more likely to reject a mediator's recommendation for settlement, even when this recommendation was evenhanded 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 credible, self-efficacy had no influence on the acceptance/rejection of mediator recommendations.<sup>76</sup>

Shestowsky and Brett argue that the time when the study is made can be crucial.<sup>77</sup> Most empirical studies of actual civil disputants have examined their perceptions of procedures almost exclusively after the disputes have ended. They state:

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>78</sup>

They provide two main reasons for this assertion. First, such perceptions can guide their procedural choices. Secondly, perceptions after the procedure has concluded may have some impact upon the way in which disputants comply with the outcomes.<sup>79</sup> This, they believe, can have important ramifications for the viability and confidence in the legal system.

73 Heuer and Penrod, above n 57, 707.

74 Ross, Brantmeier and Ciriacks, above n 26, 1158. See also Ross and Conlon, above n 26.

75 Josh A Arnold and Kathleen M O'Connor, 'How Negotiator Self-Efficacy Drives Decisions to Pursue Mediation' (2006) 36 *Journal of Applied Social Psychology* 2649.

76 Ibid 2649.

77 Shestowsky and Brett, above n 51.

78 Ibid 63.

79 Ibid 66-7.

## VII THE PREFERENCES IN THIS RESEARCH

In this research project, 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.Diff'); 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 *OCA*, which the principal author had previously prepared as part of this research.

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 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>80</sup> Approximately 45% of residents in OCs in Australia, are renters.<sup>81</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>82</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>83</sup> This is also dependent upon the procedures being appropriately implemented. As McGillicuddy, Welton and Pruitt showed, there is also less likely to be inter-party hostility and more willingness to follow the directions of the mediator/arbitrator.<sup>84</sup>

### A Findings: Preferences

In the pre-simulation questionnaire all participants (n = 252) were asked to list in order 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

80 Ross, Brantmeier and Ciriacks, above n 26, 1158; Arnold, and O'Connor, above n 75.

81 Urbis, 'Australia's Embrace of Medium and High Density Housing: Census 2011' (Paper No 2, February 2013), 5.

82 Ross and Conlon, above n 26, 419.

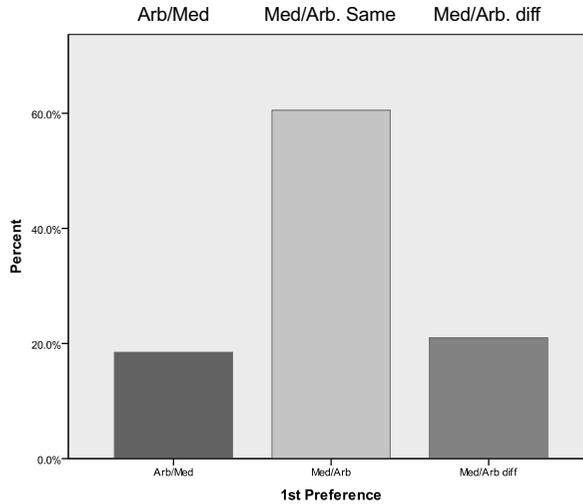
83 Conlon, Moon and Ng, above n 26; Ross and Conlon, above n 26.

84 Neil B McGillicuddy, Gary L Welton and Dean G Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53 *Journal of Personality and Social Psychology* 104, 110. In this research:

A field experiment was conducted 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) ...

process across all role groups. This can be shown in a number of ways. Figure 1.1 shows the percentage of first preferences of all participants.

**Figure 1.1: First preferences of participants**



If this overall figure is broken down by role, variations can be seen in the way in which preferences flowed. Whilst the percentage difference between complainants and respondents was not 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. Diff process) would be more inclined to favour the process in which they were involved, although not at significant levels.

Tables 1.1–1.3 show the relative distribution of the three preferences across the participants.

