Mediation in the Supreme and County Courts of Victoria
Mediation in the Supreme and County Courts of Victoria
A report by Professor Tania Sourdin

The Department of Justice commissioned Professor Tania Sourdin of the Australian Centre for Peace and Conflict Studies University of Queensland, to undertake a research project on mediation in the Supreme and County Courts of Victoria. The aim of this research project was to assess the use and effectiveness of mediation disputes filed in the Supreme and County Courts of Victoria. The final report was launched by Deputy Premier and Attorney-General, the Honourable Rob Hulls MP on 1 April 2009.

The project objectives were addressed using a consultative process with the project’s Advisory Committee. The Committee was chaired by Justice Kevin Bell, President of VCAT, and attended by Judge Sandra Davis of the County Court, as well as representatives from the legal profession and the Department of Justice.

The report assesses the use and effectiveness of mediation in the Supreme and County Courts by examining their processes in comparison to National Alternative Dispute Resolution Advisory Committee common core objectives. In summary, the report found that mostly mediation meets these objectives. Many disputants and representatives were supportive of mediation processes and felt that the outcomes were mutually beneficial. The report found that there are significant estimated costs savings for disputants where mediation processes are utilised.

Professor Sourdin identified specific areas for improvement, including: improving the quality of mediation processes by supporting excellence in mediation standards; the need for training and accreditation of mediators; the need in appropriate cases for earlier and more targeted referral to mediation by the courts; identifying and addressing the needs of special groups including self-represented litigants and disputants from regional Victoria; addressing the lack of demographic data on dispute resolution processes; and the development of a quality framework to be implemented by the courts and the Department of Justice to enhance the quality of mediation services.

The Department of Justice is currently considering these recommendations in consultation with the courts and the profession. The Government welcomes the findings of the report. It is a significant evaluative study of mediation in Victoria’s higher courts. Not only does it address a lack of information about use of mediation in the Supreme and County Courts, but it also signals the Government’s commitment, as stated in the Attorney-General’s Justice Statement 2, to a new form of justice for Victorians that is based on non-adversarial methods.

For more information about the report, contact Legal and Equity Operations, Department of Justice, on Tel: (03) 8684 0800.

To download a copy of the report, go to: http://www.justice.vic.gov.au/
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Supreme and County Courts of Victoria
Executive Summary

1. Introduction

Mediation and Alternative Dispute Resolution (ADR) processes have been used for many years within Victoria to assist people in dispute to resolve their differences. The Attorney-General of Victoria, the Hon. Rob Hulls, MP, and the Government of Victoria have supported the use of these processes by allocating funding and by sponsoring policy, research and the development of a range of practice initiatives and programs in various sectors.

The aim of this Research Project has been to assess the use and effectiveness of mediation of disputes that have been filed in the Supreme and County Courts of Victoria. Most of the mediations carried out in these Courts take place with the assistance of private mediators who are funded by litigants. These processes are responsible for the estimated resolution of more than 1,000 complex disputes each year that may otherwise have been the subject of a full hearing in Court.

To examine the use and effectiveness of mediation in these Court connected schemes, the Research Report explores how mediation is used and focuses on whether mediation processes used in disputes:

- resolved or limited the dispute (Chapter 2)
- were accessible (Chapter 3)
- were considered by the parties to be just or fair (Chapter 4)
- used resources efficiently and promoted lasting outcomes (Chapter 5)
- achieved outcomes that were effective and acceptable (Chapters 4 and 5).

The research shows that, for the most part, mediation meets these objectives. However, the research also shows that quality of mediation processes in these Court connected programs could be improved. This report makes some specific suggestions and recommendations that are directed at quality improvement and enhancing how the current system can operate into the future.

The report also makes specific recommendations about how mediation can be monitored, evaluated and reviewed. Specific options for capturing this information, using the new Integrated Courts Management System (ICMS)
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2. Research Approach

A range of research methodologies were used to conduct the research that included:

- a detailed literature review;
- a quantitative and qualitative analysis of civil disputes finalised in the Supreme and County Courts of Victoria from February to April 2008 (553 case files were examined and parties in those cases were surveyed with 98 usable disputant surveys returned and 34 mediator surveys returned and analysed); and,
- direct interviews and focus groups held with stakeholders who included litigants, mediators and representatives.

3. Key Findings and Recommendations

Use of Mediation

Parties who had their dispute finalised by mediation reported moderate to high levels of satisfaction on most variables.

81 per cent of mediation clients (n=30) were satisfied with mediation as the process that finalised their dispute and 78 per cent (n=29) were satisfied with the way the process was handled. These are positive findings suggesting that for disputants who resolve their dispute, the vast majority are satisfied with the mediation process.

The mediation processes led to the settlement of disputes particularly in some of the more intractable and difficult disputes (by reference to age of dispute and number of court events). In addition, it is likely that some matters were settled by negotiation once a referral to mediation had been made and that others may have been finalised by a negotiation following the mediation.

Mediation may also have assisted to narrow issues in matters that were not finalised at mediation and this can lead to cost and other savings if a matter is then litigated. The disputes dealt with at mediation had a range of intractable features and it seems clear that in many instances the mediation

process reduced costs that might otherwise have been expended at a hearing. In this regard, some mediators indicated in interviews that the mediation process saved ‘months of court time’ in complex and intractable disputes.

What matters are mediated and what works?

The findings suggest that dispute age (age of dispute measured from when the cause of action arises) may be more strongly associated with mediation outcomes than case age (age of case from when it is filed in Court) and that younger disputes are more likely to be finalised at mediation than older ones.

Recommendation 1: Some matters should be referred to mediation by the Courts at an earlier time. Cases where the dispute arose less than one year before the proceedings were filed should be targeted for earlier referral to mediation.

Although the sample size is relatively small, cases involving disputes over land (77 per cent finalised at mediation; n=13) and property (67 per cent finalised at mediation; n=4) had higher resolution rates at mediation, while cases where litigants sought a declaration from the Court were less likely to be finalised at mediation (29 per cent were finalised in mediation; n=5).

Recommendation 2: Some matters may be more amenable to resolution by mediation. Referral to mediation should, for example, be carefully considered in matters where the parties are seeking declaratory relief.

Improving Quality

Information concerning mediation, case type outcome and dispute duration needs to be coupled with an understanding of what occurred in mediation. In focus groups it was noted that many ‘mediations’ in personal injury matters had the following characteristics:

- the process was of a short duration – often less than 2 hours
- the plaintiffs were often not involved in the conference at all
- the negotiation could be described as compromisory or competitive.

The case outcomes also suggest that a form of abbreviated conferencing was used mainly in personal injury matters and called ‘mediation’. Mediators and others considered that these processes could not and should not be described as mediation. Such forms of conferencing are less effective than models of mediation where there are continuing relationships and the forms of mediation that may be used in property, probate and business matters where the settlement rates are much higher.

Less than half of the mediators (considering all case types) appeared to have followed any industry standard mediation model. Very few used visual aids, a significant proportion did not hear from the parties at all (only their representatives) and many appeared to have quickly broken into
a shuttle negotiation after a relatively short joint session. These findings suggest that in reality, many ‘mediations’ could more properly be characterised as conciliations, conferences or evaluations.

Recommendation 3: Courts should define and describe the mediation processes that are to be used by external mediators and ensure that all mediators are properly trained and accredited. An ongoing program should be put in place to enhance the quality of processes. Whilst many mediations were conducted in an efficient, effective and fair manner, a significant proportion were not. It is recommended that clearer process models and descriptions, improved quality assurance processes (through monitoring, and regular evaluations), requiring mediators to comply with the national mediator standards and ensuring that only accredited mediators operate in the sector should be put in place to enhance quality.

Some mediations may be conducted in a way that is more comfortable for lawyers, rather than disputants. Lawyers choose the mediators and lawyers therefore play an important role in determining the process adopted. Shuttle negotiation was a fairly common approach in many matters that were considered in this Project. It may be that this model of negotiation is more ‘comfortable’ for representatives (rather than parties). Most plaintiffs in the focus group reported that their mediation featured separate rooms and most mediators in their focus group stated that they use some form of shuttle mediation.

Recommendation 4: Courts could attempt to address the impact that the litigation culture may have on the mediation culture in a number of ways. Courts could operate with mediator panel system (where the Court chooses the mediator). Alternatively, other methods could be used to address cultural issues. Such approaches can include clearer guidelines for lawyers, litigants and mediators as well as a mixed service-delivery (using a combination of court-based and privately provided mediation can foster more supportive negotiation and mediation cultures). It is recommended that the second option be pursued.

Responses to questions raised about participation suggest that some of those involved in mediation did not consider that they were able to adequately participate in the process. This finding is linked to the type, and at times, variable quality of mediation services that were provided. Many of those involved in mediation had positive perceptions. Most participants indicated that they would have liked to have participated ‘more’ in the mediations that were conducted. Only a small number of mediators held a preliminary conference or conducted intake work with disputants and this may mean that disputants are less likely to be able to participate in the process (or understand the process and prepare).

Recommendation 5: Courts should develop a quality framework approach to enhance the quality of mediation services and should consider implementing strategies to recognise those that deliver high quality services. Participation by the disputants should be fostered, supported and required in most mediations.
Intake and preliminary work should be supported by in Court staff as well as external mediators.

Access

The research indicates that litigants from lower income occupations are more likely to use mediation to finalise their dispute, suggesting that affordability may play a role in determining the processes accessed by litigants.

Again, although the sample size was small, mediation was the process that was most likely to be used with disputants drawn from all geographical regions except for rural Victoria, where negotiation was the most commonly used process. It is also interesting to note that a larger proportion of rural, outer Melbourne and Geelong and other regional area clients were likely to attend trial and a hearing than inner-city clients (who were more likely to attend mediation and negotiation).

**Recommendation 6:** Strategies to increase mediation use need to be targeted at disputants from Regional Victoria. Circuit mediation programs may be of assistance for these disputants or the Courts could better support regional external mediation referral options. Earlier mediation referral strategies may assist lower income litigants.

Self represented litigants were less likely to access mediation services. It may be that specific strategies that support greater access to mediation can be directed at this group of litigants.

**Recommendation 7:** Self-represented litigants may require additional assistance. Mediation intake work may need to be conducted by Court staff skilled in mediation to assist such litigants. The Supreme Court uses judicial officers to mediate some cases involving self-represented disputants and this approach may be of benefit in the County Court.

It is currently difficult for courts to determine whether they are ‘accessible’ as they have little demographic information about litigants.

**Recommendation 8:** Courts could address the issue of a lack of demographic data by seeking more information when proceedings are filed and requiring all litigants to indicate some basic demographic characteristics when cases are commenced and when defendants file a response (as is the case in many external dispute resolution schemes).

Effectiveness

The resolution rates of the mediation processes were at least 45 per cent (using court file data where mediators returned their reports) and may have been as high as 65 per cent (using sample survey data). The resolution rates are lower than has been recorded in a number of comparable surveys and this may be a result of the age of the dispute, the costs already incurred as well as factors relating to the quality of the mediation processes.
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Recommendation 9: The earlier referral of disputes as well as more targeted referral will assist to increase resolution rates. In addition, improving the quality of the mediation provided and ensuring that ‘conferencing’ processes are not categorised as mediation will improve the resolution rates and provide a more accurate representation of mediation use and resolution rates.

Plaintiffs using the Court system were more likely to have been previously involved in a legal action (68 per cent; n=32).

Recommendation 10: This finding has important implications for the type of mediation processes that are used. Those that support party empowerment and negotiation learning may be more likely to reduce litigious behaviour. Courts need to articulate models and process descriptions for mediation that assist to reduce disputing behaviour into the future.

There are other matters that may be less relevant that could improve efficiency. These include reducing waiting times for litigants as well as ensuring that reality testing of outcomes takes place (to support durability and compliance with outcomes) and perhaps ensuring that information about processes is made available so that adequate party preparation takes place prior to a mediation taking place (see recommendation 5).

Timeliness

In the Supreme Court, the median number of days from when a matter was filed in Court to the first mediation was 324 days. In the County Court, the median number of days from the day the matter was filed in Court to the day of the first mediation was 260 days.

The median case age of Supreme Court matters was 426 days and in the County Court it was 341 days. This means that in both jurisdictions mediation usually took place three quarters (76 per cent) of the way through an expected full case duration (to trial). This is quite late in proceedings and can lead to increased costs.

Recommendation 11: Mediation should take place at an earlier time in relation to some disputes. Mediation referrals should be considered within two months of a response being lodged in cases that are not ‘old’ and in certain categories of matters. All information need not discovered by parties for a mediation to be effective in many instances.

Fairness

Perceptions of fairness in mediation processes were generally higher than for the other processes. Interestingly, 67 per cent (n=24) of disputants who finalised their dispute at mediation considered that they were pressured to settle the dispute (39 per cent said they ‘agreed’ and 28 per cent said they ‘strongly agreed’ that they were ‘pressured’). This ‘pressure’ may relate to a range of factors including the raising of alternatives (that is, the raising of
potential litigation outcomes) that may have meant that parties felt pressured.

Only 49 per cent of mediation participants agreed they had control during the process. Some of the reasons for this may be found in the answers to the other survey questions. For example, 47 per cent of mediation participants did not feel comfortable during the mediation and 59 per cent reported they would have liked to participate more during the process.

**Recommendation 12:** Courts need to clearly articulate the models of mediation that are to be used and apply strategies to promote high quality practices that support disputants and encourage participation.

The largest differences between plaintiff and defendant perceptions were observed in respect of the following variables:

- More defendants (95 per cent; n=18) than plaintiffs (75 per cent; n=15) considered they were able to participate during the process.
- More defendants (58 per cent; n=11) than plaintiffs (35 per cent; n=7) considered they had control during the process.
- More plaintiffs (65 per cent; n=13) than defendants (47 per cent; n=9) said they would have liked to participate more during the process.

Mediation participants who responded to the survey generally had no problems understanding what was going on during the mediation process (40 per cent said they understood ‘quite well’, n=12; 42 per cent said they understood ‘very well’, n=16).

Mediation outcomes were generally well understood, with most respondents (90 per cent; n=34) indicating that they ‘agreed’ that they understood the outcome.

**Costs**

Litigant costs were reduced as a result of mediation and the median litigation costs incurred were $30,500 (which was less than the costs in all other finalisation types). Disputants who finalised their dispute as a result of a mediation believed they saved $30,000 in legal costs, those who finalised at negotiation believed they saved $40,000, and those who finalised their dispute at a conference believed they saved $25,000.

Mediators believed that in 82 per cent of mediated cases, the process helped to save parties costs. The median amount saved by mediating was perceived by mediators to be $50,000, with the smallest amount of money saved believed to be $20,000 and the highest amount of money saved believed to be $250,000.

The correlation between perceptions of fairness and case costs was statistically significant and negative, suggesting that the more money a disputant spent on resolving a dispute, the less likely they were to think that the process was fair.
Recommendation 13: The comparatively late referral of matters to mediation may mean that significant costs are incurred before mediation is attempted and for some litigants, late referral may mean that they were either unable to access mediation or that the costs incurred were so significant that the benefits of mediation were reduced. Earlier mediation should be required in certain types of disputes particularly those where the parties have had some form of relationship (family, business or other).

The majority (58 per cent, n=52) of mediated cases only required 1–2 court events and 30 per cent (n=27) required 3–5 court events. Although these cases drew on Court resources prior to mediation, it is clear from the below figures that mediated matters required less case management than matters finalised at trial (55 per cent required 3–5 court events; n=30), pre-trial conference (73 per cent required 3–5 court events; n=8) or via negotiation (45 per cent required 3–5 court events; n=34).

Recommendation 14: Greater attention may need to be paid to the way in which representatives discuss litigated outcomes with their clients and also the way in which mediators intervene and discuss issues with disputants. Educating representatives and clients about mediation and conducting intake processes may assist to reduce the ‘pressure’ placed on litigants. Enhancing the quality of mediation may also assist.

Outcome

In contrast to the findings of previous studies, 56 per cent of mediation clients advised that either they or the other party were successful, with only 29 per cent believing that both sides were successful. In some previous studies dealing with mediation, disputants were more likely to perceive that the outcome was a ‘win-win’ outcome. This is more likely when integrative interest-based processes (rather than distributive) processes are used as agreements are more likely to reflect additional intangible and tangible elements such as apology, respectful communication and explanation for past behaviour.

Recommendation 15: Mediators need to be properly trained and skilled in conducting mediation processes and representatives and parties need to have clear obligations. The process definition and stages need to be clearly articulated by the Courts.

Satisfaction

Although mediation clients were generally satisfied, there were no significant differences in levels of satisfaction between mediation and ‘all other dispute resolution processes’ examined in this research. Most disputants were satisfied with the outcome of their dispute (57 per cent), however there were no significant differences in the levels of satisfaction between mediation clients and those who used another dispute resolution process to finalise their dispute (66 per cent were satisfied with the outcome).
While high satisfaction ratings are common in mediation, the ratings found in this research were not as high as those found in other studies and mediation did not distinguish itself as the most satisfying process. Procedural fairness is considered to be an essential component in not only enhancing satisfaction but also in producing agreed outcomes in mediation.

This research suggests that ratings for both satisfaction and procedural fairness by disputants who have been involved in mediation are high, but are not as high as in previous studies. There may be a number of reasons for lower satisfaction ratings. It may be that the perceptions have been negatively affected by delay (although in some past studies this was also a factor). However, it seems more likely that there are issues that arose in some mediations, and comments made previously about the process used and the extent to which disputants were engaged and can participate and speak are relevant.

**Recommendation 16:** The way in which disputants engage and participate in mediation is influenced by legal representatives and mediators. There are issues about to what extent a mediator can ‘control’ a representative. This issue has been the subject of much recent attention by the Victorian Law Reform Commission which suggested that it is appropriate for litigants and representatives to have certain overriding obligations in terms of their approaches to litigation and ADR processes. Good faith reporting has been suggested as a way of enabling mediators to indicate where representatives or litigants have engaged in negotiations in an obstructive or uncooperative manner. Mediators also need to be properly trained and accredited and Courts should ensure that at a minimum, mediators meet the requirements of the National Mediator Accreditation Standards.

**Monitoring, Evaluation and Periodic Review**

The Courts currently collect little information about disputants or disputes that assists to inform either referral decisions or which informs Courts about Court connected mediation. Mediators routinely do not report when a mediation has been held (in up to 50 per cent of matters, mediators do not report when a mediation has been held).

**Recommendation 17:** The ICMS system needs to collect information that can assist to enable more effective referrals to take place and monitor the ongoing work in this area. Data about cases that are filed with the Courts should be collected that shows the age of the case (so that earlier referral can take place with ‘younger cases’) as well as demographic information that can provide information about access.

The ICMS system should be adjusted to issue an alert when a mediator’s report has not been forthcoming after a referral order has been made. Mediators should be required to report on an extensive range of matters which could include information about case outcomes and ‘good faith’ reporting. Such information should be the subject of regular ICMS reporting de-identified and
made available to mediators and to the Courts so that the system can be enhanced into the future.

Recommendation 18: There are some different information needs that need to be met to ensure that mediation services are effective. This requires different evaluative approaches. For regular and ongoing monitoring, reports as to outcomes and other reporting matters (by mediators see Recommendation 17) are essential. Reporting and measuring mediation will require more effort than gathering data that can be used for ongoing monitoring and reporting. Regular surveying, perhaps for a period of one month per year is necessary to ensure that ongoing evaluation takes place. This surveying would involve gathering more information about perceptions from participants, representatives and other stakeholders and preferably using some of the same survey questions used in this research (to enable comparable reporting to take place). Deeper research strategies are also needed in the long term. Planning research reviews every five years (or more frequently) to ensure that more complex criteria are assessed (including criteria relating to cost, compliance and access) is essential in all dispute systems.

Improving Quality

Improving quality into the future will require establishing clear standards, supporting ‘excellence’ in mediation and promoting quality using a range of approaches. These approaches could include ‘quality forums’ and the distribution of more information about the results of ongoing monitoring, evaluation and mediation practice initiatives.

A Quality Framework approach involves finding strategies and processes that inspire participation in the continuous improvement of practice, at both an individual and Court level.

Another approach that could be directed at enhancing quality involves rewarding those who demonstrate high quality practice. Quality award or recognition mechanisms may also encourage the development of effective feedback mechanisms as well as promoting innovative approaches to conflict.

In terms of complaints however, where these involve an external mediator, ordinarily they will be dealt with by the mediator’s professional organisation. Courts may wish to seek more information (perhaps of a generic nature) from professional bodies about the number and patterns of any complaints about mediators (in respect of court related mediations) and how they have been resolved.

The Report explores a number of different approaches that could be used to enhance the quality of mediation processes in the future. Notably, at present there is little dialogue between the Courts and external mediators and there is also little discussion amongst mediators about the processes they use. The Report discusses the creation of a quality culture rather than
a compliance culture and suggests that a quality framework be used by the Courts into the future.

Recommendation 19: A Quality Framework should be implemented by the Courts and the Department of Justice to enhance the quality of mediation services that involves a number of elements such as:

- Innovation and recognition schemes
- Mentoring and expertise exchange
- Quality practice profiling and recognition
- Quality forums
- Training strategies for mediators, users, court staff and others
- Regular participation of users in surveys
- Capturing and retaining knowledge about demographics and processes
- Complaints management liaison and feedback
- Quality assurance and standards monitoring – assessment tools:
  - Internal self assessment of service quality
  - External assessment of service quality
  - Review mechanisms.
Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<tr>
<td>ACPACS</td>
<td>Australian Centre for Peace and Conflict Studies</td>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>AIC</td>
<td>Australian Institute of Criminology</td>
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<tr>
<td>AILR</td>
<td>Australian Indigenous Law Reporter</td>
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<tr>
<td>ALRC</td>
<td>Australian Law Reform Commission</td>
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<td>ALTA</td>
<td>Australasian Law Teachers Association</td>
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<tr>
<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
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<tr>
<td>ATSIFAM</td>
<td>Aboriginal and Torres Strait Islander Family Mediation Program</td>
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<tr>
<td>BATNA</td>
<td>Best Alternative to a Negotiated Agreement</td>
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<tr>
<td>CAV</td>
<td>Consumer Affairs Victoria</td>
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<tr>
<td>Cth</td>
<td>Commonwealth</td>
</tr>
<tr>
<td>DOJ</td>
<td>Department of Justice</td>
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<tr>
<td>DSCV</td>
<td>Dispute Settlement Centre of Victoria</td>
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<tr>
<td>FICS</td>
<td>Financial Institute Complaints Service</td>
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<tr>
<td>IAMA</td>
<td>Institute of Arbitrators and Mediators</td>
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<tr>
<td>ICJ</td>
<td>Institute for Civil Justice</td>
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<tr>
<td>ICMS</td>
<td>Integrated Courts Management System</td>
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<tr>
<td>IFaMP</td>
<td>The Indigenous Facilitation and Mediation Project</td>
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<tr>
<td>IT</td>
<td>Information Technology</td>
</tr>
<tr>
<td>LEADR</td>
<td>Leading Edge Alternative Dispute Resolvers</td>
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<tr>
<td>NADRAC</td>
<td>National Alternative Dispute Resolution Advisory Committee</td>
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<tr>
<td>NESB</td>
<td>Non English Speaking Background</td>
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<td>NMAS</td>
<td>National Mediation Accreditation Standards</td>
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<td>NSWCA</td>
<td>New South Wales Court of Appeal</td>
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<td>NSWLR</td>
<td>New South Wales Law Reports</td>
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<td>PI</td>
<td>Personal Injury</td>
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<td>QC</td>
<td>Queens Counsel</td>
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<td>RISE</td>
<td>Reintegrative Shaming Experiments</td>
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<td>SASC</td>
<td>South Australian Supreme Court</td>
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<td>SPSS</td>
<td>Statistical Package for the Social Sciences</td>
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<td>VLRC</td>
<td>Victorian Law Reform Commission</td>
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<td>VOMP</td>
<td>Victim Offender Mediation Program</td>
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<td>VSCA</td>
<td>Supreme Court of Victoria Court of Appeal</td>
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<td>WAR</td>
<td>Western Australian Reports</td>
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<td>WASCA</td>
<td>Western Australian Court of Appeal</td>
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Background and Methodology

Introduction

1.1 The Mediation in the Supreme and County Courts of Victoria Research Project (this Project) has explored the application and effectiveness of mediation processes used in civil proceedings that have been commenced in the Supreme and County Courts of Victoria.

1.2 This project has been undertaken to assist policy makers, the Department of Justice (DOJ), the Supreme Court of Victoria, the County Court of Victoria, disputants and others to evaluate existing mediation processes and make informed decisions regarding the future implementation of dispute resolution options. Only a limited amount of research into the effectiveness of mediation in the higher courts of Victoria has previously been conducted and the Department of Justice has commissioned this report to assist in planning Alternative Dispute Resolution (ADR) strategies into the future.

1.3 The Supreme Court of Victoria and the County Court of Victoria have increased ADR use and referral in recent years. The Supreme Court refers many litigated matters to externally conducted mediation and has a small internal mediation program (where Masters mediate). It also offers pre-trial conferencing in selected matters. The County Court has for many years referred matters to external mediation and also has a limited case conferencing program. The Department of Justice considers that mediation

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2 Alternative Dispute Resolution is used to describe the processes that may be used within or outside courts and tribunals to resolve or determine disputes where the processes do not involve traditional trial or hearing processes. The term ADR is used also to describe processes that may include conferencing, mediation, evaluation, case appraisal and arbitration.


5 County Court of Victoria, www.countycourt.vic.gov.au (accessed 22 July 2008) and information provided in a meeting with County Court staff on 30 January 2008.
has an important role to play in promoting an accessible and timely civil justice system.  

**Project Aims**

1.4 The overarching aim of this Project has been to assess the use and effectiveness of mediation in the Supreme and County Courts of Victoria. The Project has the following specific objectives:

- To develop agreed criteria for effectiveness of mediation in the higher courts;
- To develop a model for use in the Supreme and County Courts which enables effective evaluation of mediation, which is compatible with the Integrated Courts Management System (ICMS) data warehouse architecture;
- To enable an effective assessment of mediation in cases in which proceedings have been instituted in the Supreme and County Courts, but where mediation has not been ordered by the court – for example where the parties have used mediation as a result of self referral.

1.5 The project objectives have been addressed by using a range of research methodologies that included a detailed literature review as well as a qualitative and quantitative analysis of civil disputes finalised in the Supreme and County Courts of Victoria from February to April 2008 and direct interviews with stakeholders. As a result of this approach, this report provides information about the characteristics of different dispute resolution processes available at the Supreme and County Courts of Victoria.

1.6 The report also provides detailed information about the processes, outcomes and perceptions of mediation in the Supreme and County Courts of Victoria. The attitudes and perspectives of various stakeholders are included - namely disputants, mediators and lawyers. The report outlines the benefits and challenges associated with mediation in comparison to other dispute resolution processes and highlights opportunities for improvement. Sub-objectives of the Project have included:

a) Researching dispute resolution processes and considering whether they resolve or limit the dispute by examining their complexity, duration and cost, as well as mediator and disputant perceptions of whether the processes they used assisted in resolving their dispute.
b) Exploring the procedural fairness of different dispute resolution processes by comparing them using defined criteria, assessing stakeholder perceptions of procedural fairness, and by exploring how these are linked to outcomes.

c) Exploring issues relating to access to mediating and considering whether the higher courts in Victoria can respond differently to different disputants based on demographic and other indicators.

d) Analysing the accessibility of dispute resolution processes by assessing the availability, cost, disputant demographics and understanding of the processes. Issues about the advice given to disputants involved in the various processes are also explored.

e) Assessing efficiency by comparing legal and other costs as well as tracking time spent and disputants’ perceptions of cost savings or loss.

f) Exploring the satisfaction levels of stakeholders with different dispute resolution processes.

g) Analysing compliance with outcomes of the different processes.

1.7 Criteria to evaluate mediation were promulgated early in this Project and are discussed throughout this Report. The basic criteria that have been used to assess mediation processes are whether the mediation processes:

- resolved or limited the dispute
- were considered by the parties to be just or fair
- were accessible
- used resources efficiently' and promoted lasting outcomes
- achieved outcomes that were effective and acceptable.

The Research Team

1.8 This project was undertaken Professor Tania Sourdin of the Australian Centre for Peace and Conflict Studies (ACPACS) which is a national centre that has an office in Melbourne and is part of the University of Queensland.

1.9 The ACPACS research team completed the project work as listed in Appendix B. The project leader, principal researcher and writer was

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7 This is an adaptation of the ALRC criteria. The process should be efficient.
MEDIATION IN THE SUPREME AND COUNTY COURTS OF VICTORIA

Professor Tania Sourdin, primarily assisted by Senior Researcher Dr Nikola Balvin. Much of the statistical analyses was undertaken by Dr Nikola Balvin and expert analysis of the Courts’ IT reporting system was undertaken by Andrew Vincent. The support researcher on the project was Naomi Cukier and administrative work was completed by Sandra Padova.

1.10 The research team was assisted by the Project Advisory Committee. Please see Appendix C for details of members of the Project Advisory Committee. The Project Team wishes to acknowledge the important input of this group and to express its thanks.

**Focus of this Report**

1.11 This report is divided into six chapters, each reflecting one key area of investigation. The first chapter summarises the relevant literature and details the research methodology used in the Project. Chapter 2 discusses the use of mediation in each Court and details the characteristics of matters that were mediated. Chapters 3 to 5 focus on specific evaluation criteria: accessibility (Chapter 3), fairness and satisfaction (Chapter 4), efficiency and compliance outcomes (Chapter 5). The report concludes with an examination of overarching issues and future options in Chapter 6.

**What is mediation?**

1.12 One threshold issue concerns the subject matter of this report – mediation. As Professor Sourdin has previously noted, it is impossible to provide a final definition of ‘mediation’. At its simplest, mediation involves the intervention of a trained, impartial third party (or third parties in the case of co-mediation) who will assist the disputing parties to make their own decisions. One overseas practitioner, Press, has noted that:

> By definition, mediation will defy complete codification. Its inherent flexibility and strengths will continue to grow and applications will be discovered in new areas.

1.13 Legislation and reports across a range of jurisdictions within Australia and New Zealand have provided a number of definitions for ‘mediation’. However those definitions, although similar, are brief and primarily refer to the facilitative nature of mediation processes. In practice, very different forms of mediation processes are used in different jurisdictions and subject areas. The primary difference relates to the role of

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11 In some jurisdictions the term has not been defined: see *Native Title Act 1993 (Cth).*

**Background and Methodology**
the mediator. The lack of clear legislative definition may mean that in different States and areas of jurisdiction there is a tendency to adopt the process characteristics that are most used in that State or jurisdiction. This may mean that the process of mediation is conducted quite differently by different practitioners (mediators are drawn from a diverse range of backgrounds) in States such as Victoria and New South Wales.

1.14 According to the Australian National Mediator Accreditation Standards, mediation is:

...a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decision.

1.15 Similar definitions of mediation exist in rules and legislation, however it is recognised that due to their different application in practice, research findings may not be comparable across jurisdictions or regions.

1.16 The definitional variations in the use of the term ‘mediation’ are the subject of further comment throughout this report. However, it should be noted that practitioners, litigants and others can sometimes use the term to describe conferences, conciliation and evaluative processes that may not resemble any accepted definitions or descriptions of mediation. This matter is the subject of additional detailed comment in Chapter 2.

Overview of ADR Use in the Supreme Court and the County Court

1.17 Another issue in this Project has related to the lack of information about current ADR use in the Supreme and County Courts of Victoria. ADR is used extensively in both Courts however for a range of reasons, there has been little, if any, information gathered about ADR use, case outcomes, effectiveness or views regarding satisfaction and process characteristics. This has been a major reason for conducting this research. However, this has meant that there is no comparable past data about Supreme and County Court mediation use available from the Courts or from other sources and the researchers are therefore unable to make any...
firm conclusions about whether ADR referrals and process use have been more effective than in previous years.

1.18 This situation is not unique within Australia. The Productivity Commission, the Australian Law Reform Commission (ALRC), the National Alternative Dispute Resolution Advisory Council (NADRAC) and most recently the Victorian Law Reform Commission (VLRC) have all commented upon the lack of information available about ADR use in most Australian Courts. Courts have a lack of information for three main reasons:

1) Litigants and representatives may be reluctant to disclose information about ADR processes because they are concerned about confidentiality.

2) ADR referral may take place as a result of self referral, that is, Courts may not be aware if litigants have used an ADR process to resolve their differences.

3) The terminology issues mean that it is difficult for Courts to collect and gather information. In any event, data collection processes within Courts are unable to collect information about ADR process use, outcomes or performance measure data (notably, both the County and Supreme Court are in the process of extensively upgrading their data collection processes and case management systems – this matter is referred to below).

1.19 As noted previously, both the Supreme and County Courts of Victoria have increased their use of ADR and mediation in recent years although mediation has been a feature of the available dispute resolution processes in both Courts for more than a decade. Both Courts now offer mediation as part of the standard directions given to litigants. In addition, the Supreme Court also offers pre-trial conferencing and the County Court offers case conferencing of disputes.

1.20 The State Government’s 2008 budget initiatives includes ADR funding of $3.7 million for judge-led mediation pilots for the Supreme and County Courts. This work may involve one new judge to conduct mediation in the Supreme Court and one new judge to conduct case-conferences in the County Court. These pilots may produce more information on the effectiveness of ADR in the courts.

1.21 Both Courts have criminal and civil jurisdiction (and various divisions or separate lists within each jurisdiction) and each Court is

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upgrading its case management system so that more detailed statistics about workload and case outcomes will be available in the future.

About the Supreme Court

1.22 The Supreme Court of Victoria is the superior Court in the State.\(^{19}\) The Court has two divisions: The Court of Appeal and the Trial Division. The Court of Appeal was created by Act of Parliament in 1995 and is predominantly concerned with appeals from decisions of single judges of the Supreme and County Courts\(^{20}\).

1.23 The Trial Division has since 2000 been divided into the Criminal Division, the Common Law Division, and the Commercial and Equity Division. This project is concerned with civil matters from the Common Law and the Commercial and Equity Divisions, which are mostly heard by a Judge alone.\(^{21}\)

1.23 The Supreme Court has a wide jurisdiction and newly developed areas dealt with by the Supreme Court include planning law, administrative law and law governing property disputes between de facto partners.\(^{22}\) On the 1st of January 2008, the Court had 25 Trial Division judges, 9 Court of Appeal judges and 8 Masters. In July 2008, the Supreme Court Act 1986 was amended by the Courts Legislation Amendment (Associate Judges) Act. These amendments provided that one or more Associate Judges are to be appointed by the Governor in Council and these must include a Senior Master and may include Taxing Masters and Registrars.\(^{23}\).

1.24 In the in the year 2005–2006\(^ {24}\) (the 2006–2007 Annual Report was not available at the time of writing), approximately 6,504 cases were filed in the Civil Division of the Trial Division in Melbourne.

ADR in the Supreme Court

1.25 The Supreme Court refers disputants to two ADR processes: pre-trial conferences and mediation. Although information on how many matters are finalised via these processes is not available from the 2005–2006

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\(^{23}\) Supreme Court Act 1986 (Vic), s104 and s104A. Please note that this Act creates Associate Judges in both the Supreme and County Courts but is yet to be proclaimed. Please also note that The Courts Legislation Amendment (Associate Judges) Act 2008 amended the Supreme Court Act 1986, the Constitution Act 1975 and the County Court Act 1958.

Annual Report, the methods and numbers of civil case disposal are outlined in Figure 1.1.

1.26 This research has found using a three month sample period that of the civil cases that were finalised in that three month period, most (n=299; 64 per cent) were ‘settled, dismissed or discontinued without trial’, 98 (21 per cent) were tried to judgement, 65 (14 per cent) were dismissed after trial commenced and 3 (1 per cent) were transferred to another Court. As is noted in Chapter 2 of this Report, according to the data collected by the researchers, the process which finalised the highest number of disputes was mediation.


Pre-trial conferences

1.27 Pre-trial conferences are a form of ADR and may result in the finalisation of a small number of matters in the Supreme Court. They usually take place after a matter has been given a trial date and are predominantly carried out by the Prothonotary or Senior Deputy Prothonotary. Parties receive notice to attend a pre-trial conference from the Court of the Prothonotary or may choose to attend by consent. Pre-trial conferences may be adjourned, but only by arrangement with the Registry and generally with the consent of all parties.

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Mediation in the Supreme Court

1.28 The Chief Justice of the Supreme Court recently made the following statement in relation to mediation:

It should be stressed that mediation is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements. 28

1.29 Order 50.07 of Chapter I of the Supreme Court Rules states that the Court may at any stage of a proceeding, with or without the consent of the parties, order that a mediation take place. Parties may also at any stage ask the Court to refer them to a mediation process. 29 On 10 October 2005, the Rules of the Court were amended to allow mediation by Masters. 30 Mediations by Masters are usually conducted in cases where it is not ‘practical’ to have an external mediator conduct the process. 31

1.30 A report to the Attorney-General Office of Master, Costs Office described the mediations conducted by Supreme Court Masters, noting the advantages and disadvantages of mediations conducted by Masters. 32 Many of the noted advantages relate to convenience, costs, efficiency and accessibility whilst disadvantages relate to inappropriate allocation of court resources. 33 These processes are explored in more detail in various Chapters of this Report as well as in Chapter 6.

1.31 The Supreme Court has noted that the Masters’ mediation program (introduced as a pilot program in 2005) has been very successful. As a result of a new rule adopted and applied to that pilot, a Master may order that a master mediate the whole or any part of the proceeding. 34 Of the 50 mediations conducted by Masters, it was noted that 80 per cent were either resolved completely or in part. 35 The Court has expressed the view that Masters are appropriate people to conduct mediations and indicated that whilst they ‘have the authority of the court’ they ‘are not the people who

30 Supreme Court of Victoria, Annual Report 2005-2006 (Supreme Court of Victoria, Melbourne, 2006) p 15.
31 Supreme Court of Victoria, Annual Report 2005-2006 (Supreme Court of Victoria, Melbourne, 2006) p 15.
will ultimately decide cases at trial’. Following the July amendments referred to previously, some Masters will become known as Associate Judges in the future.

1.32 Mediations may also be carried out by a mediator agreed upon by the parties’ representatives. Usually a private mediator will be a solicitor or barrister who is also a mediator. Generally, the parties share the cost of the external mediator and if a written agreement is reached at mediation, the parties may also apply to the Court to have Orders made to finalise their case.  

1.33 The Court acknowledges that ‘litigation is adversarial in nature’ and that mediation may resolve some matters in a less time-consuming, and less costly manner, while also reducing the risks associated with litigation. Mediation can also save judicial time and Court resources as well as ‘...provid[ing] parties with certainty’ and ‘streamlin[ing] the wheels of justice’. The 2005–2006 Annual Report acknowledged that much Judge-time, party stress and cost has been saved through the introduction of internal court mediation by Masters.

Mediated cases in the Supreme Court

1.34 As discussed at the end of this Chapter, the researchers reviewed 243 civil Supreme Court files finalised in a 3-month period in early 2008 (1 Feb–30 Apr 2008). Out of these, 81 (33.3 per cent) were clearly mediated and 31 (12.8 per cent) were finalised at mediation. (Follow-up survey data suggests that these figures do not include a number of matters that were in fact mediated and resulted in the finalisation of cases. This matter is discussed in some detail in Chapter 4 and 5 of this Report.)

1.35 The Court files that were examined were comprised of 48 different ‘case types’ (according to the Supreme Court classification system, which was provided to the researchers electronically). Table 1.1 below outlines the four most frequent case types in this sample as well as the top four most frequently mediated case types in the sample. The most common case type in the sample was ‘damages P.I. Jury Ind. (asbestos)’, however this type of

39 Supreme Court of Victoria, Annual Report 2005-2006 (Supreme Court of Victoria, Melbourne, 2006) p 15.
The case was never mediated (according to sampled data). The most frequently mediated case type was ‘Declaration – Cause Writ or Writ of Summons’.

**TABLE 1.1: MAIN FOUR SUPREME COURT CASE TYPES AND MEDIATED CASE TYPES**

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<thead>
<tr>
<th>Top four case types in sample</th>
<th>Top four mediated case types in sample</th>
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<tr>
<td><strong>n</strong></td>
<td><strong>%</strong></td>
</tr>
<tr>
<td>Damages P.I. Jury Ind. (asbestos)</td>
<td>32</td>
</tr>
<tr>
<td>Declaration – Cause Writ or Writ of Summons</td>
<td>29</td>
</tr>
<tr>
<td>Damages – Cause: Breach Contract</td>
<td>22</td>
</tr>
<tr>
<td>Possession of Land – cause: Writ or Writ of Summons</td>
<td>19</td>
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1.36 It is estimated that in 2008, 25 per cent of active Supreme Court cases (excluding those cases finalised by default or where there has been no response from a defendant) will be finalised by mediation. This estimate is based on the sampled Court-file data and a cross-referencing with the survey data. The Court-file sample showed that approximately 13 per cent of active cases were clearly finalised at mediation and the survey data suggested that a further 12 per cent of active files are likely to be finalised at mediation.

**About the County Court**

1.37 As indicated on the County Court website, the County Court has the following eight lists and sittings:

- The Daily List: for Civil, Criminal and Appeal hearings for the next sitting day
- The Taxation Callover List: for pending taxations for the current month
- The Business List: This list is subdivided in the Commercial Division, the Building Cases Division and the Miscellaneous Division
- The Monthly List: list trials, Serious Injury & Assessments for the upcoming month

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40 This may be because of the urgency of such cases may make them unsuitable for mediation. For example, often the life expectancy of the plaintiff is considerably reduced by the condition and an urgent trial is ordered.

The Commercial Pilot List: This is a judge-controlled list with intensive case management through directions hearings fixing expeditious interlocutory and trial timetables

Criminal Trial Listing Vacancies: Schedule of vacant dates for criminal trials

The Damages List: This list is subdivided into the General Division, the Defamation Division, the Applications Division and the Serious Injury Division

The WorkCover List: This list contains the General Division and the Section 134AB Division.

Approximately 10,080 cases were commenced in the County Court in the year 2006–2007. Of these, more than half of the commencing cases were criminal cases and 4,909 were civil cases. This research has only examined the finalisation of civil cases.

Of civil cases that were finalised in the County Court, the vast majority were not finalised as a result of a hearing process. Many cases have been finalised through the use of some ADR process, however as previously noted for the Supreme Court, currently the County Court is unable to record the process used to finalise a matter. Where the parties reach an agreement – the Court will ordinarily make some orders to finalise the matter but the parties are not required to indicate how they reached agreement. Agreements may result from direct negotiations between parties and/or lawyers (more commonly) or may result from a case-conference or a mediation process. Some detailed information about the County Court caseload is available in its 2006–2007 Annual Report.

The number of cases that were finalised in the Civil Division of the County Court from 2001–2007 is presented in Figure 1.2. These figures have been obtained from various County Court reports.

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**FIGURE 1.2: COUNTY COURT CIVIL DIVISION CASES FINALISED BETWEEN 2001–2007**

![County Court Finalised Cases - Civil](image)

**ADR in the County Court**

1.41 The County Court of Victoria considers ‘it must offer a more cost effective alternative than the Supreme Court’,\(^4\) process cases quickly and bring them to trial with procedural efficiency. Alternative Dispute Resolution forms part of the case efficiency approach utilised by the County Court. The Court offers case conferencing and court-connected conferencing or external mediation to support the timely and cost-effective processing of its cases.

1.42 It is a general requirement that parties undertake either a case-conference or a mediation prior to trial.\(^5\) This practice has been said to have contributed to the finalisation of approximately 95 per cent of all commercial cases prior to trial.\(^6\)


1.43 Many County Court matters are resolved by private negotiations before a direction is made to refer a matter to mediation and although the majority of contested Civil County Court cases are timetabled to attend mediation sometime prior to trial, there are no systems in place to monitor whether mediation actually occurred. Mediation is not required in WorkCover, Section 133B Serious Injury and transport accident cases, as such matters ordinarily require parties to attend a conciliation process before an application can be made to the Court.

Case-conferences

1.44 Case-conferences are used only in certain types of cases in the County Court and provide an opportunity for a judge and lawyers to discuss a case in an open court with the parties present and are said to result in an ‘intense judicial management of proceedings’47. Case-conferences may be ordered at a directions hearing or by consent of the parties. The parties themselves or a representative with the power to settle the proceeding must attend the case-conference.48 Parties are given the opportunity to retire to private sessions during the conference. The objectives of the case-conference are to:

... settle the action, or if it is not possible to refine the issues and to determine the most appropriate interlocutory steps to bring the matter to civil trial.49

1.45 On 20 November 2007, Judge Anderson and Judge Kennedy indicated that the Court has trialled a case-conference procedure and finalised approximately fifty per cent of cases in certain lists.50 Case

management conferences have only been used in the Business List and the Commercial List Pilot to support case finalisation.\textsuperscript{51}

**Mediation in the County Court**

1.46 The County Court orders mediations as part of its standard directions – essentially all proceedings that are not yet finalised at a certain point will be mediated.\textsuperscript{52} The County Court website outlines the role of mediation processes and indicates when it may be ordered without the parties’ consent:

One of the platforms of the County Court’s Civil Initiative (Order 34A) is that each case is subject to a directions hearing held subsequent to the filing of an appearance of the defendant. Mediation is encouraged in the great majority of cases, on occasions ordered without the consent of the parties, at the first directions hearings.\textsuperscript{53}

1.47 The Court has also recommended that the nature of the dispute is articulated prior to a mediation, and suggested that a mediation should be held before ‘substantial costs have been incurred by the parties’.\textsuperscript{54} The County Courts’ *Standard Mediation Procedures* are included in Appendix D.

**Mediated cases in the County Court**

1.48 Of the 310 finalised civil County Court cases reviewed in this Research Project (finalised from 1 February to 11 April 2008), 104 (33.5 per cent) were mediated and 58 (18.7 per cent) were clearly finalised at mediation (the survey data does however suggest that this proportion is higher). Although it is likely that a Judge ordered mediation in almost all of the reviewed cases\textsuperscript{55} (except for WorkCover, Section 133B Serious Injury and Transport Accident), information on whether the matter was mediated was available in only 104 of the 310 Court files.


\textsuperscript{55} Based on feedback from Judge Sandra Davis, 29 August 2008.
1.49 The County Court files were comprised of 11 different ‘list types’ (according to the County Court classification system, which was provided to the researchers electronically). Table 1.2 outlines the top four most frequent list types and top four most frequently mediated list types in the sample. The General Division of the Damages List was the most frequent and most frequently mediated list type.

**TABLE 1.2: TOP FOUR COUNTY COURT-LIST TYPES AND MEDIATED LIST TYPES**

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<thead>
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<th>Top four case types in sample</th>
<th>Top four mediated case types in sample</th>
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1.50 Based on the sample and survey data, it is estimated that in 2008, 28 per cent of ‘active’ and ‘suitable for referral to mediation’ County Court cases will be finalised by mediation. ‘Active’ cases in this context are those that are not finalised by default or struck out as a result of lack of any response from a defendant. ‘Suitable for referral to mediation’ were defined as matters excluding WorkCover, transport accident and serious injury cases which are most likely to be referred to conciliation or other processes. This estimate is based on the percentage of cases clearly finalised at mediation in the Court file sample (in the ‘active’ and ‘suitable for referral to mediation’ sample) added together with an estimate of cases that were likely to be finalised by mediation according to the survey data (please see Appendix K for details).

1.51 This estimate was compared to ‘settled at mediation’ figures provided in the County Court’s Annual Reports. ‘Settled at mediation’ figures were available for the Building Division (2005–2006, 2004–2005), Defamation Division and Medical Division (2005–2006, 2004–2005, 2003–2004, 2002–2003), and are summarised in Table 1.3.
TABLE 1.3: COUNTY COURT CASES FINALISED AT MEDIATION – AVAILABLE DATA FROM ANNUAL REPORTS

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<thead>
<tr>
<th>Cases settled at mediation</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Building Division Cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005–2006</td>
<td>7</td>
<td>20</td>
</tr>
<tr>
<td>2004–2005</td>
<td>9</td>
<td>24</td>
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<tr>
<td>Defamation Division Cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005–2006</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>2004–2005</td>
<td>4</td>
<td>12.5</td>
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<td>2003–2004</td>
<td>2</td>
<td>11.5</td>
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<td>2002–2003</td>
<td>-</td>
<td>7</td>
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<tr>
<td>Medical Division Cases</td>
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<tr>
<td>2005–2006</td>
<td>70</td>
<td>14.5</td>
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<tr>
<td>2004–2005</td>
<td>59</td>
<td>6.7</td>
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<td>2003–2004</td>
<td>44</td>
<td>11.6</td>
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<tr>
<td>2002–2003</td>
<td>-</td>
<td>17</td>
</tr>
</tbody>
</table>

1.52 According to the figures in Table 1.3, the Building Division on average finalises 22 per cent of matters per year at mediation; the Defamation Division finalises 10 per cent; and the Medical Division finalises 12 per cent of cases at mediation per year. In contrast, in the 10-week smaller survey sample reviewed, 50 per cent of Building Division cases (3 out of 6), 20 per cent of Medical Division cases (4 out of 18) and no Defamation Division cases (0 out of 1) were finalised at mediation.

1.53 The data collected by the researchers, projects slightly higher mediation settlement rates for the Medical and Building Divisions than those reported in the Annual Reports. There are several possible reasons for this, including:

- the researchers’ data overestimates the annual rate as activity may vary throughout the year,\(^{56}\)
- the Annual Report data underestimates the proportion of cases finalised at mediation as these may be closed as ‘discontinued’ or under some other category,
- more cases may be mediated in 2008 than in previous years.

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\(^{57}\) This seems unlikely as the cross-referencing of Court-file data with survey data suggests that in fact more cases in the Court file sample were mediated. See Appendix K for details.
Overview of Literature Research

1.54 Various publications were reviewed to gather information about the Supreme and County Courts of Victoria, their mediation processes and current issues in the area of court connected mediation. Information regarding mediation standards, criteria and past evaluations was also reviewed. Relevant sources included the Supreme Court of Victoria and the County Court of Victoria websites and reports published by DOJ, NADRAC, ALRC, VLRC and others in this field. This report also draws on and uses extracts from various publications by Professor Tania Sourdin, in particular the 2008 3rd edition of her book, *Alternative Dispute Resolution*.

1.55 It should be noted that, despite this report’s focus on mediation in the Supreme and County Courts, there is a wider focus on ADR in Victoria. For example, initiatives to review and improve VCAT’s operations and provision of ADR opportunities took place in March 2008. On appointing VCAT’S new head, Justice Bell, Mr Hulls stated 'Alternative dispute resolution is the future of our justice system.' Another example of this broader focus is the Victorian Parliament Law Reform Committee Review of ADR which explores the use of ADR in improving access to justice in civil and criminal cases as well as the numerous research and pilot initiatives that are referred to in more detail below.

1.56 This Project therefore forms part of an increasing focus on the evaluation and exploration of ADR processes within Victoria. Access to fair, cost-effective, early and out-of-court dispute resolution is an essential element of the Victorian Attorney General’s 2004 Justice Statement. Fostering ADR in Victoria is also a goal outlined in the Department of Justice 2007 Strategic Priorities. ADR is now a priority area for the Victorian Department of Justice and also the Government of Victoria.

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63 Department of Justice, *Department of Justice Strategic Priorities 2007: A Statement of Our Focus and Direction* (Department of Justice, Melbourne, 2007) p 3.
Annual Reports

1.57 The 2005–2006 Supreme Court Annual Report\textsuperscript{64} and the 2006–2007 County Court Annual Report\textsuperscript{66} summarise the work of the Courts. The reports provide yearly statistics on initiated, finalised and pending cases and compare them to statistics from previous years.\textsuperscript{66} These statistics are available for different divisions and lists.

1.58 The Annual Reports provide information in a summary form and as noted previously, do not tend to focus on ADR and the role of mediation in the court system to any great extent. The information regarding pre-trial conferences reports that according to the Prothonotary and the Senior Deputy Prothonotary the number of pre-trial conferences from 2004–2005 to 2005–2006 have increased by 20.\textsuperscript{67}

1.59 The County Court Annual Report notes that Court premises were used by third parties to conduct mediations and that one of the Court’s objectives is to:

\[...\text{encourage early settlement through alternative dispute resolution (ADR), particularly mediation.}\textsuperscript{68}\]

1.60 However, the 2006–2007 County Court Annual Report mentions mediation to a lesser extent and reports that:

\[\text{This year fewer civil cases were resolved using pre-trial methods such as mediation.}\textsuperscript{69}\]

1.61 The Department of Justice Annual Reports for 2005–2006\textsuperscript{70} and 2006–2007\textsuperscript{71} were also reviewed. These report on statistics relating to ADR and mediation provision, with the 2005–2006 report indicating that mediations that were carried out through the Dispute Settlement Centre of Victoria (DSCV) resulted in an 80 per cent agreement rate and mediations at the Victorian Civil and Administrative Tribunal (VCAT) had a 70 per

\textsuperscript{64}Supreme Court of Victoria, \textit{Annual Report 2005–2006}. Please note that the 2006–2007 Supreme Court Annual Report was not available at time of writing.

\textsuperscript{66}County Court of Victoria, \textit{Annual Report 2006–07}. (County Court of Victoria, Melbourne, 2008)

\textsuperscript{68}The 2005–2006 County Court Annual Report at times uses four year comparisons from 02–03 through to 05–06 and also comparisons from 97–98 through to 05–06.

\textsuperscript{67}Supreme Court of Victoria, \textit{Annual Report 2005–2006}. (Supreme Court of Victoria, Melbourne, 2006) p 6.

\textsuperscript{69}County Court of Victoria, \textit{Annual Report 2005–2006}. (County Court of Victoria, Melbourne 2006) p 10.

\textsuperscript{70}(County Court of Victoria, \textit{Annual Report 2006–2007}. (County Court of Victoria, Melbourne 2008) p 8.

\textsuperscript{71}Department of Justice, Victoria, \textit{Annual Report 2005–2006}. (Department of Justice, Melbourne, 2006).

\textsuperscript{72}Department of Justice, Victoria, \textit{Annual Report 2006–2007}. (Department of Justice, Melbourne, 2007).
cent agreement rate. A number of mediation initiatives are outlined, including the approach taken at the Magistrates’ Court and the Supreme Court to improve case management efficiency by allowing court registrars and Masters to mediate, as well as the community mediation pilots established at the Collingwood Neighbourhood Justice Centre and in Corio Norlane. The role of mediation in Native Title processes is also discussed.

1.62 The 2006–2007 Department of Justice Report includes a chapter on ‘Recognising the Role of ADR’ which indicates that the Department is ‘investing considerable energy into Alternative Dispute Resolution’. In 2005–2006, the department conducted extensive survey research with ADR users and suppliers. Results of the ADR supplier surveys indicated that in that year there were over one million instances of public contact with ADR suppliers, 31,000 mediations and 102,000 non-court determinations. The research also indicated that terminology used to describe ADR processes differed across service providers and that promotion of ADR services to the community requires greater attention.

Standards

1.63 A number of criteria that assist in measuring the effectiveness of mediation were reviewed for the present research. A detailed discussion regarding approaches that could be used in the future by the Courts is discussed in Chapter 6. The Project Advisory Committee reviewed industry Standards previously developed by Professor Sourdin for research and evaluation in this areas and used them to form the appropriate criteria for assessing the effectiveness of mediation in the Supreme and County Courts of Victoria.

1.64 The following NADRAC common core objectives for ADR were used to inform the criteria for the present research:

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73 See also T Sourdin and N Balvin *Interim Evaluation of Dispute Settlement Centre of Victoria Projects: The Neighbourhood Justice Project. The Corio/Norlane Community Mediation Project* (The University of Queensland, June 2008).
78 Recent international work has also identified objectives and indicators for the justice system that focus on similar areas. See Vera Institute of Justice, *Developing Indicators to Measure the Rule of Law: A Global Approach – A Report to the World Justice Project* (Vera and Altus Global Alliance, July 2008).
That ADR:
- Resolves disputes;
- Uses the process which is considered by the parties to be fair;
- Achieves acceptable outcomes;
- Achieves outcomes that are lasting; and
- Uses resources effectively.

1.65 NADRAC considered that these ADR objectives are relevant for most parties, practitioners, service providers, government and the community in the ADR sector. In addition, the following three objectives endorsed by NADRAC were used in the development of mediation effectiveness criteria in this research:
- To resolve or limit disputes in an effective and efficient way.
- To provide fairness in procedure.
- To achieve outcomes that are broadly consistent with public and party interests.

1.66 The ALRC standards on dispute resolution and court effectiveness were also reviewed, as was a transcript produced by the Victorian Parliament’s Law Reform Committee on their Inquiry into Alternative Dispute Resolution in December 2007. The transcript articulated the challenges facing barristers who practice mediation and the requirements of mediator accreditation standards. Some of their concerns relate to the challenges of accruing the practice hours required for accreditation, whereas some relate to the cost (to the Bar) of regulation and the difficulties associated with a ‘one size fits all’ regulative model.

1.67 A Victorian Bar Inquiry also articulated the clear benefits which result for parties in using ADR - specifying the comparable time and costs associated with litigation. Other benefits are also discussed, including where parties’ ‘ownership’ of the ADR process (as opposed to having the process and outcomes imposed on them in litigation) could result in more sustainable agreements.

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County Court web site and publications

1.68 The County Court web site\(^6\) contains extensive information for practitioners, the media and the general public. The website provides background information on the Court and its history, as well as current information on its practice and procedures, lists and sittings, jury service, judgements and support services. The 'publications' section provides statistics on cases that were commenced, finalised and pending in each of the County Court from 2001 to 2006.

1.69 The report by Judge Graham Anderson and Judge Maree Kennedy, ‘Recent Reforms Relating to the Management of Commercial Litigation in the County Court’\(^7\) was particularly useful in highlighting the most recent information on the procedures and the case finalisation rates in case management conferencing in the County Court.

Supreme Court web site and publications

1.70 The Supreme Court web site offers information on the Court’s history, practice and procedures, lists and sittings, board of examiners, jury service, judgement sentences and support services. The 'publications' section stores speeches, media releases, annual reports, practice guides and other Supreme Court publications. Many of these are reviewed in the Report and more detailed information is provided under selected Chapter headings.

Civil Justice reports

1.71 The VLRC provided the Civil Justice Review Report in March 2008 (released in May 2008) which involved a comprehensive overview of the litigation system in Victoria and made a series of recommendations. The report considered the aims of the civil justice system and the principles that should guide the rules of civil procedure, summarised factors influencing the justice system and assessed the performance of the civil justice system using empirical data and feedback.

1.72 The VLRC report suggested that many litigants in the higher Courts are dissatisfied as a result of delay, inefficiency and disproportionate legal

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\(^7\) Judge G Anderson and Judge M Kennedy, Recent Reforms Relating to the Management of Commercial Litigation in the County Court (address delivered in Melbourne, 20 November 2007) at 10. See:
costs. The report made specific recommendations for reform, increasing the use of alternative dispute resolution. Proposals for the provision of an increased array of ADR processes, more effective industry specific ADR schemes and additional provisions for mandatory referral to ADR were a prominent feature. The report also suggested that there was a need for ongoing civil justice review as well as other reform proposals.

1.73 A number of newspaper articles have cited the Attorney-General, the Hon. Rob Hulls, MP’s continued support for the increased use of ADR, encouraging a ‘more responsible use of the justice system’ by parties to litigation and the legal profession were also examined. The Victorian Attorney-General cites the legal system and its high costs, including barristers’ fees as ‘prohibitive’, and encourages the use of alternative dispute resolution as a method for addressing this and other issues. Using a similar rationale, Chief Justice Marilyn Warren has referred to the large and ever increasing workload of judges and courts, supporting the VLRC recommendations for the increased use of mediation to manage many cases. Efficiency of and access to justice for those who may struggle to afford it, as well as issues of case management are prominent features of supportive commentary regarding the VLRC report together with suggested strategies, such as using reforms to address class actions.

1.74 The VLRC, the Attorney General and the Chief Justices views have been supported by commentators who, whilst acknowledging the benefits of the court system for some disputes, endorse non-adversarial approaches for other types of disputes. Examples of restorative justice are given to illustrate the specific interests met for those whose dispute might not be best dealt with in the formal court system.

1.75 Lawyers and other commentators have raised a number of points about some of the suggested reforms in this area. The issue of lawyers

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92 See for example, D Rood ‘Justice Now Out of Reach: Hulls. Attorney General Attack on Steep Barristers’ Fees’ (June 2008) The Age, p 1 and the Attorney-General, the Hon Rob Hulls, MP, ‘Our Courts are for the People’ (June 2008), The Age, p 17.
93 Chief Justice M Warren, ‘Hard Cases: It’s Time for a Change as the Workload Keeps Increasing’ (May 2008), The Australian, p 34.
94 B Schokman ‘Justice for All, Bar None (June 2008) The Age, p 17.
96 A Freiberg and M King ‘Justice Calls for More than One Size Fits All’ (June 2008) The Age, p 13.
being ‘singled out’ for criticism has been raised, and it is noted that whilst lawyers may not be concerned about the increased use of ADR, they have highlighted concerns about other features of the proposed reforms, such as pre-trial oral examinations, and measures governing conduct. Other comments have been voiced by barristers, whose statements about the merits of Legal Aid respond to the Attorney-General’s concerns regarding high litigation costs and barristers fees.

1.76 Some litigants such as those in the corporate sector have taken issue with suggestions made in the report, which they perceive will result in them ‘footing the bill’ of the justice system. These issues have also arisen in the Federal sector as the Commonwealth Attorney-General has raised options regarding a proposed increase in court fees for large corporate litigants in order to more accurately reflect court expenses such as judicial salaries and the use of court premises.

**Previous evaluations of mediation processes**

1.77 Several publications reviewing the use and effectiveness of ADR were consulted in this research, as were previous studies and reports evaluating ADR processes. Of particular relevance to the present research were four Department of Justice reports, which were completed in 2007 and 2008 and focused on various industries and areas where ADR is used.

1.78 The Alternative Dispute Resolution in Victoria - Community Survey 2007 Report was commissioned by the Department of Justice. This project

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sought to survey the community, measuring the attitudes toward and experiences of Alternative Dispute Resolution schemes operating throughout Victoria. The report featured a questionnaire and involved 502 telephone interviews, focusing on those aged 18 years and over. The survey was designed to be representative of adult Victorian populations.

1.79 The Alternative Dispute Resolution in Victoria - Small Business Survey 2007 Report\(^\text{105}\), commissioned by the Department of Justice, surveyed Victoria’s small business community, measuring attitudes toward and experiences of ADR in Victoria. Using a weighting method, results were obtained from a survey of 500 small business owners and operators (fewer than 20 employees). Surveys were designed to be representative of the small business populations of Victoria. Some of the key findings of the survey were:\(^\text{106}\)

- That over one third of Victorian small businesses had experienced at least one dispute during the 12 months leading up to May 2007, with 637,000 disputes reported overall;
- That the largest proportion of disputes (15 per cent) were in relation to debts or late payment of bills by consumers;
- That over two thirds (69 per cent) of all disputes involving small businesses were resolved without the involvement of a third party; and
- That it cost small businesses about $1.8 million in time and expenses, to resolve disputes.

1.80 The Alternative Dispute Resolution in Victoria - Supplier Survey Report\(^\text{107}\) was based on a survey inviting feedback from selected industry and government providers of Alternative Dispute Resolution services. The survey responses provided insight into how Alternative Dispute Resolution schemes operate in Victoria. Schemes based in both private and public sectors, throughout a range of industries, were assessed. The
processes ranged along the spectrum from mediation through to arbitration.

1.81 The Alternative Dispute Resolution in Victoria - Supply Side Research Report\textsuperscript{108} explored the organisation of the supply of ADR services in Victoria. This qualitative and quantitative research was obtained following reviews of existing organisational material as well as interviews with stakeholders, such as courts and tribunals, industry ombudsmen, academics and government agencies. The report addressed questions regarding types of ADR processes provided in Victoria, how those services are funded and identified a number of issues for consideration by the Victorian Government.

**Literature regarding issues in the evaluation of mediation**\textsuperscript{109}

1.82 One issue in evaluating mediation processes is related to the issue of comparing the cost and benefits of the mediation processes with those of traditional litigation. In any comparison with the cost of those cases that go to trial, results will often be flawed because many civil cases are settled out of court through negotiation.\textsuperscript{110} In addition, some of the possible benefits of mediation are difficult to measure. The increased use of mediation may for example lead to a decrease in litigious or adversarial behaviour,\textsuperscript{111} foster better relationships between parties to disputes or result in higher levels of compliance with outcomes. Some recent evaluations have compared different mediation and litigation processes, however even where large scale research has been undertaken it may not be comparable (often


\textsuperscript{109} Parts of this discussion are drawn from T Sourdin, *Alternative Dispute Resolution* (3rd Ed, Thomsons Reuters, NSW, 2008).


\textsuperscript{111} It has been suggested that those exposed to cooperative dispute resolution processes develop more constructive communication patterns and less obstructive behaviour: P Wanger, ‘The Political and Economic Roots of the ‘Adversary System’ of Justice and ‘Alternative Dispute Resolution’ (1994) 9(2) *The Ohio State Journal on Dispute Resolution*, p 203.
because of the definitional issues referred to previously).\textsuperscript{112}

1.83 Despite this issue there have been numerous attempts in the past decade to evaluate mediation and other ADR processes. These attempts have at times been made in the context of a broader inquiry into justice (as with the Australian Law Reform Commission), or case management (see the RAND Report\textsuperscript{113} discussion below) or in response to specific ADR initiatives.

1.84 Other Australian empirical studies have focused on specific industries, cultural groups and demographic areas. These evaluative studies vary in terms of their objectives and are often not comparable because of different contexts. For instance, there have been evaluative studies addressing ADR in the financial industry,\textsuperscript{114} for credit consumers\textsuperscript{115} and within small business settings.\textsuperscript{116} Court connected ADR evaluation projects\textsuperscript{117} often will include an analysis of aspects of ADR relating to the


\textsuperscript{113} J Kakalik, M Oshiro, D McCaffrey, M Vaiana, N Pace, T Dunworth and L Hill, An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act (RAND, Santa Monica, California, 1996).


\textsuperscript{116} Marsden Jacob Associates, Survey of Small Business Attitudes and Experience in Disputes and their Resolution (Attorney-General’s Department (Cth), Canberra, 1999).

\textsuperscript{117} S Davidson, ‘Court-Annexed Arbitration in the Sydney District Court: An Evaluation of the Effectiveness of Court-Annexed Arbitration in the Disposal of Cases in the Sydney Registry (Civil) of the District Court of New South Wales’ (1995) 6 Australian Dispute Resolution Journal at 195; R Ingleby, In the Ball Park: Alternative Dispute Resolution and the Courts (Australian Institute of Judicial Administration, Melbourne, 1991); F Kingham, Evaluating Quality in Court Annexed Mediation (Deputy President, Land and Resources Tribunal, Queensland, September 2002); K Mack, Court Referral to ADR: Criteria and Research (Australian Institute of Judicial Administration Incorporated and the National Dispute Resolution Advisory Council (NADRAC), Attorney-General’s Department, Canberra, 2003). See also T Sourdin and N Balvin Interim Evaluation of Dispute Settlement Centre of Victoria Project: The Neighbourhood Justice Project. The Corio/Norlane Community Mediation Project (The University of Queensland, June 2008).
system of litigation, civil justice and case management. There are also more general evaluations of ADR processes such as arbitration and conciliation and the pre-trial aspects associated with these, as well as discussion of developments in ADR by comparison of programs over time. Further analysis of ADR in relation to market forces affecting its use and effectiveness has been conducted over the past few years, much of which has fed into research about the quality of ADR services.
Specific areas of law which utilise ADR are also addressed in these projects. Areas such as family law are often candidates for ADR evaluation, as are cases that deal with children and custodial issues. Mediation and conferencing in relation to violence, juvenile offenders and restorative justice programs also feature in evaluative studies. Many

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125 S Bordow and J Gibson, Evaluation of the Family Court Mediation Service, Research Report 12 (Family Court Research and Evaluation Unit, Sydney, March 1994); D Muller and Associates and Relationships Australia, Use of, and Attitude to, Mediation Services among Divorcing and Separating Couples Report (Commonwealth Department of Family and Community Services, Canberra, 1998); *Family Court of Western Australia, Family Court of Western Australia Mediation Service Evaluation* (The Court, Perth, August 1996); Attorney-General’s Department, Family Services Branch, Evaluation of the Marriage and Relationship Counselling Sub-Program (Legal Aid and Family Services, August 1996); Family Court of Australia, Self-Represented Litigants: A Challenge, Project Report (Family Court of Australia, December 2000); J Fisher and M Blondel, *Couples Mediation: A Forum and A Framework* (New South Wales Marriage Guidance, NSW, 1993); L Moloney, A Love and T Fisher, Managing Differences: Federally-funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction (Legal Aid and Family Services, Attorney-General’s Department (Cth), Canberra, July 1996); N Mushin, ‘Court-annexed Mediation in the Family Court of Australia: The Experience of Working with Cultural Diversity’ in: D Bagshaw (Ed), *Mediation and Cultural Diversity* (Second International Mediation Conference Proceedings, South Australia Group for Mediation Studies, University of South Australia, Adelaide, 1996).


of these programs have been associated with Community Justice Centres. Evaluations of these initiatives display varying methods and results in relation to research methodologies and outcomes.

1.86 ADR evaluation research has also focused on Native Title disputes and Aboriginal and Torres Strait Islander issues. Many of these studies are reports on pilots, providing qualitative and/or quantitative feedback about the effectiveness of the resolution process from the perspective of the parties and other stakeholders. Some studies regarding Indigenous issues have a particular focus on family law.

1.87 Restorative Justice initiatives and peer mediation in schools have also been evaluated and studies have involved questionnaires for school children and their parents, while decisions regarding Legal Aid funding have been based on predominantly qualitative research conducted in this area over the past few years. Finally, WorkCover disputes have also been the focus of ADR evaluation, with an emphasis on the types of processes used and the effectiveness perceived by those involved.

1.88 In addition, research and monitoring data is increasingly being produced by performance measurement technology that is in place within some courts and tribunals. These systems can now indicate where and how intervention and finalisation may occur. Refinements in these areas will

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134 Rush Social Research and John Walker Consulting Services, Legal assistance needs phase I: estimation of a basic needs-based planning mode (Legal Aid and Family Services Division, Australian Government Attorney-General’s Department, Canberra, 1996).

135 T Beed, The Role of Conciliation (Civil Justice Research Centre and Law Foundation of New South Wales, Sydney, November 1990).
enable a clearer analysis of mediation and ADR referral processes in the future.

1.89 Some overseas large scale empirical evaluations have shown significant benefits in using ADR. An Ontario study (which analysed more than 3,000 cases in Ontario) found that there were positive impacts upon the pace, costs and outcomes of litigation when ADR processes were used.136 Within the United States there are many reports which have analysed ADR use and many have found significant benefits although some have focused only on small non-comparable samples.137

1.90 However, many evaluation reports both within Australia and overseas remain ‘unreported’ as part of internal court or tribunal circumstances or are not comparable in the Australian setting.138

1.91 In one study of Family Court cases in Queensland, the average legal fee paid by clients involved in family law disputes was examined. The study found that the average fee paid (including disbursements) was:

- $1,729 for matters resolved by negotiation or mediation without court involvement;
- $4,459 for matters resolved after a court-arranged conciliation or counselling session;
- $7,204 for matters resolved after a final court hearing was scheduled, by settlement between the parties;
- $16,832 for matters resolved by an order of the court after a contested final hearing.139

1.92 Clearly, ADR processes can reduce costs and be less expensive than litigated options if the dispute is resolved. The benefits increase where disputes are likely to consume proportionally large amounts of time in a hearing. However, where agreement is not reached and the matter is then litigated, costs can be inflated as additional preparation and conferencing time can be expended. However, mediation and other forms of ADR may narrow the issues in dispute, reduce the need for interlocutory hearings or pre-trial processes and contribute to a shorter hearing.

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137 See Resolution Systems Institute, Bibliographic Summary of Cost, Pace and Satisfaction Studies of Court – Related Mediation Programs (2nd Ed, 2007).
139 M Cunningham and T Wright, The Prototype Access to Justice Monitor, Queensland, A Joint Project of the Department of Justice, Queensland and the University of Wollongong (Justice Research Centre, Sydney, 1996) p 29.
1.93 It has been suggested that when disputes are not subject to an early ADR process that they may take longer to resolve when a process is eventually commenced.\textsuperscript{140} Despite this, the evaluation of the NSW Settlement Scheme suggested that ADR processes, such as mediation, could provide great benefits even in older, more complex cases where significant legal costs had been expended. In this regard, that report noted that even if a mediation was not attended, a mediation scheme may still have ‘a catalytic effect, as parties in many disputes (went on) to resolve their disputes without attending a mediation conference’.\textsuperscript{141}

1.94 Many mediation processes have been evaluated in a court-connected context and for this reason some studies can provide a comparative reference point. It is considered that some of the specific advantages of mediation over litigation are speed, convenience, informality, cost saving, greater control of the process, confidentiality, preservation of ongoing relationships and compliance with outcomes and in comparable studies these features are sometimes examined. The degree to which processes meet objectives and the degree of priority given to objectives varies according to the areas where mediation is used.

1.95 The ALRC report, Managing Justice – A Review of the Federal Civil Justice System,\textsuperscript{142} highlighted the need for ongoing empirical evaluation research in the general civil justice area. As noted in its executive summary:

The commission acknowledges the importance of ADR as a tool in resolving cases quickly, less expensively and to the satisfaction of parties. However, the commission also cautions against uncritical acceptance of ADR as a panacea for all ills of litigation, much in the same way that tribunals were intended to provide the “solution” to litigation problems in the 1970s. The commission makes some targeted recommendations aimed at ensuring that the benefits of ADR are realised but it is not taken to substitute for appropriate adjudication.\textsuperscript{143}

1.96 The ALRC research in the Family Court, AAT and Federal Court areas concentrated on timing, case management and costs. The focus on mediation only formed a small part of the research. This is partly because the amount of mediation practised in each of those jurisdictions was at that time relatively small. Also, the primary focus of the ALRC was judicial adjudication, case disposal and the quality of outcomes, rather than other key issues that are also of relevance to ADR practitioners, theorists and


policy makers (for example, findings as to satisfaction and compliance with outcomes). Despite not being the primary research focus, some findings, particularly in the family law area, are of interest. In this regard, the ALRC noted:

8.59 On the Commission’s analysis, consensual resolution was more likely to be achieved if both parties were represented. Lawyer-led negotiation appeared a significant factor encouraging settlement. Parties made repeated attempts at settlement at all stages of the process, including before filing their applications. Settlements were often achieved later in the process. As stated in Chapter 5, unrepresented parties were more likely to withdraw, cease defending or have their cases determined following a hearing. They were much less successful in brokering a consent outcome. Unrepresented parties most frequently nominated to the Commission “frustration with the process” as the important reason they withdrew or settled their cases. 144

1.97 The conclusions of the ALRC in the family context are of interest to ADR and legal practitioners as they suggest that in many circumstances lawyers are aiding the negotiation process in somewhat unexpected ways. This conclusion is at odds with suggestions that lawyers can hinder negotiations.

1.98 A literature review which details additional evaluation reports in respect of mediation is reported on in more detail in Chapter 2 of this Report. In addition, relevant reports are referred to throughout this Report.

Methodology

1.99 This project applied a range of methodologies at different stages of research. Following an initial literature review, the Project Advisory Committee was established. This committee included members from the County Court of Victoria, Supreme Court of Victoria, Victorian Bar Council, Department of Justice and the Law Institute of Victoria, whose details are provided in Appendix C. The committee collaborated with Professor Sourdin to develop the project criteria and methodologies for their measurement.

1.100 As a result of these discussions and inputs, the following data collection techniques, which had been trialled in previous research, 145 were used:

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145 Federal Magistrates Court (unpublished paper); T Sourdin, Dispute Resolution Processes for Credit Consumers, (La Trobe University, Melbourne, 2007); T Sourdin and J Elix, Review of the Financial Industry Complaints Scheme – What are the Issues? (La Trobe University, Melbourne, 2002); T Sourdin and T Matruglio, Evaluating Mediation – New South Wales Settlement Scheme 2002. (La Trobe University and the Law Society of New South Wales, Melbourne, 2004).
Background and Methodology

- File-based data collection from civil cases finalised in the Supreme Court of Victoria and County Court of Victoria.
- Written surveys sent to disputants and mediators.
- Focus groups with interviews of disputants, mediators and lawyers.

Ethics application process

1.101 Prior to any data collection taking place, a full review by the Department of Justice Human Research Ethics Committee and an expedited review by The University of Queensland Behavioural and Social Science Ethics Review Committee (BSSRC) took place. Both committees granted full approval to the investigation.

1.102 The ethics committees reviewed the project aims, methodology, timelines, recruitment and confidentiality procedures, as well as all invitation letters, participant information forms, consent forms, surveys, focus group questions and any other data collection materials to be used during the Project. The Participant Information forms and invitation letters required the inclusion of information regarding voluntary participation, confidentiality, security and disposal of collected information. In addition, correspondence needed to include the University of Queensland ethical paragraph, and the contact details of the Principal Investigator, the Secretary of the Department of Justice Human Research Ethics Committee and The University of Queensland Ethics Officer. As a result, the letters sent out with the surveys were relatively complicated and this may have contributed to the lower response rate in this study than in comparable studies. This matter is discussed in more detail below under ‘written surveys- disputants and mediators’.

Informing stakeholders

1.103 The researchers also made considerable efforts to inform and engage relevant stakeholders in the Project. Information about the Project was posted on associated websites, including those of the Department of Justice, the County Court of Victoria, and the Australian Centre for Peace and Conflict Studies at The University of Queensland. Information was also distributed to LEADR, the Law Institute of Victoria and the Victorian Bar, inviting feedback from stakeholders, dispute resolution practitioners, researchers and any other interested parties regarding the Project.

146 For example: T Sourdin and T Matruglio, Evaluating Mediation – New South Wales Settlement Scheme 2002 (La Trobe University and the Law Society of New South Wales, Melbourne, 2004); J Elix and T Sourdin, Review of the Financial Industry Complaints Service 2002 – What are the issues? (Community Solutions, La Trobe University, University of Western Sydney, 2002).
1.104 The researchers attended several meetings with Registrars, managers, business analysts and other senior staff from both Courts to discuss the data collection process and materials. They also met with Masters from the Supreme Court to inform them about the research, and elicit feedback about the proposed mediator and disputant surveys and encourage them to participate in the survey and focus group research. Meetings with stakeholders from the Victorian WorkCover Authority and the Dispute Settlement Centre of Victoria were also undertaken to obtain information about their involvement with the Supreme and County Courts.

1.105 In addition, Professor Sourdin and Dr Balvin attended specially convened meetings of the Law Institute of Victoria ADR Committee and Professor Sourdin also spoke with the Victorian Bar at an evening seminar which was directed at informing and encouraging mediators and lawyers to participate in the Project.

**File-based data collection**

1.106 The research team consulted with the Project Advisory Committee and relevant staff from the Supreme and County Courts of Victoria to determine matters appropriate for review in the scope of this research. The file sample from the Supreme Court comprised of all civil disputes finalised during the period from 1 February 2008 to 30 April 2008. The sample included the following civil matters: estate/probate; personal injury; corporations; building; medical negligence; and other matters. Civil matters from the Court of Appeal were also included in analysis.

1.107 The file sample from the County Court comprised of all civil disputes finalised during the period from 1 February 2008 to 11 April 2008. The sample included the following civil lists: damages (application, defamation, general, medical, serious injury); business (commercial, building, miscellaneous); commercial list pilot; and WorkCover (s134AB and WorkCover List). Although WorkCover, serious injury and transport accident cases are not ordered to attend mediation, some of these cases were included in the present sample for the purposes of comparing mediation to other dispute resolution processes used by litigants in the County Court.

1.108 Some court-file information was provided in electronic form (via an excel spreadsheet and/or PDF). The specific fields that were provided electronically by the Supreme and County Courts are outlined in Table 1.4.
### Background and Methodology

#### TABLE 1.4: COURT FILE INFORMATION PROVIDED IN ELECTRONIC FORMAT

<table>
<thead>
<tr>
<th>Supreme Court information provided electronically</th>
<th>County Court information provided electronically</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. File number</td>
<td>1. Case location</td>
</tr>
<tr>
<td>2. Folio number</td>
<td>2. Case ID</td>
</tr>
<tr>
<td>3. Division</td>
<td>3. Initial filing date</td>
</tr>
<tr>
<td>4. List</td>
<td>4. Finalising date</td>
</tr>
<tr>
<td>5. Case type</td>
<td>5. Cause of action</td>
</tr>
<tr>
<td>6. Plaintiff’s name</td>
<td>6. List type</td>
</tr>
<tr>
<td>7. Defendant’s name</td>
<td>7. Party type (defendant/plaintiff and company/individual)</td>
</tr>
<tr>
<td>8. Date case initiated</td>
<td>8. Party name</td>
</tr>
<tr>
<td>9. Date of entry to list</td>
<td>9. Party address (available for limited cases)</td>
</tr>
<tr>
<td>10. Date case disposed</td>
<td>10. Docket description</td>
</tr>
<tr>
<td>11. Mode of disposal</td>
<td>11. Docket filing date</td>
</tr>
<tr>
<td>12. Hearing date</td>
<td>12. Docket text</td>
</tr>
<tr>
<td>13. Hearing type</td>
<td>13. Court event description</td>
</tr>
<tr>
<td>14. Court event scheduled date</td>
<td></td>
</tr>
</tbody>
</table>

1.109 All other information was collected manually from Court files at the Supreme and County Court Registry premises. The days and times spent collecting information at the County and Supreme Courts are outlined in Appendix M.

1.110 The Supreme Court provided an electronic database which gave some details of 428 civil matters finalised in between 1 February 2008 to 30 April 2008. The research team were able to collect the required information from 243 of these cases (55 cases could not be found; 2 cases could not be searched due to their confidential content; 54 cases were finalised via default judgement; 2 cases had the Magistrates’ Court as a defendant; and in 72 cases, the respondent had not made a response when the proceedings were commenced and the files were therefore regarded as inactive for the purposes of this research).

1.111 The County Court provided an electronic database with 1,164 civil cases finalised in Melbourne (1,129), Wangaratta (16) and Warrnambool (19), between 1 February 2008 and 11 April 2008. The high number of cases was due to a file audit which took place in February. The researchers searched this database to exclude cases closed as a result of the file audit and only review those closed in accordance with normal processes.

1.112 Cases finalised by default judgement were also deleted from the researcher database. This left 733 cases finalised through normal processes. Of these, 72 files were not reviewed as there had been no response from the defendant (and therefore the matters were regarded as inactive or default
matters); 43 files could not be located; 229 files were defined as WorkCover liability cases and therefore excluded from the file review process; and 79 other matters were excluded for other reasons (for example, they involved applications for follow-up action that could not be mediated as the defendant was absent, or applications for transfer or some other matter). As a result, 310 County Court files that were finalised between 1 February 2008 and 11 April 2008 were closely analysed in this research.

1.113 Court data was collected using the ‘Court file data collection’ instrument in Appendix E. Only information not available electronically was recorded manually. For confidentiality reasons, two separate forms were used to collect data. One form collected ‘identifying data’ and another form that was coded separately collected all other information. The data forms were separated in accordance with ethical requirements.

1.114 The information collected from Court files included:

- Name and address of plaintiffs – of which there were 549
- Name and address of defendants – of which there were 797
- Name and address of lawyer (only in cases where parties’ details were not available)
- Name and other mediator details (where available)
- Date cause of action arose
- Cross-claim information
- Plaintiff demographics (gender, date of birth, education occupation, income, nationality, disability)
- Defendant demographics (gender, date of birth, education occupation, income, nationality, disability)
- Claim information – heads of damage for plaintiff
- Claim information – heads of damage for defendant
- Terms of settlement
- Process used to finalise matter
- All processes used in matter
- Records regarding case management action – number of hearings, adjournments and applications
- Mediation details (internally/externally mediated, date, attendance, outcome)
- Duration of final hearing
- Whether proceedings were dismissed by consent

1.115 All information was de-identified prior to analysis in accordance with ethical and privacy principals. Most variables were numerically coded and entered as either categorical or continuous numerical values into the statistical analysis software program SPSS.

1.116 The name and contact details of disputants, lawyers and mediators were kept in a separate database from all other details for privacy and
confidentiality reasons and were linked by a randomly allocated identification number for cross-referencing purposes with survey information. All personally identifying information was destroyed following the completion of focus groups.

Written surveys – Disputants and mediators

1.117 Following the collection of plaintiff, defendant and mediator details from Supreme and County Court files, all parties who had a case finalised (provided their address details were available) in the Courts in the specified period were mailed a survey examining their experience and opinions of the process used to finalise their dispute. In cases where disputants’ address was not available, the researchers mailed a survey to their lawyer asking them to forward the survey to their client. Mediators who mediated the reviewed cases and whose details were available from the Court files were mailed a mediator survey examining their professional opinion and approach during the specified mediation session. Mediator details were at times difficult to obtain from Court files and therefore the disputant survey included a question asking for their mediator’s name and address. Where this was provided, the mediator was surveyed in an additional mediator survey mail out.

1.118 The survey was developed with input from the Project Advisory Committee and staff from the County and Supreme Courts of Victoria. Many of the survey questions were used in previous studies by Professor Sourdin to review courts, tribunals and external dispute resolution organisations such as the District and Supreme Courts of New South Wales, Financial Industry Complaints Service and Consumer Affairs Victoria and as part of her work with the ALRC (exploring processes in the Federal Court of Australia, the Family Court of Australia and the AAT) that was developed from a review of cases in the Commercial Division of the Supreme Court of New South Wales.

1.119 This approach enabled a comparative analysis of the current data with that of other dispute resolution processes to take place. A copy of the written disputant survey is located in Appendix F and a copy of the written mediator survey is located in Appendix G.

1.120 Overall, 1,341 surveys were mailed out to disputants and 151 surveys were mailed to mediators. Of these, 612 disputants had cases finalised in the Supreme Court and 729 had cases finalised in the County Court. 61 mediator surveys related to mediations connected to Supreme Court disputes and 87 surveys related to County Court-connected mediations.

1.121 All participants received a first and second reminder to complete the survey; the first was sent two weeks later, the second was sent three weeks later. 182 surveys were ‘returned to sender’ as participants were no longer at that address. When the ‘return to sender’ numbers are taken out
of the response rate, the overall response rate from disputants was 8 per cent; 10 per cent of contacted Supreme Court disputants responded and 7 per cent of contacted County Court disputants responded. The response rate for mediator surveys was 24 per cent.

1.122 The response rates to the written survey in this study are however lower than those of comparable studies, such as the NSW Settlement Scheme147 (where the response rate of disputants was approximately 46 per cent) and the Financial Industry Complaints Service148 (where the response rate varied from 21.3 per cent for respondents and 43.8 per cent from applicants). The reasons for the low response rate may relate to the quality of the party address and contact information located on Court files. Other reasons that may relate to the low response rate were given to the researchers over the telephone. For example, the researchers received several phone calls from disputants who advised that their insurer or lawyer dealt with the case and therefore they had no information to base their survey completion on. Other disputants called to advise they did not wish participate in the study as they did not wish to be reminded of the experience.

1.123 Another relevant factor may have related to the mode of survey distribution. The surveys in the present study were sent in the mail, while in the NSW Settlement Scheme they were distributed in person by mediators and that may be one of the reasons why that study yielded more responses. However, the Financial Industry Complaints Service Evaluation used the same mail-out and follow-up survey process that was used in this study. It is also possible that the long and quite complicated invitation letter required by the ethics committees (see reference to the ‘Ethics application process’ above) may have acted as a deterrent to litigants who did not wish to read or did not understand such a complicated letter. In the past, the researchers have used short and simple invitation letters and this yielded a higher response rate.149 It may be beneficial for future research ethical approval processes to allow for a simple invitation letter and a separate Participant Information form in order to avoid this obstacle.

1.124 The researchers thank all parties and mediators who completed the survey.

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148 J Elix and T Sourdin, Review of the Financial Industry Complaints Service 2002 – What are the issues? (Community Solutions, La Trobe University, University of Western Sydney, 2002).
149 E.g. T Sourdin, Dispute Resolution Processes for Credit Consumers (La Trobe University, Melbourne, 2007).
Focus groups – Disputants, mediators and lawyers

Disputants

1.125 Survey participants were asked to indicate their interest in participating in focus groups examining topics touched on in the surveys in more details.

1.126 One of the disputant focus groups was for plaintiffs only and one was for defendants only to ensure that plaintiffs and defendants from the same case were not in the same group and to ensure that discomfort was minimised.

1.127 The research ID numbers of all disputants were double-checked to ensure disputants and plaintiffs from the same case did not attend the same focus group. Defendant ID codes started with a ‘D’ and plaintiff ID codes started with a ‘P’ for easy distinction of the groups. The focus group with plaintiffs was held on Thursday, 10 July 2008 (from 5 pm to 7 pm) and in addition one plaintiff participated in a telephone interview on 17 July 2008. However, although a focus group with defendants was organised for the 14 July 2008, no defendants (even those who confirmed attendance) attended the scheduled focus group.

1.128 The topics discussed in focus groups with disputants included:

- Accessibility
  - (difficulties with accessing the dispute resolution process; understanding of the process and outcome; opportunities for improving access and understanding);
- Fairness
  - (perceptions of fairness of the process and outcome; opportunities for making process and outcome fairer); and
- Efficiency
  - (how acceptable the outcome was and whether it was lasting; concerns and suggestions for improvement)

The questions explored in the disputant focus group are noted in Appendix H1. Although the questions were used as a guide, many participants provided information that was outside the ambit of the questions.

Mediators

1.129 Some mediators also indicated on their survey that they would be interested in participating in a focus group. Other mediators were recruited through presentations made at the Law Institute of Victoria and at the Victorian Bar as well as at a meeting with the Masters of the Supreme Court. Overall, five mediators participated in a focus group held on 15 July 2008 (from 5 pm to 7 pm). Two mediators attended interviews with Professor Sourdin other times.
1.130 The topics discussed in the mediator focus group included:

- Accessibility
  - (Accessibility difficulties with Court-connected mediations; opportunities for improvement);
- Fairness
  - (Fairness of process and opportunities for improvement; appropriateness of mediated issues for mediation); and
- Efficiency
  - (Efficiency of court-connected mediation; procedural preparedness of mediating parties; party understanding of issues).

1.131 Mediator focus group questions are provided in Appendix H2.

**Lawyers**

1.132 Lawyers whose details were collected from the Court files were sent invitation letters to participate in focus groups discussing their experience and opinions of dispute resolution processes in the County and Supreme Courts of Victoria. Additional lawyers were recruited through presentations given by Professor Tania Sourdin and Dr Nikola Balvin at the Law Institute of Victoria and at the Victorian Bar. Four lawyers participated in the ‘lawyer’ focus group held on Friday, 11 July 2008 (from 5 pm to 7 pm) and another lawyer attended an interview with Professor Sourdin that morning.

1.133 The focus group with lawyers explored the following issues:

- Accessibility
  - (difficulties with accessing ADR and Supreme and County Court processes; opportunities for improvement;
- Fairness
  - (fairness of mediation in the Supreme and County Court; opportunities to increase fairness; appropriateness of topics for mediation); and
- Efficiency
  - (advantages and disadvantages of mediation in comparison to other dispute resolution processes).

1.134 Lawyer focus group questions are presented in Appendix H3.

**Additional focus group details**

1.135 The focus groups were facilitated by Professor Tania Sourdin and recorded and transcribed for qualitative analysis by Dr Nikola Balvin or Naomi Cukier. Focus groups with disputants were audio recorded, but no identifying information about participants was collected.
The details of all disputants who participated in focus groups were deleted from the database following the focus groups. The details of mediators and lawyers who agreed to be quoted by name and title were kept for verification purposes and deleted once all quotes were verified. The researchers wish to thank all focus group participants.

**Analysis and definitions**

The following section provides information regarding the interpretation of research findings in this Report.

**Samples**

Firstly, the quantitative analyses in the Report are based either on the large Court file sample (i.e. the information collected from Court files by the researchers in the Supreme and County Courts) or on the smaller survey sample or both samples. The survey sample includes two different survey types: the mediator survey and the disputant survey. Qualitative comments and information collected in focus groups are also reported throughout the Report.

**Statistical analysis and statistical significance**

Most data in this report is reported using descriptive statistics, such as percentages, means or medians. The mean is a measure of central tendency and is calculated by summing all values and dividing the sum by the number of values. It is sometimes referred to as the ‘average’ amount. The median is also a measure of central tendency and is the middle value in a set of values. For example, in the following sample – 3, 10, 22, 30, 45 – the median is 22. The median is particularly useful in samples with extreme values, which may skew the mean value.

The Report also uses statistical techniques to explore relationships between variables, such as correlation and statistical techniques to compare groups, such as t-test (t) or chi-square ($\chi^2$). At times statistical significance testing is carried out to determine whether the relationship between variables or the difference between groups is real or likely to be observed by chance. If the probability that a relationship or a difference is observed by chance is small, the results are deemed ‘statistically significant’. Statistically significant differences in the Report’s tables are marked with an asterisk (*) for easy identification. Differences or relationships reported in this Report are not statistically significant unless it is specified that they are.

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1.141 In some cases, it was not appropriate to conduct statistical analyses due to small sample sizes. This was a particularly relevant issue when comparing (the survey sample’s) mediation results to trial or case conferencing. The number of responses from trial and case-conference clients was very small and general conclusions about these processes cannot be drawn from the survey data.
Mediation Use

Introduction

2.1 This Chapter comments upon how mediation is used in relation to matters that were commenced within the Supreme and County Courts in the relevant period. As many commentators have noted, considering the number of matters ‘settled’ only provides a very incomplete assessment of the effectiveness of mediation. Although this is one criterion that is relevant there are a number of other important indicators relating to efficiency, effectiveness and fairness.

2.2 Two threshold questions are also relevant in this discussion and each has influenced the way in which the research findings have been interpreted:

1. What is mediation? It is clear that for many of those involved in the civil justice system, mediation has a specific meaning and applies to a distinct process that has certain procedural steps and is ‘facilitative’. For others, mediation can mean any process that involves conferencing. This definitional issue is discussed further below.

2. How is the mediation process delivered; what service delivery models exist? In this regard mediation may be provided by legal practitioners who act as mediators, in court mediators (such as Masters) or government supported mediators (such as the Dispute Settlement Centre of Victoria mediators) or non legal private mediators (it is questionable whether any mediators in the last two categories mediated any of the sampled matters).

2.3 These questions are relevant as the definitional issue may mean that matters are considered to have been mediated when they may in fact have been the subject of a process that most commentators would not describe as
mediation. This is relevant as conciliation and advisory processes often have much lower resolution rates than facilitative processes.\(^{151}\) The service delivery question is also relevant as the varied service delivery methods mean that much of what is mediated is not counted or recorded.

2.4 Courts currently collect little information about where, when and how mediation is used. As previously noted, this is partly because a party who decides to use a mediation process may do so without informing the Court (through self referral) or where a Court does refer a matter to mediation the litigants usually do not report how or whether mediation resulted in an agreement (at times, a matter may resolve prior to or after a mediation). This Chapter reports generally on this question and recommendations regarding this matter are made in Chapter 6.

**What is Mediation?**

2.5 As noted in Chapter 1, an important threshold question involves the definition of mediation. It was clear in consultations conducted that participants and practitioners have very different views about what the mediation process involves. On the one hand, mediation was regarded by some mediators as a clearly defined process that was facilitative and involved certain procedural stages. On the other hand, mediation was regarded by some as any type of conference. This creates an issue when


conducting research and evaluation work as it is not clear what is being evaluated and the type of process being used has an impact upon how effective it might be.

2.6 The different views about what mediation is can be referenced back to litigant perceptions. One litigant perceived the ‘mediator’ as having an advisory role and noted:

The conciliator was fair – he was trying to convince them to settle – that’s his job really.

Supreme Court Plaintiff, interview on 17 July 2008 describing aspects of the private mediation attended

2.7 One difference clearly relates to the extent that mediators may provide advice about outcomes. Ordinarily a mediator does not provide advice and advice giving is regarded as contrary to most available definitions or descriptions of mediation (although blended processes may exist).

2.8 This is also a relevant issue when considering one of the largest studies of mediation to date - an American study by the RAND Institute for Civil Justice. This study is one of the few comprehensive empirical studies currently available on the effects of court-related ADR on cost, delay and perceptions of fairness.\(^{152}\) The research evaluated six federal district courts that had mediation or early neutral evaluation programs and found that there was no strong statistical evidence that these ADR programs significantly affected or reduced time spent until disposition or litigation costs.\(^ {153}\) However, in many of the mediations studied in the RAND Report, the mediator gave an opinion on the likely outcome of litigation. That is, the processes used tended to be evaluative rather than facilitative. The more facilitative programs appear to have performed better across all outcomes that were measured (including resolution rates).

2.9 The ‘giving of advice’ emerged as an issue in this Report. In terms of the characteristics of ‘mediations’ that were conducted, information was provided in a range of ways – partly through survey responses (mediators and participant surveys) and through focus groups. The results indicated that 35 per cent of surveyed mediation practitioners gave advice\(^ {154}\).


\(^{154}\) This refers to the mediator survey question: ‘Did you express any view to the parties as to the likely outcome if the matter was litigated?’ 35 per cent of mediators (7 out of 20) answered ‘yes’ to this question.
2.10 The giving of advice is not contrary to the approach used in blended processes and this approach was the subject of much comment in the National Mediator Accreditation Standards where it was noted that a mediator using a ‘blended’ process must seek agreement to do so and must also be appropriately qualified and experienced. The notion of ‘giving advice’ may however be less problematic (although it may impact upon compliance rates and whether parties consider that they have been empowered) in the context of ‘conciliation’ than some of the other approaches that are the subject of comment in this Report and which involved a lack of engagement or interaction with the disputants. In this regard, some of the mediations that were examined involved little direct party engagement and the extensive use of shuttle negotiation.

2.11 Less than half of the mediators appeared to have followed any industry standard mediation model. Very few used visual aids, many did not hear from the parties at all (only their representatives) and most appeared to have quickly broken into a shuttle negotiation after a relatively short joint session. These findings suggest that in reality, many, and possibly almost half of the ‘mediations’ could more properly be characterised as conciliations, conferences or evaluations.

2.12 This is also relevant as conciliation processes can often involve a focus on compromisory and competitive negotiation (rather than interest based negotiation), tend to be of a shorter duration and tend to result in much lower rates of resolution. These types of conciliation processes often have resolution rates between 30–40 per cent (in contrast, mediation resolution rates are normally greater than 60 per cent and in some programs exceed 80 per cent).\(^\text{155}\)

2.13 In terms of mediation definition, this research has relied in part on the non prescriptive description of mediation that is contained in the National Mediator Practice Standards:

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\(^{155}\) See previous comments regarding finalisation rates in conciliations. In respect of in court or in tribunal conciliation rates (note – conciliation is used more frequently in Tribunals) the finalisation rate appears to depend upon the type of process used and the skills and qualities of the conciliator and they type of matter (those involving one off relationships may be more amenable to resolution by conciliation). Conciliation processes that resemble industry models of mediation may have higher resolution rates (see HREOC findings referred to previously) whereas those that are more rights based, of a shorter duration and may not support a facilitated discussion tend to have lower rates of resolution. The 30–40 per cent finalisation rate is a reflection of in court conciliation models that feature short durations, representative led negotiations, shuttle processes, and directive and evaluative features. See also T Buck, *Administrative Justice and Alternative Dispute Resolution*, (UK Department of Constitutional Affairs, UK, 2005). At: http://www.dca.gov.uk/research/2005/8_2005_full.pdf (accessed 28 August 2008) for a useful summary of Tribunal schemes.
2 Description of a Mediation Process

The purpose of a mediation process is to maximise participants’ decision making.

1) A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.

2) Mediation processes are not a substitute for individual or organisational legal and/or other expert advice, or individual counseling or therapy. Mediation processes may not be appropriate for all disputants or all types of disputes.