**Table 1.1: First preferences**

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

**Table 1.2: Second preferences**

		Frequency	Percent	Valid Percent	Cumulative Percent
<b>Valid</b>	1 Arb/Med	67	26.6	28.4	28.4
	2 Med/Arb.Same	64	25.4	27.1	55.5
	3 Med/Arb.Diff	105	41.7	44.5	100.0
	Total	236	93.7	100.0	
<b>Missing</b>	System	16	6.3		
<b>Total</b>		252	100.0		

**Table 1.3: Third preferences**

		Frequency	Percent	Valid Percent	Cumulative Percent
<b>Valid</b>	1 Arb/Med	126	50.0	53.4	53.4
	2 Med/Arb.Same	28	11.1	11.9	65.3
	3 Med/Arb.Diff	82	32.5	34.7	100.0
	Total	236	93.7	100.0	
<b>Missing</b>	System	16	6.3		
<b>Total</b>		252	100.0		

These variations were further explored using a chi-square test for independence. This test is used to explore the relationship between variables. The roles of participants acting as complainants or respondents and preference was compared and explored. The test indicated no significant association between party role and preference.<sup>85</sup>

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 1.4. However, a test for independence indicated that the result was not significant between parties and non-parties in the simulation.<sup>86</sup>

An exploration of the relationship between residency type, citizenship, gender and place of birth also showed no significance for preferences using these same tests.<sup>87</sup> 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>88</sup> The

85  $1, (n = 142) = 0.051, p = 0.78, \text{Cramér's } V = 0.06$ . For a ready introduction to the statistical tests used here, see Michael O Finkelstein and Bruce Levin, *Statistics for Lawyers* (Springer-Verlag, 2<sup>nd</sup> ed, 2001).

86 A chi-square test for independence indicated that the result was not significant between parties and non-parties in the simulation ( $1, (n = 238) = 0.89, p = 0.64, \text{Cramér's } V = 0.61$ ).

87 Because the simulation was conducted upon postgraduate coursework students in Australian universities, a number of the students were neither Australian citizens nor permanent residents.

88 For a recent empirical study and review of the literature see Lorig Charkoudian and Ellen Kabcenell Wayne, 'Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation' (2010) 28 *Conflict Resolution Quarterly* 23.

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 1.4: Cross-tabulation of party and non-party roles**

			1st Preference			Total
			1	2	3	
			Arb/Med	Med/Arb.	Med/Arb.Diff	
			Same			
<b>Party and Non-Party Roles</b>	<b>1 Party Roles</b>	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%
	<b>2 Non-party Roles</b>	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%
	<b>Total</b>	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.	

The surprising result was that the Med/Arb.Same process was significantly preferred to the Med/Arb.Diff process. 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 issue in greater depth.

**B 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. Each was defined in the following terms in the questionnaire.<sup>89</sup>

**Decision control** — the ability of the parties to control the final decisions and outcomes.

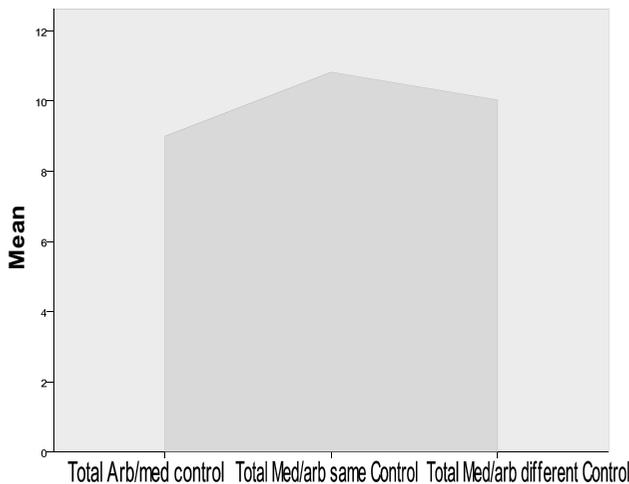
**Process control** — the ability of the parties to control the type of information/evidence provided.

89 Based on Shestowsky, above n 1.

**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 (Total Control Score of Arb/Med; Total Control Score of Med/Arb.Same; and Total Control Score of Med/Arb.Diff). This enabled an exploration of the relationship between these control elements and preferences. The means of each of these variables is shown in Figure 1.2 below.<sup>90</sup> 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.

**Figure 1.2: 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.Diff) in terms of these control elements scored above.<sup>91</sup> 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.Diff) were used as dependant variables. The independent variable was First Preference Choice.<sup>92</sup> Further testing showed a significant statistical

90 n = 236; Arb/Med Control M = 9.00, SD = 2.64; Med/Arb.Same Control M = 10.83, SD 1.68; Med/Arb. Diff Control M = 10.04, SD = 2.051. M = mean; SD = standard deviation.