3) The goal of a mediation process is agreed upon by the participants with the assistance of the mediator. Examples of goals may include assisting the participants to make a wise decision, to clarify the terms of a workable agreement and/or future patterns of communication that meet the participants’ needs and interests, as well as the needs and interests of others who are affected by the dispute.

4) The mediation process may:
   1) assist the participants to define and clarify the issues under consideration;
   2) assist participants to communicate and exchange relevant information;
   3) invite the clarification of issues and disputes to increase the range of options;
   4) provide opportunities for understanding;
   5) facilitate an awareness of mutual and individual interests;
   6) help the participants generate and evaluate various options; and
   7) promote a focus on the interests and needs of those who may be subject to, or affected by, the situation and proposed options.

5) 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.

6) Some mediation processes may involve participants seeking expert information from a mediator which will not infringe upon participant self-determination. Such information is deemed to be consistent with a mediation process if that information is couched in general and non-prescriptive terms, and presented at a stage of the process which enables participants to integrate it into their decision making. Such information might include the provision of general information and a reference to available material that could assist the participants. For example, a referral to resources that could be used by parents in a family dispute to determine the impact of options upon children or other family members.

7) Some mediators may use a ‘blended process’ model whereby they provide advice. These processes are sometimes referred to as ‘advisory mediation’, ‘evaluative mediation’ or ‘conciliation’. Such processes may involve the provision of expert information and advice, provided it is given in a manner that enhances the principle of self-determination and provided that the participants request that such advice be provided. Mediators who provide expert advice are required to have appropriate expertise (see Approval Standards at Section 5 (4)) and to obtain the consent of participants prior to providing any advisory process.

2.14 It is clear that if this definition is relied upon, approximately half of the ‘mediation’ that takes place in County Court and Supreme Court
disputes can more correctly be described as ‘conciliation’ (indicating processes which involved a rights based focus and a lack of party participation) or perhaps ‘advisory mediation’.

2.15 The VLRC noted in March 2008 that:

17. A wider range of ADR options should be available to the courts, including:
• early neutral evaluation
• case appraisal
• mini trial/case presentation
• the appointment of special masters
• court-annexed arbitration
• greater use of special referees to assist the court in the determination of issues or proceedings
• conciliation
• conferencing and
• hybrid ADR processes.

Some of these options will be more appropriate in the higher courts; for example, special masters and court annexed arbitration.\(^{156}\)

2.16 In a sense, it could be argued that at present some of the above processes are currently being used but are labelled as ‘mediation’. This raises some significant issues, in particular because advisory processes ordinarily require additional safeguards and have different impacts upon case resolution rates. This is a matter that is discussed further in Chapter 6. Essentially there are two issues that arise. First, there are definitional issues (that are relevant from a consumer protection and expectation perspective). Second, there are issues about the quality of some mediation processes. Clearer definitions and guidelines will assist with both issues and additional measures will assist with the quality issue (see Chapter 6).

2.17 Many studies suggest that in many cases, specific types of dispute resolution attract some significant benefits.\(^{157}\) Some evaluative studies have


actually aimed to address the question of which mediation models are more likely to be effective for particular kinds of conflicts and/or parties.\textsuperscript{158}

\textbf{What did Supreme and County Court mediators do?}

\textbf{Survey distribution}

Mediators who conducted Supreme and County Court-connected mediations in the sampled period and whose details were available on the Court files were sent a survey examining the mediation process from their perspective. Specifically, the survey examined the pre-mediation intake processes, attendance (of parties, representatives etc), how the session was conducted, issues that were discussed, perceptions of fairness and satisfaction, and mediation experience. A total of 151 mediator surveys were sent out. Some of these were sent to the same mediator, because some mediators mediated Supreme and County Court-connected disputes frequently.

Unfortunately, only 34 surveys, completed by 20 different mediators were returned.\textsuperscript{159} Another 11 mediators responded in some way to the survey mail-out but did not return a completed survey. These responses usually advised that mediators could not complete the survey as they did not keep notes or could not remember the mediation or they advised that they did not wish to participate in the research. Of the 34 completed surveys, 19 (56 per cent) related to County Court-connected mediations, 14 (41 per cent) related to Supreme Court-connected mediations and 1 mediation (3 per cent) combined two related cases; one from the Supreme Court and one from the County Court.

\textbf{Prior sessions and intake}

Intake and pre mediation sessions usually involve some dispute counselling or advising in order to determine whether mediation is appropriate and whether variations of the mediation model are required.\textsuperscript{160} In addition, such processes are used to prepare and inform parties about the process and to ensure that relevant information is exchanged before a mediation.

As indicated in Table 2.1, intake was sometimes conducted prior to the mediation session.

\textsuperscript{158} J Wade, \textit{Four Evaluative Studies of Family Mediation Services in Australia} (Law Papers, Faculty of Law, Bond University, QLD, 1997). Clients receiving mediation services from four family law agencies (Centacare, Relationships Australia, Unifam and the Family Court) were surveyed in 1996. Results included insight into who was choosing mediation at the time and satisfaction levels with agreements, if reached.

\textsuperscript{159} One mediator completed 10 surveys for 10 separate cases, one mediator completed 4 surveys for 4 cases and 2 mediators completed 2 surveys for 2 cases.

\textsuperscript{160} T Sourdin, \textit{Alternative Dispute Resolution} (Thomson Reuters, 3rd Ed. NSW, 2008) p125 and p 126.
TABLE 2.1: WHO CONDUCTED THE INTAKE?

<table>
<thead>
<tr>
<th>Who conducted intake?</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>I conducted the intake</td>
<td>11</td>
<td>34.4</td>
</tr>
<tr>
<td>Another mediator conducted the intake</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Someone else conducted the intake</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>No intake was conducted</td>
<td>21</td>
<td>65.6</td>
</tr>
</tbody>
</table>

2.22 Questions were also asked about whether disputants had attended another mediation process in the smaller in depth mediator survey. In two cases (6 per cent), parties had attended a previous mediation with a different mediator. In most cases (62 per cent; n=21), the mediation the survey was about was the first mediation that had been held in the matter. In 32 per cent of cases (n=11), the mediators answered that they did not know whether another mediation had been held.

2.23 The mode of intake varied for each session, with one being conducted by phone, another by a combination of phone and email, and another by a combination of phone and face-to-face intake. The mode of intake for the other two sessions that were reported was not advised.

**Pre-mediation sessions**

2.24 Pre-mediation sessions can be another form of intake and were held in 5 cases (15 per cent), with 4 out of 20 mediators (20 per cent) holding a pre-mediation session. The most commonly reported reason for not holding a pre-mediation session was that it was ‘not necessary’ (54 per cent). Other reasons for not holding a pre-mediation session were:

- Not wishing to incur additional costs (18 per cent)
- Parties and legal representatives were sophisticated (18 per cent)
- Time constraints (3 per cent)
- Pre-mediation sessions not commonly held in PI (personal injury) matters (3 per cent).

2.25 Two pre-mediation sessions were attended by the same parties as the mediation session. One pre-mediation session was attended by different parties, while no answer regarding attendance was provided for the other two pre-mediation sessions. Answers regarding four pre-mediation sessions indicated that the following were not present at the pre-mediation sessions:

- One or both parties did not attend 2 pre-mediation sessions
- Counsel did not attend 2 pre-mediation sessions
- Solicitors did not attend 3 pre-mediation sessions.

2.26 Topics discussed at the pre-mediation sessions included:

- Role of the mediators (on 2 occasions)
- Opening statements (1 occasion)
- Relevant documentation, introductions and background (1 occasion)
The mediation session

Representation and satisfaction with preparation

2.27 All 20 mediators reported they considered whether the parties understood the mediation process before the session began. However, one mediator who answered four surveys for four separate mediations reported that on one of these occasions, he/she did not consider whether the parties understood the mediation process before the session begun. The reason for this was not provided.

2.28 All parties to the dispute were legally represented in most of the mediations (94 per cent; n=32 out of 34).

2.29 When asked if satisfied with the lawyer and client preparation for the mediation, in most cases mediators reported being satisfied (88 per cent; n=30 out of 34), with 24 per cent of these noting that they were ‘very satisfied’.

Attendance and opening statements

2.30 Besides the parties and legal representatives, the following people also attended mediations on some occasions:

- Family members (on 5 (15 per cent) occasions)
- Experts (on 2 (6 per cent) occasions)
- Witnesses (on 1 (3 per cent) occasion)
- Appointed receivers and managers of defendant (on 1 (3 per cent) occasion)
- An IT technician (on 1 (3 per cent) occasion).

2.31 In most cases (88 per cent; n=30), the legal representatives made the opening statements. In three cases (9 per cent), both the legal representatives and parties made the opening statements (in 3 per cent of cases no answer was provided). However, the parties never made the opening statements on their own.

2.32 This approach was also reported in focus groups, with disputants describing a mediation process where their legal representatives made the opening statements, while they listened. In some cases, disputants were

---

161 Although these numbers only refer to 3 pre-mediation sessions, there are more than 3 ‘occasions’ as in some pre-mediation sessions more than 1 topic was discussed.

162 In 64 per cent of cases they were ‘satisfied’ and in 24 per cent of cases they were ‘very satisfied’.
advised not to speak as they were told (by legal advisers) that by speaking they could adversely effect their prospects of success in future litigation.

I was instructed before I went into the mediation to keep my mouth shut. [Why?] I suspect they’re probably trying to assess what you’d be like in Court...whether you’d be an obstacle... you are not to give them any more information.

Plaintiff, Focus Group 10 July 2008, describing instructions received from solicitor

I can’t understand why the secrets. We went to the mediation and I ask him [the defendant] something and the barrister [said] “shut up” [to the defendant to stop him from interacting with the plaintiff].

Plaintiff, Focus Group 10 July 2008, describing the difficulty of communicating with the other party during a private mediation

Similarly, practising mediators were aware of some instances where mediation could be treated as an opportunity to assess the opposing party:

At the mediation, they are treating it as a mini trial.

Barrister, Focus Group 11 July 2008

The lack of involvement by disputants in the opening stages decreases the likelihood that the disputants’ interests will be explored and it is more likely that a rights based and positional approach will be adopted. This approach (hearing from the representatives only) is contrary to industry models of mediation for the reasons noted above.

The use of visual aids

Visual aids, such as whiteboards and flipcharts, can be used to note down an agenda for the mediation. These can be important as they help to objectify the issues, summarise, ensure thoroughness (using a ‘checklist’), change the dynamics on the room, assist parties who may be more supported with visual forms of communication, address issues (rather than positions) and demonstrate that parties have been ‘heard’.

As outlined in Table 2.2, visual aids were not commonly used during mediations, with 91 per cent (n=31 out of 34) of mediations conducted without the use of whiteboard or butcher’s paper. Three out of the 20 mediators (15 per cent) who answered the survey used a whiteboard on three different occasions.

---


TABLE 2.2: THE USE OF VISUAL AIDS

<table>
<thead>
<tr>
<th>What was used to summarise issues or for some other purpose?</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whiteboard</td>
<td>3</td>
<td>8.8</td>
</tr>
<tr>
<td>Butcher’s paper</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Neither</td>
<td>31</td>
<td>91.2</td>
</tr>
</tbody>
</table>

2.37 Visual aids may also be of benefit in assisting disputants understand and ‘track’ progress in discussions. Again visual aids are a feature of all industry mediation training models although they may not be suitable for all disputes or disputants.

**Private sessions**

2.38 All mediators on all reported occasions held private sessions. The stages at which these sessions were held are outlined in Table 2.3. In some mediations, private sessions were held more than once and therefore the percentages in Table 2.3 do not add up to 100, but indicate the percentage of occasions that private sessions took place at a particular stage.

2.39 Private sessions were mostly held with parties after the mediation progressed to a stage where the dispute issues had been explored (71 per cent, n=24). However, in almost half of the cases (47 per cent, n=16), private sessions were held straight after the opening statements. This approach is also inconsistent with any industry mediation models, where private sessions are usually held later in the process after issues have been explored in joint discussion. There, the purpose of private sessions is to explore alternatives and options, prepare for negotiations and provide parties with the opportunity to disclose to the mediator issues they may not have wished to disclose in an open session.166

2.40 This early tendency to engage in private sessions was also discussed in focus group discussions with disputants:

> [The mediation went for] about half an hour before there was a break. In the break the QC took us down to have coffees... During that time we were trying to get some sense of whether there would be an offer made. So, we went back, it didn’t last long after that.

*Plaintiff, Focus Group 10 July 2008*

We had two mediations...We sat around the table for maybe half, three-quarters of an hour and then both parties went off into separate offices and then either the barrister or QC seemed to go between QCs and then the mediator would come in and talk to us and go and talk to them and come in and talk to us and go back and talk to them.

*Plaintiff, Focus Group 10 July 2008, describing the shuttle-negotiation that took place shortly after the mediation begun*

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TABLE 2.3: WHEN WERE PRIVATE SESSIONS HELD? 167

<table>
<thead>
<tr>
<th>When were private session held?</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>After issues had been explored</td>
<td>24</td>
<td>70.6</td>
</tr>
<tr>
<td>After the opening statements</td>
<td>16</td>
<td>47.1</td>
</tr>
<tr>
<td>After some clarification had taken place</td>
<td>12</td>
<td>35.3</td>
</tr>
<tr>
<td>After an impasse had been reached</td>
<td>8</td>
<td>23.5</td>
</tr>
<tr>
<td>At some other time</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Why were private sessions held?

2.41 The most common reasons for holding private sessions were to discuss issues and explore options (see Table 2.4 for details). Exploring litigation alternatives or something said in the joint session or because open sessions were no longer productive were less common responses. Private sessions occurred because one party became emotional on one occasion.

TABLE 2.4: WHY WERE PRIVATE SESSIONS HELD? 168

<table>
<thead>
<tr>
<th>Why were private session held?</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>To discuss issues</td>
<td>29</td>
<td>85.3</td>
</tr>
<tr>
<td>To explore options</td>
<td>29</td>
<td>85.3</td>
</tr>
<tr>
<td>To reality test</td>
<td>22</td>
<td>64.7</td>
</tr>
<tr>
<td>To explore BATNAs 169</td>
<td>12</td>
<td>35.3</td>
</tr>
<tr>
<td>Open sessions were no longer productive</td>
<td>11</td>
<td>32.4</td>
</tr>
<tr>
<td>To explore something that had been said in the joint session</td>
<td>11</td>
<td>32.4</td>
</tr>
<tr>
<td>One party was very emotional</td>
<td>1</td>
<td>2.9</td>
</tr>
</tbody>
</table>

2.42 The mediators were also given the opportunity to provide additional comments on their survey regarding private sessions and the reason why they were held. The following comments were made:

- The culture of these types of mediation is such that the parties want separation.
- This was a difficult mediation. With many parties over two separate mediation periods with phone calls between.
- The parties were badly prepared.

2.43 Some mediators did not answer this question as they were ‘unable to say’ or ‘recall specifically’ why private sessions were held.

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167 Please note that percentages do not add up to 100 as some mediators circled more than one answer. Thus, the percentages indicate the percentage of mediations that held private sessions at a particular stage. Some mediations may have held several private sessions.

168 Please note that percentages do not add up to 100 as some mediators circled more than one option.

169 BATNA= Best alternative to negotiated agreement
Agenda items

2.44 10 mediators (out of 20) reported listing issues/topics/common ground/an agenda in 11 of the 34 mediations (32 per cent) (these were not ordinarily listed on a whiteboard or butcher’s paper). Mediators were asked what was listed, but only ten provided a response to this question. Two of these said that they could not disclose what was listed due to confidentiality reasons and one could not remember as no notes were kept (this is to be expected in mediation).

2.45 Otherwise, the most common agenda items were liability and quantum (4 occasions). Evidentiary issues and size of asset pool were also listed. Again, this finding suggests that most mediations were focused on legal rights rather than interests as the agendas did not reflect topics that could enable an interest based conversation. An agenda item such as ‘impact’ for example, rather than ‘quantum’ can enable a party to comment on personal impact issues, concerns about process and personal time spent as well as focusing on how a Court might assess the claim.

Giving of advice

2.46 7 (35 per cent) out of the 20 mediators that responded to the survey expressed their views to the parties regarding what they thought was the likely outcome if the matter was litigated. This approach differs from the ‘mediation description’ adopted by NADRAC in which the mediator does not proffer any opinion or advice, as well as the National Mediator Standard (although as noted earlier this blended process can be used with the express consent of the parties).170

Debriefing

2.47 The aim of debriefing is to critically examine and determine what was learnt and experienced during the mediation process and to identify where further training and skills are required. It is also important for monitoring the psychological well-being of mediators and for quality control. Many mediation training programs171 require debriefing with coaches or mentors following role plays.

2.48 In co-mediation models, de-briefing with the co-mediator typically takes place immediately after the mediation,172 while mediators working on their own can debrief on a regular basis with coaches, mentors or other mediators. This matter is the subject of additional comment in Chapter 6.

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171 For example, the mediation course at the Dispute Settlement Centre of Victoria or training programs mentioned in SK Erickson and MS McKnight, The Practitioner’s Guide to Mediation: A Client-Centered Approach (John Wiley and Sons, Victoria, 2001).
2.49 Although debriefing is perceived to be an important aspect of mediation practice, only 5 mediators (25 per cent) reported debriefing following the mediation. The reported format of debriefing is somewhat different to what mediation model approaches would recommend. The mediators reported debriefing with:

- The parties and their lawyers (2 occasions)
- Counsel for parties (1 occasion)
- A party’s family member (1 occasion)
- Friends (1 occasion).

**What would you do differently next time?**

2.50 Mediators generally considered that they handled the mediation well and in 82 per cent of cases (n=28 out of 34) they said they would not do anything differently. In 15 per cent of cases, they said they would do the following differently:

a) Hold a pre-mediation session (2 mediators reported this)

b) Seek permission to conduct an intake

c) Try to speak to the parties without their lawyers present

d) Ensure all insurance instructors were in attendance

e) Take defendant’s counsel aside to ‘reprimand him’ for inappropriate behaviour

f) Ensure settlement agreement before parties left matters to heads of agreement.

**Summary**

2.51 The responses by mediators are very different to responses obtained in some previous surveys of mediators. In previous surveys\(^{173}\) for example, it was far less likely (rare) that mediators would ‘give advice’ or primarily have legal representatives providing opening comments. Further comment about this finding is made in Chapter 6. Given the very wide variation in alternative dispute resolution process models that were used by mediators – with many mediator responses suggesting that the models used were not compliant with any industry model of mediation – in this research the view has been taken that this self described model is ‘mediation’ for the purposes of this report.

How was the Matter Finalised?

2.52 The following section is based on information collected from Court files at the Supreme Court and the County Court of Victoria and focuses on mediated cases. Information about the overall sample, such as the type and number of plaintiffs and defendants and claim information are presented in Appendix I.

2.53 The research classified how each case was finalised and the results of that coding are presented in Table 2.5. As noted above, the process used to finalise a matter is often unclear from a review of the Court file, resulting in the high number of cases classified simply as ‘dismissed/discontinued’ (52 per cent).

2.54 It is estimated that as many as 30 per cent of the ‘dismissed/discontinued’ cases were finalised by mediation and a further 21 per cent were finalised by negotiation. This estimate is based on the finding that when Court file data was matched with survey data, 30 per cent of the Court files that were finalised as ‘dismissed/discontinued’ were actually finalised at mediation and 21 per cent were finalised at negotiation (according to information from survey respondents). For details of this analysis, see Appendix K.

2.55 According to Court Files, apart from the ‘dismissed/discontinued’ category (where it is likely that negotiation or mediation finalised the dispute), mediation was used to finalise a high proportion of matters (16 per cent, n=89), followed by negotiation (14 per cent, n=75) and trial (10 per cent, n=55).

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174 While coding the type of case disposition, the researchers noticed that a number of cases were dismissed on the day of trial. This outcome was only coded for the Supreme Court where 2 per cent of cases were settled by parties on the day of trial, suggesting that a small number of people wait until the last minute to settle out of Court.
TABLE 2.5: HOW WAS THE MATTER FINALISED? – USING COURT FILE DATA

<table>
<thead>
<tr>
<th></th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Pre-trial conference</td>
<td>11</td>
<td>4.5</td>
<td>0</td>
</tr>
<tr>
<td>Negotiation175</td>
<td>36</td>
<td>14.8</td>
<td>39</td>
</tr>
<tr>
<td>Trial</td>
<td>21</td>
<td>8.6</td>
<td>34</td>
</tr>
<tr>
<td>Mediation</td>
<td>31</td>
<td>12.8</td>
<td>58</td>
</tr>
<tr>
<td>Dismissed/discontinued176</td>
<td>138</td>
<td>56.8</td>
<td>151</td>
</tr>
<tr>
<td>Struck out177</td>
<td>0</td>
<td>0</td>
<td>14</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Don’t know</td>
<td>6</td>
<td>2.5</td>
<td>9</td>
</tr>
<tr>
<td>Total</td>
<td>243</td>
<td>100</td>
<td>310</td>
</tr>
</tbody>
</table>

How was the Process Delivered?

Number of mediated cases

2.56 In the Supreme Court sample, according to the file information, 81 of the 243 (33 per cent) analysed cases were mediated. A very small number of disputes in some cases were mediated more than once, providing a total of 89 recorded mediations for analysis in this report. In the County Court, 104 (34 per cent) cases out of the 310 analysed cases were mediated. However, the survey sample suggests that the ‘real’ number of mediated cases was much higher, particularly in the Supreme Court sample (see Appendix K for details).

2.57 The research has however focused on the Court file sample for the purposes of assessing some trends. In the Supreme Court, 10 (11 per cent) mediations were conducted internally by the Masters, 74 (83 per cent) mediations were conducted externally and 5 (6 per cent) were conducted by unknown mediators. Most cases (n=65; 80 per cent) were mediated only once, 8 cases (10 per cent) were mediated twice, and 1 case (1 per cent) was mediated three times. However, the number of mediations for 9 per cent of cases was unknown. This was the case in instances when a mediation

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175 Negotiation = Includes ‘settled’, ‘settled-compromise’ etc.
176 Dismissed/discontinued = Includes dismissed discontinued on day of trial; dismissed/discontinued (process unknown); dismissed by court; discontinued as one party becomes bankrupt or dies; dismissed without adjudication as to its merits.
177 Struck out = Includes ‘struck out due to parties’ failure to respond’; struck out for failure to pay trial fee; struck out for no appearance in court’; struck out with a right of reinstatement’.
session was adjourned for further mediation, but it was not clear from the Court documents whether another mediation took place.

2.58 In the County Court, most of the mediated cases (for which information was available) only had 1 mediation session (92 per cent). In 6 cases (7 per cent) 2 mediation sessions were attended and 1 matter (1 per cent) had three sessions.

**What type of cases were mediated?**

2.59 The sample size for some of the case types was relatively small however some information about type of case and likelihood of mediation was apparent. ‘Damages’ cases were the most frequently mediated category in both Courts (47 per cent (n=38) of all mediations in the Supreme Court; 84 per cent (n=90) of all mediations in the County Court). In the Supreme Court ‘declaration’ type matters were also mediated quite often (24 per cent of all mediations; n=19). The proportion of mediated cases in the two jurisdictions is depicted graphically in Figure 2.1.

**FIGURE 2.1: SUPREME AND COUNTY COURT MEDIATED MATTERS ANALYSED IN THIS STUDY**

![Pie charts showing mediated matter types in Supreme and County Courts](image)

**Was the dispute finalised as a result of the process?**

2.60 According to the Court files, just under half of the mediations connected to cases in the Supreme and County Courts were finalised at mediation (45 per cent; n=88 out of 194). Table 2.6 outlines the different outcomes of all mediations (in the analysed period) in the two jurisdictions – the outcome categories are based on the County Court ‘mediation decision sheet’. Table 2.7 presents the results by case (rather than by mediation session as in Table 2.6) and highlights the differences between the two jurisdictions in cases finalised at mediation.

2.61 According to the file based data, only 41 per cent of mediated cases in the Supreme Court were finalised at mediation, while the County Court
had a slightly higher success rate with 56 per cent of mediated cases finalised at mediation. This difference approached statistical significance.\textsuperscript{178}

2.62 These figures do not report disputes that were settled prior to the mediation or following the mediation. In addition, and importantly the research indicates that the actual number of mediations in this sample was likely to be around 30 per cent higher (using survey data results), particularly in the Supreme Court, where an estimated 21 per cent of mediated cases were finalised as ‘dismissed/discontinued’ rather than ‘finalised at mediation’ (see Appendix K for details).

2.63 Table 2.7 outlines information about mediated cases while Table 2.6 outlines finalisations at mediations. The numbers do not match as some cases were mediated more than once.

**TABLE 2.6: USING COURT-FILE DATA – WHAT WAS THE OUTCOME OF MEDIATION?**

<table>
<thead>
<tr>
<th>Mediation outcome</th>
<th>Supreme Court</th>
<th>County Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Finalised</td>
<td>23</td>
<td>25.8</td>
</tr>
<tr>
<td>Finalised – no orders required</td>
<td>8</td>
<td>9.0</td>
</tr>
<tr>
<td>Not finalised</td>
<td>41</td>
<td>46.1</td>
</tr>
<tr>
<td>Adjudged for further mediation</td>
<td>11</td>
<td>12.4</td>
</tr>
<tr>
<td>Don’t know</td>
<td>6</td>
<td>6.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>89</td>
<td>100</td>
</tr>
</tbody>
</table>

**TABLE 2.7: USING COURT-FILE DATA – WAS THE CASE FINALISED AT MEDIATION?\textsuperscript{179}**

<table>
<thead>
<tr>
<th>Mediation outcome</th>
<th>Supreme Court</th>
<th>County Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Yes</td>
<td>30</td>
<td>41.1</td>
</tr>
<tr>
<td>No</td>
<td>43</td>
<td>58.9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>73</td>
<td>100</td>
</tr>
</tbody>
</table>

**What case characteristics are related to dispute resolution at mediation?**

2.64 Dispute factors that relate to case characteristics, such as age and case type, that may contribute to finalisation at mediation are be explored in more detail below.

\textsuperscript{178} (\chi^2(1) = 3.15, p=.08); Continuity correction applied for 2x2 table.

\textsuperscript{179} Cases where the outcome was not known were excluded from this table.
Age of dispute

2.65 There are a number of ways to measure the age of a dispute and its relationship to resolution that are relevant to examining the effectiveness of mediation in the Supreme and County Courts of Victoria.

2.66 The first approach is to measure the age of the actual dispute, from the date the ‘cause of action arose’ to the date of mediation. This approach provides information on whether resolution was affected by the time that has passed since the event that caused the dispute occurred.  

2.67 The second approach is to measure the ‘case age’, that is, how long the dispute has been in the Court system when mediation took place. This approach is useful in assisting the Courts determine at what stage in a dispute, mediation should be ordered.

Dispute age at mediation

2.68 In the Supreme Court, the median dispute age at mediation (time from when cause of action arose to first mediation) was 971 days (2.7 years).  

In the County Court, the median dispute age at the time of the first mediation was 1,437 days (4 years). County Court disputes tended to be older than Supreme Court disputes at the time of mediation (this difference was statistically significant).

Case age at mediation

2.69 In the Supreme Court, the median case age (time from when the matter was filed in court to the first mediation) at the first mediation was 324 days.  

In the County Court, the median case age at first the mediation was 260 days. In summary, it took a similar length of time for cases to get to mediation in the two jurisdictions, but County Court disputes were older when they were commenced in the Court.

Time from final mediation to case disposition

2.70 The median number of days from the final mediation to the time the case was finalised was 177 days in the Supreme Court and 23 days in

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180 Research suggests that the length of dispute affects the likelihood of resolution. For example, PM Regan and AC Stam, ‘In the Nick of Time: Conflict Management, mediation Timing, and the Duration of Interstate Disputes’ (2000) 44 (2) International Studies Quarterly 239; the ‘cause of action’ date was usually derived from the originating writ or motion in which the plaintiff described the history of the conflict.

181 (n=73; M=1256.36; SD=881.09; Median=971.00)

182 (n=97; M=1615.02; SD=1184.03; Median=1437.00)

183 t(170)=2.37, p=.019

184 (n=74; M=417.05; SD=387.11; Median=324).

185 (n=99; M=345.40; SD=278.00; Median=260.00)

186 The difference in time from originating motion to mediation in the Supreme and County Court was not statistically significant (t(171)=-1.42, p>.05)

187 (n=74; M=277.32; SD=265.26; Median=176.5)
the County Court. This result indicates that cases in the County Court were finalised more quickly after mediation than cases in the Supreme Court (the result was statistically significant). This may relate to the type of settlement arrangements that were reached – with more arrangements in the Supreme Court involving structured payments over a longer period of time.

**Does age influence mediation outcomes?**

2.71 Table 2.8 outlines the results for younger and older Supreme and County Court disputes by mediation outcome (finalised at mediation; not finalised at mediation). The median (1,323.5 days) was used to split the groups. As can be seen from Table 2.8, younger disputes were more likely to be finalised at mediation and older disputed were less likely to be finalised at mediation. This difference approached statistical significance and the pattern of findings is similar to those of Sourdin and Matruglio, who found that disputes in the NSW Supreme and District Courts that had a 3 duration of 3 years or less at the time of mediation were more likely to resolve at mediation than disputes that were older than three years.

**TABLE 2.8: AGE OF DISPUTE AT MEDIATION BY OUTCOME**

<table>
<thead>
<tr>
<th>Age of dispute at mediation</th>
<th>Finalised at mediation</th>
<th>Not finalised at mediation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>&lt;= 1324 days (3.6 years) – younger disputes</td>
<td>46</td>
<td>58.2</td>
<td>37</td>
</tr>
<tr>
<td>&gt; 1324 days (3.6 years) – older disputes</td>
<td>33</td>
<td>41.8</td>
<td>49</td>
</tr>
</tbody>
</table>

2.72 Table 2.9 shows the results for mediation success rates according to case age rather than dispute age. Once again, a median split (296 days) was used to categorise cases into ‘younger’ and ‘older’ groups. Cases that had been in the Court system for a shorter period of time (less than or equal to 296 days) had a higher success rate at mediation than cases that had been in the Court system longer (more than 296 days), but this difference did not reach statistical significance.

2.73 These findings suggest that dispute age may be more strongly associated with mediation outcomes than case age and that younger...
disputes are more likely to be finalised at mediation than older ones. Additional analyses on case and dispute age and outcomes are presented in Appendix J.

**TABLE 2.9: CASE AGE AT MEDIATION\(^{193}\) BY OUTCOME**

<table>
<thead>
<tr>
<th>Case age at mediation</th>
<th>Finalised at mediation</th>
<th>Not finalised at mediation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>&lt;= 296 days (0.8 years) – younger cases</td>
<td>45</td>
<td>52.3</td>
<td>41</td>
</tr>
<tr>
<td>&gt; 296 days (0.8 years) – older cases</td>
<td>36</td>
<td>44.4</td>
<td>45</td>
</tr>
</tbody>
</table>

**Type of dispute**

2.74 The type of dispute may also determine suitability for mediation. Table 2.10 outlines mediation outcomes by case type. It is interesting to note that disputes classified as ‘WorkCover’ and ‘order’ were not mediated at all presumably because of the different types of conciliation and pre-litigation conferencing arrangements that apply. Also, due to the high occurrence of liability cases in the WorkCover pool, only a selected number of WorkCover cases were included in the sample that was analysed in this report.

2.75 Using the smaller mediated Court file sample data, disputes involving land and (77 per cent finalised at mediation, n=13) and property (67 per cent finalised at mediation, n=4) had a high resolution rate at mediation, while declaration cases were less likely to be finalised at mediation (29 per cent were finalised in mediation, n=5).

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\(^{193}\) ‘Case age at mediation’ refers to the time from date of originating process to date of mediation. 296 days is the median value. Please note that due to missing data on variable ‘finalised at mediation’, the ‘younger cases’ and ‘older cases’ groups do not have an equal proportion of cases in them, even though a median split was used to split this variable.
MEDIATION IN THE SUPREME AND COUNTY COURTS OF VICTORIA

**TABLE 2.10: CASE TYPE BY MEDIATION OUTCOME**

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Finalised at mediation</th>
<th>Not finalised at mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Appeal</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Damages</td>
<td>54</td>
<td>45.8</td>
</tr>
<tr>
<td>Debt</td>
<td>1</td>
<td>33.3</td>
</tr>
<tr>
<td>Declaration</td>
<td>5</td>
<td>29.4</td>
</tr>
<tr>
<td>Estate/Probate</td>
<td>2</td>
<td>100.0</td>
</tr>
<tr>
<td>Land</td>
<td>13</td>
<td>76.5</td>
</tr>
<tr>
<td>Order</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
<td>80.0</td>
</tr>
<tr>
<td>Property</td>
<td>4</td>
<td>66.7</td>
</tr>
<tr>
<td>WorkCover</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>87</td>
<td>49.7</td>
</tr>
</tbody>
</table>

2.76 Figure 2.2 further aggregates case types into the following four categories:
- Damages and debt
- Land/Property/ Estate and probate
- Declarations and appeals
- Other.

2.77 The differences in the proportion of cases finalised at mediation are statistically significant, suggesting that land/property/estate/probate cases and ‘other’ cases are more likely to settle at mediation than declaration and appeal cases. Damages cases had a 50 per cent likelihood that they would be finalised at mediation.

---

194 (χ² (3) = 15.62, p=.001)
Service delivery models

2.78 Mediation is delivered by a range of different individuals within the Court sector and may (rarely) also involve organisations such as the Dispute Settlement Centre of Victoria (DSCV). In the Federal Court, mediations are usually conducted by registrars, but judges can also conduct mediation conferences.\(^\text{195}\) In the Supreme Court of Victoria, mediation can be provided by Masters or by private mediators.

2.79 In the County Court, mediation is commonly provided by private mediators who may be solicitors or barristers. Conferencing may take place with other Court personnel including judges (this is discussed further in Chapter 6). This is a contentious issue as some consider that judicial officers should not mediate. On the other hand, others have suggested that judicial officers can play an important role in defined circumstances. An example is where the VLRC has suggested that the direct involvement of judicial officers in ADR has been deemed suitable, is the instance where parties cannot agree on the choice of mediator\(^\text{196}\) (see Chapter 6).

2.80 Often, legal representatives will receive a court order referring a matter to mediation (or may request such an order) or may decide that they wish to mediate without any action being taken by the Court. In many cases, disputants have a choice as to whether to commence court proceedings or whether to seek alternative processes of dispute resolution.

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One party-chosen alternative to the court based litigation processes is apparent in the industry based dispute resolution schemes.\textsuperscript{197}

2.81 This situation is common in a number of Court connected models and is said to support party empowerment and even agreement. Judicial mediation can address the situation where parties are unable to agree on a mediator. Mostly in the file sample, external mediators were used, at the parties’ expense.\textsuperscript{198} In one focus group, a representative noted:

The first agreement made by the parties is for the parties to choose their own mediator.

\textit{Legal representative, interview on 11 July 2008}

2.82 However, mostly, external mediators are chosen by legal representatives and most parties have little input into the mediator choice (this is a matter left to legal representatives). Ordinarily each or one representative will suggest three mediator names and the representatives will then choose the mediator.

2.83 This mediation service delivery model means that mediators may be chosen because of their expertise in the subject matter of the dispute, their previous association with practitioners and the choice made may not be related to the mediator’s knowledge or understanding of mediation processes.

2.84 There are other service referral models that can operate. For example, Courts can refer to a panel of mediators and choose the next name from a list or alternatively Courts can refer appointment to an organisation such as the Law Institute of Victoria, the Victorian Bar, IAMA, Australian Commercial Disputes Centre, LEADR and others. This system currently operates in NSW, where the Supreme Court has a ‘Joint Protocol arrangement’ with six mediation provider organisations which each maintain panels of mediators, suitable to mediate Supreme Court cases.\textsuperscript{199}

2.85 There are advantages and disadvantages with different service models. One disadvantage with a service model where representatives choose the mediator (rather than a Court or organisation) may arise where a representative behaves in an adversarial manner.\textsuperscript{200} In service delivery models where the representatives are responsible for the choice of mediator, adversarial behaviour may be more likely to be tolerated. Under


\textsuperscript{199} The six organisations are: Australian Commercial Disputes Centre, Australian Branch of Chartered Institute of Arbitrators, Institute of Arbitrators and Mediators Australia, Law Society of New South Wales, LEADR ands NSW Wales Bar Association. See Supreme Court of New South Wales, \url{http://www.lawlink.nsw.gov.au} (accessed 22 July 2008).

such circumstances, in a mediation the mediator may discuss process with the representative and engage a number of interventions to attempt to ensure that the approach does not negatively impact upon the mediation process, however some mediators may be concerned about continued referrals. For example, one mediator at the focus group stated:

Some barristers use mediation to grandstand – about what they are going to do in court.\textsuperscript{201}  

\textit{Lawyer and Mediator, Focus Group 15 July 2008}

2.86 It may be that where a mediator is dependent upon the legal representatives for future mediation work that some mediators will be less likely to intervene and more likely to tolerate or ignore adversarial approaches, obstructive and uncooperative behaviour displayed by representatives.

2.87 Courts could approach this issue in a range of ways. They could operate with a panel system. Alternatively they could use other methods to address cultural issues. Such approaches can include clearer guidelines for lawyers, litigants and mediators as well as mixed service delivery (which means that court based models can foster more supportive negotiation cultures). Further supporting this notion, the VLRC refers to NADRAC’s suggestion that parties be encouraged by the Courts to use their ‘best endeavours’ during an ADR process to resolve disputes, which might oblige parties’ representatives to act ‘reasonably’.\textsuperscript{202}

\textsuperscript{201} Lawyer and Mediator’s comment at the mediators focus group (conducted at the Law Institute of Victoria, 15 July 2008).

2.88 However, it may be that existing service models assist to promote certain mediation models that may be comfortable for the representatives but not the parties. Shuttle negotiation was for example a fairly common approach in many matters that were considered in this Project. However, many well known mediators such as Micheline Dewdney have questioned the need for shuttle negotiation unless there is violence and have suggested that shuttle negotiation may be more likely to take place where mediators have less skill in facilitating discussions. It may be that this model of negotiation is more ‘comfortable’ for representatives. Most plaintiffs in the focus group reported that their mediation featured separate rooms and most mediators in their focus group stated that they use some form of shuttle mediation.

2.89 Where a Court has no control over mediator choice there are also issues about what can occur if the mediator does not conduct a mediation in a competent manner. This can also be an issue for representatives who were generally very positive about mediation but who considered that some mediators were not as effective as others. One lawyer noted, in the focus group that:

It’s not that they’re lazy, it’s that they don’t know how to do it.  
Barrister, Focus Group 11 July 2008

2.90 Whilst most practicing mediators would suggest that ‘market forces’ will operate, representatives may have different views about mediator competence (compared to those of parties). For example, a party to a dispute who was very dissatisfied with the mediation felt that she was subject to the dynamics of ‘boys’ network’ in which she could not participate. It is probable that the representatives in that instance did not perceive that there was any issue with the mediation process adopted (which may have conformed with their views about mediation), whilst the party may have considered that there was a real issue with the mediator and the process used. Representatives have also expressed dissatisfaction with mediators. One lawyer, noted about one mediator:

He was totally ineffective. I was quite annoyed. But the market will sort out these mediators, I won’t be using him again.  
Lawyer and Mediator, Focus Group, 15 July 2008

Service referral models are the subject of more discussion in Chapter 6.

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203 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
204 Comment in mediator focus group (conducted at the Law Institute of Victoria, 15 July 2008).
205 Barrister’s comment in lawyers focus group (conducted at the Australian Centre for Peace and Conflict Studies Offices, 11 July 2008).
206 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
207 Comment in mediator focus group (conducted at the Law Institute of Victoria, 15 July 2008).
Conclusions

2.91 Information concerning mediation, case type outcome and dispute duration needs to be coupled with an understanding of what occurred in the different mediations that were examined. In focus groups it was noted that many ‘mediations’ in personal injury matters had the following characteristics:

- the process was of a short duration – often less than 2 hours.
- the plaintiffs were often not involved in the conference at all
- the negotiation could be described as compromisory or competitive.

2.92 Focus group participants in the disputant group said that there were characteristics of the mediation they experienced which were inappropriate to address their dispute. From research perspective, it is always inappropriate to form views based solely on focus group inputs as it is ordinarily more likely that those who are disappointed with outcome and process will attend a focus group. In addition, focus group comments are unlikely to reflect the broader views of litigants who experienced mediation.

2.93 In later Chapters it has been noted that litigants who were surveyed (a more accurate reflection of process experience) were generally very satisfied with mediation. However the focus group participant comments, lawyer comments and mediator comments indicate that for some participants, there were real and significant issues about a small minority of mediations that were conducted. Some disputant members of the focus group noted for example, that it would have been more satisfactory to go to court than mediation. Some claimed, ‘it was a charade’ and that the ‘court ordered ..we had to go’

2.94 Another account suggesting that certain mediations were not of utility, was expressed by a lawyer in a focus group who stated that:

They came to mediation so they could tick the form.

2.95 Another disputant asserted that despite being involved in a process that was defined as mediation:

You couldn’t really call it mediation.

2.96 Similar concerns about the mediation process were voiced by other disputants. For example, one plaintiff stated that:

I knew beforehand that at the mediation they will pressure us to settle.

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208 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
209 Barrister’s comment in lawyers focus group (conducted at the Australian Centre for Peace and Conflict Studies Offices, 11 July 2008).
210 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
2.97 Most mediators attending the mediator focus group described their processes as mostly facilitative but involving some shuttle negotiation at some point.

2.98 The case outcomes also suggest that a form of abbreviated conferencing was used mainly in personal injury matters and called ‘mediation’. Mediators and others considered that these processes could not and should not be described as mediation. Such forms of conferencing are less effective than models of mediation where there are continuing relationships and that may be used in property, probate and business matters where the settlement rates are much higher.

2.99 It is likely that in matters where there is a continuing relationship or where a relationship has been present in the past (rather than in one off transactions) interest based mediation may be more effective. There is however evidence from this research that compromisory conferencing styles may be used in a range of matters (with little attempt to distinguish benefits of different styles) and that it is appropriate for the Courts and the Department to consider options to ensure that these processes are correctly described and not simply categorised as ‘mediation’ and that there is also a need to improve the quality of some of the mediation services that are provided. This matter is the subject of further comment in Chapter 6.
Accessibility

Introduction

3.1 The ALRC has noted that the concept of accessibility implies that:
- Appropriate dispute resolution processes exist and are available
- Barriers to participation in the process, such as cost, are reduced or serve to channel parties into more appropriate forms of dispute resolution
- Parties and their advisers understand the process, their role in the process, and the reasons for the outcome.  

3.2 At present, the various dispute resolution processes that are available to individuals and organisations within our society are funded differently and access to processes can be limited by a variety of factors including location\textsuperscript{213}, disability, employment, literacy, information availability as well as other factors such as what can be described as ‘learned helplessness’\textsuperscript{214} (that is, disputants may not access dispute resolution services if they feel overwhelmed for a range of reasons). In many ways those that wish to use mediation services within courts must already have passed through the significant barriers that limit access to the Court system and have been the subject of recent comment by the VLRC.\textsuperscript{215}

3.2 However, a litigant that passes through the access barriers that exist in terms of commencing litigation or defending litigation may face additional access issues when considering mediation. This is partly because

much of the mediation that takes place is ordered by the Courts, often fairly late in proceedings, after considerable cost and effort has been expended by litigants. The issues regarding access may therefore be related to the timing of any initial access to the mediation process. Access can also be related to the way in which participants can participate in the mediation process. Initial access is explored in relation to disputant demographics in the sections referred to below that report on demographic information. Participation and understanding of process is the subject of further discussion in the final section of this Chapter.

3.3 In terms of cost, there are a range of different funding arrangements that relate to mediation. The majority of mediation services provided in the Supreme and County Courts of Victoria are privately funded and supported. That is, most litigants pay for the costs of a mediator and mediation process (as well as their own legal costs) unless they have access to a Master mediator or they access a mediator from a service such as the Dispute Settlement Centre of Victoria (which according to this research is a very rare event). Although under such circumstances they will usually be required to pay their own legal costs.

3.4 This is not a unique situation within Australia. Many Court-connected mediation services are privately funded. Some services are partly funded by government (in such instances a Court may charge a fee for mediation services that partly or completely deals with the costs of Court provided mediation – such as much of the mediation in the Federal Court of Australia). Some Courts do however provide free mediation services if the mediation service is provided by a Court official. For example, the Supreme Court and District Courts of Western Australia provide free mediation service.

3.5 Within the Victorian higher Courts, a range of approaches have been fostered to assist litigants in terms of the costs of mediation services. For example, in the Supreme Court of Victoria, a new Mediation Centre was launched by Rob Hulls, Deputy Premier and Attorney-General, on 4 March 2008. This service means that litigants who are able to access mediation that is conducted by Masters do not have to pay for costs associated with venue hire and also means that venues are accessible and appropriate for mediation.

3.6 In addition in the Supreme Court some litigants receive free mediation services provided by Masters. The types of cases in which Masters may conduct mediations are limited to:

- cases where there is financial hardship for one or more of the parties
- urgent cases
- cases where there has already been an unsuccessful external mediation and a further mediation is considered necessary
cases where there is the potential for issues to be narrowed or resolved by mediation.\textsuperscript{216} 

3.7 In early 2007, the Court of Appeal implemented a pilot Mediation program by Masters. This program was set up in addition to the pre-trial conferences which for many years have been conducted in personal injury cases by the Prothonotary and senior members of that office and are much valued by practitioners in that area.

3.8 Similarly, litigants in the County Court who attend a case-conference conducted by a judicial officer do not pay to access such services.

3.9 The variations in cost mean that it is cheaper for litigants to access government-supported mediation systems (using a Court official) than to access privately provided ADR services. Issues relating to costs are further explored under ‘Case cost’ at the end of this Chapter and in Chapter 5.

3.10 In order to determine the characteristics of those using mediation processes, the Court file data was analysed and explored. This also enabled some comparative analysis to take place to determine who was accessing services and how this took place. More detailed reporting regarding the Court and survey data is located in Appendix L.

3.11 More relevant data relating to mediation processes was then obtained using survey data (which had more extensive demographic information than the court files).

Who Uses the Courts?

3.12 Information about disputant occupation, income and language was collected wherever possible from the 553 Court files that were examined. The information collected from Court files focused on disputants’ occupation rather than their industry of employment. This information was available for 35 per cent of disputants and is compared in Table 3.1 to Victorian data from the 2006 Census. The most frequent occupation category consisted of disputants who were retired, unemployed or performed home duties (20 per cent, n=57).\textsuperscript{217}

3.13 The presence of labourers, technicians, trades workers and machinery operators within the disputant population was slightly higher than in the rest of the Victorian population. However, as occupation information was only available for 35 per cent of disputants, these figures may be skewed by those making compensation claims (who were more likely to note their occupation in Court file records), that is, manual


\textsuperscript{217} However, this category is not included in Table 3.1, as comparative information was not available.
workers may be more likely to be injured in their job and seek compensation.

3.14 The proportion of professionals was similar to the rest of Victorian population, while non-professional categories, such as clerical, sales and administrative workers were lower in the Court sample.

TABLE 3.1: PARTY OCCUPATION – COURT-FILE DATA

<table>
<thead>
<tr>
<th>Income</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
<th>Victoria (from ABS)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Professionals</td>
<td>17</td>
<td>17.2</td>
<td>26</td>
<td>21.5</td>
</tr>
<tr>
<td>Clerical and administrative workers</td>
<td>6</td>
<td>6.0</td>
<td>8</td>
<td>6.6</td>
</tr>
<tr>
<td>Technicians and trades workers</td>
<td>22</td>
<td>22.2</td>
<td>19</td>
<td>15.7</td>
</tr>
<tr>
<td>Managers/directors</td>
<td>11</td>
<td>11.1</td>
<td>20</td>
<td>16.5</td>
</tr>
<tr>
<td>Sales workers</td>
<td>3</td>
<td>3.0</td>
<td>5</td>
<td>4.1</td>
</tr>
<tr>
<td>Labourers</td>
<td>23</td>
<td>23.2</td>
<td>16</td>
<td>13.2</td>
</tr>
<tr>
<td>Community and personal service workers</td>
<td>7</td>
<td>7.1</td>
<td>11</td>
<td>9.1</td>
</tr>
<tr>
<td>Machinery operators and drivers</td>
<td>10</td>
<td>10.1</td>
<td>16</td>
<td>13.2</td>
</tr>
<tr>
<td>Total</td>
<td>99</td>
<td>100</td>
<td>121</td>
<td>100</td>
</tr>
</tbody>
</table>

Income

3.15 To explore whether high-income earners are more prevalent among those who access the Victorian higher Court system, information about income collected from the Court files was analysed.

3.16 However, the information from Court files was influenced by the type of income information that was available in filed court documents. This lack of demographic information on Court files presents difficulties for any broader analysis of data and this is an issue that could be further considered by the Courts. In this regard, it is difficult for courts to determine whether they are ‘accessible’ if they have little demographic

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218 Based on first plaintiff and first defendant information collected from Court files. Supreme Court sample: plaintiffs n=76, defendants n=23; County Court sample: plaintiffs n=93, defendants n=25.

information. Courts could address this issue by seeking more information when proceedings are filed and requiring all litigants to indicate some basic demographic characteristics (as is the case in many external dispute resolution schemes).

3.17 As discussed previously, occupation and income information was often available for compensation claims, which were often made by manual workers, but was less available for other types of claims. In addition, this information was rarely available for defendants and for this reason only the incomes of plaintiffs are analysed. The income results in Table 3.2 are therefore likely to be influenced by the number of plaintiff manual workers seeking compensation.

3.18 Nevertheless, the information in Table 3.2 shows that a low percentage of Victorians from the lowest income category (nil–$20,799) accessed the Court system, with most plaintiffs (on whom income information was available) falling into the second income category ($20,800–$41,599).

3.19 With the income information from survey data (see Appendix L) likely to be influenced by those with a formal education (who might be more likely to respond to a survey) and the court-file information likely to be influenced by those who are injured and are seeking compensation, the average income of those who access the Court system is likely to be between these two estimates. However, in both estimates the lowest income earners are underrepresented in their access to the higher Court system. This is consistent with the underrepresentation of non-professional occupation categories, such as sales, clerical and administrative workers (noted above) and may reflect dispute patterns and also the value and type of claims that are more likely to be filed in each Court.

**TABLE 3.2: INCOME OF PLAINTIFFS – COURT-FILE DATA**

<table>
<thead>
<tr>
<th>Income</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
<th>Victoria (from ABS)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Nil–$20,799</td>
<td>7</td>
<td>20.6</td>
<td>7</td>
<td>17.1</td>
</tr>
<tr>
<td>$20,800–$41,599</td>
<td>8</td>
<td>23.5</td>
<td>24</td>
<td>58.5</td>
</tr>
<tr>
<td>$41,600–$67,599</td>
<td>11</td>
<td>32.4</td>
<td>9</td>
<td>22.0</td>
</tr>
<tr>
<td>$67,600–$103,999</td>
<td>4</td>
<td>11.8</td>
<td>1</td>
<td>2.4</td>
</tr>
<tr>
<td>$104,000 or more</td>
<td>4</td>
<td>11.8</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Who Uses Mediation Services?

3.20 This section compares the demographic characteristics of disputants in the Supreme and County Courts of Victoria who used mediation at some stage of their dispute to those who did not. The information was collected from court files and from the disputant surveys. For general demographic information on the Supreme and County Court litigants, please see Appendix L and above.

Survey distribution and response

3.21 Surveys were mailed out between April and June 2008 to all disputants in the sample (see Chapter 1) and 98 usable completed surveys were returned. The survey included questions concerning the demographic characteristics of survey respondents. These factors are important in understanding who accesses mediation services in the Supreme and County Court system in Victoria and how their perceptions vary.221

Are people who are less well off more likely to settle at mediation?

3.22 The following analysis examined whether disputants of lower income are more likely to finalise their dispute at mediation. The results show some support for this hypothesis.

221 The survey was returned mainly by litigants who had finalised their dispute at mediation or who had attended a mediation. This may have been due to the name of the research project: ‘Mediation in the Supreme and County Courts of Victoria’. In fact, some of the phone calls received by the researchers regarding the survey suggested that parties who did not attend mediation believed they were not eligible to complete the survey. This perception was incorrect and the letter sent out with the survey stated that we are interested in ‘the process that finalised your dispute’. To increase participation by non-mediation participants, reminder letters included the following statement:

‘It is important that to learn about the experiences of all people who have contact with the court system and we are interested in learning about your experience regardless of whether your case settled in court, out of court (e.g. via negotiation or mediation) or did not settle.’

Nevertheless, the majority of survey respondents had their matter finalised at mediation. This creates an issue in terms of data analysis as the survey data is disproportionate to the proportion of overall cases finalised by mediation and other processes (see Chapter 2 and Appendix I for proportion of sampled cases finalised at mediation and through other dispute resolution processes). This response bias has been considered when interpreting the survey data.
3.33 To examine this issue, the occupation and income of those who finalised their matter at mediation was compared to those who finalised their matter using some other process. Analyses were conducted using data collected from the Court files as well as from disputant surveys. The Court file data indicated that plaintiffs who finalised their case at mediation had a lower average income ($M= $17018.2, n=6) than those who used some other process to finalise their dispute ($M= $57423.8, n=27), but low numbers prevented statistical testing.\footnote{Due to the large amount of missing data for this variable, the sample size was too small and significance testing could not be conducted.}

3.34 Although the survey data also showed a higher percentage of low income earners (sample included plaintiffs and defendants) finalising their dispute at mediation, the difference was not statistically significant.\footnote{($\chi^2(1) = 0.85, p=.36$)} Survey respondents’ income by process of resolution is tabulated in Table 3.3.

<table>
<thead>
<tr>
<th>Income</th>
<th>Finalised at mediation</th>
<th>Finalised using some other process</th>
<th>Total</th>
<th>Victoria (from ABS)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Nil–$41,599</td>
<td>14</td>
<td>40.0</td>
<td>10</td>
<td>29.4</td>
</tr>
<tr>
<td>$41,600–$67,599</td>
<td>4</td>
<td>11.4</td>
<td>10</td>
<td>29.4</td>
</tr>
<tr>
<td>$67,600+</td>
<td>17</td>
<td>48.6</td>
<td>14</td>
<td>41.2</td>
</tr>
<tr>
<td>Total</td>
<td>35</td>
<td>100</td>
<td>34</td>
<td>100</td>
</tr>
</tbody>
</table>

3.34 The occupation of disputants (plaintiffs and defendants) was also examined. The results for the Court file sample are presented in Table 3.4 and the differences between the occupation of disputants who finalised their case via mediation and those who finalised it through some other process were statistically significant.\footnote{($\chi^2(4) = 13.46, p=.009$)} The greatest differences were as follows:

- Clerical, sales and community workers were more likely to finalise their dispute at mediation
- Students, unemployed and retired were more likely to finalise their dispute at mediation

Machinery operators and labourers were less likely to finalise their dispute at mediation.

3.35 There is some evidence in these results to suggest that people from certain low income categories, specifically students, unemployed and retired, are more likely to finalise their dispute at mediation. This trend is also supported by survey results (see Table 3.5), which also show that a higher percentage of disputants from the ‘home duties, retired and other’ category were more likely to finalise their dispute at mediation.

3.36 According to the survey sample, professionals, IT and finance industry workers were less likely to finalise their dispute at mediation. However, significance testing was not carried out on the survey sample due to the low number of disputants across categories. Overall, the income and occupation data shows that people from lower income occupations were more likely to finalise their dispute at mediation.

3.37 This finding is also of interest as it seems that mediation is more effective in some types of matters (see Chapter 2). It may be that case resolution is linked not only to disputant characteristics but also to case type (notably WorkCover cases were excluded from the case-type survey response, see Chapter 2).

**TABLE 3.4: OCCUPATION OF THOSE WHO FINALISED THEIR DISPUTE AT MEDIATION AND ALL OTHERS – COURT-FILE DATA**

<table>
<thead>
<tr>
<th>Occupation type</th>
<th>Finalised at mediation</th>
<th>Finalised using some other process</th>
<th>Total</th>
<th>Victoria (from ABS)³²⁷</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Managers, directors and professionals</td>
<td>11</td>
<td>21.6</td>
<td>61</td>
<td>28.8</td>
</tr>
<tr>
<td>Technicians and trade workers</td>
<td>9</td>
<td>17.6</td>
<td>32</td>
<td>15.1</td>
</tr>
<tr>
<td>Clerical, sales and community workers</td>
<td>12*</td>
<td>23.5</td>
<td>27*</td>
<td>12.7</td>
</tr>
<tr>
<td>Machinery operators and labourers</td>
<td>5*</td>
<td>9.8</td>
<td>60*</td>
<td>28.3</td>
</tr>
<tr>
<td>Students, unemployed and retired</td>
<td>14*</td>
<td>27.5*</td>
<td>32</td>
<td>15.1</td>
</tr>
<tr>
<td>Total</td>
<td>51</td>
<td>100</td>
<td>212</td>
<td>100</td>
</tr>
</tbody>
</table>

*<p<=.05.

---

TABLE 3.5: OCCUPATION OF THOSE WHO FINALISED THEIR DISPUTE AT MEDIATION AND ALL OTHERS – SURVEY DATA

<table>
<thead>
<tr>
<th>Industry of employment</th>
<th>Finalised at mediation</th>
<th>Finalised using some other process</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Professional, IT and Financial services</td>
<td>1</td>
<td>3.3</td>
<td>7</td>
</tr>
<tr>
<td>Resource and building industries</td>
<td>1</td>
<td>3.3</td>
<td>0</td>
</tr>
<tr>
<td>Accommodation, administrative, sales and rental industries</td>
<td>19</td>
<td>63.3</td>
<td>19</td>
</tr>
<tr>
<td>Education, public services and health-care</td>
<td>4</td>
<td>13.3</td>
<td>6</td>
</tr>
<tr>
<td>Home duties, retired and other</td>
<td>5</td>
<td>16.7</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>30</strong></td>
<td><strong>100</strong></td>
<td><strong>34</strong></td>
</tr>
</tbody>
</table>

**Education level of mediation clients**

3.38 The highest attained level of education of disputants who finalised their dispute at mediation and those who finalised it using another process is depicted in Table 3.6. The only significant difference between the two groups was in the percentage of TAFE graduates (in the Court file sample). TAFE graduates were more likely to use mediation to finalise their dispute.228

---

228 \( \chi^2(1) = 3.70, p=.05 \)
TABLE 3.6: EDUCATION OF DISPUTANTS – COURT-FILE AND SURVEY DATA

<table>
<thead>
<tr>
<th>Highest level of education completed</th>
<th>Court file data</th>
<th>Survey data</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Finalised at mediation n=9</td>
<td>Finalised using some other process n=50</td>
</tr>
<tr>
<td>School certificate</td>
<td>33.3</td>
<td>36.0</td>
</tr>
<tr>
<td>Higher school certificate</td>
<td>11.1</td>
<td>10.0</td>
</tr>
<tr>
<td>TAFE</td>
<td>55.6*</td>
<td>24.0*</td>
</tr>
<tr>
<td>University degree</td>
<td>0.0</td>
<td>26.0</td>
</tr>
<tr>
<td>Other</td>
<td>0.0</td>
<td>4.0</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

*p<.05.

English as first language

3.39 Most litigants reported that English was their first language. There were no significant differences for those who finalised their dispute at mediation and those who used another process. Some Victorian statistics report that 25 per cent of Victorians speak a language other than English, suggesting that this population is under-represented in the Supreme and County Court sample.

TABLE 3.7: ENGLISH AS FIRST LANGUAGE – SURVEY DATA

<table>
<thead>
<tr>
<th>Is English your first language?</th>
<th>Finalised at mediation n=39</th>
<th>Finalised using some other process n=38</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Yes</td>
<td>89.7</td>
<td>94.7</td>
</tr>
<tr>
<td>No</td>
<td>10.3</td>
<td>5.3</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

Other Issues Relating to Access

3.40 As noted previously, access to the Court system can be linked to the levels of disputant understanding about how the system operates, whether a disputant is represented and the availability of services in different geographical areas. This section analyses three variables related to this topic and explores how these factors are linked to mediation use:

- Disputant previous involvement in legal action;
- Whether litigants were represented; and
- Access to mediation services by litigants from different geographical regions.

Previous involvement in legal action

3.41 The smaller in depth survey asked whether disputants had been involved in legal action prior to the present case. 58 per cent (n=56 out of 97) of those that responded to the survey (and answered this question) had been involved in a previous legal action. Specifically, 60 per cent of Supreme Court survey respondents and 55 per cent of County Court survey respondents had been involved in a previous legal action. This is an interesting finding as it suggests that there are many litigants who access the Courts on more than one occasion (‘frequent litigants’).

TABLE 3.8: HAVE YOU BEEN INVOLVED IN PREVIOUS LEGAL ACTION? – SURVEY DATA

<table>
<thead>
<tr>
<th>Previous involvement in legal action</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Yes</td>
<td>32</td>
<td>60.4</td>
<td>24</td>
</tr>
<tr>
<td>No</td>
<td>21</td>
<td>39.6</td>
<td>20</td>
</tr>
<tr>
<td>Total</td>
<td>53</td>
<td>100</td>
<td>44</td>
</tr>
</tbody>
</table>

Who are the frequent litigants?

3.42 As shown in Table 3.9, plaintiffs were more likely to have been previously involved in a legal action (68 per cent; n=32). This difference is consistent with results obtained in 2002 from the NSW Supreme and District Courts\(^\text{230}\) and suggests that people likely to respond to surveys are more likely to be those who have experience in the Court system.

3.43 The finding may also suggest that those who have previously used the Court system are more likely to use it again. This finding has important implications for the type of mediation processes that are used – those that support party empowerment and negotiation learning may be more likely to reduce litigious behaviour.

TABLE 3.9: FREQUENT LITIGANTS – SURVEY DATA

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>n=32</td>
<td>n=23</td>
</tr>
<tr>
<td></td>
<td>%68.1</td>
<td>%48.9</td>
</tr>
<tr>
<td>No</td>
<td>n=15</td>
<td>n=24</td>
</tr>
<tr>
<td></td>
<td>%31.9</td>
<td>%51.1</td>
</tr>
</tbody>
</table>

**Self-represented litigants**

3.44 The research process also involved the collection of information about representation. 3 per cent of litigants in the County Court sample and 4.5 per cent of litigants in the Supreme Court sample were self-represented.231

3.45 In the County Court, one-third (n=8) of self-represented litigants were plaintiffs (all were companies) and two-thirds (n=16) were defendants (10 individuals; 6 companies). Only one self-represented litigant used mediation and the outcome of this mediation was ‘not finalised’.

3.46 The Supreme Court information on self-represented litigants indicated whether litigants were self-represented for the entire case or only part of it. In the Supreme Court, 21 per cent (n=7) of self-represented litigants were plaintiffs (1 company, 6 individuals), but the majority of these (n=4) were only self-represented for a part of the case. 79 per cent (n=26) of self-represented litigants were defendants (20 individuals, 4 companies, 2 unknown); 2 were self-represented for only part of the case.

3.47 A number of these self-represented litigants were involved in the same case, in fact, 9 cases (out of the 24 cases with self-represented litigants) had 2 self-represented litigants (all but one were defendants).

3.48 Self-represented litigants in the Supreme Court used mediation more than in the County Court; one-third (n=8 out of 24) of cases with self-represented litigants were mediated. All mediations except one were conducted externally; one mediation with a self-represented plaintiff was conducted by a Supreme Court Master. The finalisation rate of mediations with Supreme Court self-represented litigants was quite low:

231 This data was collected in July 2008. County Court data was obtained through a request to the County Court and Supreme Court data was obtained by a researcher from ACPACS checking Supreme Court electronic records at the Registry. The data collection techniques for the two jurisdictions for this question were therefore different and this may impact the reported results.
- 63 per cent (n=5) were ‘not finalised’ at mediation;
- 25 per cent (n=2) were ‘finalised’ at mediation, and
- the outcome of one mediation was unknown.

How were self-represented litigants’ disputes finalised?

3.49 Most disputes involving self-represented litigants were dismissed/discontinued or finalised at negotiation. In the County Court, 21 per cent (n=5 out of 24) of disputes involving self-represented litigants were finalised at trial. Figure 3.1 below outlines the results in more detail.

FIGURE 3.1: HOW WAS THE DISPUTE FINALISED? – SELF-REPRESENTED LITIGANTS

What court events did self-represented litigants attend?

3.50 The median number of Court events attended by self-represented litigants in the Supreme Court was 4\(^2\) events and in the County Court 2\(^2\) events. These event numbers are very similar to the rest of the County Court sample\(^2\) and slightly lower than the rest of the Supreme Court sample.\(^2\)

3.51 Figure 3.2 outlines the Court events attended by self-represented litigants, with a directions hearing being the most frequent event.

---

\(^2\) Both were externally conducted mediations.

\(^2\) \([n=24, M=4.42; SD=3.49; Median=4.00]\)

\(^2\) \([n=24, M=2.79; SD=2.69; Median=2.00]\)

\(^2\) \([n=310, M=2.38; SD=2.04; Median=2.00]\)

\(^2\) \([n=243, M=5.20; SD=3.94; Median=5.00]\)
FIGURE 3.2: WHAT COURT EVENTS WERE ATTENDED? – SELF-REPRESENTED LITIGANTS

Court events used by self-represented litigants

- Interlocutory hearing
- Directions hearing
- Trial
- Case conference
- Trial date fixed
- Hearing (other)
- Chambers Directions hearing (consent)
- Practice Court

Supreme Court
County Court
**Are mediation services available in different regions?**

3.52 A large proportion of survey respondents lived in the inner-city area of Melbourne (44 per cent, n=43).\(^{237}\) A proportion was from the outer Melbourne area (17 per cent, n=17)\(^{238}\) or drawn from rural regions (16 per cent, n=16)\(^{239}\), while a smaller proportion was from Geelong and other regional towns (9 per cent, n=9), and from interstate (6 per cent, n=6). Some respondents did not provide their postcode (7 per cent, n=7).

3.53 Figure 3.3 shows the dispute resolution processes that were used by survey respondents from different areas when trying to finalise their dispute. These figures record the processes that finalised the dispute, and also those that were used at some stage during the dispute.

3.54 Mediation was the process that was most likely to be used with disputants drawn from all geographical regions except for rural Victoria, where negotiation was the most commonly used process. No interstate survey respondent attended a case-conference in Court and this process was also used less by rural respondents.

3.55 This may indicate that case-conferences in Court were more difficult to access for disputants who are located further away from the metropolitan areas of Melbourne. It is also interesting to note that a larger proportion of rural, outer Melbourne, and Geelong and other regional area clients were likely to attend trial and a hearing than inner-city clients (who were more likely to attend mediation and negotiation).

---

\(^{237}\) This includes Bayside City Council, City of Port Phillip, City of Knox, City of Yarra, City of Glen Eira, City of Stonnington, City of Whitehorse, Boroondara City, City of Darebin, City of Moreland and the City of Melbourne.

\(^{238}\) Frankston City Council, Greater Dandenong, Patterson Lakes, Shire of Melton, Shire of Yarra Ranges etc.

\(^{239}\) East Gippsland, Loddon Shire, Mitchell Shire, Cardinia Shire, Yarrawonga, Bundalong, Cobden, Beeac etc.
FIGURE 3.3: ACCESS TO DISPUTE RESOLUTION SERVICES IN DIFFERENT AREAS – SURVEY DATA

Dispute resolution services by area

<table>
<thead>
<tr>
<th>Area</th>
<th>Mediation</th>
<th>Negotiation</th>
<th>Trial</th>
<th>Conference</th>
<th>Case Conference in Court</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interstate (NSW &amp; QLD)</td>
<td>10</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Inner city (VIC)</td>
<td>30</td>
<td>20</td>
<td>10</td>
<td>15</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>Outer/Greater Melbourne</td>
<td>15</td>
<td>10</td>
<td>5</td>
<td>5</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>Geelong and other regional towns</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Rural Victoria</td>
<td>15</td>
<td>10</td>
<td>5</td>
<td>5</td>
<td>15</td>
<td>15</td>
</tr>
</tbody>
</table>

Summary

3.56 A number of reports have previously identified barriers to accessing the Court system and the recent VLRC report has discussed approaches that could enhance access to the justice system. The research suggests that the general barriers to the Court system mean that those who access it are unlikely to be representative of the general population (see Appendix L for details).

3.57 To some extent, the demographic characteristics of litigants reflect the nature of the cases dealt with in the Supreme and County Courts. The research also indicates that litigants from lower income occupations are more likely to use mediation to finalise their dispute, suggesting that affordability may play a role in determining the processes accessed by litigants.

3.58 There are various other issues regarding initial access to mediation that are relevant. Clearly many litigants who use the services of the Courts are ‘frequent litigants’. What this may mean is that mediators may make assumptions that lawyers and parties understand the mediation process and may therefore not provide much procedural information or conduct explanatory intake sessions (this is also discussed in Chapter 2). However, a large number of disputants are not frequent litigants.

3.59 These findings suggest that greater attention by the Courts and mediators may be required to improve the accessibility, relevance and value of mediation services for a wider range of litigants. This is discussed further below.

3.60 In addition, it may be appropriate to consider general access issues. Previous studies have suggested accessibility could be improved by using
inclusive processes and targeted recruitment and providing cultural awareness training for staff, amongst other things and more specific training about ADR processes and early referral options. In this regard, the Administrative Appeals Tribunal (AAT) has previously discussed steps taken to address the results of an examination of the accessibility of their dispute resolution processes. A past annual report describes the steps taken to improve the accessibility and quality of information that is provided to parties and the general public about the Tribunal. A salient feature of the AAT program is an ‘outreach’ approach where Court staff contact litigants and discuss process and procedure. This may be particularly helpful with some litigants and may better support their involvement in litigation.

**At What Stage in Proceedings are Mediation Services Accessed?**

3.61 In the Supreme Court, the median number of days from when a matter was filed in Court to the first mediation was 324 days. In the County Court, the median number of days from the day the matter was filed in Court to the day of the first mediation was 260 days.

3.62 As outlined in Appendix I, the median case age of Supreme Court matters was 426 days and in the County Court it was 341 days. This means that in both jurisdictions mediation usually took place three quarters (76 per cent) of the way through an expected full case duration (to trial). This is fairly late in proceedings and can lead to increased costs. This matter is discussed further in Chapter 5 and later in this Chapter.

**Can Litigants Participate in Mediation?**

3.63 Table 3.10 compares survey respondents’ perceptions of participation in mediation to the aggregated responses to four other dispute resolution processes (negotiation, trial, case-conference in Court and conference). The number of participants commenting on trial, conference and case-conference in Court was quite small and therefore these results were aggregated along with negotiation into ‘all other processes’.

---


242 (n=74; M=417.05; SD=387.11; Median=324)

243 (n=99; M=345.40; SD=278.00; Median=260.00)
MEDIATION IN THE SUPREME AND COUNTY COURTS OF VICTORIA

3.64 The Table also places the current results into a broader context, comparing the current survey sample’s perceptions to those of relating to mediation conducted as part of the NSW Settlement Scheme, as well as perceptions of advisory dispute resolution processes utilised by the Financial Industry Complaints Service in 2002 and Consumer Affairs Victoria/VCAT in early 2007. These three research projects were conducted by Professor Sourdin and used a similar methodology to the current project, allowing for comparison in relation to many variables.

Comparing mediation to other dispute resolution processes

3.65 To examine the differences between disputes finalised at mediation and disputes finalised using another process (this included negotiation, conference, trial and case-conference in Court), a series of independent sample t-tests (a statistical technique comparing differences between groups) were conducted for the questions in Table 3.8.

3.66 There were no statistically significant differences between mediation and ‘all other processes’ in the current sample. The difference in responses to ‘I was able to participate during the process’ approached statistical significance, with those who finalised their dispute at mediation indicating they were able to participate slightly more than those who finalised their dispute using another process.

3.67 Interestingly, only 49 per cent of mediation participants of the smaller survey sample (n=18 out of 37) agreed they had control during the process. Some of the reasons for this may be found in the answers to the other survey questions. For example, 47 per cent (n=18 out of 38) of mediation participants did not feel comfortable during the mediation and 59 per cent (n=22 out of 37) reported they would have liked to participate more during the process.

3.68 This finding is related to the models of mediation that were used (see Chapter 2 and Chapter 6) and arguably much of what was called ‘mediation’ could not be described in this manner if one considers available definitions and descriptions of mediation.

Recommendation:
Courts need to clearly articulate the models of mediation that are to be used and use strategies to promote high quality practices.

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J Elix and T Sourdin, Review of the Financial Industry Complaints Service 2002 – What are the issues? (Community Solution, La Trobe University and University of Western Sydney, 2002).

T Sourdin, Dispute Resolution Processes for Credit Consumers (La Trobe University, Melbourne, 2007).

(t2)-1.7, p=.09, n=77; Mediation: M=3.05, SD=.66; All other processes: M=2.75, SD=.90; Scale range 1–4, 1=strongly disagree, 4=strongly agree)
TABLE 3.10: PERCEPTIONS OF PARTICIPATION BY PROCESS OF RESOLUTION

<table>
<thead>
<tr>
<th>Process perception variables</th>
<th>Mediation n=37-38</th>
<th>All other processes n=40-42</th>
<th>NSW Settlement Scheme n=60-61</th>
<th>CAV n=50-52</th>
<th>FICS n=91-93</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Agree</td>
<td>Agree</td>
<td>Agree</td>
<td>Agree</td>
<td>Agree</td>
</tr>
<tr>
<td>I was able to participate during the process</td>
<td>86.5</td>
<td>75.0</td>
<td>96.7</td>
<td>64.0*</td>
<td>38.5**</td>
</tr>
<tr>
<td>I had control during the process</td>
<td>48.6</td>
<td>42.9</td>
<td>90.2**</td>
<td>53.9</td>
<td>21.5**</td>
</tr>
<tr>
<td>I felt comfortable during the process</td>
<td>52.6</td>
<td>63.5</td>
<td>88.3**</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>There was enough time to present/discuss all necessary information</td>
<td>45.9</td>
<td>35.7</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>I would have liked to participate more during the process</td>
<td>59.5</td>
<td>48.8</td>
<td>N/A</td>
<td>N/A</td>
<td>72.5</td>
</tr>
</tbody>
</table>

*p < .05, **p < .01

Comparison of the present results to past research

3.69 Although the mediation sample in this research project is relatively small, the reported levels of participation, control and comfort during ‘mediation’ are not as high as those noted in previous studies.

3.70 For example, when compared to the facilitative style of mediation used in the NSW Settlement Scheme, participants in the present mediation sample reported they participated to a lesser extent, had less control had less control

---

248 The ‘agree’ numbers presented in this table are the sum of ‘agree’ and ‘strongly agree’ responses on a 4-point scale, where 1=strongly disagree and 4=strongly agree. Please note that the tables in this report show the percentages of clients that agreed/were satisfied etc with the topic in question, as this is an easier way for readers to understand responses than reporting mean values. However, the (parametric) statistical tests (t-test) used to compare differences in responses of the current sample compare differences between groups based on mean values. Parametric tests are used where appropriate as they are more sensitive than non-parametric tests. However, when comparing the differences between the current sample and the CAV, NSW Settlement Scheme and FICS samples, non-parametric tests (chi-square) are used as the data to conduct t-tests was not available at the time of analysis.

249 This difference approached statistical significance ($\chi^2 (1) = 3.64, p=.06$).

250 ($\chi^2 (1) = 20.89, p=.00$)
and felt less comfortable\(^{251}\) (the first difference approached statistical significance, the last two were statistically significant).

3.71 On the other hand, when compared to the advisory dispute resolution process previously used by the Financial Industry Complaints Service, the present mediation sample reported significantly higher levels of participation\(^{252}\) and control\(^{253}\) during the process. Disputants also reported significantly higher participation levels\(^{254}\) than those who participated in the advisory (and largely telephone based) dispute resolution processes for credit consumers at Consumer Affairs Victoria.

3.72 The emerging pattern from this cross-contextual comparison is that Supreme and County Court litigants who used mediation to finalise their dispute found they could participate in the resolution process to a greater extent than those using advisory processes in other research samples. However, disputants in the current sample were not able to participate as much as those who had used mainly facilitative mediation processes, such as that of the NSW Settlement Scheme.

**Plaintiffs and defendants**

3.73 To examine whether differences in perceptions of participation during mediation relate to the role of the parties in the dispute, a comparison of plaintiffs and defendants was conducted. Again, the smaller in depth survey was used to gather information. The largest differences between plaintiff and defendant perceptions were observed in respect of the following variables:

- More defendants (95 per cent, \(n=18\) out of 19) than plaintiffs (75 per cent, \(n=15\) out of 20) considered they were able to participate during the process.
- More defendants (58 per cent, \(n=11\)) than plaintiffs (35 per cent, \(n=7\)) considered they had control during the process.
- More plaintiffs (65 per cent, \(n=13\)) than defendants (47 per cent, \(n=9\)) said they would have liked to participate more during the process.

3.74 The differences were not however statistically significant\(^{255}\). While it is not clear why plaintiffs felt they had less control and opportunity to participate, the finding emphasises the importance of participation in shaping perceptions during a dispute resolution process and is consistent with some comments received about some mediation processes where plaintiffs considered that they had been marginalised. For example, one

\(^{251}\) \(\chi^2(1) = 15.61, p=.00\)

\(^{252}\) \(\chi^2(1) = 24.32, p=.00\)

\(^{253}\) \(\chi^2(1) = 9.43, p=.00\)

\(^{254}\) \(\chi^2(1) = 5.53, p=.02\)

\(^{255}\) \(d=37.38, r=-1.73<1.61, p>.05\)
extreme situation involved the legal team changing the date of the mediation and not telling the plaintiffs.256 Another plaintiff stated: ‘The process was never in my control’… ‘I just let it run…’257

3.75 On the other hand, one plaintiff commented: ‘I was involved in the to-ings and fro-ings’258 of the mediation, which does indicate a level of participation in that particular process or is at least a reflection about shuttle patterns. Another plaintiff, reflecting on the accessibility and lack of respect experienced in these situations emphasised the notion with the question: ‘Who do you complain to when they are all playing on the same team?’259

TABLE 3.11: PERCEPTIONS OF PARTICIPATION DURING MEDIATION BY PARTY TYPE260

<table>
<thead>
<tr>
<th>Process perception variables</th>
<th>Plaintiffs</th>
<th>Defendants</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Agree n</td>
<td>Agree n</td>
<td>Agree n</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>I was able to participate during the process</td>
<td>15 75.0</td>
<td>18 94.8</td>
<td>33 84.6</td>
</tr>
<tr>
<td>I had control during the process</td>
<td>7 35.0</td>
<td>11 57.9</td>
<td>18 46.2</td>
</tr>
<tr>
<td>I felt comfortable during the process</td>
<td>17 81.0</td>
<td>15 83.4</td>
<td>32 82.0</td>
</tr>
<tr>
<td>There was enough time to present/discuss all necessary information</td>
<td>14 70.0</td>
<td>13 68.4</td>
<td>27 69.3</td>
</tr>
<tr>
<td>I would have liked to participate more during the process</td>
<td>13 65.0</td>
<td>9 47.4</td>
<td>22 56.5</td>
</tr>
</tbody>
</table>

Jurisdiction

3.76 Table 3.12 compares differences in the perceptions of participation during the mediation according to court type. Again the smaller in depth survey results were considered. The only difference between Supreme Court and County Court clients that approached statistically significance was that Supreme Court clients considered that they were able to participate more (100 per cent, n=21) than County Court clients (69 per cent, n=11 out of 16).261

3.77 More specifically, in the smaller survey, 76 per cent of Supreme Court mediation participants (n=16) said they ‘agreed’ that they were able

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256 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
257 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
258 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
259 'Agree' is the sum of responses to ‘agree’ and ‘strongly agree’ on a 4-point scale, where 1= ‘strongly disagree’ and 4= ‘strongly agree’.
260 (t(21)=-1.86 p=.08, Supreme Court M=3.24, SD=.44; County Court M=2.81, SD=.83; Scale range 1–4, 1=strongly disagree, 4=strongly agree)
to participate and 24 per cent (n=5) said they ‘strongly agreed’ that they were able to participate. Nevertheless, 57 per cent (n=12) of Supreme Court clients reported that they would have liked to participate more.

TABLE 3.12 – PERCEPTIONS OF MEDIATION PARTICIPATION BY JURISDICTION

<table>
<thead>
<tr>
<th>Process perception variables</th>
<th>Supreme Court</th>
<th>County Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Agree</td>
<td>%</td>
</tr>
<tr>
<td>I was able to participate during the process</td>
<td>21</td>
<td>100.0</td>
</tr>
<tr>
<td>I had control during the process</td>
<td>11</td>
<td>52.4</td>
</tr>
<tr>
<td>I felt comfortable during the process</td>
<td>12</td>
<td>54.5</td>
</tr>
<tr>
<td>There was enough time to present/discuss all necessary information</td>
<td>15</td>
<td>68.2</td>
</tr>
<tr>
<td>I would have liked to participate more during the process</td>
<td>12</td>
<td>57.1</td>
</tr>
</tbody>
</table>

**Gender**

3.78 The results in Table 3.13 show that in the smaller survey group, female disputants considered they were able to participate more, had more time to discuss the necessary information, felt more comfortable and had more control during the process than males. However, these differences were not statistically significant.262

TABLE 3.13– PERCEPTIONS OF MEDIATION PARTICIPATION BY GENDER

<table>
<thead>
<tr>
<th>Process perception variables</th>
<th>Females</th>
<th>Males</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Agree</td>
<td>%</td>
</tr>
<tr>
<td>I was able to participate during the process</td>
<td>17</td>
<td>94.5</td>
</tr>
<tr>
<td>I had control during the process</td>
<td>11</td>
<td>61.1</td>
</tr>
<tr>
<td>I felt comfortable during the process</td>
<td>11</td>
<td>57.9</td>
</tr>
<tr>
<td>There was enough time to present/discuss all necessary information</td>
<td>14</td>
<td>77.8</td>
</tr>
<tr>
<td>I would have liked to participate more during the process</td>
<td>10</td>
<td>55.6</td>
</tr>
</tbody>
</table>

262 (df=37-38, t<1.12<.89, p>.05)
Do Litigants Understand Mediation?

**Understanding the process**

3.79 Mediation participants who responded to the survey generally felt they understood what was going on during the mediation process ‘quite well’. Only two respondents indicated they did ‘not at all’ understand what was going on during the mediation process.

3.80 Table 3.14 summarises information relating to understanding the mediation process using percentages and compares understanding across the two jurisdictions, party type, previous experience with mediation and legal action. It also compares the current sample’s understanding with that of the NSW Settlement Scheme (the FICS and CAV sample populations were asked this question in a slightly different format).

3.81 Plaintiffs’ understanding tended to be slightly better than defendants’ understanding, but this difference was not statistically significant. ‘Frequent litigants’ (i.e. those who had sought legal action before this one) tended to have a good understanding of the mediation process, but surprisingly understanding amongst those who attended more than one mediation session was comparatively low.

3.82 It is possible that they rated their overall perception of mediation or that cases requiring more than one mediation session are generally more confusing. The low respondent numbers in this category make it difficult to make any concrete conclusions, but it nevertheless is an interesting trend for examination in future research.

3.83 Finally, the differences in understanding the mediation process between the present sample and that of the NSW Settlement Scheme were statistically significant, suggesting that more facilitative processes resulted in greater understanding than some of the mediation processes used in Victoria.

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263 \( (M=3.15; SD=.91; \text{Range}=1-4; \text{1=Not at all, 4=Very well}) \)

264 \((t(38)=-1.82, p=.076)\)

265 \((\chi^2(1)=14.44, p=.00)\)
### Understanding the outcome

**3.84** Respondents were asked to rate how well they felt they understood the outcome of the process that finalised their dispute. Mediation outcomes were generally well understood, with most respondents indicating that they ‘agreed’ that they understood the outcome. Table 3.15 compares the responses for mediation and all other dispute resolution processes, while Table 3.16 compares understanding of mediation outcomes across jurisdictions and party type. Those who finalised their dispute at mediation reported higher understanding of outcomes than those who used another process to finalised their dispute. Although this is consistent with one of the theoretical advantages of mediation (that parties are involved in the process and ‘own’ the decisions that are made), this finding was not statistically significant.

**3.85** Supreme Court clients and defendants considered that they understood the mediation outcome slightly better than County Court clients and plaintiffs. However the difference in ratings is very small and not statistically significant.

#### TABLE 3.15: UNDERSTANDING THE OUTCOME – MEDIATION AND OTHER DISPUTE RESOLUTION PROCESSES

<table>
<thead>
<tr>
<th>Preference</th>
<th>Mediation n=38</th>
<th>All other processes n=41</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Agree</td>
<td>89.5</td>
<td>80.5</td>
</tr>
<tr>
<td>Disagree</td>
<td>10.5</td>
<td>19.5</td>
</tr>
</tbody>
</table>

---

265 ‘Not well’ is the sum of ‘not at all’ (rating 1) and ‘not very well’ (rating 2). ‘Well’ is the sum of ‘quite well’ (rating 3) and ‘very well’ (rating 4). Scale range: 1–4.

267 ‘Agree’ = agree (3)+ strongly agree (4). (M=3.12; SD=.71; Range=1–4; 1=Strongly disagree, 4=Strongly agree).

268 Supreme Court vs. County Court (t(39)=−.522, p>.05); Plaintiff vs. Defendant (t(38)=−1.15, p>.05).

269 Disagree= strongly disagree (1)+disagree (2). Agree=agree (3)+strongly agree(4). Scale range: 1–4.
TABLE 3.16: UNDERSTANDING THE MEDIATION OUTCOME

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Supreme Court clients n=23</th>
<th>County Court clients n=18</th>
<th>Plaintiffs n=21</th>
<th>Defendants n=19</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Agree</td>
<td>95.7</td>
<td>83.4</td>
<td>85.7</td>
<td>94.7</td>
</tr>
<tr>
<td>Disagree</td>
<td>4.3</td>
<td>16.7</td>
<td>14.3</td>
<td>5.3</td>
</tr>
</tbody>
</table>

Are there Cost Savings?

Case costs

3.86 Survey respondents were asked to indicate how much they had spent during their dispute. Table 3.17 outlines this information by reference to the smaller in depth survey by jurisdiction and by overall amounts spent (note - this information is for all dispute resolution processes).

3.87 The mean value outlines the average amount spent. The median value represents the middle value of the sample (when ordered from lowest to highest) and is not inflated by extreme values the way the mean value can be. The minimum value is the smallest value reported by survey respondents, while the maximum is the highest value reported by survey respondents.
TABLE 3.17: CASE COSTS – SURVEY DATA

<table>
<thead>
<tr>
<th></th>
<th>Supreme Court $</th>
<th>County Court $</th>
<th>Overall $</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional fees</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-Mean</td>
<td>60,372</td>
<td>72,897</td>
<td>66,080</td>
</tr>
<tr>
<td>-Median</td>
<td>30,000</td>
<td>30,000</td>
<td>30,000</td>
</tr>
<tr>
<td>-Minimum</td>
<td>3,000</td>
<td>500</td>
<td>500</td>
</tr>
<tr>
<td>-Maximum</td>
<td>760,000</td>
<td>700,000</td>
<td>760,000</td>
</tr>
<tr>
<td>n</td>
<td>43</td>
<td>36</td>
<td>79</td>
</tr>
<tr>
<td>Disbursements:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-Mean</td>
<td>11,745</td>
<td>20,203</td>
<td>15,725</td>
</tr>
<tr>
<td>-Median</td>
<td>5,000</td>
<td>5,000</td>
<td>5,000</td>
</tr>
<tr>
<td>-Minimum</td>
<td>500</td>
<td>500</td>
<td>500</td>
</tr>
<tr>
<td>-Maximum</td>
<td>60,000</td>
<td>300,000</td>
<td>300,000</td>
</tr>
<tr>
<td>n</td>
<td>27</td>
<td>24</td>
<td>51</td>
</tr>
<tr>
<td>Other costs:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-Mean</td>
<td>25,233</td>
<td>87,501</td>
<td>54,885</td>
</tr>
<tr>
<td>-Median</td>
<td>15,000</td>
<td>41,875</td>
<td>20,000</td>
</tr>
<tr>
<td>-Minimum</td>
<td>3,000</td>
<td>1,760</td>
<td>1,760</td>
</tr>
<tr>
<td>-Maximum</td>
<td>80,000</td>
<td>350,000</td>
<td>350,000</td>
</tr>
<tr>
<td>n</td>
<td>11</td>
<td>10</td>
<td>21</td>
</tr>
<tr>
<td>Total costs:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-Mean</td>
<td>72,515</td>
<td>103,426</td>
<td>86,840</td>
</tr>
<tr>
<td>-Median</td>
<td>37,500</td>
<td>32,500</td>
<td>35,000</td>
</tr>
<tr>
<td>-Minimum</td>
<td>3,000</td>
<td>500</td>
<td>500</td>
</tr>
<tr>
<td>-Maximum</td>
<td>849,000</td>
<td>730,000</td>
<td>849,000</td>
</tr>
<tr>
<td>n</td>
<td>44</td>
<td>38</td>
<td>82</td>
</tr>
</tbody>
</table>

3.88 The median amount spent on a dispute was $35,000. The median amount spent by County Court litigants was slightly lower than Supreme Court litigants (County Court: $32,500; Supreme Court: $37,500).

3.89 Out of professional fees, disbursements and other costs, professional fees tended to make up the bulk of money spent on a dispute. The most a survey respondent spent on professional fees was $760,000 and the least someone spent was $500. Although, the value of $760,000 is extreme and only found in one case, other respondents also indicated they spent above half a million dollars. The following professional costs were reported:

- $760,000 (1 person)
- $700,000 (1 person)
- $520,000 (1 person).
Comparison across dispute resolution processes

3.90 Table 3.18 compares total costs spent during dispute across five dispute resolution processes. The median values for total costs spent on matters finalised as a result of mediation, negotiation and hearing process ranged from $30,500 to $48,400.

3.91 Matters finalised by case-conference in Court tended to be most expensive, while those finalised by mediation were least expensive. However, the low sample numbers in the trial, case-conference and conference categories limits any definitive results.

<table>
<thead>
<tr>
<th>TABLE 3.18: TOTAL CASE COSTS BY PROCESS OF FINALISATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
</tr>
<tr>
<td>------</td>
</tr>
<tr>
<td>Mediation</td>
</tr>
<tr>
<td>Negotiation</td>
</tr>
<tr>
<td>Trial</td>
</tr>
<tr>
<td>Case-conference in Court</td>
</tr>
<tr>
<td>Conference</td>
</tr>
</tbody>
</table>

*Please note that some of the extreme maximum values reported in Table 3.17 are not reported in Table 3.18 as they we finalised via an “other” process.

How much was saved in legal costs?

3.92 Survey respondents were also asked how much they believed they saved by settling their dispute out of Court. 54 respondents answered this question, with the median amount of money believed to be saved through out-of-court settlement being $35,000. Those who finalised their dispute as a result of a mediation believed they saved $30,000 in legal costs, those who finalised at negotiation believed they saved $40,000, and those who finalised at a conference believed they saved $25,000. This suggests that out of court settlement was perceived as a financially beneficial option by most disputants that used it.

3.93 County Court clients thought they saved more than Supreme Court clients, but this difference was not statistically significant.

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270 (n=54; M=53,191.48; SD=66,537.85; Median=35,000; Minimum=340; Maximum=350,000)
271 (n=30; M=58,400.00; SD=81,867.26; Median=30,000; Minimum=1,000; Maximum=350,000)
272 (n=15; M=42,666.67; SD=38,951.74; Median=40,000; Minimum=3,000; Maximum=150,000)
273 (n=4, M=30,000.00; SD=14,142.14; Median=25,000; Minimum=20,000; Maximum=50,000)
274 County Court (M=58040; SD=84009.66; Median=40000; Minimum=1000; Maximum=350000)
275 Supreme Court (M=490011.72, SD=47872.15; Median=30000; Minimum=340; Maximum=200000).
276 (t(52)=.494, p>.05)
Cost savings – mediator perceptions

3.94 Questions on the mediator survey (see Chapter 2 for details) also addressed the topic of cost savings from a mediator’s perspective. The mediators believed that in 82 per cent of mediated cases (n=28), the process helped to save parties costs. This percentage is based on 34 returned mediator surveys; thus 34 mediated cases. The median amount saved by mediating was believed to be $50,000, with the smallest amount of money saved believed to be $20,000 and the highest amount of money saved believed to be $250,000.277

Conclusions

3.95 The information on accessibility and participation suggests that that issues relating to access to the mediation processes within higher courts is linked to more general issues regarding access to the court system. However, the survey results suggest that mediation is more likely to be used by some disputants and that those with lower incomes may be more likely to both use mediation and finalise their dispute through a mediation process.

3.96 The research also indicated that most of those using mediation had a good understanding of the process and outcome and that the mediation process reduced costs (see also Chapter 5). These matters are relevant from an access perspective as they indicate that mostly, the mediation process and outcomes were comprehensible and cost effective. However, the survey data suggests there are issues that impede access and are linked to the:

- Comparatively late referral of matters to mediation. This may mean that significant costs are incurred before mediation is attempted and for some litigants late referral may mean that they were unable to access mediation (this is the subject of additional comment in Chapter 5).

- Location of disputants. Disputants from certain geographical areas were less likely to be able to access court related mediation. This finding was not conclusive but may suggest that mediation is less accessible for those from rural and regional areas.

- Representation of disputants. Self-represented litigants were less likely to access mediation services. It may be that specific strategies that support greater access to mediation can be directed at this group of litigants.

277 [n=12, M=82,500, SD=71,270.93, Median=50,000]
The survey data and comparative data also highlighted issues that are linked to access and to the participation levels of disputants in the mediation process. The material on participation suggests that some of those involved in mediation did not consider that they were able to adequately participate in the process. This finding is linked to the type and, at times, variable quality of mediation services that were provided. Importantly however, many of those involved in mediation had positive perceptions (see also Chapter 4).
Fairness and Satisfaction

Introduction

4.1 This Chapter considers how mediation processes are used within the Supreme and County Courts and whether litigants, and to a lesser extent their lawyers and mediators, regard these processes as fair. It is often said that mediation and other processes are viewed as ‘more fair’ by disputants. As has been noted by Sourdin, the view that disputants do, in fact, view the mediation process as more fair has been the subject of debate.

4.2 According to some studies, ‘procedures are viewed as fairer when ... “process control” is vested in the disputants’. However, some researchers have identified additional relevant features. These features have been identified as ‘dignitary process features’ and relate to:

   the manner in which the procedure is enacted, rather than with the distribution of control mandated by the procedure. Dignitary process features involve the belief that disputants are treated with respect and politeness and that the dispute is treated as a serious matter worthy of a dignified hearing. Field studies of procedural justice judgments have shown that dignitary process features are at least as important as control issues in determining whether a procedure is seen as fair.

4.3 One research issue relates to whether it is the process or the outcome that is being considered and how an evaluation can take place. If the process (rather than the outcome) is considered then the extent and nature of disputant participation may be relevant factors. Other relevant

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factors could include the length taken in the dispute resolution system and participant perceptions relating to how exchanges take place within the dispute resolution process.

4.4 If the focus is upon the outcome - agreements or solutions that are reached as a result of mediation processes - then there are issues about whether or not such outcomes should have any objective characteristics. ADR literature refers to ‘win–win solutions’, options for mutual gain and integrative bargaining. There is also reference to mediation’s capacity to promote ‘wise’ agreement. Parker has suggested that it is appropriate for ADR practitioners to set standards for parties in conflict, that is, options should be ‘mutually beneficial’. Parker also suggests that any defined outcome should be realistic as well as mutually beneficial. Clearly, a mutually beneficial outcome is not possible in many court proceedings.

4.5 An interpretation of what is ‘fair’ can be determined by analysing the particular process and the fact that different dispute resolution processes in turn have different objectives. For example, a process such as mediation may involve standards relating to inclusiveness, openness and fairness in terms of process, whereas a ‘fair’ outcome may require a value judgement by a neutral party and this is inconsistent with the defined role of a mediator (see Chapter 2).

4.6 NADRAC has also suggested that ‘fairness’ could involve an ADR practitioner conducting a ‘process in a fair and even-handed way’ (see the NMAS material later in this Chapter). It could be suggested that in negotiation processes, ethics, codes and standards may assist to support outcomes and processes that are ‘fair’. It is of interest that NADRAC has suggested another key objective – ‘achieves acceptable outcomes’ – that draws upon perceptions relating to outcomes (this is discussed in more detail in Chapter 5).

4.7 Perceptions and expectations of fairness are also linked to the objectives of each Court. What does the term ‘fairness’ mean in the context of dispute resolution at the Supreme Court and County Court? The requirement that both bodies are seen to operate fairly, is acknowledged throughout their core publications. For instance, Supreme Court Rules provide that the Court may make orders in a situation where fair trial

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might otherwise be compromised as well as to ensure the fairness of proceedings.\footnote{Supreme Court (General Civil Procedure) Rules 2005, 23.02 (c) and (d) and (d).} 

4.8 In addition, the Court’s Strategic Directions Report states that it seeks to enable the Courts to enhance their delivery of ‘accessible, fair, equitable, timely, high-quality, consistent, efficient and effective justice outcomes to the community’.\footnote{Supreme Court (General Civil Procedure) Rules 2005, 36.02(6).} Further, that the Courts should be seen to be fair.\footnote{Supreme Court of Victoria, Courts Strategic Directions Report (September 2004) p 1. See: http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/ebf75c445a981d5/Courts_Strategic_Directions_Document.pdf (accessed 29 July 2008).}


4.10 The importance of fairness in the dispute resolution process is recognised throughout other literature. Benchmarks for complaints handling,\footnote{Consumer Affairs Division, Department of Industry, Science and Tourism, Benchmarks for Industry-based Customer Dispute Resolution Schemes (Department of Industry, Science and Tourism, Canberra, August 1997).} proposed Australian standards,\footnote{National Alternative Dispute Resolution Advisory Committee (NADRAC), The Development of Standards for ADR, Discussion Paper (Attorney General’s Department, Canberra, 2000) p 22.} The Australian Securities and Investments Commission’s ADR scheme policy statements\footnote{Australian Securities and Investments Commission (ASIC), Approval of External Complaints Resolution Schemes (Policy Statement No 139, ASIC, July, 1999) p 11.} and leading academic commentary\footnote{T Sourdin, Alternative Dispute Resolution (2nd Ed, Lawbook Co, NSW, 2005) p 82.} all refer to fairness (or justice) as a core element in the effective resolution of disputes.

4.11 In this Chapter, fairness is considered in a broad context, not just by reference to outcomes, but as a term that includes consideration of the perceptions of the process, as well as the outcome. This Chapter also considers issues regarding satisfaction with process and outcome.
Defining Fairness

4.12 Legislation in each Court does not define what is meant by the word ‘fair’ or ‘fairness’. Like ‘justice’ the term ‘fairness’ is widely understood in a general sense, yet resists specific definition. Fairness can be described in a number of ways, including the following:

- Fairness can be expressed in terms of general community standards or expectations. Community expectations of a ‘fair’ dispute resolution system may include expectations about pursuit of truth and about reasonable levels of cost and delay (including equality of access).
- Fairness based upon the observance of procedures and procedural rules.
- Fairness based upon the impartiality of an adjudicator or mediator and their personal indifference to the outcome of the process.
- Fairness may relate to ensuring that inequalities between the parties do not unduly influence the outcome of the process.
- Fairness may be related to party control over the dispute resolution process and providing parties with an opportunity to be heard.
- Fairness may relate to party consent to entry into the dispute resolution process.

4.13 Ideas about fairness may conflict to some extent. For example, a comprehensive and exhaustive dispute resolution process may be fair in terms of its pursuit of truth, but may produce unfairness if the expense of the process has an unequal effect on the parties. In one sense, where parties define the parameters of the ‘contest’, this may be a fair means of achieving an outcome, as long as the parties are equal in terms of their capacity to define that contest.

4.14 Fairness can, however, also be defined by reference to broader concepts. As noted in the previous Chapter, supporting the direct participation and engagement of parties may make a process fairer for some disputants.