91 For a general introduction to using this measure see James Stevens, *Applied Multivariate Statistics for the Social Sciences* (Lawrence Erlbaum, 3<sup>rd</sup> ed, 1996).

92 Preliminary assumptions testing was conducted to check for normality, linearity, homogeneity of variances, covariance matrices and multi co-linearity with no serious violations noted.

relationship between at least two of these dependent variables and preferences. That is, perception of control was generally a factor in disputant preference.<sup>93</sup>

A one-way analysis of variance (ANOVA), used to compare the mean scores of different groups, 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.<sup>94</sup> These tests showed that those whose first preference was Med/Arb.Diff did not differentiate between the three control measures in the same way 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 1.4). What is clearly indicated is that those who chose a process rated it consistently higher on the control measures than they did for the other processes. Overall, as the multivariate analysis showed, there was a significant difference in these scores.<sup>95</sup> These results generally would seem to confirm the extant theory in this area from the pioneering work of Thibaut and Walker<sup>96</sup> onwards, which became the instrumental model of justice. That is, the perception of greater control associated with a process will tend to cause a party

93 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 Total Med/Arb.Same were clearly significant using a modified Bonferroni adjusted alpha level of 0.017. The Total Med/Arb.Diff 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.Diff. Those whose first preference was Med/Arb.Same (the predominant choice) gave a score of total control for Arb/Med of 8.78, for Med/Arb.Same of 11.16 and for Med/Arb.Diff of 10.15. Those who gave Med/Arb.Diff first preference gave a mean score to Arb/Med of 8.22, Med/Arb.Same of 10.25 and Med/Arb.Diff of 10.33.

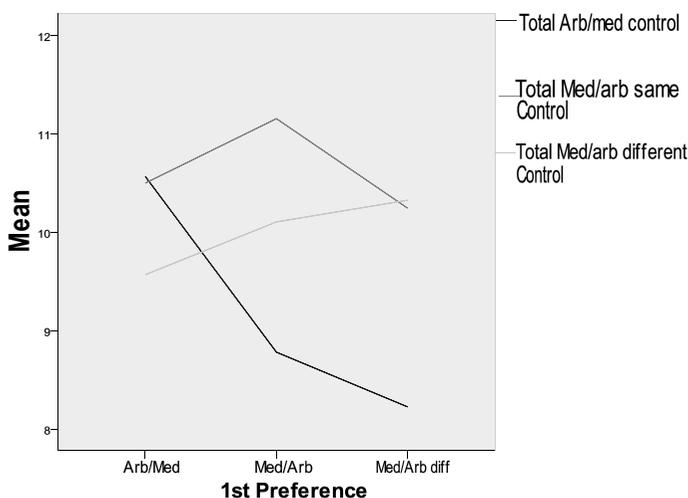
94 The ANOVA for the Total Control Score of Arb/Med dependent variable showed that there was a statistically significant difference at the  $p < 0.05$  level for first preferences.  $F(2,232) = 11.2$ ,  $p = 0.00$ . The effect size was medium. Post-hoc comparisons using the Tukey HSD test indicated that 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.Diff ( $M = 8.22$ ,  $SD = 2.623$ ), 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 those whose first preference was Arb/Med ( $M = 10.57$ ,  $SD = 2.509$ ), but did differ significantly from those whose preference was Med/Arb.Diff ( $M = 10.24$ ,  $SD = 1.738$ ). 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.Diff. For the Total Control Score of Med/Arb.Diff 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 both from those who first preference was Med/Arb.Same ( $M = 10.11$ ,  $SD = 1.927$ ) and also from Med/Arb.Diff ( $M = 10.33$ ,  $SD = 2.240$ ), representing a medium group size effect using eta-squared of 0.06.

95 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.Same but not for Med/Arb.Diff.

96 Thibaut and Walker, above n 26.

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.Diff mean scores by comparison.

**Figure 1.4: 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.<sup>97</sup> 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 showed an overall statistical significance in a preference for the Med/Arb.Same procedure.<sup>98</sup> 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

97 Total Control Score of Arb/Med; Total Control Score of Med/Arb.Same; and Total Control Score of Med/Arb.Diff.

98 Non-citizens:  $n = 35$  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.

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.