Fairness and Mediation

4.15 The disputant survey asked a number of questions relating to how fair disputants considered the process of mediation to be and whether they considered that they had been treated with respect.

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4.16 As noted previously, one of the issues with the notion of fairness is that outcomes may be perceived by parties to be unfair even though they comply with legal requirements. This is a reason why an analysis of how perceptions of fairness are formed should be measured separately with reference to indicators concerning process and outcome.

**Perceptions of fairness**

4.17 The disputant survey examined issues of fairness and aspects of dispute processing that are related to perception of fairness. The following questions in the survey were related to disputant perceptions of fairness during mediation:

- Whether a disputant was able to participate during the process;
- Whether they felt they had control during the process and over the outcome;
- How comfortable they felt;
- Whether they were treated with respect;
- How affordable the process was;
- Whether they understood what was going on during the process at the outcome;
- Whether their expectations of dispute resolution timeliness were met; and,
- Whether the process actually assisted with resolving the dispute.298

4.18 The sections below compare perceptions of fairness by reference to party type, jurisdiction and gender.

**Comparing mediation fairness to other dispute resolution processes**

4.19 74 per cent of disputants (n=28) who responded to the smaller in depth survey and who attended a mediation that finalised their dispute agreed that the process was fair and 84 per cent (n=31) agreed that they were treated with respect. Survey respondents’ perceptions of mediation fairness, as well as all other dispute resolution processes examined in this research are outlined in Table 4.1.

4.20 Perceptions of fairness in mediation processes were generally higher than for the other processes, but only one of the differences between mediation and ‘all other processes’ in Table 4.1 was statistically

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298 Pearson product-moment correlations showed that all these questions significantly correlated with the question: ‘The process was fair’ ($p<.05$).
significant. This difference related to the pressure felt by disputants to settle their dispute.

4.21 Interestingly, 67 per cent of disputants (n=24 out of 36) in the smaller in depth survey, who finalised their dispute at mediation considered that they were pressured to settle the dispute (39 per cent said they ‘agreed’ and 28 per cent said they ‘strongly agreed’). In comparison, a lower percentage (42 per cent, n=17) of disputants who used a process (such as direct negotiation or case-conference etc) to finalise their dispute felt pressured to settle (20 per cent said they ‘agreed’ and 22 per cent said they ‘strongly agreed’).

4.22 This ‘pressure’ may relate to a range of factors including the raising of alternatives (that is the raising of potential litigation outcomes) that may have meant that parties felt pressured. However, this finding suggests that greater attention may need to be paid to the way in which representatives discuss litigated outcomes with their clients and also the way in which mediators intervene and discuss issues with disputants. The concerns around ‘pressure’ were experienced by a higher proportion of disputants in this sample than in the other studies outlined in Table 4.1. This is discussed further below.

Comparing the present results to past research

4.23 As with the comparative analysis of perceptions of accessibility presented in Chapter 3, perceptions of fairness were also compared with data collected in past studies of dispute resolution processes – namely, the NSW Settlement Scheme (2004), the Financial Industry Complaints Service (FICS) study in 2002/2003 and the Consumer Affairs Victoria/VCAT study in 2007.

4.24 All statistically significant differences between the mediation sample in this study and the samples of previous studies are marked with an asterisk in Table 4.1. As is noted, all differences (that were available for comparison) between the mediation sample and the past samples were statistically significant. Although most in the mediation sample agreed that the process was fair (74 per cent), this rating was significantly lower than that reported in the NSW Settlement Scheme, where 97 per cent of disputants thought the process was fair.

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290 (t(75)=-2.26, p=.03; Mediation M=1.67, SD=.48; All other processes M=1.41, SD=.50; Rated on a 4-point scale where 1=’Strongly disagree’ and 4=’Strongly agree’).


292 J Elix and T Sourdin, Review of the Financial Industry Complaints Service 2002 – What are the issues? (Community Solution, La Trobe University and University of Western Sydney, 2002).

293 T Sourdin, Dispute Resolution Processes for Credit Consumers. (La Trobe University, Melbourne, 2007).

294 (χ²(1)=11.67, p=.00)
4.25 Disputants in the NSW Settlement Scheme sample also had significantly higher perceptions of control over the outcome of their dispute than the current sample\textsuperscript{304}. These differences may be a reflection of the different mediation styles used in the two studies, with mediators in the NSW study tending to use more facilitative approaches and some of the mediators in the current Victorian sample using rights based, advisory and shuttle negotiation and exclusionary approaches (as indicated by survey and focus group results).

4.26 Another difference, which may be influenced by the type of dispute resolution process that was used, relates to the perceptions of dispute outcome control between the current mediation sample and the FICS sample. Those surveyed in the FICS sample considered that they had significantly lower\textsuperscript{305} (21 per cent) control over the outcome of their dispute than the mediation sample in this study (46 per cent). FICS used conciliation, advisory and panel hearing their main dispute resolution processes. The results indicate that although the current mediation sample did not perceive as much outcome control as the facilitative mediation sample of the NSW Settlement Scheme, the mediation was more empowering that the more advisory processes that were used by FICS at that time.

4.27 Perhaps the most surprising difference between the present mediation sample and the three past studies is that disputants in the present sample experienced significantly more pressure to settle their dispute than those in the past studies (NSW Settlement Scheme\textsuperscript{306}, FICS\textsuperscript{307}, CAV\textsuperscript{308}).

\textsuperscript{304} ($\chi^2(1)=22.64, p=.00$)
\textsuperscript{305} ($\chi^2(1)=8.18, p=.00$)
\textsuperscript{306} ($\chi^2(1)=17.18, p=.00$)
\textsuperscript{307} ($\chi^2(1)=9.07, p=.00$)
\textsuperscript{308} ($\chi^2(1)=18.63, p=.00$)
TABLE 4.1: COMPARISON OF MEDIATION PERCEPTIONS OF FAIRNESS TO OTHER PROCESSES

<table>
<thead>
<tr>
<th>Perception of fairness variables</th>
<th>Mediation n=36-38</th>
<th>All other processes n=40-41</th>
<th>NSW Settlement Scheme n=59-61</th>
<th>CAV n=46</th>
<th>FICS n=77-91</th>
</tr>
</thead>
<tbody>
<tr>
<td>The process was fair</td>
<td>73.7</td>
<td>67.5</td>
<td>96.7**</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>I was treated with respect during the process</td>
<td>83.8</td>
<td>78.0</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>I felt pressured to settle</td>
<td>66.7</td>
<td>41.5*</td>
<td>23.7**</td>
<td>19.6**</td>
<td>36.4**</td>
</tr>
<tr>
<td>I had control over the outcome</td>
<td>45.9</td>
<td>36.6</td>
<td>90.0**</td>
<td>N/A</td>
<td>20.9**</td>
</tr>
</tbody>
</table>

* p<.05, ** p<.01

4.28 In terms of the ‘pressure to settle’ perceptions, it is notable that this has been a matter that has been discussed in the mediator sector for some time. Recently, the National Mediator Accreditation Scheme (NMAS) that contains a Practice Standard for Mediators and became operational in January 2008 detailed what was required of mediators in the context of procedural fairness and outlined the obligations of mediators and indicated how mediators can support parties in a mediation process.

4.29 Both the Victorian Bar and the Law Institute of Victoria have accredited mediators under this scheme and the Victorian Bar has indicated that it will have only NMAS accredited mediators on its panel in the future. Mediators accredited under the NMAS are required to agree to the Practice Standards. Many of the issues relating to procedural fairness issues that have been raised in this research project are addressed in the Practice Standards. For example, the Practice Standard states:

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309 Agree is the sum of ‘strongly agree’ (rating 4) and ‘agree’ (rating 3). Scale range 1–4. 1=Strongly disagree; 2=disagree. This is the case for all tables with ‘agree’ in Chapter 4.

310 In the FICS study, this question was reworded: ‘I had some control over the outcome.’
9 Procedural Fairness

A mediator will conduct the mediation process in a procedurally fair manner.

1) A mediator will support the participants to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent.
2) The mediator will provide each participant with an opportunity to speak and to be heard in the mediation, and to articulate his or her own needs, interests and concerns.
3) If a mediator, after consultation with a participant, believes that a participant is unable or unwilling to participate in the process, the mediator may suspend or terminate the mediation process.
4) The mediator should encourage and support balanced negotiations and should understand how manipulative or intimidating negotiating tactics can be employed by participants.
5) To enable negotiations to proceed in a fair and orderly manner or for an agreement to be reached, if a participant needs either additional information or assistance, the mediator must ensure that participants have sufficient time and opportunity to access sources of advice or information.
6) Participants should be encouraged, where appropriate, to obtain independent professional advice or information.
7) It is a fundamental principle of the mediation process that competent and informed participants can reach an agreement which may differ from litigated outcomes. The mediator, however, has a duty to support the participants in assessing the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participant’s own subjective criteria of fairness, taking cultural differences and where appropriate, the interests of any vulnerable stakeholders into account.
8) The primary responsibility for the resolution of a dispute rests with the participants. The mediator will not pressure participants into an agreement or make a substantive decision on behalf of any participant.

Plaintiffs and defendants

4.30 To examine whether differences in perceptions of fairness relate to whether parties were plaintiffs or defendants in a dispute, a comparison of their perceptions was conducted. The results are presented in Table 4.2. There were no statistically significant differences in perceptions of fairness between plaintiffs and defendants\(^\text{311}\). Defendants in the smaller in depth survey, indicated they felt slightly more pressure (74 percent, n=14 out of 19) than plaintiffs (56 percent, n=9 out of 16) to settle the dispute and it is possible that this effect would become significant with a larger sample.

\(^{311}\) (df=34-35, t=-1.35<.57, p>.05)
TABLE 4.2: PERCEPTIONS OF MEDIATION FAIRNESS BY PARTY TYPE

<table>
<thead>
<tr>
<th>Process perception variables</th>
<th>Plaintiffs n=17-18</th>
<th>Defendants n=19</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Agree</td>
<td>Agree</td>
</tr>
<tr>
<td>The process was fair</td>
<td>72.2</td>
<td>73.7</td>
</tr>
<tr>
<td>I was treated with respect during the process</td>
<td>83.3</td>
<td>83.3</td>
</tr>
<tr>
<td>I felt pressured to settle</td>
<td>56.2</td>
<td>73.7</td>
</tr>
<tr>
<td>I had control over the outcome</td>
<td>43.8</td>
<td>47.3</td>
</tr>
</tbody>
</table>

Jurisdiction

4.31 Table 4.3 compares perceptions of mediation fairness of Supreme Court and County Court disputants using the smaller in depth survey responses. The largest differences in their answers regarding perceptions of fairness were:

- More Supreme Court disputants considered that the mediation was fair (86 per cent, n=19 out of 22) compared to County Court survey respondents (56 per cent, n=9 out of 16).
- County Court disputants experienced greater pressure to settle (81 per cent, n=13 out of 16) compared with Supreme Court disputants (55 per cent, n=11 out of 20).

4.32 However, these differences were not statistically significant.\textsuperscript{312}

TABLE 4.3: PERCEPTIONS OF MEDIATION FAIRNESS BY JURISDICTION

<table>
<thead>
<tr>
<th>Process perception variables</th>
<th>Supreme Court n=20-22</th>
<th>County Court n=16</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Agree</td>
<td>Agree</td>
</tr>
<tr>
<td>The process was fair</td>
<td>86.4</td>
<td>56.2</td>
</tr>
<tr>
<td>I was treated with respect during the process</td>
<td>85.7</td>
<td>81.2</td>
</tr>
<tr>
<td>I felt pressured to settle</td>
<td>55.0</td>
<td>81.2</td>
</tr>
<tr>
<td>I had control over the outcome</td>
<td>50.0</td>
<td>38.9</td>
</tr>
</tbody>
</table>

\textsuperscript{312} (df=35-36, \( t > -1.41 < 1.61, p > .05 \)
Is a public or a private procedure fairer?

4.33 Although most survey respondents preferred a private process to a public one, survey respondents tended to think that a public procedure was fairer. Of those who preferred a public procedure, 44 per cent (n=14 out of 32) did so because they thought it was fairer, while only 14 per cent (n=11 out of 78) of those that preferred a private procedure did so because they thought it was fairer.

4.34 Some of the reasons for views about public/private finalisation preference were discussed in the focus groups and also emerged from the survey data. Essentially, some disputants may feel more pressured to settle behind the closed doors of a private procedure (such as in a mediation), while in a public procedure (such as a Court hearing) it was considered that the presence of a judge could support fairer conduct.

4.35 For example, one litigant in a focus group described how his barristers pressured him to settle out of court: ‘...if you don’t sign these papers we have to go to court’. Yet, his response was: ‘I want to go to court’,335 as that was where he considered that his dispute would be resolved in a just way. Again, for the reasons indicated previously, it is likely that the focus group participants were more likely to have been ‘disatisfied’ and their responses are not reflective of the majority of those who used mediation processes. In addition, these responses suggest that what the disputants experienced was influenced by the approaches taken by legal representatives.

4.36 Another litigant commented that the dealings with her legal representatives and those of the opposing party were quite unfair and that prior to attending mediation, they ‘...knew beforehand that at the mediation they will pressure us to settle’. From this perspective, a Court hearing was perceived as less biased and fairer: ‘We wanted a fair go and didn’t get it till we got to court.’336

In the end, who was successful?

4.37 Questions were also asked about how disputants regarded the outcome of their dispute. This question was asked for a range of reasons: in part to determine whether the outcome was considered appropriate by disputants; and, because responses to this question can be linked to other responses to determine whether a survey respondent considered a process as ‘unfair’ because they perceived that they did not ‘win’.

335 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, Melbourne, 10 July 2008.
336 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, Melbourne, 10 July 2008.
4.38 Parties in all matters (including those that were finalised by processes other than mediation) were asked in the smaller in depth survey: ‘In the end, who do you believe was successful?’ and the responses were as follows:

- 36 per cent (n=31) believed the other side was successful,
- 26 per cent (n=22) believed both sides were successful,
- 24 per cent (n=21) believed they were successful, and
- 14 per cent (n=12) believed no one was successful.

4.39 Although an equal number of plaintiffs and defendants responded to the survey, the most common response was that the other side was successful. Only 26 per cent of survey respondents reported that both sides were successful.

4.40 Responses to this question by process of dispute finalisation are provided in Table 4.4. In contrast to the findings of previous studies, 56 per cent of mediation clients advised that either they or the other party were successful, with only 29 per cent believing that both sides were successful.

4.41 In some previous studies dealing with mediation, disputants are more likely to perceive that the outcome was a ‘win-win’ outcome. This is more likely when integrative interest-based processes (rather than distributive) processes are used as agreements are more likely to reflect additional intangible and tangible elements such as apology, respectful communication and explanation for past behaviour.

4.42 It would therefore be expected that with mediation, a higher number of disputants would consider that both sides were successful. However, in this study, disputants only perceived a ‘win-win’ outcome in 29 percent of cases. Focus group comments suggested that some of the mediation processes that were adopted could be described as ‘rights based’ and distributive, and this may explain this perception in some matters.

4.43 As would be expected, perceptions of both sides being successful were lowest when the case was finalised as a result of a court hearing. The number of survey responses from those who had attended a hearing or case-conferences was however small.

Recommendation:

Mediators need to be properly trained and skilled in conducting mediation processes and representatives and parties need to have clear obligations.

The process definition and stages need to be clearly articulated by the Courts.

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MEDIATION IN THE SUPREME AND COUNTY COURTS OF VICTORIA

### TABLE 4.4: WHO WAS SUCCESSFUL IN THE END?

<table>
<thead>
<tr>
<th>Who was successful?</th>
<th>Mediation</th>
<th>Negotiation</th>
<th>Trial</th>
<th>Case-conference in Court</th>
<th>Conference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>You</td>
<td>8</td>
<td>19.5</td>
<td>6</td>
<td>23.1</td>
<td>3</td>
</tr>
<tr>
<td>The other side</td>
<td>15</td>
<td>36.6</td>
<td>7</td>
<td>26.9</td>
<td>1</td>
</tr>
<tr>
<td>Both sides</td>
<td>12</td>
<td>29.3</td>
<td>7</td>
<td>26.9</td>
<td>1</td>
</tr>
<tr>
<td>No one</td>
<td>5</td>
<td>12.5</td>
<td>5</td>
<td>19.2</td>
<td>1</td>
</tr>
</tbody>
</table>

**Are perceptions of fairness related to outcomes?**

4.44 It was previously noted that perceptions of fairness are linked to how involved a disputant is with the dispute resolution process, their level of comfort and whether they consider they were treated with respect. This approach reflects NADRAC’s suggestion that ‘fairness’ can involve an ADR practitioner conducting a ‘process in a fair and even-handed way’.

4.45 NADRAC has also suggested another key objective, ‘achieves acceptable outcomes’ and perceptions of acceptability of outcome may be linked to overall perceptions of fairness. To examine whether ‘fairness’ is related to ‘acceptable outcomes’, a (Pearson product-moment) correlation was conducted between these two variables. Firstly, six questions relating to perceptions of process comfort, participation and control were averaged to form the ‘fairness’ variable. Similarly, five questions relating to lasting outcomes and satisfaction with outcomes were averaged to form the ‘acceptable outcomes’ variable.

4.46 There was a large positive correlation between ‘fairness’ and ‘acceptable outcomes’, suggesting that perceptions about whether a process was fair were related to whether the outcomes were perceived as lasting and acceptable. This relationship was significant for all dispute resolution processes, as well as for mediation only indicating that a fair ADR process

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316 Please note that totals do not add up to 100 per cent as some respondents did not answer this question.

317 National Alternative Dispute Resolution Advisory Council (NADRAC), The Development of Standards for ADR, Discussion Paper (Canberra, Attorney-General’s Department, 2000) p 22.

318 National Alternative Dispute Resolution Advisory Council (NADRAC), The Development of Standards for ADR, Discussion Paper (Canberra, Attorney-General’s Department, 2000) p 22.

319 This is a statistical technique for exploring the association between pairs of variables.

320 These statements were: I was able to participate during the process; the process was fair; I had control during the process; there was enough time to present/discuss all information; I felt comfortable during the process; I was treated with respect during the process.

321 These questions related to: Satisfaction with outcome at time of resolution; satisfaction with outcome now; control over outcome of dispute; the agreed outcomes have lasted; satisfaction with outcome of dispute.

322 \(r=.80, n=93, p=.000\)

323 \(r=.81, n=41, p=.000\)
should also involve acceptable outcomes. The relationship is depicted in Figure 4.1.

**FIGURE 4.1: RELATIONSHIP BETWEEN PERCEPTIONS OF FAIRNESS AND SATISFACTION WITH OUTCOMES**

4.47 Five other relationships with fairness were investigated: case costs and fairness; timeliness and fairness; and demographic aspects (age, education, income) and fairness. The findings in respect of these relationships are reported below.

**Are perceptions of fairness linked to case costs?**

4.48 The correlation between perceptions of fairness\(^{324}\) and case costs was statistically significant and negative, suggesting that the more money a disputant spent on resolving a dispute, the less likely they were to think that the process was fair. This relationship was significant for all dispute resolution processes,\(^{325}\) as well as for mediation only\(^{326}\) and is depicted in Figure 4.2.

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\(^{324}\) The variable of fairness was calculated as in Figure 4.1 above.

\(^{325}\) \(r=-.47, n=79, p=.000\)

\(^{326}\) \(r=-.53, n=37, p=.000\)
Are perceptions of fairness related to timeliness?

4.49 Perceptions of fairness were linked to expectations of dispute resolution timeliness in that those who thought the dispute took longer than expected were less likely to think that the process was fair. In contrast, those who thought the process took less time than expected had the highest perceptions of fairness. This was the case for cases finalised through mediation\textsuperscript{327} as well as for all cases.\textsuperscript{328}

\textsuperscript{327} [r=.40, n=41, p=.009]
\textsuperscript{328} [r=.28, n=91, p=.007]
Are perceptions of fairness linked to demographic aspects?

4.50 Perceptions of fairness were not linked to age, level of education or income\(^{329}\). This suggests that it is the process rather than the personal characteristics of a disputant that determine perceptions of fairness.

Were both sides treated equally?

4.51 Survey respondents (in the smaller in depth survey) were asked whether both sides to a dispute were treated equally by a judge (in a hearing or other process) or mediator. Overall, 71 per cent (n=52) of respondents said both sides were treated equally and 28 per cent (n=20) said the other side was favoured. In mediation, the perceptions of fairness were higher, with 82 per cent (n=27) reporting that both sides were treated equally and 17 per cent (n=6) reporting that the other side was favoured by the mediator.

Mediator’s perceptions of fairness

4.52 The mediator survey (see Chapter 2 for details) also examined mediator perceptions of what was a fair outcome. In 21 cases (out of 23 finalised cases reported in the returned mediator surveys) the mediators

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329 Fairness x age \(r=\cdot11, n=90, p>0.05\); Fairness x level of education \(r=\cdot11, n=89, p>0.05\); Fairness x income \(r=\cdot15, n=82, p>0.05\). Fairness was calculated as in Figure 4.1 above.
believed that 62 per cent of parties achieved a fair outcome. In 24 per cent of cases the mediator ‘would rather not say’ and in 14 per cent of cases they had ‘not formed a view’ as to whether the outcome was fair or not.

**Summary of findings on fairness**

4.53 Procedural aspects of the dispute resolution process are fundamental in the formation of perceptions about fairness in mediation. As noted previously, factors relating to procedural aspects include: whether parties are able to participate or not; whether participants have access to information and advice; and various factors relating to process control.\(^{320}\) Perceptions of outcome fairness are also linked to consideration of the costs incurred and timeliness.\(^{321}\) Indicators that are often identified as ‘psychological factors’ of fairness may include a disputant being treated with respect and sensitivity.\(^{322}\)

4.54 Another factor that related to fairness arose in one mediation that was explored in a focus group and concerned a litigant who perceived that the process was unfair because the mediator had a relationship or knew the other disputant prior to the mediation. The litigant also indicated that the process was ‘unfair’ because of concerns about not only the other party but also because of the relationship that the mediator had with all the representatives (this matter is also referred to in Chapter 2). The litigant indicated that the mediator said in the mediation that they ‘knew the other party’ although they did not have a social relationship.

The mediator introduced himself, and said he knew X [i.e. the other party], even though hasn’t been there for dinner, ha ha.

*Disputant, Focus Group 10 July 08*\(^{333}\)

4.55 This scenario raised issues about what mediators are required to do under such circumstances. The NMAS states:

**5 Impartial and Ethical Practice**

A mediator must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice.

1) Impartiality means freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the appearance of such favouritism or bias. A mediator will disclose actual and potential grounds of bias and conflicts.

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\(^{333}\) Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
of interest. The participants shall be free to retain the mediator by an informed waiver of the conflict of interest. However, if in the view of the mediator, a bias or conflict of interest impairs their impartiality, the mediator will withdraw regardless of the express agreement of the participants.

2) A mediator should identify and disclose any potential grounds of bias or conflict of interest that emerge at any time in the process. Clearly, such disclosures are best made before the start of a process and in time to allow the participants to select an alternative mediator. Mediators should take reasonable steps to minimise the chances of being in a position of potential bias or conflict of interest before the process commences.

3) A mediator should avoid conflicts of interest, or potential grounds for bias or the perception of a conflict of interest, in recommending the services of other professionals. Where possible, the mediator should provide several alternatives if recommending referrals to other practitioners and services.

4) A mediator will not use information about participants obtained in mediation for personal gain or advantage.

5) The perception by one or both of the participants that the mediator is partial does not in itself require the mediator to withdraw. In such circumstances, however, the mediator must remind all parties of a right to terminate the mediation process.

6) A mediator should not become involved in relationships with parties that might impair the practitioner’s professional judgment or in any way increase the risk of exploiting clients. Except where culturally required, practitioners will not facilitate disputes involving close friends, relatives, colleagues/supervisors or students.

7) Mediators should adhere to, and be familiar with, the code of conduct or ethical standards prescribed by the organisation or association with which they have membership (see Approval Standards).

4.56 As noted previously, the NMAS Practice Standards had not yet been adopted when this research was conducted. However it may be that the Standards would assist to more clearly set out mediator obligations under such circumstances (see the conclusions later in this Chapter).

Satisfaction

4.57 There are often questions about the degree to which court related processes should ‘satisfy’ litigants. However as with fairness, arguably a distinction can be made between procedural satisfaction and outcome satisfaction. In assessing ‘fairness’ or ‘justice’ much research in the ADR field considers issues about whether disputants find the processes satisfying.

4.58 Most Courts now consider that litigant satisfaction is important and many Courts and Tribunals survey litigants about whether they are satisfied with their experiences within Registries and in terms of case management and ADR processes (although it remains rare for surveys to assess litigant satisfaction with Court hearings).

4.59 For example, the Supreme Court of Western Australia has undertaken some evaluation of processes and determined that mediation of the type the Supreme Court provides is associated with high client
satisfaction. \(^{334}\) Their study was based on data analysed from court files surrounding ‘settlement mediation’ and acknowledged that the high client satisfaction is a subjective measure and needs to be compared to other, non-court-annexed mediation programs.

4.60 Various studies have also sought to determine and link levels of client satisfaction, cost, outcomes, and the durability of agreements at mediation. For example, one study, of four family mediation services demonstrated that the ‘quality’ of the mediation services was an important factor in determining levels of disputant satisfaction, but that ‘accelerated’ models of mediation in the context of family separation did not necessarily produce durable outcomes or high levels of client satisfaction. \(^{335}\)

4.61 A number of studies have considered satisfaction levels when comparing different ADR processes, \(^{336}\) while other studies have reported on satisfaction levels over time and following variations in programs. \(^{337}\) Other research on satisfaction \(^{338}\) has led to an increased focus on how the quality of mediation can be enhanced. This research is linked to studies that address how mediation training and cultural factors impact upon mediation use, \(^{339}\) as well as disputant satisfaction, durability rates,

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\(^{336}\) M Delaney and T Wright, Plaintiffs’ Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-trial Conference and Mediation (Justice Research Centre and Law Foundation of New South Wales, Sydney, January 1997).


\(^{338}\) I McEwin, Cost of Legal Services and Litigation Access to Legal Services: The Role of Market Forces, Background Paper (Senate Standing Committee on Legal and Constitutional Affairs, February 1992); Senate Standing Committee on Legal and Constitutional Affairs, Cost of Legal Services and Litigation Access to Legal Services: The Role of Market Forces, Background Paper (Senate Standing Committee, February 1992).

\(^{339}\) D Bagshaw, Innocents Abroad? An Examination of the Relevance and Effects of Western Mediation Education and Training on Dispute Resolution Practices in the Asia Pacific (Keynote Paper, 3rd Asia Pacific Mediation Forum Conference, Fiji, June 2006); D Bagshaw, Developing Mediation Models, Practices and Approaches Incorporating Cultural Traditions, Values and Perspectives of Asia Pacifica Communities (Research paper, Hawke Research Institute, University of South Australia at the NADRAC Research Forum, Melbourne, July 2007).
predictions, procedural justice ratings and perceptions regarding the quality of justice.  

4.62 Studies have included consideration of client satisfaction with process and quantitative aspects (such as number of agreements reached following mediation).

**Overall Satisfaction**

4.63 The participant survey examined a range of matters that are relevant to assessing levels of satisfaction. Questions were focused on the overall level of satisfaction with the system, as well as satisfaction levels with different aspects of the dispute. Overall satisfaction with ‘the way the system operated for your dispute’ was related to the following variables:

- Satisfaction with the process that finalised the dispute
- How the process met parties’ interests
- How the process was ‘handled’
- Satisfaction with outcomes
- Time taken to resolve the dispute, and
- The amount of money that was received.

**Comparing mediation satisfaction to other dispute resolution processes**

4.64 Table 4.5 shows the proportion of ‘satisfied’ survey respondents who had their dispute finalised at mediation or using another dispute

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341 *J Cameron, Evaluating the ‘Quality of Justice’ Provided by the Christchurch Community Mediation Service* (Seminar Proceedings no 15, Australian Institute of Criminology, Alternative Dispute Resolution, AIC, Canberra, 1986).


343 Pearson product-moment correlations were conducted between overall satisfaction and the listed variables. All correlations were statistically significant. All correlations except that with ‘money received’ had strong positive relationship; ‘money received’ had a small relationship [$r>.28<.85$, $n=86-97$, $p<.05$].

344 ‘Satisfied’ is the sum of ‘satisfied’ (rating 3) and ‘very satisfied’ (rating 4) on a 4-point scale, where 1=‘very dissatisfied’ and 4=‘very satisfied.’
resolution process (‘all other processes’ refers to negotiation, conference, case-conference in Court, trial). The Table also compares satisfaction in the current mediation sample to past research (discussed in more detail below).

4.65 Parties in the smaller in depth survey who had their dispute finalised by mediation reported moderate to high levels of satisfaction on most variables. 81 per cent of mediation clients (n=30 out of 37) were satisfied with mediation as the process that finalised their dispute and 78 per cent (n=29) were satisfied with the way the process was handled. These are positive findings that suggest that for disputants who resolve their dispute the vast majority are satisfied with the mediation process.

4.66 However, although mediation clients were generally satisfied, there were no significant differences in levels of satisfaction between mediation and ‘all other dispute resolution processes’ examined in this research.

4.67 While high satisfaction ratings are common in mediation the ratings found in this research are not as high as those found in other studies and mediation does not distinguish itself as the most satisfying process.

Comparing the present results to past research

4.68 Table 4.5 also compares satisfaction with mediation in the current sample with satisfaction levels found in previous research – in the NSW Settlement Scheme and the Financial Industry Complaints Service (The CAV study is not included as directly comparable questions were not available).

4.69 As was the case with accessibility and fairness, satisfaction levels with the mostly facilitative mediation process used in the NSW Settlement Scheme were also higher. More specifically, differences in satisfaction between the current mediation sample and that of the NSW Settlement Scheme were statistically significant for the following factors:

- The way the process was handled
- The time it took to deal with dispute
- The outcome of dispute
- The time it took to resolve the dispute.

347 J Elix and T Sourdin, Review of the Financial Industry Complaints Service 2002 – What are the issues? (Community Solution, La Trobe University and University of Western Sydney, 2002).
348 ($\chi^2(1)=8.28, p=.00$)
349 ($\chi^2(1)=15.76, p=.00$)
350 ($\chi^2(1)=10.04, p=.00$)
4.70 When compared to the FICS sample, the Supreme and County Court survey population was significantly more satisfied with the way the process was handled\(^{353}\) and the outcome of dispute\(^ {353}\) than the FICS sample.

4.71 These results suggest that facilitative mediation (as in the NSW Settlement Scheme) is more satisfying for parties than advisory processes such as conciliation and arbitration (as in FICS). The satisfaction levels in the present sample are located between these two approaches to dispute resolution.

**TABLE 4.5: SATISFACTION BY PROCESS OF FINALISATION**

<table>
<thead>
<tr>
<th>Satisfaction variables</th>
<th>Mediation n=36–38 (last question n=21)</th>
<th>All other processes n=39–41 (last question n=19)</th>
<th>NSW Settlement Scheme n=59–80</th>
<th>FICS n=95–96</th>
</tr>
</thead>
<tbody>
<tr>
<td>Satisfied</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Overall system</td>
<td>75.7</td>
<td>70.7</td>
<td>88.8</td>
<td>N/A</td>
</tr>
<tr>
<td>Outcome at time of resolution</td>
<td>55.6</td>
<td>60.0</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Outcome now</td>
<td>56.8</td>
<td>65.9</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Process that finalised dispute</td>
<td>81.1</td>
<td>70.7</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>The way process was handled</td>
<td>78.4</td>
<td>67.5</td>
<td>96.7**</td>
<td>37.9**</td>
</tr>
<tr>
<td>Time it took to deal with dispute</td>
<td>57.9</td>
<td>48.7</td>
<td>91.7**</td>
<td>N/A</td>
</tr>
<tr>
<td>Outcome of dispute</td>
<td>63.2</td>
<td>65.9</td>
<td>89.8**</td>
<td>37.9**</td>
</tr>
<tr>
<td>The way process met needs</td>
<td>65.8</td>
<td>65.0</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Time it took to resolve dispute</td>
<td>57.9</td>
<td>46.2</td>
<td>91.7**</td>
<td>51.0</td>
</tr>
<tr>
<td>Amount of money received (if money received)</td>
<td>42.9</td>
<td>68.4</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

**p<.01

### Satisfaction by jurisdiction

4.72 Table 4.6 outlines satisfaction with the overall system, as well as various satisfaction variables across the two jurisdictions. Specifically, the proportion of survey respondents who were satisfied and dissatisfied with each variable is reported. Although, the differences in satisfaction between the jurisdictions were not statistically significant,\(^{354}\) Supreme Court

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\(^{351}\) \((\chi^2(1)=15.76, p=.00)\)

\(^{352}\) \((\chi^2(1)=17.46, p=.00)\)

\(^{353}\) \((\chi^2(1)=6.99, p=.01)\)

\(^{354}\) A series of independent sample t-test showed no significant differences in ratings of satisfaction between Supreme and County Court clients. \([df=85-95, r<-1.45>.181, p>.05]\)
disputants who responded to the in depth, smaller survey were slightly more satisfied with the outcome of their dispute, the process that finalised their dispute as well as the time it took to deal with the dispute.

TABLE 4.6: SATISFACTION\(^{355}\) BY JURISDICTION

<table>
<thead>
<tr>
<th>Satisfaction variables</th>
<th>Supreme Court n= 49–52 (last question n=25)</th>
<th>County Court n=40–44 (last question n=20)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Satisfied</td>
<td>Satisfied</td>
</tr>
<tr>
<td>------------------------</td>
<td>-----------</td>
<td>-----------</td>
</tr>
<tr>
<td>Overall system</td>
<td>59.6</td>
<td>63.6</td>
</tr>
<tr>
<td>Outcome at time of resolution</td>
<td>55.1</td>
<td>47.6</td>
</tr>
<tr>
<td>Outcome now</td>
<td>59.2</td>
<td>50.0</td>
</tr>
<tr>
<td>Process that finalised dispute</td>
<td>75.5</td>
<td>61.9</td>
</tr>
<tr>
<td>The way process was handled</td>
<td>71.4</td>
<td>61.0</td>
</tr>
<tr>
<td>Time it took to deal with dispute</td>
<td>49.0</td>
<td>42.5</td>
</tr>
<tr>
<td>Outcome of dispute</td>
<td>66.7</td>
<td>53.5</td>
</tr>
<tr>
<td>The way process met needs</td>
<td>63.3</td>
<td>57.1</td>
</tr>
<tr>
<td>Time it took to resolve dispute</td>
<td>53.1</td>
<td>40.0</td>
</tr>
<tr>
<td>Amount of money received (if money received)</td>
<td>55.6</td>
<td>50.0</td>
</tr>
</tbody>
</table>

**Expected dispute duration and satisfaction with duration**

4.73 As noted in Table 4.5 above, satisfaction with the time it took to deal with and resolve the dispute was comparatively low across all dispute resolution processes. Mediation clients were slightly more satisfied (58 per cent, n=22 out of 38) with this aspect than those who used other processes to finalise their dispute (49 per cent satisfied, n=18-19 out of 39).

**Relationship between expectations of case duration and satisfaction with case duration**

4.74 Previous research has found a relationship between expectations and satisfaction with people more satisfied when their expectations are matched by reality.\(^{356}\) The comparatively low levels of satisfaction with case

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\(^{355}\) ‘Satisfied’ is the sum of ‘satisfied’ (rating 30 and ‘very satisfied’ (rating 4) on a 4-point scale, where 1=’very dissatisfied’ and 4=’very satisfied’.

duration reported in Table 4.5 are consistent with survey respondents’ expectations reported in Table 4.8. Most parties who responded to the smaller in depth survey (59 per cent, n=54 out of 92) indicated that dispute finalisation took more time than expected and only 27 per cent (n=25) advised that dispute finalisation took about as long as they expected. Table 4.8 also provides case duration expectations across jurisdictions and these are very similar for the Supreme Court and the County Court.

TABLE 4.8: EXPECTATION OF CASE DURATION BY JURISDICTION

<table>
<thead>
<tr>
<th>The finalisation of the dispute took ...</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>More time than expected</td>
<td>30</td>
<td>60.0</td>
<td>24</td>
</tr>
<tr>
<td>About as much time as expected</td>
<td>12</td>
<td>24.0</td>
<td>13</td>
</tr>
<tr>
<td>Less time than expected</td>
<td>8</td>
<td>16.0</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>50</td>
<td>100</td>
<td>42</td>
</tr>
</tbody>
</table>

4.75 The relationship between expectation of case duration and satisfaction with duration was explored further using Pearson product-moment correlation.357 There was a medium, positive correlation between expectation and two of the satisfaction variables,358 supporting prior research findings that expectations of duration are related to satisfaction with duration. These relationships are depicted in Figure 4.4 and Figure 4.5.

4.76 It is unclear how most disputants form their expectation about how long a matter will take to be finalised. For most disputants it is likely that expectations will be informed by legal advice and it may be that the advice given does not match the reality of the court related proceedings.

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357 A statistical technique used to explore the association between pairs of variables.
358 Expectations x Satisfaction with time taken to deal with dispute \([r=.48, n=90, p=.000, \text{shared variance }=23\%]\). Expectation x Satisfaction with time taken to resolve dispute \([r=.42, n=89, p=.000, \text{shared variance}=17.6\%]\).
FIGURE 4.4: RELATIONSHIP BETWEEN CASE DURATION EXPECTATION AND SATISFACTION WITH TIME TAKEN TO DEAL WITH DISPUTE

FIGURE 4.5: RELATIONSHIP BETWEEN CASE DURATION EXPECTATION AND SATISFACTION WITH TIME TAKEN TO RESOLVE DISPUTE
4.77 The case duration data may also suggest that many litigants would benefit from earlier referral to mediation or case conferencing and the issue of case duration was noted as a significant cause of dissatisfaction.

4.78 Some litigants considered that mediation could be ordered at an earlier stage while others were frustrated because of the conduct of the other party or what they perceived as a lack of judicial management intervention (or both).

4.79 In the focus group, litigants spoke about delay. One said that his case ‘… took five years to settle. Each dismissal incurred more costs… A simple unfair dismissal’ case Another party asked: ‘Why does something that is so straightforward have to go through such a prolonged process?’ Other concerns around the delay expressed cynicism and despair. ‘We had to go through this dance [issuing writs etc]. ‘He must have seen a mounting legal bill…’, ‘…for us it was quite daunting as we were going to be homeless and could not wait six months to settle.’

Satisfaction and gender

Was there a difference between men and women in relation to their perceptions of and satisfaction with the mediation process?

4.80 Females who responded to the smaller in depth survey tended to be more satisfied than males when engaged in the mediation process. Three of the differences shown in Table 4.9 approached statistical significance. These were:

- Female mediation clients had higher levels of overall satisfaction regarding ‘the way the system operated for their dispute’
- Female mediation clients were more satisfied with the mediation outcome at time of resolution
- Females were more satisfied with the way the mediation process was handled

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359 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
360 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
361 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
362 \[t(31)=-1.69, p=.09, \text{Females } M=3.06, \text{SD}=.54, \text{Males } M=2.61, \text{SD}=1.02, \text{Scale range } 1-4, 1=\text{very dissatisfied}, 4=\text{very satisfied}\]
363 \[t(37)=-1.90, p=.07, \text{Females } M=2.81, \text{SD}=.79, \text{Males } M=2.29=.90 \text{Scale range } 1-4, 1=\text{very dissatisfied}, 4=\text{very satisfied}\]
364 \[t(27)=-1.85, p=.08, \text{Females } M=3.22, \text{SD}=.43, \text{Males } M=2.76, \text{SD}=1.04, \text{Scale range } 1-4, 1=\text{very dissatisfied}, 4=\text{very satisfied}\]
TABLE 4.9: SATISFACTION WITH MEDIATION AND GENDER

<table>
<thead>
<tr>
<th>Process perception variables</th>
<th>Females n=33–37 (last question n=19)</th>
<th>Males n=46–51 (last question n=24)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Satisfied</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Overall system</td>
<td>88.9</td>
<td>61.9</td>
</tr>
<tr>
<td>Outcome at time of resolution</td>
<td>72.3</td>
<td>47.7</td>
</tr>
<tr>
<td>Outcome now</td>
<td>72.2</td>
<td>47.7</td>
</tr>
<tr>
<td>Process that finalised dispute</td>
<td>88.9</td>
<td>76.2</td>
</tr>
<tr>
<td>The way process was handled</td>
<td>100.0</td>
<td>61.9</td>
</tr>
<tr>
<td>Time it took to deal with dispute</td>
<td>57.9</td>
<td>52.4</td>
</tr>
<tr>
<td>Outcome of dispute</td>
<td>73.7</td>
<td>57.2</td>
</tr>
<tr>
<td>The way process met needs</td>
<td>73.7</td>
<td>57.2</td>
</tr>
<tr>
<td>Time it took to resolve dispute</td>
<td>68.4</td>
<td>47.7</td>
</tr>
<tr>
<td>Amount of money received (if money received)</td>
<td>61.5</td>
<td>20.0</td>
</tr>
</tbody>
</table>

Satisfaction with outcomes – Mediator perceptions

4.81 Mediators were asked to indicate (see Chapter 2 for details of mediator survey) how satisfied they thought parties were with the mediated outcomes. Results are presented in Table 4.10 indicating that according to the mediators’, when a dispute was finalised at mediation, parties were (96 per cent) satisfied with the outcome. When a dispute was not finalised at mediation, the mediators reported that half of the parties were satisfied with the outcome.

TABLE 4.10: MEDIATOR PERCEPTIONS OF PARTIES’ SATISFACTION WITH OUTCOMES

<table>
<thead>
<tr>
<th></th>
<th>Disputes finalised at mediation</th>
<th>Disputes not finalised at mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Satisfied</td>
<td>22</td>
<td>95.7</td>
</tr>
<tr>
<td>Dissatisfied</td>
<td>1</td>
<td>4.3</td>
</tr>
<tr>
<td>Total</td>
<td>23</td>
<td>100</td>
</tr>
</tbody>
</table>

Conclusions

4.82 Most negotiation research suggests that in order for a party in a dispute to be satisfied with a process and often (although not always) to enable a party to reach negotiated outcome and comply with that outcome,
the disputant needs to have their substantive, procedural and psychological interests met.

4.83 Procedural fairness is considered to be an essential component in not only enhancing satisfaction but also in producing agreed outcomes in mediation. This research suggests that ratings for both satisfaction and procedural fairness by disputants who have been involved in mediation are high, but are not as high as in previous studies. There may be a number of reasons for this. It may be that the perceptions have been negatively affected by delay (although in some past studies this was also a factor). However, it seems more likely that there are issues that arose in some mediations and comments made previously about the process used and the extent to which disputants were engaged and can participate and speak are relevant.

4.84 Some studies addressing fairness in dispute resolution include an examination of the perceptions of parties in relation to the dispute resolution practitioner themselves. That is, the analysis is focused on the manager of the process rather than the process itself. However, arguably this is an inadequate focus and where representatives are involved, their role must also be considered.

4.85 For some litigants it is clear that it was not the mediator who had an impact on fairness but it was the other party or the other party’s representative who made the process ‘unfair’. For instance, a plaintiff mentioned that a barrier to the process was: ‘Not being told earlier in the case that the other party had no money to pay anyway.’ Further reference is made to the behaviour of the other party and their representatives, such as an observation that: ‘...there is no point going through that if one party has no intention to settle.’ One lawyer mentioned: ‘...sometimes I find the lawyers get in the way, usually the barristers, or aggressive solicitors who want to show off in front of the client.’

4.86 There are issues about to what extent a mediator can ‘control’ a representative particularly given the factors identified in Chapter 2. This issue has been the subject of much recent attention by the VLRC which suggested that it is appropriate for litigants and representatives to have certain overriding obligations in terms of their approaches to litigation and ADR processes.

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367 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
368 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
369 Barrister’s comment at the lawyers focus group (conducted at Australian Centre for Peace and Conflict Studies Offices, Melbourne, 11 July 2008).
Recommendation:  
There are issues about to what extent a mediator can ‘control’ a representative.

This issue has been the subject of much recent attention by the VLRC which suggested that it is appropriate for litigants and representatives to have certain overriding obligations in terms of their approaches to litigation and ADR processes.

Good faith reporting has been suggested as a way of enabling mediators to indicate where representatives or litigants have engaged in negotiations in an obstructive or uncooperative manner.

Mediators also need to be properly trained and accredited and Courts should ensure that at a minimum, mediators meet the NMAS requirements.

4.87 In this regard, whilst the VLRC has noted that the concept of good faith is ‘nebulous’, it has concluded that the concept now applies in a range of legal settings and it is also a concept that is the subject of case law. In discussing good faith and obligations to disclose, the VLRC also considered that the overriding obligations would extend to settlement negotiations, mediation and other ADR processes which may be utilised by the parties to litigation.

4.88 However, some litigants and representatives reported situations in focus groups where they considered that the mediator was not ‘firm’ or ‘assertive enough’. Patience and persistence are often viewed as core strengths of effective mediators. Essentially however, some litigants (and their representatives) were concerned that the mediator could have done more to support procedural fairness in the mediation process.

4.89 One plaintiff commented: ‘The mediation was a waste of time as the mediator was not strong enough to control it.’ Concerns expressed about the mediator also included assertions as to their being directive and overpowering, and in this way, not supporting procedural fairness for both sides. For example, a plaintiff related that: ‘the mediator made negative comments and did not listen to us making comments such as ‘…it’s not your money anyway.’

4.90 These matters are worthy of some attention as such comments indicate that some mediations may have been of lower quality because of the mediator and that in some circumstances mediators may not have had the skills or temperament to conduct the mediation in an even handed manner.

4.91 Clearly, there is no simple way to assess or analyse fairness in light of the reality of multiple stakeholders, subjective and other variables and contexts. However, some commentators have suggested that addressing issues of fairness can be achieved by establishing codes of practice. These would be designed to guide mediators and representatives in the mediation process.

372 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
373 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).
374 Australian Dispute Resolution Association (ALRC), Issues of Fairness and Justice in Alternative Dispute Resolution (submission to NADRAC discussion paper, March 1998).
4.92 If judges are to be involved in mediation processes, additional safeguards may be required. Issues regarding fairness have been raised recently in discussions concerning judicial mediation, where fairness has been linked to concepts such as ‘lack of bias’. These matters are explored in more detail in Chapter 6. The responses to the VLRC report released in May 2008 expand upon this interpretation of fairness as well as emphasising on the importance of the integrity of dispute resolution processes in the eyes of the public and it may be that articulated protocols are required where Judges engage in mediation.

4.93 It is suggested that Courts need to indicate that basic NMAS Standards should apply in all court connected mediation and move to promulgate model process information for mediators, litigants and representatives.

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375 2003 [SASC] 272 AT [23]
Efficiency and Compliance with Outcomes

Introduction

5.1 The ALRC has noted that when considering dispute resolution processes and their objectives, efficiency can be viewed from a number of perspectives including:

- The need to ensure appropriate public funding of courts and dispute resolution processes that avoid waste.
- The need to reduce litigation costs and avoid repetitive or unnecessary activities in case preparation and presentation.
- The need to consider the interests of other parties waiting to make use of the court or other dispute resolution process.\(^{376}\)

5.2 In addition, efficiency can also refer to long-term gains, rates of compliance and the broader costs of unresolved conflict. Using these broader notions of efficiency, many ADR processes may arguably meet efficiency objectives more readily than conventional litigation or non-integrative processes.

5.3 This Chapter considers whether the mediation processes used are ‘efficient’ using a range of measures and whether using a mediation process can promote compliance with an outcome. In addition, some of the possible benefits of mediation are explored. For example, did the use of mediation lead to a decrease in litigious or adversarial behaviour\(^{377}\) or foster

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\(^{377}\) It has been suggested that those exposed to cooperative dispute resolution processes develop more constructive communication patterns and less obstructive behaviour: P Wanger, ‘The Political and Economic Roots of the ‘Adversary System’ of Justice and Alternative Dispute Resolution’ (1994) 9(2) Ohio State Journal on Dispute Resolution 203.
better relationships between parties to disputes and in this way contribute to the overall efficiency of the system.

5.4 Efficiency is also explored in the context of legal and other costs. This involves analysing the costs incurred by litigants (legal and indirect) and their perceptions of the costs incurred as well as by undertaking a comparative review of costs incurred with the use of different processes. However, as previously noted, one issue in comparing the direct litigation or other costs of conventional processes with ADR processes is that comparisons with the cost of those cases that go to trial are difficult because many civil cases are settled out of court.

5.5 Efficiency is also linked to timeliness. The ALRC has said that timeliness relates to:

- minimising the delay between the commencement of proceedings and the hearing of the dispute having regard to the complexity and features of the dispute
- the time taken to resolve the dispute once the resolution process has commenced
- the time which parties, their legal representatives, witnesses, judicial officers and others must devote to the process.

5.6 Timeliness is also explored in this Chapter and broader cost issues are also discussed that relate to both the direct and indirect costs that may be experienced if a dispute is not resolved or finalised in a timely manner. Clearly, where disputes are not resolved within a reasonable time frame, there can be significant impacts on disputants relating to cost, loss of opportunity, loss of profit and associated health and family losses.

5.7 Efficiency is also linked to notions of proportionality. The VLRC has recently noted that:

> Court-conducted mediation in the Supreme Court is also consistent with the requirement that the court, in exercising any power under the rules, endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined... the Supreme Court is considering whether rule 1.14(a) [Supreme Court (General Civil Procedure) Rules 2005] might be expanded and strengthened to make explicit...

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380 T Sourdin, *Dispute Resolution Processes for Credit Consumers* (La Trobe University, Melbourne, March 2007) p 93.
aspects of the court’s inherent power to control its own proceedings; to encourage proportionality. 381

5.8 In addition, in the Justice Statement, the Attorney-General has identified the following principles for ADR: Fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability. Proportionality requires that the:

...legal and other costs incurred in connection with the proceedings are minimised and proportionate to the complexity or importance of the issues and the amount in dispute.

Cost minimisation and ‘proportionality’ are key elements of recent civil justice procedural reforms. 382

5.9 That is, efficiency requires a consideration of the costs (public and private in the context of the nature of the claim).

5.10 However, it is important to consider other commentators who have highlighted concerns arising out of the emphasis on efficiency as a primary goal and feature of mediation. Professor Laurence Boulle suggests that in the practice of mediation, demands of efficiency may place pressure on the process/substance distinction. That is, blunt measures of efficiency that emphasise short term quantitative factors (such as time and cost) may not accommodate the qualitative factors which assist to determine effectiveness (client satisfaction, and impact on behaviour and compliance). 383 As a result in this research efficiency has been considered using the widest range of measures – not just time and cost measures.

Did Mediation Result in the Resolution of Disputes?

5.11 In terms of whether the mediation process was efficient, perhaps the first question that is relevant is whether the process assisted to finalise disputes. Chapter 2 set out various findings in relation to the resolution of disputes at mediation and it is clear that a relatively large proportion of matters in each Court were mediated and finalised at mediation (59 per cent in the survey sample and 48 per cent in the much larger file sample using only matters that were clearly ‘mediated’ 384 (see discussion below)).

384 It is clear that many matters in the larger file sample were mediated and this finalization rate in respect of the larger sample size may therefore be artificially low, see Appendix K. For this reason the survey sample finalisation rate, 59 per cent, is more likely to be an accurate reflection of finalisation rates. The issues with the lack of reporting of mediation finalisation material are discussed in some detail in Chapter 6.
5.12 Each sample suggests that the mediations led to the settlement of disputes particularly in some of the more intractable and difficult disputes (by reference to age of dispute and number of court events). In addition, it is likely that some matters settled by negotiation once a referral to mediation had been made and that others may have been finalised by a negotiation following a mediation. Mediation may also have assisted to narrow issues in matters that were not finalised at mediation and this can have a significant impact on efficiency if a matter is then litigated. Mediators considered that this ‘narrowing’ and partial resolution of some issues took place in matters that were mediated but not resolved in the survey sample (see below).

**How was the dispute finalised?**

5.13 As indicated in Figure 5.1, most survey respondents in the in depth smaller survey, finalised their dispute through mediation (43 per cent, n=41 out of 95), followed by negotiation (27 per cent, n=26 out of 95). Only 7 per cent of survey respondents had their dispute finalised at trial.

5.14 The trend in these figures is somewhat similar to that obtained from the Court files (see Figure 5.2 below for comparison), where 16 per cent of matters (n=89 out of 553) were finalised using a mediation process and 14 per cent of cases (n=75) were finalised as a result of a negotiation. However, the much higher percentage of cases finalised through mediation among survey respondents suggest that many of the ‘dismissed/discontinued’ cases in the Court file sample were finalised by mediation. As discussed earlier in Chapter 2, when survey results were cross-referenced with Court file results, the analysis indicated that a possible 30 per cent of the ‘dismissed/discontinued’ cases were finalised at mediation (see Appendix K for details). Another factor leading to the higher mediation rates amongst survey respondents may be that a higher proportion of survey respondents were mediation clients.

5.15 As previously noted, currently, the Supreme and County Courts of Victoria do not have a systematic or mandatory requirement for collecting information about mediated cases, making it difficult to provide accurate statistics on the percentage of cases settled at mediation (see also Chapter 6). However, both the survey and court-file data suggest that mediation is one of the most frequently used processes to finalise Supreme and County Courts disputes. In fact the survey and court-file data suggest it is the most frequently used process. However, these results must be interpreted with the limitations of the available data in mind.

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**Recommendation:**

The earlier referral of disputes as well as more targeted referral will assist to increase resolution rates.

In addition improving the quality of the mediation provided and ensuring that ‘conferencing’ processes are not categorised as mediation will improve the resolution rates and provide a more accurate representation of mediation use and resolution rates.
5.16 On this basis, it would seem that mediation processes were efficient in that mediation resulted in fewer court hearings (see Chapter 2 and below), may have prompted finalisation at an earlier time (avoiding ‘door of the court’ negotiation) and that the processes therefore reduced both public and private costs.

5.17 However, would such cases have settled anyway? The survey data suggests that this would have been unlikely. The disputes dealt with at mediation had a range of intractable features and it seems clear that in many instances the mediation process reduced costs that might otherwise have been expended at a hearing. In this regard, some mediators indicated in interview that the mediation process saved ‘months of court time’ in complex and intractable disputes.
5.18 It is however also useful to explore why mediation did not finalise disputes as this inquiry can assist in improving effectiveness and efficiency in the future.

**Why were disputes not finalised? – Mediator perceptions**

5.19 Mediators were asked questions about the disputes they mediated in the mediator survey. This section reports on mediator perceptions about why disputes were not finalised.

5.20 The mediators responding to the survey reported that mediation finalised the dispute in 68 per cent (n=23) of cases. Some did not know what happened to the dispute after the mediation (15 per cent of cases, n=5), while 18 per cent (n=6) reported that the dispute was not finalised following the mediation (even though in many cases the mediators considered that the mediation helped to define the issues, see below).

5.21 The most common reason why a dispute was not finalised at mediation was because the ‘the parties were too far apart’ (12 per cent of cases, n=4). The second most common reason related to the unwillingness of parties to negotiate (9 per cent of cases, n=3).

5.22 The reasons provided by mediators as to why a dispute was not finalised at mediation are provided in Table 5.1. Although these results are limited by the small response rate to the mediator survey (see Chapters 2 and 6 for details), they suggest that the greatest obstacle to finalising a dispute at mediation are the different positions that parties take and a lack of willingness to negotiate further (or at all).

5.23 Other factors identified by mediators are of interest in terms of improving the effectiveness of mediation in the future. The responses (below) suggest that some parties were not ‘reasonable’ and ‘getting instructions’ or having sufficient authority can also be an issue. It is possible that these issues could be addressed using a number of strategies (see Chapter 6).
TABLE 5.1– WHY WERE DISPUTES NOT FINALISED?  

<table>
<thead>
<tr>
<th>Responses</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>One or more parties could not get instructions</td>
<td>1</td>
<td>2.9</td>
</tr>
<tr>
<td>One or more parties would not negotiate</td>
<td>3</td>
<td>8.8</td>
</tr>
<tr>
<td>One or more parties were unreasonable</td>
<td>2</td>
<td>5.9</td>
</tr>
<tr>
<td>The parties were too far apart</td>
<td>4</td>
<td>11.8</td>
</tr>
<tr>
<td>One or more parties were not well advised</td>
<td>1</td>
<td>2.9</td>
</tr>
<tr>
<td>Expert evidence was needed</td>
<td>1</td>
<td>2.9</td>
</tr>
<tr>
<td>Person responsible for authorising offers was not present and provided instructions via telephone – Made things difficult</td>
<td>1</td>
<td>2.9</td>
</tr>
</tbody>
</table>

Did mediation assist in resolving the dispute?  

5.24 The mediators were also asked whether the mediation assisted with resolving the dispute and helped to define issues. In 71 per cent of cases (n=24 out of 34), the mediators considered that the mediation assisted in resolving the dispute and in 91 per cent of cases (n=31) they considered that mediation assisted to define the issues.

5.25 In cases where the dispute was not finalised at mediation, the mediation was also thought to be helpful in narrowing the issues in 80 per cent of cases (n=8 out of 10). This suggests that mediators considered that even where mediation did not finalise a matter, the process may assist to reduce hearing costs.

Did the Mediation Process Save Costs?  

5.26 There are various factors that must be considered when assessing costs. These include considering litigant costs, including the legal and related professional costs that are incurred in litigation, the personal time spent by litigants and also the public costs of the system.

5.27 In relation to issues surrounding litigation costs in general (including those related to mediation and in respect of preparatory costs), it is likely that broader systemic changes will have an impact on these costs into the future. The introduction of new legislation establishing a Costs Court will influence how litigants legal and related costs are determined and allowed. The Courts Legislation Amendment (Costs Court and Other Matters) Bill 2008, establishes a new Court which, as a Division of the State Supreme Court, will determine disputes relating to litigation costs.  

385 The numbers and percentage in this table are not additive as mediators were able to provide several reasons as to why a dispute was not finalised at mediation.

5.28 However, establishing new cost determination measures may not necessarily reduce litigation costs. Arguably, litigation costs can only be reduced by making the litigation process less time consuming and less likely to result in professional fee costs (legal and other). Also, to a large extent, litigation costs are determined not just by the Court – but very much by the other party and the representatives involved in the litigation.

5.29 In this research litigants were asked questions about what legal costs were incurred by them in an attempt to determine whether litigation costs were reduced where mediation was used. These matters are the subject of discussion in Chapter 3 where a detailed analysis of responses was undertaken.

5.30 In summary however a comparison of total legal and related professional costs spent during the dispute (across five dispute resolution processes) suggests that mediation is the least costly method of finalisation and that the process can result in cost savings for litigants. Table 3.16 in Chapter 3 and the discussion on costs that follows suggests that mediation was perceived to be a financially beneficial option by most disputants that used it.

**Could disputes be resolved earlier?**

5.31 In relation to the costs issues it is important to determine not only whether mediation diverted cases from trial but also to determine whether such cases could have resolved prior to entry into the court system or at an earlier time following entry into the court system.

5.32 In this regard a focus of this research was also on whether disputants attempted to resolve the dispute before a Court action was commenced. In addition, the research questions focused on: why the dispute was filed in Court and what procedural difficulties were encountered; and, how the processes influences the parties’ relationship afterwards.

**Did you try to resolve the dispute before it was filed in Court?**

5.33 73 per cent (n=72 out of 98) of the survey respondents in the smaller in depth survey reported that they tried to resolve their dispute before it was filed in Court. County Court clients were more likely to attempt this (86 per cent) than Supreme Court clients (71 per cent).\(^{387}\) However, this difference was not statistically significant.\(^ {388}\)

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\(^{387}\) These responses may be linked to the availability of pre litigation conciliation in some categories of disputes.

\(^{388}\) \(\chi^2(1) = 2.21, p=.14\)
5.34 Table 5.2 outlines the process that finalised the dispute and whether those who used this process tried to resolve the dispute prior to filing it in Court. A very high proportion of the very small group of people who ended up going to a hearing in the in depth survey reported that they tried to resolve the dispute before it was filed in Court (86 per cent, n=6 out of 7). Those who settled at mediation and negotiation also tried to resolve their disputes prior to filing in Court on most occasions (80 per cent, n=31 out of 39) and 76 per cent (n=19 out of 25) respectively.

**TABLE 5.2: ATTEMPT TO RESOLVE DISPUTE – CATEGORISED BY PROCESS OF FINALISATION**

<table>
<thead>
<tr>
<th>How was the case finalised?</th>
<th>Tried to resolve dispute prior to filing in Court?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes (%)</td>
</tr>
<tr>
<td>Conference</td>
<td>50.0</td>
</tr>
<tr>
<td>Case-conference in Court</td>
<td>55.6</td>
</tr>
<tr>
<td>Negotiation</td>
<td>76.0</td>
</tr>
<tr>
<td>Mediation</td>
<td>79.5</td>
</tr>
<tr>
<td>Trial</td>
<td>85.7</td>
</tr>
<tr>
<td>Other</td>
<td>92.3</td>
</tr>
</tbody>
</table>

**Why was the case filed in Court?**

5.35 The most common reason why a case was commenced in the Supreme or County Court was because ‘the other side was not prepared to settle’ (42 per cent, n=41 out of 98). Other frequent reasons were that the ‘other party filed the case’ (26 per cent, n=25) or that the survey respondent was ‘advised to file’ the proceedings (21 per cent, n=21).

5.36 Plaintiffs were most likely to commence proceedings because they believed that defendants were not prepared to settle, while defendants’ most common response to a question about why the case was filed in Court was that ‘the other side filed it’.

5.37 There was little information about how litigants tried to resolve matters before proceedings commenced. It seems clear however that it was relatively rare for mediation to be attempted prior to the commencement of proceedings when one considers the small number of matters that had previously been mediated as well as the focus group responses. Such responses suggest that pre-filing mediation may be of utility in some cases. It may be that some cases could have been resolved much earlier, even prior to the commencement of litigation.

5.38 Interestingly, in focus group interviews, two mediators indicated they were receiving an increasing number of mediation referrals before proceedings had commenced in a Court and that some litigants were
actively attempting to reduce litigation costs by attempting pre litigation mediation.

TABLE 5.3: WHY WAS THE CASE FILED IN COURT?

<table>
<thead>
<tr>
<th>Reasons for filing case in Court</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>I was advised to do this</td>
<td>17 47.2</td>
<td>4 12.1</td>
<td>21 30.4</td>
</tr>
<tr>
<td>The other side wouldn’t give me what I wanted</td>
<td>14 38.9</td>
<td>4 12.1</td>
<td>18 26.1</td>
</tr>
<tr>
<td>The other side was not prepared to settle</td>
<td>25 69.4</td>
<td>15 45.5</td>
<td>40 58.0</td>
</tr>
<tr>
<td>The other side was taking too long</td>
<td>9 25.0</td>
<td>7 21.2</td>
<td>16 23.2</td>
</tr>
<tr>
<td>The other side filed the case</td>
<td>3 8.3</td>
<td>21 63.6</td>
<td>24 34.8</td>
</tr>
<tr>
<td>There was more than one party on the other side</td>
<td>10 27.8</td>
<td>4 12.1</td>
<td>14 20.3</td>
</tr>
<tr>
<td>Other</td>
<td>6 16.7</td>
<td>4 12.1</td>
<td>10 14.5</td>
</tr>
</tbody>
</table>

**Timeliness of process**

5.39 There are different views about when a mediation process can be used once litigation has commenced. This subject was the topic of conversation in representative, litigant and mediator focus groups. Some suggested that mediation processes should be conducted once discovery had been completed. The issues and potential outcomes were made clear by comments which highlight the legal profession’s approach:

It’s fair to say that in the Federal Court, judges have widely varied views about when to send parties to mediation. One of them said before the defence is even in – early. The other said later – most people say I want discovery first, in case of a smoking gun. I think the profession resists mediation prior to discovery.’

5.40 Another comment addresses other concern from the perspective of disputant costs:

At the mediation, the barrister didn’t believe a word and said “until I have read your affidavits I won’t take anything on board.” This meant it was blown out of proportion, it was very sad – it cost the client thousands.

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389 Please note, question was a multiple response question and therefore total percentages do not equal 100.
390 Comment at the mediator focus group (conducted as the Law Institute of Victoria, Melbourne, 15 July 2008).
391 Comment in the mediator focus group (conducted at the Law Institute of Victoria, Melbourne, 15 July 2008).
5.41 Clearly the costs borne by disputants are closely related to the timing of a mediation.

5.42 Others suggested that mediation could be attempted earlier and if high costs had already been incurred, it was difficult for litigants to resolve their differences. For instance, one mediator noted that:

‘all that has happened is the risks have changed – people can still mediate early’.

5.43 At present there are a number of pre-litigation mediation programs that exist within Australia. There are also programs that operate at an early stage once litigation has commenced. The survey data from the finalised cases suggests that many mediation cases are ‘old’ cases. That is they are cases that have already been in the litigation system for some time. This is important as length of time in the litigation system increases both party and public costs.

5.44 Sourdin has noted that ‘ripeness’ for mediation is said to be an important factor in any referral. One mediator suggested that the timing of mediation influences the process and outcome of mediation, and that often disputants require time to formulate a direction for their negotiations. For example:

Many mediations are likely to be ineffective because people aren’t ready and can’t talk sense about it – there are too many gaps in the issues.

5.45 However, this factor may be less important than previously thought. Goldberg and others have indicated that it is not necessary for all issues to be apparent and readily addressed to enable processes such as mediation to succeed.

5.46 However, other mediation referral programs cite ‘the stage which the case has reached’ and the ‘extent of time pressure for resolution’ as important factors in determining appropriateness for mediation. This may be partly because in some instances disputants may need to incur costs to appreciate the issues involved in the litigation. Also, as one respondent to a survey relating to the Commercial Division of the Supreme Court of New South Wales has noted:

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392 Comment at the mediator focus group (conducted as the Law Institute of Victoria, Melbourne, 15 July 2008).
394 Comment in the mediator focus group (conducted at the Law Institute of Victoria, Melbourne, 15 July 2008).
The higher level of legal costs helps to focus a party’s mind on the ‘reality’ of expensive, time-consuming litigation.\(^{397}\)

5.47 Awareness of legal costs and other potential costs (loss of opportunity and profit costs, costs in stress, management time costs) can be important in providing an incentive to negotiate or mediate. In addition, ripeness considerations may relate to the emotional state of the disputants and whether or not a grieving process has commenced or been completed (in respect of a lost relationship or a significant injury or other loss). Some ADR processes can assist parties to move through cycles of change and prompt development of outward-looking approaches.

5.48 For those within the litigation system, the provision of hearing dates\(^{398}\) and interlocutory events may promote a greater focus on settlement options and may also mean that legal representatives are in a better position to assess the potential litigation outcomes. On the other hand, it has been noted that it seems to ‘…be accepted that there is no automatically right or wrong time for referral; however, a system of automatic referral at a certain stage in the litigation process will inevitably result in some inappropriate referrals’.\(^{399}\)

5.49 In this regard, the timing of referral can also relate to efficiency in terms of the saving of public as well as private costs. In terms of public cost savings the issues are twofold. First, did mediation processes save time within the court in terms of hearing time and judicial resources? Second, did mediation processes have any impact upon other costs such as the public costs incurred in case processing? To respond to each of these questions and to explore issues relating to the timing of mediation referral decisions a detailed analysis of case processing was undertaken.

What Case-management Processes took Place?

Number of Court events

5.50 The number of court events (these include directions hearings, case-conferences, pre-trial conferences, interlocutory hearings and in-chambers directions hearings (usually based on consent orders)) that took place in the court sample are presented in Figure 5.3 and Table 5.4; categorised by the process that finalised the case. The majority (58 per cent, n=52) of mediated

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MEDIATION IN THE SUPREME AND COUNTY COURTS OF VICTORIA

cases only required 1–2 court events and 30 per cent (n=27) required 3–5 court events.

5.51 Although these cases drew on Court resources prior to mediation, the figures set out below indicate that mediated matters required less case management than matters finalised at trial (55 per cent required 3-5 court events, n=30), pre-trial conference (73 per cent required 3–5 court events, n=8) or those finalised through negotiation (45 per cent required 3–5 court events, n=34).

FIGURE 5.3 – NUMBER OF COURT EVENTS ATTENDED – BY PROCESS OF DISPUTE FINALISATION

TABLE 5.4 – NUMBER OF COURT EVENTS – CATEGORISED BY PROCESS OF DISPUTE FINALISATION

It is clear that most matters that were mediated had a significant case management history. Mediated matters were likely to have been the subject of a number of case management hearings (either in Court or chambers) prior to any mediation being conducted.

Efficiency and Compliance with Outcomes
5.53 The high number of case management events suggests that considerable public and private costs were expended prior to a mediation being conducted. This was a concern for litigants who discussed their frustration with case management where they considered that additional costs were expended.

5.54 One disputant described the large costs he incurred and followed with, ‘I have no respect for my barristers and QCs’ and explained that they ‘changed [the] story too many times’. He went on to say, ‘if I knew what I know now, I would have gone to court straight away.’ It was ‘...very disrespectful that they [the Courts] have no consideration or concern for their [the lawyers’] lack of management’.400

5.55 The data suggests that earlier referral to mediation, particularly in cases where the dispute is of a short duration may assist to reduce both public and private cost expenditure. Whist all evidence may not be clear at that point, case management processes that have clarified the issues in dispute may assist to better identify cases that can be referred more quickly to mediation. Case management related processes were referred to in the survey sample but were the subject of greater in depth comment in the focus groups (see above).

**Procedural difficulties**

**Did you experience any procedural difficulties in resolving your dispute?**

5.56 Table 5.5 outlines the procedural difficulties survey respondents experienced in trying to resolve their dispute. Differences for plaintiffs and defendants and for the Supreme and County Courts are provided. These questions were asked in part because the highlighted the interplay between mediation and court management processes and also because they provided information about some of the problems encountered by litigants that may have prevented an earlier mediation referral.

400 Comment in plaintiff focus group (conducted at the Law Institute of Victoria, Melbourne, 10 July 2008).
TABLE 5.5: PROCEDURAL DIFFICULTIES EXPERIENCED

<table>
<thead>
<tr>
<th>Difficulties</th>
<th>Plaintiff</th>
<th></th>
<th>Defendant</th>
<th></th>
<th>Supreme Court</th>
<th></th>
<th>County Court</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Costs too high</td>
<td>26</td>
<td>54.2</td>
<td>18</td>
<td>39.1</td>
<td>23</td>
<td>44.2</td>
<td>22</td>
<td>48.9</td>
</tr>
<tr>
<td>Process took too long</td>
<td>26</td>
<td>54.2</td>
<td>19</td>
<td>41.3</td>
<td>26</td>
<td>50</td>
<td>20</td>
<td>44.4</td>
</tr>
<tr>
<td>Location of mediation/hearing etc. was inconvenient</td>
<td>2</td>
<td>4.2</td>
<td>4</td>
<td>8.7</td>
<td>2</td>
<td>3.8</td>
<td>5</td>
<td>11.1</td>
</tr>
<tr>
<td>Time of mediation/hearing etc. was inconvenient</td>
<td>4</td>
<td>8.3</td>
<td>4</td>
<td>8.7</td>
<td>4</td>
<td>7.7</td>
<td>4</td>
<td>8.9</td>
</tr>
<tr>
<td>Difficulty getting legal advice</td>
<td>4</td>
<td>8.3</td>
<td>5</td>
<td>10.9</td>
<td>4</td>
<td>7.7</td>
<td>5</td>
<td>11.1</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
<td>22.9</td>
<td>5</td>
<td>10.9</td>
<td>9</td>
<td>17.3</td>
<td>7</td>
<td>15.6</td>
</tr>
<tr>
<td>No difficulty experienced</td>
<td>11</td>
<td>22.9</td>
<td>23</td>
<td>50</td>
<td>21</td>
<td>40.4</td>
<td>15</td>
<td>33.3</td>
</tr>
</tbody>
</table>

5.57 Defendants were less likely to experience procedural difficulties than plaintiffs. Costs and process timeliness issues were more likely to create difficulties for plaintiffs than defendants.

5.58 When comparing the procedural difficulties experienced by Supreme and County Court clients, Supreme Court clients were more likely to report they experienced no difficulties (40 per cent) than County Court clients (33 per cent). County Court clients experienced more difficulties (11 per cent) with the location of their mediation, hearing or other process than Supreme Court clients (4 per cent).

**What other costs were incurred?**

5.59 Litigants were also asked questions about their personal costs and this was also a subject of discussion in focus groups. In the survey sample, almost half of the litigants (48 per cent; n= 46 out of 96) reported that they spent more than four weeks of their personal time on attempting to finalise the dispute from the date that proceedings were commenced in court (see Table 5.6 for details).

5.60 These findings suggest that for many litigants later resolution can not only increase their legal and professional costs but may also have other significant impacts upon their personal lives. Again, in terms of efficiency indicators this finding suggests that earlier referral strategies are likely to be of assistance to some litigants.

5.61 Only 30 per cent of survey respondents spent less than a week of their personal time on the matter, indicating that in most cases the personal time spent on a matter has a significant impact on a litigant’s daily life and
may also have a significant impact upon family and any related business activities.

TABLE 5.6: HOW MUCH OF YOUR PERSONAL TIME HAVE YOU SPENT ON THE DISPUTE SINCE IT WAS FILED IN COURT?

<table>
<thead>
<tr>
<th>Length of time</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than a day</td>
<td>7</td>
<td>7.3</td>
</tr>
<tr>
<td>About a day</td>
<td>6</td>
<td>6.3</td>
</tr>
<tr>
<td>2–3 days</td>
<td>16</td>
<td>16.7</td>
</tr>
<tr>
<td>1–2 weeks</td>
<td>10</td>
<td>10.4</td>
</tr>
<tr>
<td>3–4 weeks</td>
<td>11</td>
<td>11.5</td>
</tr>
<tr>
<td>More than 4 weeks</td>
<td>46</td>
<td>47.9</td>
</tr>
</tbody>
</table>

5.62 In focus groups, litigants commented that the court processes had ‘consumed them’ and some talked about the impact on their health and personal lives. One disputant described how the experience affected her:

‘It had a physical impact on me... we were told at the mediation that things will get worse once it goes to court’... and that the barristers said ‘Can you handle it?’

Efficiency in terms of waiting

5.63 Clearly many litigants waited a long period of time before having any face to face meeting with the other litigant. In addition some litigants also waited on Court or other premises for the dispute finalisation process to take place.

Waiting for a judge or mediator

5.64 Survey respondents were asked whether throughout the process they ever had to wait for a judge or mediator to become available on the day their matter was to be dealt with. 23 per cent (n=23 out of 94) of respondents said they had to wait and the responses of Supreme and County Court clients were very similar on this issue.

Waiting for a hearing, mediation or conference

5.65 Only 16 respondents reported the length of time they waited for a hearing, conference or mediation. The average length of waiting time was 8
hours, with the longest reported waiting period being 48 hours and the shortest being 10 minutes.

How long did the mediation or trial take?

Mediation

5.66 35 survey respondents whose case was finalised by mediation reported how long the mediation session took. The longest mediation lasted seven days and the shortest mediation lasted 2.5 hours – with the average length of a mediation session being 7.6 hours. The most frequent length of time for mediations was one day (27 per cent).

Trial

5.67 Only five survey respondents whose case was finalized at trial reported on how long this process took. The longest trial took 7 days and the shortest took 2 hours. The average trial length was just over two days (16.6 hours).

The Mediation Process

Number of mediation sessions

5.68 Efficiency also relates to the time spent in the process and the number of sessions attended. 25 (26 per cent) of survey respondents reported that they attended more than one mediation session. The breakdown of how many multiple sessions were attended is presented in Table 5.7, with the highest number of mediation sessions attended for a single case being 6.

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403 (M=8.07; SD=13.62)
404 Please note that one respondent reported waiting for 2 months, but this was most likely a misunderstanding of the question and the extreme value was removed from analysis.
405 (M=7.64; SD=8.68)
406 (M=16.60; SD=22.82)
TABLE 5.7: MEDIATION SESSIONS ATTENDANCE – SURVEY DATA

<table>
<thead>
<tr>
<th>Number of mediation sessions</th>
<th>Frequency of attendance</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
</tr>
<tr>
<td>1 mediation session</td>
<td>45</td>
</tr>
<tr>
<td>2 mediation sessions</td>
<td>10</td>
</tr>
<tr>
<td>3 mediation sessions</td>
<td>6</td>
</tr>
<tr>
<td>4 mediation sessions</td>
<td>3</td>
</tr>
<tr>
<td>6 mediation session</td>
<td>1</td>
</tr>
<tr>
<td>Unknown</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>70</td>
</tr>
</tbody>
</table>

5.69 It was unclear why more than one session was required in a number of mediations. This may be linked to complex settlement arrangements or more complex discussions and could also be linked to authority issues (that is where a party needs to obtain direction from another authority). For those who attended focus groups, and for survey respondents there was little concern that a matter might have taken too long at mediation (rather the concerns were that some mediations may not have been ‘long enough’).

**How formal was the mediation process and were parties comfortable with the level of formality?**

**Level of formality**

5.70 Survey respondents were asked how formal they found the mediation process. This question is linked to efficiency indicators as the question that can be raised is whether litigants considered that the mediation protocols were somehow ineffective. The average response was halfway between ‘somewhat formal’ and ‘somewhat informal’. When analysed using percentages (as in Table 5.8), most responses (56 per cent, n=23 out of 41) fell into the ‘formal’ category and this was particularly the case for respondents from the Supreme Court. However, differences in perceptions of mediation formality in the Supreme and County Courts were not statistically significant.

5.71 One of the factors that may influence perceptions of higher mediation formality among Supreme Court clients may be the attendance of a Master-conducted mediation session at the Supreme Court. Correspondence with a lawyer who had represented a party in a mediation conducted by a Supreme Court Master lends support to the perception that

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407 Please note that not all respondents who attended more than one mediation session advised the number of sessions they attended.

408 ($M=2.49; SD=.59; Range 1–4; 1= very formal, 4= very informal)$
such mediations are quite formal. They are conducted in the formal settings of a Court and Masters tend to conduct themselves as members of the Court. The following introduction by a Master indicates the level of formality in some Master-conducted mediations:

This is an informal process, you can call me Master…

Lawyer, quoting the introduction provided by a Supreme Court Master in a mediation.409

5.72 However, the formality of Master conducted mediations could not be explored using the survey data as surveys were received for only three of the cases mediated by Masters (although 10 mediations in the larger file sample were conducted by Supreme Court Masters). This suggests that perceptions of formality may be influenced by other factors such as the location of the mediation sessions.410

TABLE 5.8: PERCEPTIONS OF PROCEDURAL FORMALITY411 IN MEDIATION

<table>
<thead>
<tr>
<th>Formality</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Formal</td>
<td>15</td>
<td>65.2</td>
<td>8</td>
</tr>
<tr>
<td>Informal</td>
<td>8</td>
<td>34.7</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>18</td>
<td>100</td>
<td>23</td>
</tr>
</tbody>
</table>

5.73 The level of formality experienced during mediation was compared to the other processes that were used to finalise respondents’ disputes, as well as to the results obtained in a study of the 2002 New South Wales Settlement Scheme412.

5.74 The results are presented in Table 5.9. The differences in formality between mediation and all other processes approached statistical significance413, indicating that mediation was perceived as more informal than the other dispute resolution processes connected to the higher courts in Victoria. However, in comparison to the facilitative style of mediation used in the NSW Settlement Scheme, the ‘mediations’ connected to

409 Comment made in personal correspondence with a lawyer who had represented parties at a mediation conducted by a Supreme Court Masters (26 August 2008).

410 Note: It has been suggested that a newly designed mediator reporting form could include provision for noting the location of the mediation session. This information could then be assessed in follow-up evaluations.

411 ‘Formal’ is the aggregated response to ‘very formal’ and ‘somewhat formal’ (ratings 1 and 2 on a 4 point scale). ‘Informal’ is the aggregated response to ‘somewhat informal’ and ‘very informal’ (ratings 3 and 4 on a 4 point scale).


413 \( t(76)=-1.96, p=.054 \); Mediation: \( M=2.47, SD=.60 \), Other processes: \( M=2.15, SD=.83 \), scale range=1=very formal, 4=very informal]
Supreme and County Court disputes in the present study were considered significantly more formal.

TABLE 5.9: COMPARING PROCEDURAL FORMALITY ACROSS PROCESSES

<table>
<thead>
<tr>
<th>Procedural formality</th>
<th>Mediation n=38</th>
<th>All other processes n=40</th>
<th>NSW Settlement Scheme n=57</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Formal</td>
<td>57.9</td>
<td>67.5</td>
<td>26.3**</td>
</tr>
<tr>
<td>Informal</td>
<td>42.1</td>
<td>32.5</td>
<td>73.7**</td>
</tr>
</tbody>
</table>

**p<.01

Formality preference

5.75 Formality perceptions may vary as a result of the mediator style, setting and personal preference of the disputant. Most survey respondents considered the level of formality during their mediation was ‘right’. It is interesting to note that a higher percentage of County Court clients would have preferred a more formal process. This is most likely to be related to personal preference or other personal or circumstantial characteristics (e.g. level of understanding), as many mediators mediate in both jurisdictions.

TABLE 5.10: FORMALITY PREFERENCE IN MEDIATION

<table>
<thead>
<tr>
<th>Preference</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>More formal</td>
<td>2</td>
<td>8.7</td>
<td>4</td>
</tr>
<tr>
<td>Less formal</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Formality was right</td>
<td>21</td>
<td>91.3</td>
<td>13</td>
</tr>
<tr>
<td>Total</td>
<td>18</td>
<td>100</td>
<td>23</td>
</tr>
</tbody>
</table>

Preferences for a public or private procedure

5.76 Survey respondents in the in depth smaller survey, indicated that in 86 per cent (n=76 out of 88) of cases the procedure that ultimately resolved their dispute was a private procedure. County Court clients were more likely to use a public procedure than Supreme Court clients. Specifically:

- 21 per cent of County Court clients finalised their dispute through a public procedure
- 6 per cent of Supreme Court clients finalised their dispute through a public procedure

\( \chi^2(1) = 9.56, p=.00 \)
5.77 Parties tended to be quite satisfied with their choice of either a public or a private procedure.\textsuperscript{415} The reasons why either a public or private procedure was preferred are summarised in Tables 5.11 and 5.12.

TABLE 5.11: REASONS FOR PREFERING A PRIVATE PROCEDURE\textsuperscript{416}

<table>
<thead>
<tr>
<th>Reasons</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n %</td>
<td>n %</td>
<td>n %</td>
</tr>
<tr>
<td>Ensures case is a personal affair</td>
<td>17 47.2</td>
<td>11 28.2</td>
<td>28 37.3</td>
</tr>
<tr>
<td>Saves embarrassment</td>
<td>8 22.2</td>
<td>5 12.8</td>
<td>13 17.3</td>
</tr>
<tr>
<td>Less intimidating</td>
<td>17 47.2</td>
<td>17 43.6</td>
<td>34 45.3</td>
</tr>
<tr>
<td>Fairer</td>
<td>3 8.3</td>
<td>7 17.9</td>
<td>10 13.3</td>
</tr>
<tr>
<td>Cheaper</td>
<td>13 36.1</td>
<td>21 53.8</td>
<td>34 45.3</td>
</tr>
<tr>
<td>Produces better outcome</td>
<td>6 16.7</td>
<td>14 35.9</td>
<td>20 26.7</td>
</tr>
<tr>
<td>Other</td>
<td>4 11.1</td>
<td>3 7.7</td>
<td>7 9.3</td>
</tr>
</tbody>
</table>

TABLE 5.12: REASONS FOR PREFERING A PUBLIC PROCEDURE\textsuperscript{417}

<table>
<thead>
<tr>
<th>Reasons</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n %</td>
<td>n %</td>
<td>n %</td>
</tr>
<tr>
<td>Ensures case is a personal affair</td>
<td>1 5.9</td>
<td>1 6.7</td>
<td>2 6.3</td>
</tr>
<tr>
<td>Saves embarrassment</td>
<td>0 0</td>
<td>1 6.7</td>
<td>1 3.1</td>
</tr>
<tr>
<td>Less intimidating</td>
<td>3 17.6</td>
<td>1 6.7</td>
<td>4 12.5</td>
</tr>
<tr>
<td>Fairer</td>
<td>8 47.1</td>
<td>6 40</td>
<td>14 43.8</td>
</tr>
<tr>
<td>Cheaper</td>
<td>1 5.9</td>
<td>0 0</td>
<td>1 3.1</td>
</tr>
<tr>
<td>Produces better outcome</td>
<td>7 41.2</td>
<td>5 33.3</td>
<td>12 37.5</td>
</tr>
<tr>
<td>Other</td>
<td>5 29.4</td>
<td>3 20.0</td>
<td>8 25.0</td>
</tr>
</tbody>
</table>

5.78 The main reasons for preferring a private procedure were:
- it is cheaper (45 per cent)
- it is less intimidating (45 per cent)
- it ensures the dispute is a personal affair (37 per cent).

5.79 The perception that a private procedure is cheaper was more likely to make it preferable to the defendants (54 per cent) than the plaintiffs (36

\textsuperscript{415} (M=2.91, SD=.85; range 1(very dissatisfied) – 4 (satisfied))
\textsuperscript{416} Please note, question was a multiple response question and therefore percentages in total column do not equal 100.
\textsuperscript{417} Please note, question was a multiple response question and therefore percentages in total column do not equal 100.
per cent). Plaintiffs preferred a private procedure because it was less intimidating and the case remained a personal affair.

5.80 The three main reasons for preferring a public procedure were:
- it is fairer (44 per cent)
- it produces a better outcome (38 per cent)
- other (25 per cent, included reasons of accountability and fairness).\(^\text{418}\)

5.81 Plaintiffs were more likely than defendants to consider that a public procedure produces a better outcome. However private procedures (such as mediation) were often preferred because they were perceived as cheaper and this is certainly the case from a public cost perspective. From the perspective of private costs this is also likely to be the case as the process is likely to take a considerably shorter period of time than a hearing and is also likely to be conducted at an earlier time.

### Efficiency and Quality of Outcomes

5.82 The notion of efficiency is also linked to the durability of any outcomes. These objectives are clearly interrelated as unless an outcome is accepted by the parties, in any broader context it is unlikely to be effective or ‘efficient’. This is also related to the objective noted by NADRAC in respect of lasting outcomes.

5.83 This section examines whether outcomes from court connected mediation were durable or lasting. Compliance with outcomes is often perceived as a significant advantage in facilitative dispute resolution processes such as mediation outcomes.\(^\text{419}\) Longer term longitudinal studies may be of assistance in examining compliance issues (and perceptions of outcome) in the future.

5.84 Evaluative studies in respect of industry organisations that use ADR services, have suggested that the management of disputes, during all phases will influence the nature and durability of outcomes. Such studies have specified that disputes that are managed in relation to time and cost are more likely to lead to a lasting resolution.\(^\text{420}\)

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\(^\text{418}\) The ‘other’ reasons for why a public procedure was preferred included concerns over lawyers controlling the process too much behind ‘closed doors’; making the other party accountable; the right of the public to know about the case as it may affect them; having things on record.


5.85 There are also said to be additional benefits with mediation that are related to the quality and therefore the durability of outcomes. Some court mediation programs, such as the scheme at the Civil Division of the Magistrates Court of South Australia, publicise the option of mediation for resolving minor civil and general claims and endorse this choice as likely to ‘reach more flexible solutions’.421

5.86 The Victim-Offender Mediation Program (VOMP), which was created as a result of the publication of The Victorian Legal and Constitutional Committee Report (1987), was set up as a pilot program.422 This restitution program, which used mediation, suggested that often the most important aspect of the restorative justice interventions was the process. That is, the significance of the victim and offender engaging in discussion (during the process) was a more significant factor in party satisfaction than was the outcome.423 Despite this, the report acknowledged the importance of the empowerment of both the victim and the offender by providing an opportunity for them to determine their own outcomes,424 which according to notions of ‘ownership in the process’ would suggest greater compliance with outcomes.

### Analysing compliance with outcomes

#### Compliance with outcomes by jurisdiction

5.87 Survey responses regarding compliance with outcomes were generally positive, with 84 per cent (n=73) of those in the overall in depth sample reporting that the agreed outcomes have lasted (these responses are for all dispute resolution processes – not mediation exclusively). The occurrence of compliance with outcomes was almost the same across both jurisdictions.

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TABLE 5.13: COMPLIANCE WITH OUTCOMES BY JURISDICTION

<table>
<thead>
<tr>
<th>The agreed outcomes have lasted</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Agree</td>
<td>40</td>
<td>83.3</td>
<td>33</td>
</tr>
<tr>
<td>Disagree</td>
<td>8</td>
<td>16.6</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>48</td>
<td>100</td>
<td>39</td>
</tr>
</tbody>
</table>

Compliance with outcome by party type

5.88 Perceptions of compliance with outcomes tended to be higher among defendants in the smaller in depth sample group - (90 per cent) than plaintiffs (77 per cent). This is an interesting finding and may be related to issues connected with late or slow payments of settlement amounts by defendants.

TABLE 5.14: COMPLIANCE WITH OUTCOMES BY PARTY TYPE

<table>
<thead>
<tr>
<th>The agreed outcomes have lasted</th>
<th>Plaintiffs</th>
<th>Defendants</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Agree</td>
<td>34</td>
<td>77.3</td>
<td>36</td>
</tr>
<tr>
<td>Disagree</td>
<td>10</td>
<td>22.7</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>44</td>
<td>100</td>
<td>40</td>
</tr>
</tbody>
</table>

Compliance with outcomes by process of finalisation

5.89 Table 5.15 indicates the level of agreement with the statement: ‘outcomes agreed at mediation or in some other process have lasted’. There were no significant differences between the two groups, with 87 per cent of disputants (n=33 out of 38) who finalised their matter at mediation and 87 per cent (n=34 out of 39) of those who finalised their matter using some other process reporting that their outcomes have lasted.

TABLE 5.15: COMPLIANCE WITH OUTCOME BY PROCESS OF FINALISATION

<table>
<thead>
<tr>
<th>The agreed outcomes have lasted</th>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Mediation</td>
<td>33</td>
<td>86.8</td>
</tr>
<tr>
<td>All other processes</td>
<td>34</td>
<td>87.2</td>
</tr>
</tbody>
</table>
Compliance with outcomes – Mediators' opinion

5.90 Mediators opinion of whether a mediation reached outcomes which were lasting was also sought in the mediator survey (see Chapter 2 for details of mediator survey). Mediators reported that in all cases finalised by mediation, they believed the outcomes that were reached were lasting.\footnote{This question was answered in 18 cases. 15 of these cases were finalised by mediation and mediators either ‘agreed’ (4) or ‘strongly agreed’ (11) that the outcomes reached were lasting.}

Were the outcomes of good quality?

5.91 Apart from considering durability of outcomes, questions were also asked about whether the quality of outcomes. The findings in relation to perceptions of outcome are explored in detail in Chapter 4. Essentially the findings indicated that perceptions of the acceptability and quality of outcomes are closely linked to overall perceptions of fairness.

5.92 As noted in Chapter 4, to explore whether ‘fairness’ is related to perceptions of the quality of outcomes – that is ‘acceptable outcomes’ – a (Pearson product-moment) correlation was conducted between these two variables. Firstly, six questions\footnote{These questions were: I was able to participate during the process; the process was fair; I had control during the process; there was enough time to present/discuss all information; I felt comfortable during the process; there was enough time to present/discuss all information; I felt comfortable during the process; I was treated with respect during the process.} relating to perceptions of process comfort, participation and control were averaged to form the ‘fairness’ variable. Similarly, five questions\footnote{These questions were: Satisfaction with outcome at time of resolution; satisfaction with outcome now; control over outcome of dispute; the agreed outcomes have lasted; satisfaction with outcome of dispute.} relating to lasting outcomes and satisfaction with outcomes were averaged to form the ‘acceptable outcomes’ variable.

5.93 There was a large positive correlation\footnote{\(r=.80, n=93, p=.000\)} between ‘fairness’ and ‘acceptable outcomes’, suggesting that a perceptions about whether a process was fair was related to whether the outcomes were perceived as lasting and acceptable.

5.94 In Chapter 4 it was also noted that mediation is often said to promote ‘better’ agreements that satisfy the interests of the disputants and may therefore be of higher quality. ADR literature refers to ‘win–win solutions’, options for mutual gain and integrative bargaining.\footnote{J Gillespie and M Bazerman, ‘Parasitic Integration: Win–Win Agreements Containing Losers’ (1997) XIII Negotiation Journal 3.} There is also reference to mediation’s capacity to promote ‘wise’\footnote{R Fisher, W Ury and B Patton, Getting to Yes – Negotiating an Agreement Without Giving In (2nd Ed, Random House, Sydney, 1991) (originally Fisher and Ury, 1981). Note that ‘a wise agreement is one which meets the legitimate interest of each side to the extent possible, and takes community interest into account’, p 4.} agreement. As previously noted, Parker has suggested that it is appropriate for ADR practitioners to set standards for parties in conflict, that is, options should
be ‘mutually beneficial’.⁴³¹ Parker also suggests that any defined outcome should be realistic as well as mutually beneficial. Clearly, a mutually beneficial outcome is not possible in many court proceedings.

5.95 The research suggested that mediators and some disputants did perceive that the outcomes were of a high quality. However, as discussed in Chapter 4, the quality of the outcome may be linked to the nature of the process. Focus group comments suggested that some mediation processes that were adopted could be described as ‘rights based’ and distributive, and may therefore be less likely to support flexible outcomes or higher quality outcomes (in that interests may not be discussed and therefore will not be satisfied).

5.96 The issues raised about the intrinsic nature of outcomes and whether they are better in one process or another cannot however be answered except on a subjective basis. This is because of the matters noted in Chapter 4 relating to outcome fairness. Essentially, matters that resolve at mediation may do so without all information being available and that which is available is likely to be untested. This means that it is difficult to assess and compare the quality of outcomes in different processes.

5.97 However, it is interesting to note that a recent very large study of more than 2,000 litigated matters in the US that focused on outcomes in litigation (compared to offers made in settlement negotiations) found that most of the plaintiffs who decided to reject a settlement offer, choosing to go to trial instead, received a lesser award (less money) than they would have if they had accepted the offers made in the settlement negotiations.⁴³² The US study considered a range of matters and in particular considered risk-taking behaviour by litigants and their representatives (this behaviour is said to be reduced by mediation). The conclusions reached in that study were that outcomes achieved at litigation did not match expectations and were of a lower quality than those that could be reached using other processes. If such findings are at all comparable in the Australian context, then this would suggest that litigated outcomes are likely to be ‘worse’ than the final offers made in negotiation.

**Relationship with the other party**

5.98 Efficiency indicators can also be linked to whether a relationship between the disputants is improved as a result of the process used. However, to some extent, if the relationship between the parties was a one-off relationship it is unlikely that the parties would consider that the

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process had a significant impact. The survey data however indicated that many parties considered that the relationship was ‘worse’ following the dispute finalisation processes:

- only 2 survey respondents (3 per cent) said their relationship with the other party improved
- 36 (46 per cent) said the relationship remained about the same
- the majority (n=40, 51 per cent) said their relationship with the other party got worse after ‘the process’.

**Relationship by process of dispute finalisation**

5.99 The information presented in Table 5.16 suggests that party relationships following a mediation usually remained the same (47 per cent) or got worse (50 per cent). The results for all other processes were similar to those of mediation, with no statistically significant differences observed between the two groups.

**TABLE 5.16: RELATIONSHIP WITH OTHER PARTY BY PROCESS OF FINALISATION**

<table>
<thead>
<tr>
<th>The relationship with the other party:</th>
<th>Improved</th>
<th>Remained about the same</th>
<th>Got worse</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n %</td>
<td>n %</td>
<td>n %</td>
</tr>
<tr>
<td>Mediation</td>
<td>1 2.6</td>
<td>18 47.4</td>
<td>19 50.0</td>
</tr>
<tr>
<td>All other processes</td>
<td>1 2.8</td>
<td>20 55.6</td>
<td>15 41.7</td>
</tr>
</tbody>
</table>

**Relationship by gender**

5.100 As noted in Table 5.17, differences in the state of parties’ relationship following involvement in the process that finalised their dispute did not differ for males and females. This suggests that the impact a dispute resolution process had on parties’ relationship was not affected by gender.

**TABLE 5.17: RELATIONSHIP WITH OTHER PARTY BY GENDER**

<table>
<thead>
<tr>
<th>The relationship with the other party:</th>
<th>Females</th>
<th>Males</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n %</td>
<td>n %</td>
<td>n %</td>
</tr>
<tr>
<td>Improved</td>
<td>1 3.0</td>
<td>1 1.3</td>
<td>2 2.6</td>
</tr>
<tr>
<td>Remained about the same</td>
<td>15 45.5</td>
<td>21</td>
<td>46.7</td>
</tr>
<tr>
<td>Got worse</td>
<td>17 51.5</td>
<td>23</td>
<td>51.1</td>
</tr>
<tr>
<td>Total</td>
<td>33 100</td>
<td>45</td>
<td>100</td>
</tr>
</tbody>
</table>
Conclusions

5.101 Mediation processes have resulted in the finalisation of large numbers of cases in both Courts. Clearly mediation processes have a significant and positive impact on the caseload in each court and they also reduce litigant and public costs where a matter is settled.

5.102 If a matter is not finalised, litigant and public costs can increase as parties will mostly be required to pay for the mediators fees, their legal fees (for attendance at a mediation) and preparation costs. Such costs can be high, particularly if mediation involves a number of sessions. However, the increased cost for many litigants appears to constitute only a small proportion of their overall litigation cost. In addition, it may be that even where a dispute is not resolved, costs are saved if the mediation process narrows issues (as discussed in Chapter 4).

5.103 There is some evidence that using mediation processes at an earlier time could result in lower public and private costs. This approach should be linked to early case management approaches which require party representatives to clearly indicate the issues in the dispute before a judge. It is also suggested that early mediation referral may be most effective in younger cases, that is, matters in which proceedings have been filed less than one year after the original dispute arose.

5.104 The matters referred to in Chapter 2 regarding the effectiveness of processes suggest that efficiency could be improved if various options were pursued to improve overall process effectiveness. In addition, reducing waiting time for litigants, ensuring that reality testing of options and outcomes takes place (to support the durability of agreements) as well as ensuring that information about processes is made available (so that adequate party preparation takes place prior to a mediation taking place) may make such processes more effective. Whilst many mediators may actively consider such matters, others may not.
Issues and Future Options

Introduction

6.1 It is more difficult to evaluate mediation processes in schemes when the mediation work is conducted by private practitioners rather than in house mediators or other staff. This is because surveying disputants and others about services in the conflict resolution area is a complex issue and there are many factors that can produce significant differences in terms of disputant perceptions of process. These differences in perception are magnified in Court related mediation systems where private practitioners are involved in service delivery and result from:

- **Service variation.** Some private practitioners may offer facilitative processes, others may offer structured conference-like services and other practitioners may provide evaluative processes that may be called ‘mediation’. This factor alone may cause some disputants to experience dissatisfaction as they may expect one type of service and then experience something different. Service variation may also mean that ‘rights based’ rather than ‘interest based’ processes are fostered and this can have a direct impact upon whether the process is effective in resolving disputes.

- **Practitioner variation.** Practitioners may vary from the lone barrister practitioner who provides mediation services on an irregular basis to practitioners who derive much of their income from this area and may include Court officials. The training and education of practitioners varies considerably with some having had little (if any) training in mediation to others who have had more extensive training and ongoing professional development.

- **Disputant variation.** Disputants accessing mediation processes come from all sectors of the community. As with any widely drawn sample in the Australian community, clients will have special vulnerabilities that may be related to disability, isolation (including geographical isolation), literacy levels as well as characteristics that may arise as a result of cultural and other factors. These variations
mean that one model of dispute resolution will not be responsive to the needs of all clients – for example, some clients will prefer more or less formality and their perceptions of process may be intermingled with their own idiosyncratic views. Where services are provided by a diverse group of practitioners with no common training and with little inter practitioner contact, the vulnerability and special needs of some categories of disputants is unlikely to be systematically addressed.