## VIII RATIONALISING THE REASONS FOR PREFERENCE DECISIONS

Qualitative data was gathered alongside the quantitative data described above so as to expand upon the analysis of this research.<sup>99</sup> Such research in this domain has been used with regard to bargaining and negotiation behaviour.<sup>100</sup> We performed such research by including (in the initial questionnaire given to participants) a question requiring them to give three reasons for the preference they gave in a pre-simulation questionnaire.<sup>101</sup> This question was posed 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 it was subsequently coded. Out of a possible total of 756 reasons, 517 were provided. Participants clearly indicated that their preferences were based upon subjective perceptions of fairness or justice. The responses were coded by using the definitions from Colquitt in validating and refining four factors in justice research (distributive, procedural, interpersonal and informational).<sup>102</sup>

Judgments regarding the fairness of outcomes or allocations have been termed 'distributive justice'.<sup>103</sup> This is usually judged by assessing if rewards are proportional to costs, whether outcomes align with expectations,<sup>104</sup> and if outcome/input ratios match those of a comparison other.<sup>105</sup> Judgments regarding the fairness of process elements are termed 'procedural justice'. This is usually assessed by determining whether procedures are accurate, consistent, unbiased and correctable, as suggested by Leventhal; and open to disputant input or

99 For an overview of research designs utilising qualitative and quantitative data see Katharina J Srnka and Sabine T Koeszegi, 'From Words to Numbers: How to Transform Qualitative Data into Meaningful Quantitative Results' (2007) 59 *Schmalenbach Business Review* 29.

100 See Linda L Putnam and Tricia S Jones, 'Reciprocity in Negotiations: An Analysis of Bargaining Interaction' (1982) 49 *Communication Monographs* 171; Jeanne M Brett, Debra L Shapiro and Anne L Lytle, 'Breaking the Bonds of Reciprocity in Negotiations' (1998) 41 *Academy of Management Journal* 410; Laurie R Weingart et al, 'Tactical Behavior and Negotiation Outcomes' (1990) 1 *International Journal of Conflict Management* 7.

101 The question was: 'On what basis are your preferences made? List at least three reasons.'

102 Colquitt, above n 38.

103 George Caspar Homans, *Social Behaviour: Its Elementary Forms* (Routledge & Kegan Paul, 1961) 73.

104 Ibid 75; Peter M Blau, *Exchange and Power in Social Life* (John Wiley & Sons, 1964) 156.

105 J Stacy Adams, 'Inequity in Social Exchange' (1965) 2 *Advances in Experimental Social Psychology* 267, 272-3.

'voice' as suggested by Thibaut and Walker.<sup>106</sup> Judgments 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>107</sup> The former is 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 the third party's honesty and adequacy.

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 that indicated a concern with process efficiency and cost. The analysis was therefore modified to include this element. The coding was hence reflective of the overall research concerns in the thesis and provided a useful further point of 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 validate the categories and provide independent judgment of the units of analysis, and in coding them understand their further reliability. An independent coder was trained in the use of the five terms and given access to the specific data. An inter-coder consistency matrix was then utilised so that the codes could be checked across the results from the coders.<sup>108</sup> The coders, one of whom was the principal author, then conferred and checked their results, revising some as appropriate. The corrected data was then inputted into the SPSS software<sup>109</sup> and a Cohen's kappa measure of agreement analysis was performed to check the consistency of the two coders' ratings. This showed an inter-coder consistency rate of 80.5 per cent with a kappa value of 7.09, indicating good to very good agreement between the coders.<sup>110</sup>

Table 1.5 below shows the total percentage of the reasons provided for each of the coded categories. They clearly indicate that the preponderance (68.8 per cent) were given to procedural justice. 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 different processes as a first preference. This analysis was aided by collating the number of preference reasons for each category (and efficiency) into separate variables to enable chi-

106 Gerald S Leventhal, 'What Should Be Done with Equity Theory?: New Approaches to the Study of Fairness in Social Relationships' in Kenneth J Gergen, Martin S Greenberg and Richard H Willis (eds), *Social Exchange: Advances in Theory and Research* (Plenum Press, 1980) 27, 39–43; Thibaut and Walker, above n 26, 548–51.

107 Colquitt et al, above n 38, 426–7.

108 See Srnka and Koeszegi, above n 99.

109 SPSS Statistics is a software package used for statistical analysis. It is now officially named 'IBM SPSS Statistics'. See IBM, *SPSS Software* <<http://www-01.ibm.com/software/analytics/spss/>>.

110 Matthew Lombard, Jennifer Snyder-Duch and Cheryl Campanella Bracken, 'Content Analysis in Mass Communication: Assessment and Reporting of Intercoder Reliability' (2002) 28 *Human Communication Research* 587, 600.

square tests for independence between these and possibly associated variables.<sup>111</sup> These tests showed no significant variation between party role and preferences or reasons for these preferences. Nor was any significant association found between other variables and reasons for preferences using this test, including role, 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 1.5: Preference reason 1**

		Frequency	Percent	Valid Percent	Cumulative Percent
<b>Valid</b>	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	
<b>Missing</b>	System	31	12.3		
<b>Total</b>		252	100.0		

## IX DISCUSSION

The results from this research show clearly that disputants prefer those procedures in which they feel they will have control. 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. Such knowledge 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 judgments between the three processes. All three processes were rated relatively evenly at the post-mediation and post-arbitration phases. That is, the most preferred procedure at the start of the simulation was not favoured in terms of later justice perceptions as the process progressed.

What was not expected in the results was the preponderance of preferences given to Med/Arb. Same (57 per cent of first preferences) over Med/Arb. Diff (20 per cent of first preferences). The latter is a configuration that is most common in our

111 Chi-square tests for independence indicated no significant association between party roles (complainant and respondent) or between first, second or third preferences, and reasons given for preferences (p = .776; .073; .445; and .517, respectively).

legal and organisational systems and therefore perhaps could be more familiar and understandable to the participants. Yet it was clearly less preferred. It could also be that Med/Arb.Diff requires more time and effort and may have therefore been perceived as less efficient. 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>112</sup> However, some recent empirical research by Wissler indicated that lawyers preferred mediations or conferences conducted by judges not associated with the case, to those by a judge connected with the case.<sup>113</sup> These due process issues are mainly concerned with the propensity of parties to disclose information and evidence in mediation or a like process and this being subsequently used in an arbitration or adjudicatory process where this knowledge may not have otherwise been disclosed.

Of course, the choices open to participants in this study were limited to three hybrid processes and they were not, except for a small minority, OC dwellers. The results, however, support findings by Peirce et al in their study of a landlord–tenant dispute, that mediation was the most preferred procedure involving a neutral third party.<sup>114</sup> It was clear that participants preferred the mediation then arbitration sequence.<sup>115</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 the process.

One of the reasons stated for the introduction of the *OCA* in Victoria was that the previous legislation, the *Subdivision Act 1988* (Vic), was perceived by many to be too limited, expensive and inaccessible.<sup>116</sup> A review of the legislated response and a comparison of interstate and international jurisdictions shows that most legislated OC reforms have relied upon a hybrid dispute regime involving

112 In Australia, s 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 Standing Committee of Attorneys General, ‘Reform of the Uniform Commercial Arbitration Acts — s 27D Mediation Clause’ (Issues Paper, 2011), 3–5.

113 Roselle L Wissler, ‘Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences’ (2011) 26 *Ohio State Journal on Dispute Resolution* 271. See also Lisa Blomgren Bingham, ‘Designing Justice: Legal Institutions and Other Systems for Managing Conflict’ (2008) 24 *Ohio State Journal on Dispute Resolution* 1.

114 Peirce, Pruitt and Czaja, above n 57, 204–6.

115 Ibid 218. 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.

116 Consumer Affairs Victoria, ‘Final Report’, above n 22.

mediation (or conciliation) along with adjudication.<sup>117</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 model rules set up under the *OCA* 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>118</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 Peirce et al as a common response, or proceeding directly to VCAT, would perhaps be more attractive than following the model rules.<sup>119</sup> This is especially so as s 153(3) of the *OCA* 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>120</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>121</sup>

Further, a disputing domain like OC disputes is difficult to plan for as the types of disputes encountered are likely to be highly polarised. That is, whilst many of the disputes will concern fees, and particularly the late payment of these, various disputes will involve ‘lifestyle’ issues, which involve substantive clashes of interests and values.<sup>122</sup> Fee disputes are more likely to be ‘cognitive’ disputes involving issues around disputed facts, whereas the latter are more likely to be