6.2 There are also other issues that arise in evaluation work and have been particularly relevant in this study. There were four basic methodologies used in this Report: literature review, file-based surveys, surveys of litigants and mediators, and in-depth focus group interviews. The file-based surveys (using Court files) yielded little information about the actual litigation or the outcomes reached.

6.3 There was little demographic material that was available on the Court files and the electronically available information was limited (although a new electronic filing system is expected to be fully operational in the near future and this will assist to produce some information). In this regard, it is notable that some Court files in other jurisdictions contain much more material that is of benefit to researchers (this may however be coupled with more limited public access to Court files).

6.4 The surveys of litigants also yielded a low response rate and this was lower than in comparable studies. A number of litigants also contacted the researchers directly to express their disappointment about how litigation and mediation processes had affected them. It is not clear why the survey response rate was lower. However, this can be the result of a wide range of factors and as previously noted may also be linked to the contact details that were obtained from Court files as well as the ethical information that needed to be inserted into covering letters.

6.5 It was also somewhat disappointing that only a relatively small number of mediators responded to surveys and focus group invitations. The response rates of mediators and representatives may have been influenced by the ongoing discussions in the media and elsewhere about matters that relate to this Report. For example, the release of the VLRC Report in late May 2008 and ongoing discussions relating to judicial mediation may have meant that some mediators and representatives were less inclined to participate in this study.

6.6 However despite these limitations and the variations earlier referred to, this research does reveal that for the most part:

- Mediation processes can and do resolve or limit disputes that are commenced in the Supreme and County Court.
- Mediation participants and mediators tend to take the view that the processes are fair.
The mediation processes can be accessed by participants.

The processes use resources efficiently.

The processes achieve outcomes that are effective and acceptable.

6.7 In this regard it is important to note that many disputants and representatives were very supportive of mediation processes, and that for some disputants the processes were considered to have produced effective and mutually beneficial outcomes for the parties that could not have otherwise been achieved through litigation.

6.8 This research also reveals that there are areas where mediation processes could be improved and there are a range of different options that can be used to support more effective mediation use into the future. These options are summarised below under each of the evaluation criteria headings that have been previously referred to.

**Resolving and Limiting Disputes**

6.9 The resolution rate for mediations conducted in the Supreme and County Courts of Victoria is lower than rates recorded in some comparable studies. However, there is a real lack of clarity about what mediation is and it is acknowledged that some conferences and shuttle negotiations were recorded as mediations. This matter was discussed in some detail in Chapter 2.

6.10 The research suggests that at least four matters that had an impact upon, and reduced the resolution rate of matters that were mediated:

1. **The timing of referral.** Disputes were often mediated late in a dispute after considerable costs had been expended. Representatives appeared to consider that this was appropriate so that they could properly advise their clients. However, clearly once this point is reached (that is, all information is clear and available), many litigants are reduced to a situation where they can be primarily mediating about costs. Principles of proportionality as well as the findings in this Report would suggest that many matters should be mediated at an earlier time.

2. **The type of processes used.** Some mediators used evaluative processes and focused on compromisory and competitive negotiation. Some litigants barely spoke in the mediation and some representatives behaved in an adversarial manner.

In this regard, lawyers, courts and tribunals have in the past shown a preference for evaluation, conciliation and arbitration procedures
rather than mediation. The National Consumer Council Report, *Far From Wanting Their Day in Court: Civil Disputants in England and Wales*, is of particular interest. In that report the research findings suggested that parties preferred someone who sat down with them and ‘helped them sort out their problems’ rather than the intervention of someone who ‘told them what to do’.

The New South Wales study by the Justice Research Centre, *Plaintiffs’ Satisfaction with Dispute Resolution Processes*, described and evaluated in detail plaintiffs’ perceptions of four dispute resolution procedures: trial, arbitration, and pre-trial conference in the New South Wales District Court’s Sydney Registry, and private mediation through the New South Wales Law Society mediation program. In that study, disputants (rather than their lawyers) expressed a clear preference for pre-trial conference and mediation (rather than a preference for arbitration or trial).

Another survey found that company directors felt that ownership and control of conflict management was lost during litigation and there was wide agreement that conflict could be better resolved using a mechanism other than litigation. The respondents had positive attitudes towards mediation.

The FICS evaluation suggested that many participants preferred face-to-face and facilitative, rather than advisory, processes. That research suggests that while outcome can be an important factor in determining levels of satisfaction, other factors such as levels of participation, perceptions of fairness, costs, delay and control are important in determining levels of satisfaction and positive perceptions about processes. For example, participants who consider that they ‘lose’ in a process may still have positive perceptions of that process.

This research suggests that there are some concerns about the quality of some of the mediation processes that were conducted. Whilst many mediations appear to have been conducted in an

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433 In some Australian States such as Victoria there has also been a growth in the use of mediation processes. This has occurred largely through the advent of compulsory mediation at the County Court and Supreme Court levels.


efficient, effective and fair manner a proportion were not. It is suggested that the following may assist:

- Clearer process models and descriptions\(^{438}\)
- Improved quality assurance processes (through regular surveying)
- Requiring compliance with national mediator standards
- Ensuring that only accredited mediators operate in this sector.

3. **The approach taken by parties and representatives.** Some survey respondents, mediators and focus group attendees commented on the attitude and behaviours of some representatives and some parties. At times some parties complained that mediators did not intervene appropriately (see below).

It is suggested that a mixed model of service delivery, clearer guidelines for representatives, parties and mediators and possibly a requirement to report to a court a situation where a representative or party failed to act in good faith could assist to support more effective negotiations. In this regard one mediator said “At times I feel powerless when counsel says this is how it is going to be.” It is suggested that the capacity for mediators to report a lack of ‘good faith’ may assist mediators to intervene so that they can ensure that the processes meets the needs of disputants. It is acknowledged that such a measure will be regarded as contentious.

4. **The skills and backgrounds of mediators.** The National Mediator Accreditation Scheme is being introduced in Victoria throughout 2008. At the time that this research was conducted many mediators had not been accredited to the basic level required in the scheme. This means that some mediators who conducted mediation in the research period have little training or understanding of integrative negotiation, conflict dynamics or how to intervene in conflict situations. There is a wealth of research that indicates that basic skills based training in mediation can greatly assist mediators to operate more effectively.

**Mediation experience**

6.11 In relation to mediation training and experience, mediators were asked to provide information regarding their experience. In the analysis conducted, the information was counted per mediator, rather than per mediated case. If a mediator completed more than one survey, only one

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\(^{438}\) There are clear descriptive process models that are available from other jurisdictions. See: http://www.aat.gov.au/ApplyingToTheAAT/AlternativeDisputeResolution.htm (accessed 1 September 2008).
survey with their experience was included in the analysis of mediator skills.

6.12 As indicated in Table 6.1, most of the mediators who responded to the survey had 11–15 years mediating experience. The most experienced mediator started mediating in 1990 (18 years of experience) and the least experienced started mediating in 2004 (2 years of experience).

6.13 Mediation practice and models used for mediation have been considerably developed over the past 10 years and have been informed by research in a range of areas.

TABLE 6.1: MEDIATION EXPERIENCE

<table>
<thead>
<tr>
<th>Years of mediating</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>4–5 years</td>
<td>3</td>
<td>15</td>
</tr>
<tr>
<td>6–10 years</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>11–15</td>
<td>13</td>
<td>65</td>
</tr>
<tr>
<td>16–20</td>
<td>2</td>
<td>10</td>
</tr>
</tbody>
</table>

6.14 Mediators were also asked to answer an open-ended question regarding their mediation and related experience and the number of mediations they had conducted. Their answers are summarised in Table 6.2, suggesting a wide range of experience and mediation involvement. The mediators ranged from those who had conducted ten mediations to those who worked as fulltime mediators and said they had conducted over 3,000 mediations.

6.15 Several mediators also outlined their experience in litigation and as lawyers appearing in mediations and conciliations as being relevant in terms of their experience. Others referred to their mediator accreditation with LEADR or as a LIV accredited specialist mediator. Although the present data only provides the mediation experience of 20 mediators who had mediated Supreme and County Court matters, it suggests that their mediation experience is quite varied.
TABLE 6.2: MEDIATION AND RELATED EXPERIENCE

<table>
<thead>
<tr>
<th>Type of experience</th>
<th>n</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conducted 10–12 mediations</td>
<td>2</td>
</tr>
<tr>
<td>Conducted about 50 mediations</td>
<td>4</td>
</tr>
<tr>
<td>Conducted between 300 and 900 mediations</td>
<td>5</td>
</tr>
<tr>
<td>Conducted 1,000–1,500 mediations</td>
<td>4</td>
</tr>
<tr>
<td>Conducted 3,000 mediations</td>
<td>1</td>
</tr>
<tr>
<td>Conciliation/arbitration experience</td>
<td>2</td>
</tr>
<tr>
<td>Experience appearing in mediations/conciliations as lawyer</td>
<td>2</td>
</tr>
<tr>
<td>Litigation experience</td>
<td>2</td>
</tr>
<tr>
<td>LIV/LEADR specialist accreditation</td>
<td>2</td>
</tr>
<tr>
<td>Full-time mediator</td>
<td>1</td>
</tr>
</tbody>
</table>

6.16 In terms of the training and backgrounds of mediators, it is suggested that the NMAS criteria should be used by the courts to set a basic threshold accreditation requirement. That is, the Courts should state that only NMAS accredited mediators should accept work that is referred by the Courts. At the date of this report, both the Victorian Bar and the Law Institute of Victoria had already adopted the NMAS scheme so it is not anticipated that this will result in additional burdens being placed upon practitioners or professional bodies. Courts should also make it clear that (as in the NMAS) it is expected that mediators will comply with National Mediator Practice requirements.

6.17 It is also suggested that mediators should be required to furnish additional reporting material to courts (see later in this Chapter) and that the Courts adopt strategies to promote high quality professional practices into the future (see below).

**Fairness of Processes**

6.18 One issue that surfaced in relation to perceptions of fairness was related to how other parties and litigants behaved in mediation. Good faith reporting by mediators may assist to address this issue (see below). There are also issues related to what processes mediators followed. These issues are referred to in some detail in Chapter 2. One major issue related to the use of shuttle and evaluative processes. Essentially shuttle negotiation may be perceived as unfair because of ‘secrecy’ while evaluative processes that...
limit disputant engagement, participation and involve the formation of a view by a mediator after private meetings may not be viewed as ‘fair’.

6.19 The role of the ADR practitioner ‘in the room’ and the personal characteristics and style of the mediator\(^{440}\) may also be relevant in terms of the formation of disputant views about fairness. Mediators use a range of interventions to assist parties to move forward and the nature of the interventions has been the subject of considerable discussion in recent years.\(^{445}\) Bowling and Hoffman have noted that:

> The effectiveness of our interventions often arises not from their forcefulness but instead from their authenticity. When our action as mediators ... communicates a high degree of genuineness, presence, and integration, even the gentlest of interventions may produce dramatic results”.\(^{442}\)

6.20 A list of mediator qualities reflecting a range of recent writings on mediators and their interventions has previously been summarised.\(^{443}\) Essentially mediation involves the integration of these qualities, which include:

1. Presence, respect, trustworthiness and authenticity

   “…a quality of being in which the individual feels fully in touch with, and able to marshal, his or her .....resources, in the context of his or her relationship with other people and with his or her surrounding environment. Others have used the term ‘mindfulness’ to describe this quality.” \(^{444}\)“This concept is also related to ‘respect’ which is often perceived to be a primary characteristic of any effective mediation process. In essence, effective mediators are said to be respectful of each person and that the process is intended to promote mutual respect.\(^{445}\)

2. Emotional intelligence and empathy

   These characteristics can be described firstly as mediators having an emotional reaction whilst ensuring that this does not create an appearance of partiality, That is mediators are responsive but

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\(^{441}\) See T Sourdin, Alternative Dispute Resolution, (3rd Ed, Thomson Reuter,NSW 2008) at Chapter 3.


\(^{443}\) T Sourdin, Alternative Dispute Resolution (3rd Ed, Thomson Reuters, NSW, 2008).


appropriately so. To do this, a high level of awareness (of self and others)\textsuperscript{446} and empathy must be present.

3. Curiosity, artistry and intuition

Mediators need to be genuinely curious and focussed on feelings and perceptions as well as facts – the whole story.\textsuperscript{447} Artistry involves combining all their resources with knowledge, skills and personal characteristics.\textsuperscript{448} Intuition can be described in the context of mediator responsiveness and essentially involves the mediator responding to their ‘gut response’. Notably however some mediators would suggest that counter intuitive responses are essential in mediation\textsuperscript{449} - that is, the mediator does not respond to an exchange between disputants in a ‘normal’ manner, rather the mediator uses some artistry to respond. In this context intuition can be viewed not from the context of the nature of the response (which may be counter intuitive) but rather in the context of the ability to discern where there is dissonance or resonance between verbal and non verbal responses or even an awareness of omission, distortion or movement in behaviour.

6.21 There are other qualities that may also be relevant to mediator effectiveness. The capacity to be patient, positive, persistent\textsuperscript{450} and to be able to ensure that a mediator does not consider their view to be superior to that of participants are all perceived as necessary qualities. There is also an ongoing discussion about how ‘wise’ a mediator needs to be.\textsuperscript{451}

6.22 From the perspective of this research, there are issues about how such qualities can be ‘measured’ using survey research approaches (observational approaches may be more helpful). However, this research suggests that for some participants, these various qualities may not have been present in all the mediators that assisted with their disputes. Additional education and training may assist some mediators to perform more effectively.\textsuperscript{452}

\textsuperscript{446}See K Cloke and J Goldsmith; The Art of Waking People Up; Cultivating Awareness and Authenticity at Work; Jossey-Bass, San Francisco.


\textsuperscript{451}T Sourdin, Alternative Dispute Resolution (3rd Ed, Thomson Reuters, NSW, 2008) p 70 and p 71.

6.23  Fairness may also be enhanced by more effective intake approaches so that disputants understand and are better prepared for mediation processes. In this regard it is clear that many participants have little if any contact with the mediator before a face to face mediation takes place. This may result in participants being unprepared (and less ready to speak and negotiate) and may also mean that disputant expectations of the process are unclear.

6.24  In recent years there has been an increased focus on the importance of intake and preliminary work in mediation and some leading mediators and commentators have expressed the view that intake and preliminary work by mediators is essential – not only because this increases the likelihood that a mediation process will result in the resolution of a dispute but also because this supports participant views regarding participation and fairness.\(^{453}\)

**Access**

6.25  Many of the issues relating to access to mediation processes are linked to broader access to justice issues and the costs of litigation. However, it is notable that the Supreme Court mediation program that uses Masters as mediators is specifically oriented towards removing cost barriers for litigants who may otherwise have difficulty in accessing mediation services. The State Government’s 2008 budget initiatives, which include $3.7 million for judge-led mediation pilots for the Supreme and County Courts may provide opportunity for the County Court to consider these issues more closely.

6.26  The report to the Attorney-General Office of Master, Costs Office\(^{454}\) described the proceedings of mediations conducted by Supreme Court Masters. The Issues Paper identified a number of advantages to using Masters as mediators:

- ‘masters are neutral facilitators, removing potential disputes over choice of mediator;
- masters are able to give binding directions to the parties and to finally resolve aspects of the dispute;
- masters can assist litigants with limited funding and potentially reduce costs for litigants;
- court premises can be made available; and

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masters can advise on a range of issues such as the likely trial date, possible costs of trial and what further directions might be needed for trial preparation.\footnote{Crown Counsel Victoria, \textit{Report to the Attorney-General} (Office of Masters, Costs Office, Melbourne, March 2007), p 42, p 18.}

6.27 Some potential disadvantages to using Masters as mediators were also identified. These included:

- ‘mediation is time-consuming and resource-intensive, although the resources used in a successful mediations may off-set the cost of additional trial resources, and result in the Court functioning more efficiently; and
- masters are not physically able to mediate all cases before the Court so that it is necessary to prioritise mediation referrals to ensure the best use of the Court’s resources (particularly in terms of maximising the off-set advantages), and the most equitable allocation of Court resources to litigants.’\footnote{Crown Counsel Victoria, \textit{Report to the Attorney-General} (Office of Masters, Costs Office, Melbourne, March 2007) at Q11 p 19.}

6.28 The Issues Paper outlined the reservations held by the Victorian Bar and the Law Institute of Victoria about the use of Supreme Court Masters for mediation. Specifically, the Victorian Bar considered that mediations were ‘inconsistent with masters’ responsibilities and functions’\footnote{Crown Counsel Victoria, \textit{Report to the Attorney-General} (Office of Masters, Costs Office, Melbourne, March 2007) p 42, p 18.} and potentially delayed the operational proceedings of the Court. The Victorian Bar also expressed a concern over Master conducted mediations breaching principles of apprehended bias. The Law Institute of Victoria expressed similar concerns as the Victorian Bar in terms of the cost-effectiveness and fairness of Master-conducted mediations.\footnote{Crown Counsel Victoria, \textit{Report to the Attorney-General} (Office of Masters, Costs Office, Melbourne, March 2007) at Q11 p19.} It also stressed the importance of the ability of parties to choose their own mediator.

6.29 It may be that as noted in Chapter 2, Judicial mediation processes will require the development of clear protocols to address some of the concerns raised. In addition, continuing evaluation of these processes is essential.

**Efficiency**

6.30 As previously noted, greater efficiency in terms of cost and time savings could be supported by case management approaches (including earlier referral. There are also other matters that could be explored to enhance efficiency. At, the end of the mediator survey, mediators were asked for any comments about improving mediation processes or systems. Their suggestions emerged as six different themes that were mainly oriented towards improving efficiency, including:

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\footnote{Crown Counsel Victoria, \textit{Report to the Attorney-General} (Office of Masters, Costs Office, Melbourne, March 2007), p 42, p 18.}
1) improving the understanding of parties and lawyers about their role in mediation
2) conducting intake sessions
3) having mediations earlier in the Court case
4) procedural issues
5) record keeping
6) improving mediations relating specifically to personal injury matters. In this regard, most mediators were of the view that in the personal injury area, matters were really not being mediated. What was usually occurring was an abbreviated evaluative conference process rather than a process that had any of the characteristics of a mediation.

6.31 Each of these suggestions are broadly consistent with the recommendations made in this Report.

**TABLE 6.3: MEDIATORS’ SUGGESTIONS FOR IMPROVEMENT**

<table>
<thead>
<tr>
<th>Themes</th>
<th>Suggestions for improvement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Improve understanding of mediation protocol</td>
<td>‘Better education of parties that it is their mediation not the lawyers’</td>
</tr>
<tr>
<td></td>
<td>‘Educating the lawyers more regarding the process’</td>
</tr>
<tr>
<td>Improving timing and contact</td>
<td>‘Early contact with parties / practitioners prior to mediation’</td>
</tr>
<tr>
<td></td>
<td>‘Should occur earlier in court process (as in VCAT)’</td>
</tr>
<tr>
<td>Appropriateness of mediation for civil cases</td>
<td>‘Civil mediation is structurally predisposed to the parties meeting in the middle even in weak or strong cases’</td>
</tr>
<tr>
<td>Procedural issues</td>
<td>‘It is important that the decision maker is present’</td>
</tr>
<tr>
<td></td>
<td>‘Ensure mediation is booked for a FULL day’</td>
</tr>
<tr>
<td>Record keeping</td>
<td>‘Supreme Court should have a mediation outcome document which mediator can complete and file’</td>
</tr>
<tr>
<td>Improving Personal Injury mediation processes</td>
<td>‘Mediation process uses slightly different technique in Personal Injury matters, could always be better’</td>
</tr>
</tbody>
</table>

6.32 The research findings suggest that mediation outcomes were often regarded as effective and durable. However, perceptions about effectiveness were influenced by timeliness as well as process quality and perceptions about the role of representatives in mediation.
Future Issues – Measuring Mediation

6.33 The VLRC report indicated that there is a lack of empirical information on the effectiveness of Victorian Court ordered mediation.\(^{469}\) The VLRC indicated that in Victoria, mediators are obliged to file a mediation report with the Magistrates’ Court, in a specified form.\(^{469}\) Similar provisions exist in the higher Courts of NSW. Provisions of the NSW Civil Procedure legislation also require that the plaintiff, following mediation, gives ‘Joint Protocol Evaluation Information,’ consisting of detailed and specific information, to the Principal Registrar.\(^{461}\) It is clear from this study that many mediators (perhaps up to 50%) did not report back to the County or Supreme Courts when they conducted a mediation and that even if they did report back, the existing reporting form contains little useful information in terms of enhancing quality into the future.

6.34 More comprehensive reports, such as those required by the Victorian Magistrates Court and the NSW Courts, would enable the County and Supreme Courts to access more accurate data on ADR for the purposes of ongoing monitoring, reporting and evaluation. The Supreme and County Courts rules require the mediator, if so requested by the Court, to report as to whether the mediation has been completed.\(^{462}\) However, the VLRC has noted that at present, reports are not always filed with the Court, even where the mediator is ordered to do so, making it difficult for the Courts to obtain accurate data about the mediation.\(^{465}\) The research findings confirm that this is the reality.

6.35 In light of the VLRC proposals, the Law Institute of Victoria recently agreed that parties to Court referred mediation should be required to submit reports at the conclusion of any ADR process. It noted that these reports ‘could provide useful evaluation of both the mediation process and mediator’.\(^{464}\) It also suggested that based on these reports, it would be important that Courts release regular analytical summaries of de identified information, ‘which would benefit all participants in the process’.\(^{465}\)

6.36 Other organisations, such as Telstra and the Mental Health Legal Centre, had different responses to the VLRC proposal, suggesting that such reports should be either voluntary or anonymous. 466

6.37 The VLRC also recommended that reports by parties could also be used to identify possible improvements in the Court system. 467 It noted that requiring the parties to assess the ADR practitioner in a ‘party’ report will allow the Court to ‘monitor the quality of the ADR practitioners providing services’. 468 In addition, it suggested that a new Civil Justice Council could be responsible for conducting empirical analyses into the effectiveness of ADR. 469

6.38 Clearly, there are different information needs that need to be met that require different evaluative approaches. For regular and ongoing monitoring, reports as to outcomes and other matters by mediators are essential. For evaluation purposes, surveying of litigants, parties and mediators on a semi regular basis is required (see below). For deeper research (on a review basis, say every five years) much more comprehensive data analysis and reporting is required which can address more complex issues such as those relating to compliance with outcomes through the use of longitudinal studies.

**Regular monitoring – Incorporating measurement of mediation into ICMS**

6.39 In terms of the Courts accessing more useful information for regular and ongoing monitoring, the researchers met with designers and representatives from the team assigned with the task of designing and implementing the Integrated Courts Management System (ICMS).

6.40 The ICMS program is intended to deliver a standard courts case management system for all jurisdictions. It has a case management component (‘CourtView’) that integrates major court systems and requirements including case and financial management, docketing, scheduling, forms and notices, and also can provide reports on cases at all stages of the litigation process. Other key components include a suite of eServices for legal practitioners and other users of the legal system, modern court-conferencing and other court technologies that enable electronic viewing (‘Smart-Courts’ Program), an online advertising system for

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probate, and a judicial officers information network (JOIN).\textsuperscript{176} The ICMS representatives indicated that there is little data that cannot be collected, with the obvious caveat that the data must be collected through some type of form and entered into the system. The ICMS representatives advised that the specific requirements would need to be analysed, as some changes to the system may be required to enable it to store the proposed data.

6.41 The ICMS team suggested that online forms are the most effective method to collect data and that a version of the mediation reporting sheet could be provided online. This approach would reduce the amount of double handling and the possibility of data entry errors.

6.42 However, online login and data entry was not an option favoured by mediators interviewed in the focus groups, who considered that there was a ‘generational gap’\textsuperscript{177} between current technological advances and the work culture of many mediators. They indicated a clear preference for paper-based data collection. In addition, many external mediators may operate in a range of environments and having on line reporting requirements would mean that passcodes and security access information for a number of systems would need to be obtained and updated.

6.43 It may be that mediators should have the option of providing information through a paper-based approach, as well as an email response form and an online logon process. This approach provides the opportunity to evolve to an online or email system of data collection without requiring movement to an on line process (which would require passcodes etc) and could result in less reporting by mediators.

**Three necessary stages of data collection**

6.44 ICMS representatives advised that it would be possible to include all collected information as part of a data warehouse and this would enable efficient reporting of mediation outcomes. The major obstacle remains the accurate collection of this information. The research has suggested that there are three major stages where data can be collected:

**Stage 1: Initial case lodgement**

6.45 At initial case lodgement it is possible to collect some information regarding case history. This assists in providing data regarding the history of negotiation attempts and past ADR process use. In the County Court, information could be collected through the request to enter a list form and in the Supreme Court another form may need to be created.

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\textsuperscript{177} Comment made in lawyers’ focus group (conducted at Australian Centre for Peace and Conflict Studies, Friday 11 July 2008).
6.46 At initial case lodgement, court staff can use the information provided regarding case history to link the current case to a previous case, presumably to any in any jurisdiction (for example, a case from VCAT can be linked to an appeal case etc). At this stage it would also be possible to enter data relating to dispute age. As this research has shown, referring ‘younger disputes’ to earlier mediation may be of particular benefit.

6.47 Additional demographic information could also be sought at the initial case lodgement stage and this may assist Courts to monitor trends and access issues.

**Stage 2: Case referred to mediation**

6.48 Information needs to be collected more effectively through a mediation reporting form in both the Supreme and County Courts. The form needs to be revised and a more effective method of ensuring its return is required. The data must also be consistently recorded. It is recommended that the ‘mediation reporting form’ at the Supreme and County Courts is as far as practicable check box based (see below). It is possible that on a regular basis, Courts could require mediators to furnish additional material that can assist with evaluation, such as their views about the reasons why a mediation did not result in the resolution of a dispute. Such reasons could be listed so that the individual completing the form could simply check the appropriate box.

6.49 While the information collected through the mediation reporting form is important, it is imperative that a method for the timely completion and submission of the form be created and that every time a mediation occurs, one of these forms is submitted.

6.50 Another issue is how the material should be reported by the Courts. In this regard, Courts need to generate regular three monthly reports both for internal management processes and to report back to mediators, through an electronic newsletter about the results of the monitoring process. This type of regular reporting may also encourage greater compliance by mediators in terms of the submission of mediation reporting forms.

**Options for ensuring the timely return of the ‘mediation reporting form’**

6.51 There are three possible options for the ensuring the timely and accurate return of the ‘mediation reporting form’.

1. The current method continues and the mediator is responsible for the timely and accurate completion of the form. This has proved unsatisfactory to date. However mediators could be educated and encouraged to return the forms. The Courts could also report in their monitoring process reports which mediators have returned forms. This may encourage reluctant mediators to report more frequently.
2. The mediator remains responsible for the return of the form but it becomes a more clearly articulated mandatory requirement. The Supreme and County Courts could keep a list of accredited mediators and require mediators, by Rule change, to ensure accurate and timely returning of the form.

3. The plaintiff is responsible for the returning the form. This is the case presently in the NSW Supreme Court. Practice Notes could be issued detailing the procedure that should be followed. If mediation is successful, this fact could also be incorporated into a revised Notice of Discontinuance Form. One option suggested was that it might be possible to ensure the return of the form by the inclusion of a bond in the initial fee charged for submission that can be refunded when the form is submitted. However, it is noted that this approach could be costly from an administrative perspective.

6.52 If responsibility for returning the outcome of the mediation form is made compulsory for the plaintiff then the information at the end of the current Mediation Decision Sheet regarding the estimation of trial duration, number of witnesses should remain on the form.

6.53 Option 2 (above) is the preferred option as it allows additional information to be collected from the mediator (see below).

Stage 3: Notice of Discontinuance

6.54 Clearly information regarding the frequency of agreements is dependent on the prompt return and accurate completion of a mediation reporting form. If a case is withdrawn, it is also necessary to collect information concerning the reasons for withdrawal, especially if mediation has been ordered, but the case is discontinued before a mediation has taken place (as the ordering of the mediation may have prompted settlement discussions).

6.55 As noted above, in both the Supreme Court and the County Court, the ‘Notice of Discontinuance’ could be modified to collect information about the reasons for discontinuance. It may also be possible to redesign the form so that the Notice of Discontinuance includes information regarding the processes used to reach this outcome.

**Recommendations regarding the measurement of mediation – Monitoring and ongoing evaluation**

6.56 In addition to the redesign of Court forms such as the Notice of Discontinuance and the earlier collection of ‘trigger data’ (that can assist Courts to make earlier referrals), it is considered that Court Rules should be amended requiring all mediators in Court-related actions to lodge a report with the Courts as follows:
extensive ran
report on an
Mediators should
has been made.
a referral order
enhanced into the
the s
mediators and to
made available to
ICMS reporting
subject of regular
should be the
information
reporting. Such
and ‘good faith’
case outcomes
information about
matters which
be amended to issue
an alert when a
mediator’s report
has not been
forthcoming after
a referral order
has been made.

Recommendation:
The ICMS system
should be
Mediators should
report on an
extensive range of
matters which
could include
information about
case outcomes
and ‘good faith’
reporting. Such
information
should be the
subject of regular
ICMS reporting
and should be
disclosed and
made available to
mediators and to
the Courts so that
the system can be
enhanced into the
future.

Recommendation:
The ICMS system
should be
amended to issue
an alert when a
mediator’s report
has not been
forthcoming after
a referral order
has been made.

a) Name and number of the case as registered with the court.
b) Plaintiff’s name(s) and legal representative(s) names.
c) Defendant’s name(s) and the legal representative(s) names.
d) Brief description of the subject matter of the dispute.
e) Date that matter was referred to ADR.
f) Name of the ADR practitioner.
g) Date and location of ADR session, adjournments and the
number of sessions.
h) Information as to the outcome of the dispute. In this regard,
ideally where the session resulted in an agreement, a copy of the
signed agreement with the original signatures of the senior
party representatives and the ADR practitioner.
i) Where the session did not result in a partial or total agreement,
the mediator should be required to check a box as to whether, in
the mediators view, one or other of the parties or their
representatives did not negotiate in good faith and to indicate
which party or practitioner did not negotiate in good faith. In
terms of this assessment the practitioner may be required to
consider matters such as the following:

1) Whether a party or a representative acted in a hostile,
rude or unhelpful manner in the context of negotiations
(bearing in mind that it is likely that the parties may
have strong emotions about a dispute);

2) Whether a party or their representative or some other
person undermined the process, for example, by
adopting adversarial cross examination or bullying
techniques or by preventing a party from expressing
their views;

3) Whether one or other party or their representatives did
not show a willingness to consider options for the
resolution of the dispute that were put forward by the
opposing party;

4) Whether there was a willingness to give consideration to
putting forward options for the resolution of the dispute.

6.57 It is clear that items (h) and (i) (above) are the most contentious of
these recommendations. In view of these matters, further consultation
regarding each of these recommendations is essential.

6.58 Recommendation (h), for example, may require Rule changes
regarding confidentiality and general file access; and, item (i) is also
contentious as mediators may fear that they will be required to ‘assess’ and
‘judge’ attitudes and behaviours (which may be regarded as incompatible
with the mediator’s role). Mediators may also be concerned that they could be required to give evidence about matters relating to good faith requirements in a Court.

6.59 These are serious concerns that require further consultation before these recommendations are implemented. In addition, it may well be that safeguards can be put in place that may give mediators, parties and representatives some comfort. For example, where a mediator reports that a party or representative has not acted in ‘good faith’, the file could be automatically referred to a Master (in the Supreme Court) or an allocated Judge in the County Court (who would have no further dealings with the matter other than in relation to ADR) so that decisions could be made about whether it was appropriate to refer a matter to another mediation or ADR process (where a good faith issue arose).

6.60 In addition, where good faith issues have been raised, a Court officer may make or defer a costs decision (in respect of the ADR session) or defer a costs decision until the matter had been dealt with finally.

6.61 It could be also be made clear that mediators would not be required to give any evidence about what had led to the formation of their views regarding good faith and that this would be a matter for a separate Judicial Officer to inquire into and determine without referring or requiring any input from a mediator.

6.62 These recommendations differ from those of the VLRC in relation to litigant and representative obligations. However, it is considered that the suggested approach would provide additional support to mediators and provide a mechanism which would encourage more effective negotiations. The ‘good faith’ approach would also be consistent with many other jurisdictions and developing case law.

**Enhancing quality and promoting a quality culture**

6.63 As noted previously, reporting and measuring mediation will require more effort than gathering data that can be used for ongoing monitoring and reporting. Regular surveying, perhaps for a period of one month per year is necessary to ensure that ongoing evaluation takes place. This surveying would involve gathering more information about perceptions from participants, representatives and other stakeholders and preferably using some of the same survey questions used in this research.

Planning research reviews every five years (or more frequently) to ensure that more complex criteria are assessed (including criteria relating to cost, compliance and access) is essential in all dispute systems.
6.68 Mentoring and occasional co-mediation processes which support sharing information about good practice can assist to enhance a quality culture by supporting and promoting skills transfer within the sector. They can also be considered part of ongoing professional development and supervision. Mediation is an evolving field in which innovative and varied ways of dealing with conflict and improving models and practice are being explored.

6.69 Mentoring and the exchange of expertise provide ways for the skills and knowledge involved in new models of practice to be disseminated, as well as providing a mechanism for expanding existing competencies. Mentoring can be an ongoing process that encourages and rewards cross fertilisation in ideas and practice by a variety of mechanisms, and could extend to practitioners across the sector.

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6.70 Mentoring may be particularly beneficial for regional and sole mediation practitioners who may not work within an existing mentoring organisational structure and who may not access the same level of ongoing professional education as some other practitioners. Non aligned practitioners could, for example, be required to be part of a mentoring program that involves linking in or even co mediating with either Court based mediators or those in funded agencies (such as Dispute Settlement Centre Victoria) or even through co-mediation arrangements and requirements set up by professional associations such as the Victorian Bar and the Law Institute of Victoria.

Quality forum

6.71 The establishment of a regular quality forum for non aligned practitioners as well as practitioners within Courts may also be another way of enhancing practice and ensuring that practices are relevant and appropriate. A quality forum could involve either a physical forum or an internet based forum (or both). A quality forum may enable ideas about practice, feedback mechanisms and developments in mediation practice to be exchanged.

6.72 However, the issues relating to isolated and even disinterested practitioners may continue to raise issues and concerns about quality. Another alternative may be to require practitioner attendance at a quality forum every two to three years, together with the establishment of a web site that supports the quality forum process. For example, this could involve identified question and answer sessions as well as reporting on the ongoing monitoring processes.

Training strategy and planning

6.73 Ongoing education, keeping skills up to date, and being informed about current practice developments are widely regarded as maintaining and improving practitioner competence, and therefore being in the best interests of consumers. Requirements in these areas have been recognised in the NMAS Approval Standards that have set a ‘low’ hurdle requirement.

6.74 However, arguably in order for ongoing training and education services to be delivered effectively it may be appropriate for the Courts, the Department and mediators to articulate core values and goals in the mediation area beyond the basic competencies that exist in the NMAS Practice Standards. For example, goals could include assisting disputants in some areas to move through a conflict resolution process with minimum
emotional and economic stress. Additional articulated goals can then be linked to education strategies that can be directed at representatives, litigants, Court staff and others to ensure that referral to mediation takes place at an appropriate time.

6.75 Another issue in ongoing training and education relates to how feedback is articulated into any training priority areas. There may need to be additional processes that enable client feedback and stakeholder input to inform mediator professional development and training. In addition, it has been said that it is the combination of practical experience and application, with theoretical knowledge, that facilitates a continuous approach to professional development. This is the approach recommended by NADRAC as best enhancing practitioner competence and quality.

6.76 This may mean that Courts or the Department of Justice need to do more in this area and support mediator development by ensuring that mediators understand the inputs received from stakeholders and disputants. Courts could, for example, publish regular e-newsletters for mediators that provide information about trends and innovations.

6.77 Courts and the Department may also wish to consider how their existing linkages with the Victorian Judicial College (VJC) can assist to raise judicial awareness and competencies (in terms of referral) and how any internal mediators can be supported. The VJC may also be able to assist with training and education strategies. In this regard notably VCAT mediators are now able to access a jointly conducted program in this area. It may be that such programs can be considered for the broader external mediator population or at least linked to professional programs.

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Quality practice profiling and recognition

6.78 Another approach that could be directed as enhancing quality involves rewarding those who demonstrate high quality practice. Many organisations reward ‘excellence’ in identified areas. The establishment of quality awards could assist to foster and enhance improvements and excellence in practice. Quality award or recognition mechanisms may also encourage the development of effective feedback mechanisms as well as promoting innovative approaches to conflict.

6.79 Courts also need to establish clear policies in this area in association with the Department of Justice that are directed at establishing a quality culture rather than a compliance culture. A policy context that not only promotes minimum standards, but also encourages, recognises and rewards continuous improvement and best practice is arguably more likely to create a quality culture.

6.80 Recently, some commentators who have considered conflict resolution approaches have supported the need for continuing feedback approaches and the desirability of sound complaint management processes (to deal with complaints about dispute resolution and management processes).  

6.81 In the Australian context, NADRAC has also considered that provision for client feedback and complaints is an essential part of a quality system, and recommended it forms part of any code of practice in the alternative dispute resolution field. However, having an effective complaints handling system will not necessarily enhance quality. It may assist to support the provision of satisfactory mediation services but may do little to enhance or improve processes beyond a ‘basic’ level.

6.82 In terms of complaints however, where these involve an external mediator, these are ordinarily dealt with by the professional organisations. Courts may wish to seek more information (perhaps of a generic nature) from professional bodies about the number and patterns of any complaints about mediators (in respect of court-related mediations) and how they have been resolved.

Taking the Next Steps

6.83 Processes used to enhance quality will necessarily need to be developed slowly across the sector. Ideally, mediators (as has been the case

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41 National Alternative Dispute Resolution Council (NADRAC), A Framework for ADR Standards (Attorney-General’s Department, Canberra, 2001) p 63 and p 73, Recommendation 3.
in other sectors such as the family area) will also be involved in developing strategies and indicating how these can be fostered by the Courts and the Department.

6.84 Existing quality framework approaches can also assist to design an iterative approach to improving quality within the Courts. The central components of a quality framework include a number of strategies that can be grouped as follows:

**Quality enhancement – Involvement and commitment:**
- Innovation and recognition schemes
- Mentoring and expertise exchange
- Policy and practice frameworks.

**Quality practice profiling and recognition:**
- Quality forums
- Training strategies for mediators, users, court staff and others.

**Participation and feedback – collecting and interpreting information:**
- Consumer satisfaction survey
- Capturing and retaining knowledge
- Complaints management liaison and feedback
- Data information and management – mediators and courts.

**Quality assurance and standards monitoring – assessment tools:**
- Internal self assessment of service quality
- External assessment of service quality
- Review mechanisms.

6.85 The Courts and the Department of Justice could consider how and when various quality components could be introduced so that the quality of mediation processes is enhanced into the future.

6.86 Victoria has a rich tradition in the area of mediation and is regarded as a leader within Australia and internationally in relation to the use of mediation. This role has been achieved as a result of the strong commitment of government, mediation practitioners and the Courts and has led to the provision of many high quality mediation services.

6.87 In order for that leadership role to be maintained and enhanced, it is essential that mediation continues to grow and develop in ways that meet the needs of disputants. This research has suggested that the existing programs can be further enhanced to ensure that the needs of the Victorian community can continue to be met and supported into the future. This will require the professions and the Courts to re-examine their service provision and relationships and will also require Courts, the professions and litigants to actively consider mediation referral at earlier stages in litigation.
Appendices

Appendix A: Selected References

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**Appendices**

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T Sourdin, *Dispute Resolution Processes for Credit Consumers* (La Trobe University, Melbourne, 2007).


# Appendix B: Project Team

<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal Research, design, coordination and writing</td>
<td>Professor Tania Sourdin</td>
</tr>
<tr>
<td>Project management, and senior research and statistical data analysis</td>
<td>Dr Nikola Balvin</td>
</tr>
<tr>
<td>Research support</td>
<td>Naomi Cukier</td>
</tr>
<tr>
<td>Court file and data collection</td>
<td>Alex Azarov</td>
</tr>
<tr>
<td></td>
<td>Deborah Macfarlane</td>
</tr>
<tr>
<td></td>
<td>Lauren Freeman</td>
</tr>
<tr>
<td>Expert statistical advice</td>
<td>Jeromy Anglim</td>
</tr>
<tr>
<td>ICMS liaison and data commentary</td>
<td>Andrew Vincent</td>
</tr>
<tr>
<td>Administrative support</td>
<td>Sandra Padova</td>
</tr>
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</table>
# Appendix C: Project Advisory Committee

## Members of the Advisory Committee

<table>
<thead>
<tr>
<th>Name</th>
<th>Organisation</th>
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<tbody>
<tr>
<td>Justice Bell</td>
<td>Advisory Committee Chair, Supreme Court of Victoria</td>
</tr>
<tr>
<td>Sara Law</td>
<td>Associate to Justice Bell, Supreme Court of Victoria</td>
</tr>
<tr>
<td>Judge Davis</td>
<td>County Court of Victoria</td>
</tr>
<tr>
<td>Joel Harris</td>
<td>Associate to Judge Davis, County Court of Victoria</td>
</tr>
<tr>
<td>Louis Schetzer</td>
<td>Former Manager, Research, Civil Law Policy, Department of Justice</td>
</tr>
<tr>
<td>Chris Humphreys</td>
<td>Civil Law Policy, Department of Justice</td>
</tr>
<tr>
<td>Jo Metcalf</td>
<td>Courts and Tribunals Unit, Department of Justice</td>
</tr>
<tr>
<td>Ruth Andrew</td>
<td>Courts and Tribunals Unit, Department of Justice</td>
</tr>
<tr>
<td>Jacinta Morphett</td>
<td>ADR Strategy, Department of Justice</td>
</tr>
<tr>
<td>Paul Myers</td>
<td>ADR Strategy, Department of Justice</td>
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<tr>
<td>George Golvan QC</td>
<td>Victorian Bar Council</td>
</tr>
<tr>
<td>Ian Lulham</td>
<td>Law Institute of Victoria</td>
</tr>
<tr>
<td>Irene Chrisafis</td>
<td>Law Institute of Victoria</td>
</tr>
</tbody>
</table>
Appendix D: County Court Standard Mediation Procedures

Standard Mediation Procedures

1. The standard order made by the court is:

   By [nominated date], the Parties must have completed the mediation of the dispute.

2. This order is in “short form”. Ordinarily the following procedures are to be understood as encompassed by the “short form” order:

   a. The mediation is to be conducted pursuant to Rule 50.07.

   b. The proceedings are referred to a Mediator to be appointed by agreement between the parties, failing such agreement to a Mediator appointed by the Court.

   c. The mediation must be held on or before the specified date.

   d. The Mediator must before proceeding, inform all parties of the amount of the fees to be charged in respect of the Mediation. The fees, as agreed, shall be paid equally by the parties and the Mediator may decline to proceed until the whole of the fees are paid.

   e. The parties’ solicitors must take all necessary steps to ensure that the mediation commences on the date and time nominated.

   f. The plaintiff’s solicitors must deliver a copy of all relevant pleadings to the Mediator.

   g. Those persons who have the ultimate responsibility and authority for deciding whether to settle the dispute and the terms of any settlement and the lawyers who have the ultimate responsibility to advise the parties in relation to the dispute and its settlement must attend the Mediation.

   h. In the event that the proceeding settles at or after mediation the plaintiff must notify the Court of the settlement prior to the trial date.

   i. Subject to the direction of the trial judge, in the event that the mediation fails to settle the dispute, the costs of the Mediation shall be costs in the cause.

   j. The Mediator must within 7 days from the date of mediation complete the “Notice of Mediation Result” and file it with the Court.
Appendix E: Court File Data Collection Instrument
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<td>initials</td>
<td></td>
</tr>
<tr>
<td>2 Date coded</td>
<td>dd-mm-yy</td>
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<td></td>
<td></td>
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<td>use code</td>
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</table>

| 33 What other processes were used in this case? |
| circle all relevant |

| 34 Was the matter mediated? |
| 1=yes / 2=no / 3=don't know |

| 35 Did the Court or the parties refer the matter to mediation? |
| 1=Court / 2=parties / 3=don't know |

<table>
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| 37 What was the date of mediation? |
| dd-mm-yy |

| 38 Did all the parties attend mediation? |
| 1=yes / 2=no |

| 39 Was the matter mediated internally or externally? |
| 1=internally / 2=externally |

| 40 What was the outcome of mediation? |
| use code |

| 41 Detail ALL the court events listed. Write in date, type and duration of each |
| 1) dd-mm-yy |
| type (code use) |

| 2) dd-mm-yy |
| type (code use) |

| 3) dd-mm-yy |
| type (code use) |

| 4) dd-mm-yy |
| type (code use) |

| 5) dd-mm-yy |
| type (code use) |

| 42 If a final hearing was attended, what was the duration? |
| hours/minutes |

| 43 Were the proceedings dismissed by consent? |
| 1=yes / 2=no / 3=don't know |

| Case disposition: settlement/mediation/hearing |
| dd-mm-yy |

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Appendix F: Disputant Survey
Section 1: Your dispute

1. Overall, how satisfied were you with the way the system operated for your dispute? (Please circle the corresponding number)
   - Very dissatisfied 1
   - Dissatisfied 2
   - Satisfied 3
   - Very satisfied 4

2. Overall, how satisfied were/are you with the following:
   - 1 = very dissatisfied (VD)
   - 2 = dissatisfied (D)
   - 3 = satisfied (S)
   - 4 = very satisfied (VS)

<table>
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<th>Outcome at the time of resolution</th>
<th>VD</th>
<th>D</th>
<th>S</th>
<th>VS</th>
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<td>The outcome now</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
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</table>

3. When did the problem that the dispute was/is about take place?
   Write date (Month/ Year) _____/_____

4. How long do you think this matter took in the Court system?
   - 3 months or less 1
   - 3 - 6 months 2
   - 6 - 12 months 3
   - 1 - 2 years 4
   - 2 - 3 years 5
   - 3 years or more 6

5. How much of your personal time have you spent on resolving this dispute since this matter was started in court?
   - Less than a day 1
   - About a day 2
   - 2 to 3 days 3
   - 1 - 2 week 4
   - 3 - 4 weeks 5
   - More that 4 weeks 6

6. Overall, did the dispute take more or less time to be resolved than you expected?
   - More time than expected 1
   - Less time than expected 2
   - About as much time as expected 3
   - Not yet finalised Go to 15 4

7. How was your dispute finalised? (Circle all that apply)
   - At a conference 1
   - At a case conference in Court 2
   - By negotiation 3
   - At a mediation 4
   - At a hearing/trial 5
   - Other, (please specify): 6

Section 2: Your experience of the process that finalised your dispute

Note that the following questions relate to the process used to finalise your dispute. If your dispute has not been finalised, go to Q.15.