117 See, eg, National Community Titles Institute, *How Different Are We?: State by State Comparison of Strata & Community Title Management* (July 2008) Chambers Franklyn <<http://chambersfranklyn.com.au/upload/documents/Owners/ReferenceMaterial/NCTI-HowDifferentAreWe.pdf>>. 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 use in the Victorian context, the term ‘owners corporation’ (OC) is used in this research. See also K Everton-Moore et al, ‘The Law of Strata Title in Australia: A Jurisdictional Stocktake’ (2006) 13 *Australian Property Law Journal* 1; Chris Guilding et al, ‘Investigation of the Strata-Titled Tourism Accommodation Sector in Australia: Legal Context and Stakeholders Views’ (Technical Report, Sustainable Tourism CRC, 2006); Alice Christudason, ‘Subdivided Buildings — Developments in Australia, Singapore and England’ (1996) 45 *International and Comparative Law Quarterly* 343; C G van der Merwe, ‘A 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’ (2002) 31 *Georgia Journal of International and Comparative Law* 101; Cornelius van der Merwe and Luis Muñoz-Argüelles, ‘Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme’ (2006) 16 *Duke Journal of Comparative & International Law* 125.

118 *Owners Corporations Regulations 2007* (Vic) sch 2 r 6(5).

119 Peirce, Pruitt and Czaja, above n 57, 204–8.

120 Ibid 204–6; Tyler, Huo and Lind, above n 39, 113–15.

121 William L Ury, Jeanne M Brett and Stephen B Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Jossey-Bass, 1988) 171.

122 Victorian Civil and Administrative Tribunal, ‘Annual Report 2008–09’ (Report, 2009) 28; Victorian Civil and Administrative Tribunal, ‘Annual Report 2009–10’ (Report, 2010) 32.

interest-based disputes around goals and values.<sup>123</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>124</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.<sup>125</sup> It could be speculated that many lifestyle disputes are ‘lumped’ by the complainants and are therefore not acted on or are acted on outside the formal statutory arrangements. The implementation of model rules by the *OCA*, which fail to specify a process to follow other than having a ‘meeting’, would seem to mitigate against in-house procedures to encourage direct negotiation between the parties.

As noted above, the particular environment of OCs will ensure a high level of disputing. 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 affected parties viewing the process itself as less fair than would otherwise have occurred. 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 do not, therefore providing a recipe for either recourse to a relatively protracted process through VCAT (most OCs 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 activity 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>126</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. 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.

For example, the design of the New South Wales OC statutory scheme is a good example of the use of an active multi-tiered process involving negotiation, mediation, adjudication (on the papers) and then a hearing.<sup>127</sup> The contrast between the New South Wales and the Victorian scheme, which has approximately the same number of OCs in its jurisdiction, is significant. In Victoria, relatively few cases are mediated or conciliated with the vast majority going through to an adjudicated hearing. CAV, which has a role in providing conciliation services for OC disputes, reported no conciliations under the *OCA* in

123 Bryan W Husted and Robert Folger, ‘Fairness and Transaction Costs: The Contribution of Organizational Justice Theory to an Integrative Model of Economic Organization’ (2004) 15 *Organization Science* 719, 722–3.

124 Mollen, above n 11.

125 Victorian Civil and Administrative Tribunal, ‘Annual Report 2008–09’, above n 122, 28; Victorian Civil and Administrative Tribunal, ‘Annual Report 2009–10’, above n 122, 32.

126 See Consumer Affairs Victoria, ‘Annual Report 2009–10’ (August 2010) 16. More recent annual reports do not list owners corporation disputes and their conciliation as a separate category probably because of the small number of same.

127 See further NSW Fair Trading, ‘Year in Review 2009–2010’ (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)>.

the last reporting period.<sup>128</sup> By contrast, the equivalent NSW Fair Trading runs a virtually compulsory mediation scheme which takes over 1000 cases per year.<sup>129</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 New South Wales. In Victoria, the rate of hearing of OC matters is consequently approximately twice that of New South Wales. 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 New South Wales.<sup>130</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 OCs develop a 'litigious culture'.<sup>131</sup> This research states that:

these statistics suggest that once a dispute reaches OCBCCM, the scheme involved is likely to experience multiple disputes. This, anecdotally, seems to be because the initial dispute can cause the members of the scheme to become factionalised. For the 145 heavily disputed schemes, it seems that a highly conflictual and litigious culture emerges, as a result of which scheme members feel a sense of entitlement to have grievances arbitrated by a third party external to the dispute.<sup>132</sup>

What these differences do 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 by some preliminary analysis of survey data from OC managers in Victoria (in which the principal author was involved), which indicates that the model rules under the *OCA* are

128 Consumer Affairs Victoria, 'Annual Report 2009–10', above n 126. More recent annual reports do not list owners corporation disputes and their conciliation as a separate category probably because of the small number of same.

129 NSW Government Fair Trading, 'Year in Review 2011–2012' (2013) 29 <[http://www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/About\\_us/Publications/Annual\\_reports/FT469\\_Year\\_in\\_review\\_2011-12.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Publications/Annual_reports/FT469_Year_in_review_2011-12.pdf)>.

130 Craig A McEwen and Richard J Maiman, 'Mediation in Small Claims Court: Achieving Compliance Through Consent' (1984) 18 *Law & Society Review* 11; William L F Felstiner, 'Influences of Social Organization on Dispute Processing' (1974) 9 *Law & Society Review* 63, 71–74; William L F Felstiner and Lynne A Williams, *Community Mediation in Dorchester, Massachusetts* (National Institute of Justice, United States Department of Justice, 1980); Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; Erving Goffman, *Interaction Ritual: Essays in Face-To-Face Behavior* (Doubleday, 1967); Alvin W 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).

131 Lisa Toohey and Daniel Toohey, 'Achieving Quality Outcomes in Community Titles Disputes: A Therapeutic Jurisprudence Approach' (2011) 37 *Monash University Law Review* 298, 303–4.

132 *Ibid.*

perceived not to be particularly useful, and that OC managers tend to follow their 'own procedures'.<sup>133</sup> The grievance procedure set out in the model rules applies to disputes involving a lot owner, manager, 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 which administers the *OCA*, or VCAT, being the legal forum where OC disputes are run. Whilst OCs have the ability to develop their own tailored rules, this is difficult to achieve.<sup>134</sup> Guidance notes from the relevant government agencies could provide important and relevant practical advice to them.

None of party role, gender, or 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 — which concludes that there is a need for a disputing system providing for negotiation followed by mediation then adjudication by way of a private arbitration process — is attractive, despite the possible drawbacks of the latter process.<sup>135</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.

The qualitative preferences data indicated a predominant concern for procedural justice issues. 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

133 Rebecca Leshinsky, Aron Perenyi 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, 4–8 July 2011).

134 The *OCA* has left the design of alternative dispute procedures to the committees of management of OCs. 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 (s 138);
3. Set up a Dispute Resolution or Grievance Committee; and
4. Register the new rules with the Registrar of Titles (s 142).

135 Mollen, above n 11, 99.

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. 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 on self-interest, and that post-experience evaluations were based on the quality of the procedures.<sup>136</sup> Further, a review of the procedural justice literature within court systems by Welsh indicates that the way in which disputing processes are constructed has a material impact on disputants' perceptions of the distributive justice that is delivered by a dispute resolution process, their compliance with the outcome of the dispute resolution process, and their perception of the legitimacy of the institution providing or sponsoring the process.<sup>137</sup> It follows from this research that ensuring that mediation and like processes come within a procedural justice paradigm serves some of the courts' most important goals — delivering justice, delivering resolution, and fostering respect for the important public institution of the courts.

The research here could be extended by allowing participants an opportunity to answer a range of unstructured questions at the end of the mediation and arbitration aspects, and then comparing the coded results with those derived from the pre-simulation questionnaire. It has been shown that participants justify or evaluate their pre-experience preferences predominantly upon procedural justice grounds, but that they base their preferences on the amount of control their preference will give them. In a future paper, the authors will explore another aspect of the research that examines how the outcomes from the arbitrated decision impacted upon perceptions of fairness.

136 See Tyler, Huo and Lind, above n 39.

137 Nancy A Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79 *Washington University Law Quarterly* 787; Nancy Welsh, Donna Stienstra and Barbara McAdoo, 'The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions' in Tania Sourdin and Archie Zariski (eds), *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters, 2013) 57. See also Nancy A Welsh, 'The Place of Court-Connected Mediation in a Democratic Justice System' (2004) 5 *Cardozo Journal of Conflict Resolution* 117.