8. Was the process used to finalise your dispute:
   - Very formal 1
   - Somewhat formal 2
   - Somewhat informal 3
   - Very informal 4

9. Would you have preferred if it was:
   - More formal 1
   - Less formal 2
   - The level of formality was right 3

10. How well do you feel you understood what was going on during the process?
    - Not at all 1
    - Not very well 2
    - Quite well 3
    - Very well 4

11. During the process that was used to finalise your dispute, if a judge or mediator was involved, were both sides treated equally or was one side favoured?
    - Both sides were treated equally 1
    - My side was favoured 2
    - The other side was favoured 3

Appendices
12. How strongly do you agree or disagree with the following statements?
1 = strongly disagree (SD)
2 = disagree (D)
3 = agree (A)
4 = strongly agree (SA)

<table>
<thead>
<tr>
<th>SD</th>
<th>D</th>
<th>A</th>
<th>SA</th>
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<tbody>
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<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The process assisted in resolving the dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>I was able to participate during the process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The process was fair</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>I felt I had control during the process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>I would have liked to participate more during the process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>I felt I had control over the outcome of my dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>I felt pressured to settle my dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>There was enough time to present/discuss all necessary information</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>I felt comfortable during the process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>I felt I was treated with respect during the process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The process was affordable</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>I understood the outcome of the process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The agreed outcomes have lasted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

13. Overall, how satisfied were you with the following?
1 = very dissatisfied (VD)
2 = dissatisfied (D)
3 = satisfied (S)
4 = very satisfied (VS)

<table>
<thead>
<tr>
<th>VD</th>
<th>D</th>
<th>S</th>
<th>VS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The process that finalised your dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>How the process was handled</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The time it took to deal with your dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The outcome of your dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The way the process met your needs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The time it took to resolve your dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>If you got any money, the amount of money you got</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

14. What impact did the process have on your relationship with the person/organisation you were disputing with?
It improved 1
It remained about the same 2
It got worse 3

15. Circle all of the processes used to try to finalise your case:
A conference 1
A case conference in Court 2
Negotiation 3
Mediation 4
Trial/hearing 5
Other, (please specify): 6

16. Did you try to resolve the dispute before it was filed in a Court?
Yes 1
No Go to 18 2

17. Why was the case filed in a Court? (Circle all that apply)
I was advised to do this 1
The other side wouldn’t give me what I wanted 2
The other side was not prepared to settle 3
The other side was taking too long 4
The other side filed the case 5
There was more than one party on the other side 6
It was the result of a previous injury case 7
Other (please specify) 8

18. Was the procedure that ultimately resolved your case public (e.g. a hearing in a courtroom) or private (e.g. a mediation or conference)?
The procedure was public 1
The procedure was private 2
Case not finalised Go to 25 3

19. How satisfied were you with this (i.e. the procedure being private/ public)?
Very dissatisfied 1
Dissatisfied 2
Satisfied 3
Very satisfied 4

Appendices 199
20. If you prefer a private procedure, is it because a private procedure: (Circle all that apply)

<table>
<thead>
<tr>
<th>Reason</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ensures the case is a personal affair</td>
<td>1</td>
</tr>
<tr>
<td>Saves embarrassment</td>
<td>2</td>
</tr>
<tr>
<td>Is less intimidating</td>
<td>3</td>
</tr>
<tr>
<td>Is fairer</td>
<td>4</td>
</tr>
<tr>
<td>Is cheaper</td>
<td>5</td>
</tr>
<tr>
<td>Produces a better outcome</td>
<td>6</td>
</tr>
<tr>
<td>Other (please specify):</td>
<td>7</td>
</tr>
</tbody>
</table>

21. If you prefer a public procedure, is it because a public procedure: (Circle all that apply):

<table>
<thead>
<tr>
<th>Reason</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ensures the case is a personal affair</td>
<td>1</td>
</tr>
<tr>
<td>Saves embarrassment</td>
<td>2</td>
</tr>
<tr>
<td>Is less intimidating</td>
<td>3</td>
</tr>
<tr>
<td>Is fairer</td>
<td>4</td>
</tr>
<tr>
<td>Is cheaper</td>
<td>5</td>
</tr>
<tr>
<td>Produces a better outcome</td>
<td>6</td>
</tr>
<tr>
<td>Other (please specify):</td>
<td>7</td>
</tr>
</tbody>
</table>

22. Before you were involved in the process used to finalise your dispute, what did you think your chances of success were? Did you think you had:

<table>
<thead>
<tr>
<th>Chance Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>A small chance</td>
<td>1</td>
</tr>
<tr>
<td>A fair chance</td>
<td>2</td>
</tr>
<tr>
<td>A possible range of outcomes</td>
<td>3</td>
</tr>
<tr>
<td>I did not know</td>
<td>4</td>
</tr>
<tr>
<td>There was a near certainty that I would win</td>
<td>5</td>
</tr>
<tr>
<td>No chance</td>
<td>6</td>
</tr>
</tbody>
</table>

23. In the end, was the outcome of your dispute:

<table>
<thead>
<tr>
<th>Outcome Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Better than you expected</td>
<td>1</td>
</tr>
<tr>
<td>Worse than you expected</td>
<td>2</td>
</tr>
<tr>
<td>About the same as you expected</td>
<td>3</td>
</tr>
</tbody>
</table>

24. In the end, who do you believe was successful?

<table>
<thead>
<tr>
<th>Party</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>You</td>
<td>1</td>
</tr>
<tr>
<td>The other side</td>
<td>2</td>
</tr>
<tr>
<td>Both sides</td>
<td>3</td>
</tr>
<tr>
<td>No-one</td>
<td>4</td>
</tr>
</tbody>
</table>

25. Did you experience any procedural difficulties in trying to resolve your dispute? If yes, what were they? (Circle all that apply)

<table>
<thead>
<tr>
<th>Difficulty Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>No difficulties experienced</td>
<td>1</td>
</tr>
<tr>
<td>Costs were too high</td>
<td>2</td>
</tr>
<tr>
<td>The process overall took too long</td>
<td>3</td>
</tr>
<tr>
<td>The location of the mediation/hearing etc. was inconvenient</td>
<td>4</td>
</tr>
<tr>
<td>The time of the mediation/hearing etc. was inconvenient</td>
<td>5</td>
</tr>
<tr>
<td>Difficulty getting legal advice</td>
<td>6</td>
</tr>
<tr>
<td>Other (specify below):</td>
<td>7</td>
</tr>
</tbody>
</table>

26. Did you have to spend time waiting for your dispute to be dealt with? That is, did you wait for a judge or mediator to become available on the day(s) your matter was to be dealt with?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>1</td>
</tr>
<tr>
<td>No Go to 28</td>
<td>2</td>
</tr>
</tbody>
</table>

27. How long did you wait for a hearing, conference or mediation?

<table>
<thead>
<tr>
<th>Time Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hours: __________ Minutes: __________</td>
<td></td>
</tr>
</tbody>
</table>

28. If your case was finalised by mediation or at trial, how long did the process take?

<table>
<thead>
<tr>
<th>Time Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Days: __________ Hours: __________ Minutes: __________</td>
<td></td>
</tr>
</tbody>
</table>

29. Did you attend more than one mediation session?

<table>
<thead>
<tr>
<th>Answer</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>1</td>
</tr>
<tr>
<td>No</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Time Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>If yes, how many sessions were held?</td>
<td></td>
</tr>
</tbody>
</table>

30. If you settled your dispute how much do you think you saved in legal costs?

<table>
<thead>
<tr>
<th>Amount</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ __________</td>
<td></td>
</tr>
</tbody>
</table>

31. Can you indicate how much has been spent on the following during the dispute:

<table>
<thead>
<tr>
<th>Category</th>
<th>Amount</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional fees</td>
<td>$ __________</td>
<td></td>
</tr>
<tr>
<td>Disbursements</td>
<td>$ __________</td>
<td></td>
</tr>
<tr>
<td>Other costs</td>
<td>$ __________</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Time Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional fees</td>
<td></td>
</tr>
<tr>
<td>Disbursements</td>
<td></td>
</tr>
<tr>
<td>Other costs</td>
<td></td>
</tr>
</tbody>
</table>

Appendices
32. Do you have any further comments about the resolution of your dispute?
No 1
Yes What are they? 2

33. Have you ever been involved in a legal action before this one?
No 1
Yes What was it about? 2

Section 4: About you
These questions are optional. However, we would appreciate your answers as they enable us to understand who accesses courts and assist with future resource planning.
We confirm that all information collected in this research will be de-identified and kept confidential.

34. Are you:
Male 1
Female 2
A company or organisation 3
A solicitor with an organisation 4

35. What is your age?
Under 18 1
18-30 2
31-40 3
41-50 4
51-65 5
Over 65 6

36. Is English your first language?
Yes 1
No (what is your first language?) 2

37. What is your highest grade of education?
School certificate (Fourth form/Year 10) 1
Higher school certificate (Sixth form/Year 12) 2
TAFE qualifications 3
College/University bachelor degree 4
College/University postgraduate degree 5
Other (please specify) 6

38. What was your occupation at the time the dispute arose?
Agriculture, forestry & fishing 1
Mining 2
Electricity, gas, water & waste services 3
Construction & manufacturing 4
Wholesale & retail trade 5
Accommodation & food services 6
Transport, postal & warehousing 7
Information media & telecommunications 8
Financial & insurance services 9
Rental, hiring & real estate services 10
Professional, scientific & technical services 11
Administrative & support services 12
Public administration & safety 13
Education & training 14
Health care & social assistance 15
Arts & recreation services 16
Home duties & retired 17
Other (specify): 18

39. In which of the following ranges was your personal gross (before tax) income at the time the dispute arose?
nil-20,799 1
$20,800 – 41,599 2
$41,600 - 67,599 3
$67,600 – 103,999 4
$104,000 or more 5

40. What is your postcode? ________________________

41. If you attended a mediation for this matter, what was the name of your mediator?
Mediator’s name: _______________________________________
Mediator contact details (if known): ________________________

42. We are looking to explore some of these issues in more detail in focus groups. These focus groups will take place in Melbourne CBD in May/June. Would you be interested in participating in a focus group? If yes, what phone number may we contact you on and at what time? (Providing your phone number does not mean you commit yourself to participating)
Phone No: ________________________________________
Convenient time to call: ________________________

43. Do you wish to receive the final report via email? If yes, please provide your email address:

THANK YOU FOR YOUR TIME.
Appendix G: Mediator Survey
This survey is seeking information about what occurred in a mediation which we believe you mediated (see the top of the mediation letter for details). All information will be de-identified and analysed in aggregated format.

Thank you for taking the time to complete this survey.

Part A
Please answer this section about the ABOVE specified mediation only

1. Was another mediation held in this matter before this mediation?
   No 1
   Don’t know 2
   Yes 3
   If yes, how many?

2. Who conducted the intake for this session? Circle any that apply.
   I conducted the intake 1
   Another mediator conducted the intake 2
   Someone else conducted the intake. Please specify ____________________________
   No intake was conducted 4

3. Did you hold a pre-mediation session? Yes 1
   No 2
   If no, why not? Go to 8

4. Was the pre-mediation session conducted by phone, email or face-to-face (or a combination)? Circle any that apply.
   Phone 1
   Email 2
   Face-to-face 3

5. What was discussed at the pre-mediation session? Circle any that apply.
   Authority to settle 1
   The agreement 2
   Empowerment 3
   Role of mediator 4
   Opening statements 5
   Other (please specify) 6

6. Did the same parties attend at the pre-mediation conference as at the mediation?
   Yes 1
   No 2

7. Who did not attend the pre-mediation conference? Circle all that apply.
   The parties 1
   Counsel 2
   Solicitors 3
   Other (please specify) 4

8. Were all parties represented? Yes 1
   No 2
   If no, which party was not represented? Go to 11

9. To what extent were you satisfied with the lawyer and/or client preparation for the mediation?
   Very dissatisfied 1
   Dissatisfied 2
   Satisfied 3
   Very satisfied 4

10. Did the legal representatives or the parties make the opening statements?
    The legal representatives 1
    The parties 2
    Both 3
11. Was there anyone else at the mediation apart from legal representatives and parties? Circle all that apply.
- Experts 1
- Family members 2
- Witnesses 3
- Other (please specify) 4

12. Did you use a whiteboard or butcher’s paper to summarise issues or for some other purpose? Circle all that apply.
- Used a whiteboard 1
- Used butcher’s paper 2
- Did not use either 3

13. Did you consider whether the parties understood the mediation process before the session began? Circle all that apply.
- Yes 1
- No 2

14. Did you hold private sessions? Circle all that apply.
- Yes 1
- No Go to 17 2

15. Can you identify when private sessions were held? If so, was it (circle all that apply):
- After the opening statements 1
- After some clarification had taken place 2
- After issues had been explored 3
- After an impasse had been reached 4
- At some other time (please specify) 5

16. If you held private sessions, why did you do so? Circle all that apply.
- To reality test 1
- To explore BATNAs 2
- To discuss issues 3
- Open sessions were no longer productive 4
- To explore options 5
- To explore something that had been said in the joint session 6
- One party was very emotional 7
- Comments:

17. Did a listing of issues/topics/common ground/an agenda take place? Circle all that apply.
- Yes 1
- No 2

18. What issues were noted?

19. Did you have a chance to debrief following the mediation? Circle all that apply.
- Yes 1
- No 2
If yes, who did you debrief with?

20. Did you express any view to the parties as to the likely outcome if the matter was litigated? Circle all that apply.
- Yes 1
- No 2

21. Has this dispute been finalised? Circle all that apply.
- Yes Go to 23 1
- No 2

22. If the dispute was not finalised, why do you think this was the case? Circle all that apply.
- One or more parties could not get instructions 1
- One or more parties would not negotiate 2
- One or more parties were unreasonable 3
- The parties were too far apart 4
- One or more parties were not well advised 5
- Expert evidence was needed 6
- One party wanted a precedent 7
- One or other party did not act in good faith 8
- Other reasons or comments:

Comments:
Mediator survey – Mediation and other processes in the Supreme and County Courts, Victoria

23. If the dispute has been finalised, was the outcome fair?
   Yes 1
   No 2
   I would rather not say 3
   I have not formed a view - Please explain. 4

24. If the matter was not finalised, were issues narrowed as a result of the mediation process?
   Yes 1
   No 2

25. Do you think the mediation process helped to save the parties costs?
   Yes 1
   No 2

26. If you think the process saved costs, can you estimate the cost saving for all parties?
   Write estimated amount $....................

27. How strongly do you agree or disagree with the following statements?
   1 = strongly disagree (SD)
   2 = disagree (D)
   3 = agree (A)
   4 = strongly agree (SA)

   SD D A SA
   The mediation assisted in resolving the dispute 1 2 3 4
   The mediation helped to define the issues 1 2 3 4
   The mediation was not helpful in resolving the issues 1 2 3 4
   The mediation reached outcomes which were lasting 1 2 3 4

28. Overall, how satisfied do you think the parties were with the outcomes?
   Very dissatisfied 1
   Dissatisfied 2
   Satisfied 3
   Very satisfied 4

29. If you were to mediate another dispute like this one, would you do anything differently?
   Yes 1
   No Go to 31 2

30. What would you do differently? Write below

31. What is your previous mediation experience?
   Indicate approximate number of mediations conducted and other relevant experience, e.g. experience in conciliation.

32. When did you first start mediating?
   Write year: ______________

33. Do you have any comments about improving mediation processes or systems?

34. We are seeking to explore some of these questions in more detail in focus groups. These will take place in Melbourne CBD in May/June. Would you be interested in participating in a focus group? (Circling yes does not mean you commit yourself to participating)
   Yes 1
   No Go to 36 2

35. If yes, what phone number may we contact you on and at what time?
   Phone no: _____________________________
   Convenient time for call:____________________

36. Do you wish to receive the final report via email? If yes, please provide your email address:

Thank you for your time

Part B

Appendices
Appendix H1: Focus Group Questions – Disputants

Estimated session time: 90 mins
Brief introduction to research by researcher/ focus group facilitator
Participant Information form read: Y/N
Consent form signed: Y/N

Warm up questions
1. Please tell us briefly about your dispute and what processes you used?
2. What process was used to finalise your dispute?

Accessibility
3. Did you experience any barriers to resolving your dispute? For example, cost, time it took, location, option of mediation. What were they?
4. What could the Court do differently in the future to help people overcome such barriers?
5. Did you feel you understood the dispute resolution process and what was going on at the time?
6. What could have been done differently to improve your understanding of what was going on?
7. Did you feel you understood the outcome? Why/ Why not?

Fairness
8. Did you find the dispute resolution process fair? Why/why not?
9. What could be done differently to make the process more fair?
10. Did you find the dispute outcome fair? Why/Why not?
11. What could have been done differently to make the outcome more fair?

Efficiency
12. Was the outcome acceptable to you? Why/ why not?
13. Has the outcome achieved through the process been lasting? Why/ Why not?

Mediation:
Please describe the mediation in more detail? Who attended? How long did it take? At what stage were private sessions held?
(Discussion of any other issues arising from focus group)
Final questions

14. Do you have any other concerns or suggestions for improvement you would like to raise?

15. What is the main thing that needs improvement?
Appendix H2: Focus Group Questions – Mediators

Brief introduction to research by focus group facilitator
Participant Information form read:  Y/N
Consent form signed:        Y/N
These questions relate to mediations involving Supreme or County Court disputes only.

Warm up question

1. How often do you conduct mediations involving Supreme or County Court disputes (also referred to as Court-connected mediations)?

Efficiency

2. What could be done to make the process of Court-connected mediation more efficient?

3. In cases where parties choose to go to Court following a mediation, do you feel the mediation assists them in defining and understanding the issues? Does it assist them in being procedurally prepared? Why/ why not?

Accessibility

4. What barriers have you experienced in providing mediations involving Supreme and County Court disputes? Specifically in relation to costs, location, time etc.

5. What can be done differently to overcome these barriers?

6. Are there aspects of mediation that parties commonly don’t understand?

Fairness

7. Is the process of mediations of County and Supreme Court disputes fair? Why/Why not?

8. What can be done to increase fairness?

9. Are there certain types of currently referred litigants or disputes that you feel are inappropriate for mediation?

Mediation

10. What are the greatest barriers to mediating?

11. At what stage are private sessions held?

12. Do you provide advice to the parties?

(and any other issues arising out of discussion)
Other issues

13. What is your opinion of JDR?

14. If ICMS required you to complete an online form, would you use it?

15. Do you have any other concerns or suggestions for improvement you would like to raise?
Appendix H3: Focus Group Questions – Lawyers

Brief introduction to research by focus group facilitator
Participant Information form read: Y/N
Consent form signed: Y/N
These questions relate to mediations involving Supreme or County Court disputes only.

Warm up questions
1. How often do you attend mediations involving Supreme or County Court disputes (also referred to as Court-connected mediations)?
2. Please describe the process of mediations in your area. Who attends? Who speaks? Are matters usually finalised?

Accessibility
3. Do your clients have access to ADR processes in your area? What processes? If not, what difficulties do they encounter?
4. What barriers have you experienced with dispute resolution processes used by the Supreme and County Courts? Specifically in relation to costs, location, time etc.
5. What can be done to improve accessibility to Court dispute resolution processes?

Efficiency
6. How does mediation compare to some of the other dispute resolution processes, such as litigation and negotiation? What are the advantages and disadvantages?
7. What process promotes lasting outcomes? Why?

Fairness
8. Was the mediation process of disputes from the Supreme or County Court fair? Why/Why not?
9. What can be done to increase fairness?
10. Are there certain types of currently referred litigants or disputes that you feel are inappropriate for mediation?
(And any other issues arising from discussion)

Final questions
11. What is your opinion of JDR?
12. Do you have any other concerns or suggestions for improvement you would like to raise?
13. What is the main aspect that needs improvement?
Appendix I: How is the process delivered?
– Information for the Supreme and County Courts on all dispute resolution processes

Appendix I outlines additional information about the reviewed Supreme and County Court cases that is not directly related to mediation, but may be of interest to stakeholders. All information in Appendix I is based on the Court file sample.

Court-file data collection

As detailed in the methodology section, the researchers collected information from 243 Supreme Court files finalised between 1 February 08 and 30 April 08 and 310 County Court files finalised between 1 February and 11 April 08. The sampled period for the Supreme Court was slightly longer as the Supreme Court tends to process fewer cases than the County Court and the researchers needed a sufficiently large sample. The analysis in the next section is based on information collected from these court files.

Case details

Information was collected from each Court file to gain understanding about the proportion and type of cases that went to mediation, the timing of mediation within case processing, the length and complexity of mediated disputes, party details and whether a dispute was resolved at mediation or via another process. It is important to note that the data reported in this section is limited by information available in Court files.

For example, if a matter was mediated, but no record of mediation appeared on the Court file, the researchers would have no way of knowing that the mediation took place unless this was separately reported in the surveys (from which inferential statistical information could be obtained). In some Court files, a County Court ‘mediation decision sheet’ was completed for mediated cases (this form was also often used in the Supreme Court) advising the outcome of mediation. However, in other instances, a letter from a mediator advised that mediation took place with no information about the outcome of the mediation.

The challenges and limitations faced during the data collection process need to be considered when interpreting the results. The survey responses however suggest that in approximately 30 per cent of cases mediations were held, but no information appeared on the Court file indicating that this had occurred (see Appendix K for details).
Case types

The Supreme Court and the County Court of Victoria have specific classification categories for the matters they process. The sample analysed in this research consisted of 54 Supreme Court dispute type categories and 45 County Court dispute type categories depicted in Table I.1 and I.2. County Court List types are also outlined in Table I.3. To make the review of case types easier, these matters were aggregated into 10 dispute type categories presented in Table I.4. The most common dispute type in both courts fell into the ‘damages’ category, but this was considerably higher in the County Court than in the Supreme Court (County Court=81 per cent; Supreme Court=44 per cent).

### Table I.1 – Civil Dispute Types Included in This Research That were Finalised in the Supreme Court From 1 Feb 08 – 30 Apr 08

<table>
<thead>
<tr>
<th>Type of Matter</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accident Compensation Act</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Appeal: decision of Magistrates’ Court – Civil</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Appeal: Decision of Magistrates’ Court</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Appeals from Tribunals</td>
<td>6</td>
<td>2.5</td>
</tr>
<tr>
<td>Commercial Arbitration Act</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Damages P.I. Cause – Negligence</td>
<td>8</td>
<td>3.3</td>
</tr>
<tr>
<td>Damages P.I. Jury – Negligence</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Damages P.I. – Cause Motor Vehicle</td>
<td>5</td>
<td>2.1</td>
</tr>
<tr>
<td>Damages P.I. – Cause, Ind (Asbestos)</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Damages P.I. – Jury, Ind. (Gen)</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Damages P. I. – Jury Motor Vehicle</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Damages P.I. – Jury, Ind. (Gen)</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Damages P.I. – Jury, Ind (Asbestos)</td>
<td>32</td>
<td>13.2</td>
</tr>
<tr>
<td>Damages P.I. – Jury, Wrongs Act</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Damages – Cause: Negligence (General)</td>
<td>5</td>
<td>2.1</td>
</tr>
<tr>
<td>Damages – Cause: Breach of Contract</td>
<td>22</td>
<td>9.1</td>
</tr>
<tr>
<td>Damages – Cause: Breach of Duty</td>
<td>5</td>
<td>2.1</td>
</tr>
<tr>
<td>Damages – Cause: Defamation/Libel</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Damages – Cause: Other</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Damages – Cause: Professional Negligence</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Damages – Jury: Negligence (General)</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Damages – Jury: Breach contract</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Damages – Jury: Breach of Duty</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Damages – Jury: Defamation/Libel</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Debt – Cause: Writ or Writ of Summons</td>
<td>16</td>
<td>6.6</td>
</tr>
<tr>
<td>Declaration – Cause: Writ or Writ of Summons</td>
<td>31</td>
<td>12.8</td>
</tr>
</tbody>
</table>
## MEDIATION IN THE SUPREME AND COUNTY COURTS OF VICTORIA

<table>
<thead>
<tr>
<th>Type of Matter</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indemnity – Cause: Writ or Writ of Summons</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td>Judicial Review – Civil</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Legal Prof. Prac. Act: Other</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Partnership Dispute – Cause: Writ or Writ of Summons</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Possession of land – Cause: O.53 O/Motion</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Possession of Land – Cause: Writ or Writ of Summons</td>
<td>19</td>
<td>7.8</td>
</tr>
<tr>
<td>Probate: Other</td>
<td>5</td>
<td>2.1</td>
</tr>
<tr>
<td>Probate-Part IV. Cause O:16 Chll-O/Motion</td>
<td>19</td>
<td>7.4</td>
</tr>
<tr>
<td>Property Law Act</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Property Law Act – Defacto – Writ</td>
<td>10</td>
<td>4.1</td>
</tr>
<tr>
<td>Property Law Act – Other – O/Motion</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Property Law Act – Other – Writ</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Property Law Act – Other – Writ</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Register of Probates</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Review: Administrative Law Act</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Set aside Stat Demand</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Specific Performance</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Transfer from Magistrates’ Court – Cause</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Transfer of Land</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Transport Act</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Trustee Act</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Damages P.I. Cause Ind (Gen)</td>
<td>5</td>
<td>2.1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>243</td>
<td>100</td>
</tr>
</tbody>
</table>
TABLE I.2– CIVIL DISPUTE TYPES INCLUDED IN THIS RESEARCH THAT WERE FINALISED IN THE COUNTY COURT FROM 1 FEB 08 – 11 APR 08

<table>
<thead>
<tr>
<th>Type of Matter</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application S134AB Accident Comp</td>
<td>24</td>
<td>7.7</td>
</tr>
<tr>
<td>Application S93 Transport Accident</td>
<td>12</td>
<td>3.9</td>
</tr>
<tr>
<td>B&amp;C Industry Sec of Payments</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Breach of Agreement</td>
<td>52</td>
<td>16.8</td>
</tr>
<tr>
<td>Corporations Law</td>
<td>1</td>
<td>.3</td>
</tr>
<tr>
<td>Damages – Other than death or PI</td>
<td>15</td>
<td>4.8</td>
</tr>
<tr>
<td>Defamation</td>
<td>1</td>
<td>.3</td>
</tr>
<tr>
<td>Disability Claim Rejection</td>
<td>3</td>
<td>1.0</td>
</tr>
<tr>
<td>Domestic Partners Property</td>
<td>25</td>
<td>8.1</td>
</tr>
<tr>
<td>Negligence</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
<td>3.5</td>
</tr>
<tr>
<td>Other Property Damage</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Part IV Admin. &amp; Probate Act</td>
<td>5</td>
<td>1.6</td>
</tr>
<tr>
<td>Personal injury – Assault</td>
<td>4</td>
<td>1.3</td>
</tr>
<tr>
<td>Personal injury – Dog bite</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Personal injury – Public liability</td>
<td>27</td>
<td>8.7</td>
</tr>
<tr>
<td>Personal injury - Slipping</td>
<td>12</td>
<td>3.9</td>
</tr>
<tr>
<td>Personal injury – Other</td>
<td>5</td>
<td>1.6</td>
</tr>
<tr>
<td>Personal injury – Industrial accident</td>
<td>25</td>
<td>8.1</td>
</tr>
<tr>
<td>Personal injury – Medical negligence</td>
<td>18</td>
<td>5.8</td>
</tr>
<tr>
<td>Personal injury – Motor car accident</td>
<td>19</td>
<td>6.1</td>
</tr>
<tr>
<td>Personal injury – Product liability</td>
<td>1</td>
<td>.3</td>
</tr>
<tr>
<td>Personal injury – School accident</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Personal injury – Sexual assault</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Professional negligence</td>
<td>4</td>
<td>1.3</td>
</tr>
<tr>
<td>Recover possession of land</td>
<td>4</td>
<td>1.3</td>
</tr>
<tr>
<td>S138 Accident Compensation Act – Indemnity</td>
<td>12</td>
<td>3.9</td>
</tr>
<tr>
<td>Taxation</td>
<td>9</td>
<td>2.9</td>
</tr>
<tr>
<td>Work &amp; labour done</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Workcover – S92</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Workcover – S93 weekly payments</td>
<td>5</td>
<td>1.6</td>
</tr>
<tr>
<td>Total</td>
<td>310</td>
<td>100</td>
</tr>
</tbody>
</table>
TABLE I.3 – COUNTY COURT MATTERS BY LIST TYPE (CIVIL MATTERS FINALISED 1 FEB 08 – 11 APR 08)

<table>
<thead>
<tr>
<th>List Type</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Building List – Building Cases</td>
<td>6</td>
<td>1.9</td>
</tr>
<tr>
<td>Business List – Commercial Division</td>
<td>41</td>
<td>13.2</td>
</tr>
<tr>
<td>Business List – Miscellaneous</td>
<td>42</td>
<td>13.5</td>
</tr>
<tr>
<td>Commercial List Pilot</td>
<td>19</td>
<td>6.1</td>
</tr>
<tr>
<td>Damages List – Applic Division</td>
<td>5</td>
<td>1.6</td>
</tr>
<tr>
<td>Damages List – Defamation Division</td>
<td>1</td>
<td>.3</td>
</tr>
<tr>
<td>Damages List – General Division</td>
<td>136</td>
<td>43.9</td>
</tr>
<tr>
<td>Damages List – Medical Division</td>
<td>18</td>
<td>5.8</td>
</tr>
<tr>
<td>Damages List – Serious Injury</td>
<td>16</td>
<td>5.2</td>
</tr>
<tr>
<td>WorkCover – s134AB</td>
<td>19</td>
<td>6.1</td>
</tr>
<tr>
<td>WorkCover List</td>
<td>7</td>
<td>2.3</td>
</tr>
<tr>
<td>Total</td>
<td>310</td>
<td>100</td>
</tr>
</tbody>
</table>

Table I.4 outlines the categories summarised in this research in aggregate format and also shows the percentage of matters in each category that were mediated.

TABLE I.4: AGGREGATE SUPREME AND COUNTY COURT DISPUTES ANALYSED IN THIS STUDY

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Supreme Court – all matters</th>
<th>Supreme Court – mediated matters</th>
<th>County Court – all matters</th>
<th>County Court – mediated matters</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Appeal</td>
<td>15</td>
<td>6.2</td>
<td>1</td>
<td>1.2</td>
</tr>
<tr>
<td>Damages</td>
<td>107</td>
<td>44.0</td>
<td>38</td>
<td>46.9</td>
</tr>
<tr>
<td>Debt</td>
<td>17</td>
<td>7.0</td>
<td>4</td>
<td>4.9</td>
</tr>
<tr>
<td>Declaration</td>
<td>31</td>
<td>12.8</td>
<td>19</td>
<td>23.5</td>
</tr>
<tr>
<td>Estate/Probate</td>
<td>1</td>
<td>0.4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Land</td>
<td>49</td>
<td>20.2</td>
<td>9</td>
<td>11.1</td>
</tr>
<tr>
<td>Order</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
<td>4.1</td>
<td>4</td>
<td>4.9</td>
</tr>
<tr>
<td>Property</td>
<td>13</td>
<td>5.3</td>
<td>6</td>
<td>7.4</td>
</tr>
<tr>
<td>WorkCover</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Total</td>
<td>243</td>
<td>100</td>
<td>81</td>
<td>100</td>
</tr>
</tbody>
</table>
Court Clients

Overall file sample
The file sample included 625 plaintiffs and 921 defendants. Most cases had only one plaintiff (91 per cent) and one defendant (61 per cent), and many disputes had more than one defendant. Specifically, 8 per cent of cases had two plaintiffs, while 25 per cent of cases had two defendants and 8 per cent of cases had three defendants. The highest number of plaintiffs per case was 16 and the highest number of defendants per case was 12 (this happened on two occasions).

Plaintiffs
The County Court matters were more likely to have only one plaintiff (93 per cent) than the Supreme Court (88 per cent), while the Supreme Court matters were more likely to have two or more plaintiffs (12 per cent) than the County Court (7 per cent).

Defendants
Figure I.1 outlines the differences in the number of defendants in cases in the two jurisdictions. The County Court tended to have only one defendant on more occasions (66 per cent) than the Supreme Court (54 per cent), while the Supreme Court was more likely to have four or more defendants per case (8 per cent) than the County Court (4 per cent). These differences were statistically significant. The emerging pattern for party numbers is that the Supreme Court is more likely to deal with multi-party disputes than the County Court (number of parties is also a measure of complexity – this is discussed in other parts of this Report).

1 \( (\chi^2(1) = 4.24, p=.04) \)
2 \( (\chi^2(3) = 10.16, p=.017) \)
FIGURE I.1: NUMBER OF DEFENDANTS IN SUPREME AND COUNTY COURT CASES

Companies vs. individuals
Most plaintiffs in the file sample were individuals (74 per cent), while most defendants were organisations (59 per cent). The Supreme Court had more plaintiffs that were organisation (32 per cent) than the County Court (21 per cent).\(^3\) Interestingly, the County Court had a higher proportion of defendants that were organizations (62 per cent) than the Supreme Court (54 per cent).\(^4\) These differences are depicted in figure I.2 below.

FIGURE I.2: TYPES OF DISPUTANTS

---

\(^3\) This difference was statistically significant \((\chi^2(1) = 9.03, p=.003)\)

\(^4\) This difference approached statistical significance \((\chi^2(1) = 3.65, p>.05)\)
Dispute Age

Dispute age at originating motion

Disputes that were finalised at the County Court tended to be of a more ‘long standing’ duration than those finalised at the Supreme Court. In the County Court, the median time between the date the cause of action arose and the date of originating motion or writ was 1,000 days. This means that it usually took approximately 2.7 years from the time the matter arose to the time proceedings were commenced and filed in the County Court. The shortest dispute duration between cause of action and originating motion was 2 days, while the longest dispute length duration (prior to commencing proceedings) was 7,609 days (20.8 years).

The longest standing dispute in the Supreme Court sample lasted 53.5 years before an originating motion was filed. This dispute was however uncharacteristically long and removed from further analysis. The shortest dispute was 3 days old when an originating process was filed. The median age of disputed matters at the time the matter was filed in the Supreme Court was 312 days (0.9 years). At the time the originating motion was filed, disputes at the County Court were significantly older than disputes at the Supreme Court.

How long did it take to finalise the dispute once it had been commenced within the Court?

Time between originating process and defence

In both jurisdictions, a defence was filed in 72 per cent of the examined cases. The median number of days from the date the matter was filed in Court to the filing of a defence was 56 days in the Supreme Court and the same number of days (56) in the County Court.

Time between originating process and setting a trial date

In the Supreme Court, the median number of days between when the case was filed in Court and the first time a judge set a trial date was 374 days, while in the County Court this process took much less time, with a trial set 95 (median) days after the originating

---

5 (M=1150.31; SD=1032.2; 5% Trimmed Mean=1052.53; Median=1000)
6 (M=689.71; SD=843.81; 5% Trimmed Mean=587.04; Median=311.50)
7 (t(504)=5.46, p=.00)
8 Figure does not include appeal and transfer cases.
9 (n=176; M=97.01; SD=165.88; Median=55.5)
10 (n=222; M=104.27; SD=155.31; Median=56.0)
11 (n=62; M=408.50; SD=260.50; Median=374.0)
12 (n=201; M=174.90; SD=234.00; Median=95.0)
process. This difference was statistically significant, indicating that the County Court tends to set a trial date earlier in the process than the Supreme Court and is probably related to the complexity of the cases considered (which may mean that evidence is assembled more slowly) as well as other factors including Court workload.

**Time between originating process and trial**

Despite the variations noted above, the difference in the two jurisdictions in the number of days from the originating process to the date the actual trial commenced was not statistically significant. In the Supreme Court, the median number of days between the case being filed in Court and the trial was 447 days. In the County Court it was 316 days. Although the County Court set its first trial date much earlier than the Supreme Court, there was not as much difference between the jurisdictions in terms of when a trial actually took place. This suggests there is a different approach to case management, but less of a difference in terms of how long it actually takes to bring a matter to trial.

**Time from trial to case disposition**

The median number of days between the commencement of the final hearing and the date a case was considered ‘finalised’ was 3.5 days in the Supreme Court and 0 days in the County Court. This suggests slightly faster processing in the County Court than the Supreme Court following trial. However, this difference was not statistically significant.

**Time from originating motion to case disposition**

Finally, the median case age (time from originating process to case disposition) at the Supreme Court was 426 days (1.1 years), and in the County Court it was 341 days. This difference was statistically significant, suggesting that matters in the Supreme Court take significantly longer to finalise than in the County Court. The results are summarised in Table I.5.

---

13 \( (t(93)=-6.32, p=.00) \)
14 \( (t(68)=.223, p>.05) \)
15 \( (n=31; M=414.55; SD=248.23; Median=447.0) \)
16 \( (n=39; M=431.05; SD=347.03; Median=316.0) \)
17 \( (n=30; M=80.37; SD=208.45; Minimum=0; Maximum=919;Median=3.5) \)
18 \( (n=39; M=39.72; SD=93.37;Median=0.0) \)
19 \( (t(67)=-1.08, p>.05) \)
20 \( (n=243; M=557.84; SD=508.11;Median=426.00) \)
21 \( (n=310; M=437.88; SD=353.86;Median=341.00) \)
22 \( (t(414)=-3.13,p=.002) \)

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TABLE I.5: DISPUTE AGE AND LENGTH OF DISPUTE PROCESSING – SUMMARY OF RESULTS

<table>
<thead>
<tr>
<th>Dispute age at time originating proceedings were filed</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Significantly different?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median (days)</td>
<td>312</td>
<td>1000</td>
<td>Y**</td>
</tr>
<tr>
<td>Time between originating process filing date and defence filing</td>
<td>56</td>
<td>56</td>
<td>-</td>
</tr>
<tr>
<td>Time between originating process and setting of trial date</td>
<td>374</td>
<td>95</td>
<td>Y**</td>
</tr>
<tr>
<td>Time from originating process to mediation</td>
<td>324</td>
<td>260</td>
<td>N</td>
</tr>
<tr>
<td>Dispute age at mediation</td>
<td>971</td>
<td>1437</td>
<td>Y*</td>
</tr>
<tr>
<td>Time from originating process to trial</td>
<td>447</td>
<td>316</td>
<td>N</td>
</tr>
<tr>
<td>Time from final mediation to case disposition</td>
<td>177</td>
<td>23</td>
<td>Y**</td>
</tr>
<tr>
<td>Time between judgement delivered and administrative case disposition</td>
<td>3.5</td>
<td>0\textsuperscript{24}</td>
<td>N</td>
</tr>
<tr>
<td>Case age</td>
<td>426</td>
<td>341</td>
<td>Y**</td>
</tr>
</tbody>
</table>

*\(p<.05\), **\(p<.001\).

What was claimed?

Supreme Court

The number of claims made and claim amount can also add to the complexity of a Court case.\textsuperscript{25} Table I.6 outlines the claim information for the 243 Supreme Court cases analysed in this research. Plaintiff claim information was usually available from the Originating proceedings, while defendant claim information and the terms of settlement were often not available.

This was mainly due to a small percentage of defendants filing a counterclaim (10.7 per cent) and the small number of cases that were settled at hearing (8.6 per cent) (information on cases settled prior to that time was often not available from court files). The information in Table I.6 is organised as follows:

- \(n\) = the number of plaintiffs/defendants that sought the various remedies. The number provided in the ‘\(n\)’ column signifies the

---

\textsuperscript{23} Results for ‘dispute age at mediation’, ‘case age at mediation’ and ‘final mediation to case disposition’ are presented in Chapter 2.

\textsuperscript{24} This indicates that cases in the County Court that had a judgement delivered tended to be disposed of (“finalizing date” in electronic system) on the same day.

number of cases coded as ‘yes’ for the particular variable (i.e. ‘yes’ the party was seeking that remedy).

- % = indicates the percentage of sample represented by ‘n’. That is, how many plaintiffs/defendants in the overall sample made this type of claim.

Median amount = indicates the median amount of money claimed for each category (median rather than average figures are used to avoid the influence of extreme values). Unfortunately, the information on claim amount was not always available and in many cases where damages, costs etc. were sought, the Writ or Originating Motion did not specify the amount that was claimed. Therefore, the information in the ‘Median amount’ column is not necessarily based on all the cases indicated in the ‘n’ column.

The information indicates that categories in the ‘other’ category, such as interest, orders and declarations were sought the most (68.7 per cent) by plaintiffs. Damages were the second most sought category (54.7 per cent), followed by costs (29.2 per cent), past economic loss (23.9 per cent) and future economic loss (15.2 per cent).

Information on total awards was mostly available for information relating to costs (37.4 per cent of cases), with ‘no order as to costs’ being the most frequent outcome for this category (19.8 per cent).
### TABLE 1.6: SUPREME COURT CLAIMS AND TERMS OF SETTLEMENT

<table>
<thead>
<tr>
<th>Claim Type</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Total Award</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>Median amount $</td>
</tr>
<tr>
<td>Damages</td>
<td>133</td>
<td>54.7</td>
<td>346,229&lt;sup&gt;22&lt;/sup&gt;</td>
</tr>
<tr>
<td>Past Economic Loss</td>
<td>58</td>
<td>23.9</td>
<td>102,703&lt;sup&gt;30&lt;/sup&gt;</td>
</tr>
<tr>
<td>Future Economic Loss</td>
<td>37</td>
<td>15.2</td>
<td>127,899&lt;sup&gt;32&lt;/sup&gt;</td>
</tr>
<tr>
<td>Costs</td>
<td>71</td>
<td>29.2</td>
<td>1,322&lt;sup&gt;33&lt;/sup&gt;</td>
</tr>
<tr>
<td>Indemnity</td>
<td>10</td>
<td>4.1</td>
<td>-</td>
</tr>
<tr>
<td>Party/party</td>
<td>57</td>
<td>23.5</td>
<td>-</td>
</tr>
<tr>
<td>Each party pays own costs</td>
<td>1</td>
<td>0.4</td>
<td>-</td>
</tr>
<tr>
<td>Legal costs</td>
<td>2</td>
<td>0.4</td>
<td>-</td>
</tr>
<tr>
<td>No order as to costs</td>
<td>1</td>
<td>0.8</td>
<td>-</td>
</tr>
<tr>
<td>Other&lt;sup&gt;35&lt;/sup&gt;</td>
<td>167</td>
<td>68.7</td>
<td>54,200&lt;sup&gt;36&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>20</sup> Indicates the percentage of sample making this claim.
<sup>21</sup> \((n=50; M=702641.56; SD=931640.44; Median=346228.75; Min=25496; Max=4892998)\). Please note that amounts were not specified for all claims of damages, past economic loss etc.
<sup>22</sup> \((n=4; M=40791.03; SD=29452.02; Median=41575.9; Minimum=4950; Maximum=75062.3)\) The median value for defendants’ damages is based on only 4 cases and the median value of defendants’ past economic loss is based on only 2 cases and is therefore not representative of the larger sample. Unfortunately, claim amount information was not available for most of these variables during data collection.
<sup>23</sup> \((n=7; M=123824.43; SD=106039.19; Median=101000; Minimum=10771; Maximum=300000)\)
<sup>24</sup> \((n=6; M=5547.48; SD=1895.7; Median=1895.7; Min=300; Max=25000)\)

The number and percentage for ‘other’ \((n=167, \%=68.7)\) indicates the number and percentage of cases that made ‘other’ claims. The subcategories for ‘other’ indicate how many times these types of claims were sought across and within cases. Many parties sought several ‘other’ claims (i.e. one person may have made a claim for interest, declarations and orders) and for this reason the numbers and percentages of the ‘other’ subcategories do not equal 167.
<sup>25</sup> \((n=7; SD=74071.96; M=88428.39; Median=54200; Min=5694; Max=188734)\)
County Court

The County Court claim information in Table I.7 is organised as that for the Supreme Court in Table I.6. In the County Court, damages were the most frequently sought claim category (sought in 64.8 per cent of cases) by plaintiffs, followed by costs (sought in 60.3 per cent of cases) and ‘other’ types of claims (42.6 per cent – this includes orders, declarations, leave from proceedings, interest etc).

29 defendants (9.4 per cent) in the County Court filed a counterclaim and unlike for plaintiffs, cost remedies were sought most frequently by defendants (in 11.3 per cent of cases).

Similarly to the Supreme Court, information on total awards was mostly available for information relating to costs, which were mentioned in 47.7 per cent of cases and ‘party/party costs’ (22.3 per cent) as well as ‘no order as to costs’ (21.3 per cent) were the most frequent outcome for this category.
### TABLE I.7: COUNTY COURT CLAIMS AND TERMS OF SETTLEMENT

<table>
<thead>
<tr>
<th>Claim Type</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Total Award</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>Median amount $</td>
</tr>
<tr>
<td>Damages</td>
<td>201</td>
<td>64.8</td>
<td>132,828$^{37}</td>
</tr>
<tr>
<td>Past Economic Loss</td>
<td>108</td>
<td>34.8</td>
<td>80,000$^{40}</td>
</tr>
<tr>
<td>Future Economic Loss</td>
<td>76</td>
<td>24.5</td>
<td>142,500$^{42}</td>
</tr>
<tr>
<td>Costs</td>
<td>187</td>
<td>60.3</td>
<td>1,150$^{43}</td>
</tr>
<tr>
<td>Indemnity</td>
<td>15</td>
<td>4.8</td>
<td>-</td>
</tr>
<tr>
<td>Party/party</td>
<td>48</td>
<td>15.5</td>
<td>-</td>
</tr>
<tr>
<td>Each party pays own costs</td>
<td>1</td>
<td>0.3</td>
<td>-</td>
</tr>
<tr>
<td>Legal costs</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>No order as to costs</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Other</td>
<td>132</td>
<td>42.6</td>
<td>27,483$^{46}</td>
</tr>
</tbody>
</table>

37 \(n=65; M=156792.42; SD=139775.07; Median=132828.4; Minimum=137; Maximum=898519\)
38 \(n=2; M=81013.05; SD=61771.36; Median=81013.05; Minimum=3733; Maximum=124692\)
39 \(n=6; M=108580.42; SD=53281.54; Median=95318; Minimum=500000; Maximum=180000\)
40 \(n=4; M=90455.04; SD=84188.40; Median=90873.32; Minimum=354; Maximum=179720\)
41 \(n=6; M=108580.42; SD=53281.54; Median=95318; Minimum=500000; Maximum=180000\)
42 \(n=18; M=204857; SD=216322; Median=142500; Minimum=18200; Maximum=839457\)
43 \(n=11; M=10414.42; SD=14375.30; Median=1150.20; Minimum=255; Maximum=39986\)
44 \(n=4; M=4233.81; SD=6976; Median=930; Minimum=400; Maximum=14675\)
45 \(n=21; M=6721.15; SD=8231.26; Median=90873.32; Minimum=364; Maximum=179720\)
46 \(n=9; M=216301.86; SD=566660.43; Median=27483 Minimum=750; Maximum=1725000\)
47 \(n=9; M=63516.87; SD=56950.01; Median=662000; Minimum=4000; Maximum=160000\)
Appendix J: Type of Dispute – Detailed Analysis

Appendix J presents additional analyses on case age and dispute age at mediation and mediation outcomes. The cut-off age used in the below analyses is 3 years or less and more that 3 years. These cut-off points are based on analyses conducted by Sourdin and Matruglio in their 2004 evaluation of the New South Wales Settlement Scheme,1 where disputes equal to or less than 3 years old were more likely to resolve at mediation than disputes older than 3 years. However, is this sample 3 years was not the median age and therefore the analysis in Chapter 2 was conducted using a median split. Table J.1 and J.2 are included for comparative purposes with past research only. The differences observed in these tables were not statistically significant.

TABLE J.1: CASE AGE AT MEDIATION BY OUTCOME

<table>
<thead>
<tr>
<th>Case age at mediation</th>
<th>Finalised at mediation</th>
<th>Not finalised at mediation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>&lt;= 3 years</td>
<td>76</td>
<td>95.0</td>
<td>82</td>
</tr>
<tr>
<td>&gt; 3 years</td>
<td>4</td>
<td>5.0</td>
<td>3</td>
</tr>
</tbody>
</table>

This difference was not statistically significant.2

TABLE J.2: DISPUTE AGE AT MEDIATION BY OUTCOME

<table>
<thead>
<tr>
<th>Age of dispute at mediation</th>
<th>Finalised at mediation</th>
<th>Not finalised at mediation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>&lt;= 3 years</td>
<td>38</td>
<td>48.7</td>
<td>34</td>
</tr>
<tr>
<td>&gt; 3 years</td>
<td>40</td>
<td>51.3</td>
<td>50</td>
</tr>
</tbody>
</table>

This difference was not statistically significant.3

1 T Sourdin and T Matruglio, Evaluating Mediation – New South Wales Settlement Scheme 2002 (La Trobe University and the Law Society of New South Wales, Melbourne) at 18.
2 ($\chi^2$(1) = .007, $p > .05$) Continuity correction used for 2x2 table.
3 ($\chi^2$(1) = .804, $p > .05$) Continuity correction used for 2x2 table.
Appendix K: How many ‘dismissed/discontinued’ cases were finalised at mediation?

The court-file sample had 289 cases which were dismissed/discontinued (as coded by the researchers). 151 (52 per cent) of these were from the County Court and 138 (48 per cent) were from the Supreme Court. As previously noted, the researchers coded any case where the outcome was not clearly documented in the Court file as ‘dismissed/discontinued’. The surveying of the sample’s plaintiffs and defendants provided a unique opportunity to find out what proportion of the ‘dismissed/discontinued’ cases were actually finalised at mediation.

To do this, each returned survey was matched with the court-file information (via the abstract code assigned to each case). The results are presented in Table K.1 – there were 33 matches between cases classified as ‘dismissed/discontinued’ in the court-file sample and returned surveys. The results in Table K.1 indicate that a possible 30 per cent of the ‘dismissed/discontinued’ cases were finalised at mediation.

<table>
<thead>
<tr>
<th>Process</th>
<th>Total</th>
<th>Supreme Court</th>
<th>County Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Mediation</td>
<td>10</td>
<td>30.3</td>
<td>21.2</td>
</tr>
<tr>
<td>Negotiation</td>
<td>7</td>
<td>21.2</td>
<td>6.1</td>
</tr>
<tr>
<td>Case-conference in Court</td>
<td>2</td>
<td>6.1</td>
<td>0</td>
</tr>
<tr>
<td>Conference</td>
<td>3</td>
<td>9.1</td>
<td>6.1</td>
</tr>
<tr>
<td>Trial</td>
<td>1</td>
<td>3.0</td>
<td>3.0</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
<td>30.3</td>
<td>15.2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>33</strong></td>
<td><strong>100</strong></td>
<td><strong>51.5</strong></td>
</tr>
</tbody>
</table>

TABLE K.1: ESTIMATES OF ‘DISMISSED/DISCONTINUED’ CASES FINALISED VIA MEDIATION AND OTHER PROCESSES
Appendix L: Accessibility – Court-Client Demographic Information

Appendix L is an extension of the demographic information presented in Chapter 3 and relates to the accessibility of Court services. It presents demographic information collected about Court clients from the Court files, as well as via the written surveys; it is based on 98 completed disputant surveys and 553 reviewed Court files.

The heading of each section indicates whether the reported data is from the Court-file sample or from the survey sample. The information in Appendix L is for all disputants and is not subdivided according to which dispute resolution processes they used. In some cases, only survey data is reported as some information was not available from Court files. Where possible, Court clients are compared to all Victorians using data from the Australian Bureau of Statistics (2006).

Disputant type/gender

Survey respondents

Survey response rates by gender, organisation and solicitor for the Supreme and County Courts are presented in Table L.1. Overall, most survey respondents were male (45 per cent) and the lowest response rate was obtained from solicitors working for an organisation (3 per cent). A higher response rate was achieved in surveys directed at Supreme Court litigants (54 per cent of all survey responses) which is interesting as more County Court parties were mailed a survey (due to the higher number of cases finalised in the County Court during the sample period).

<table>
<thead>
<tr>
<th>Gender/Type of respondent</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Male</td>
<td>24</td>
<td>45.3</td>
<td>20</td>
</tr>
<tr>
<td>Female</td>
<td>20</td>
<td>37.7</td>
<td>15</td>
</tr>
<tr>
<td>Company/Organisation</td>
<td>6</td>
<td>11.3</td>
<td>10</td>
</tr>
<tr>
<td>A solicitor with an organisation</td>
<td>3</td>
<td>5.7</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>53</td>
<td>100</td>
<td>45</td>
</tr>
</tbody>
</table>

Court-file information

Table L.2 outlines the numbers of males, females and organisations in the Supreme Court and County Court samples. The information provided is for all plaintiffs and defendants whose gender and type could be identified from the court files. Males were more likely than females, and individuals (i.e. males and females) were more likely than organisations to access the Court system. Table L.2 also shows that the survey response rate of males
and females is consistent with the smaller overall number of female litigants. However a comparative analysis highlights that companies were underrepresented in the survey response data.

**TABLE L.2: GENDER AND OTHER TYPE OF COURT CLIENTS – COURT-FILE DATA**

<table>
<thead>
<tr>
<th>Gender/Type of client</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Male</td>
<td>233</td>
<td>36.6</td>
<td>217</td>
</tr>
<tr>
<td>Female</td>
<td>125</td>
<td>19.6</td>
<td>152</td>
</tr>
<tr>
<td>Company/ Organisation</td>
<td>279</td>
<td>43.8</td>
<td>335</td>
</tr>
<tr>
<td>Total</td>
<td>637</td>
<td>100</td>
<td>704</td>
</tr>
</tbody>
</table>

**Age**

**Survey respondents**

Most of the survey respondents were 51–65 years old (48 per cent). The smallest proportion of survey respondents were from the 18–30 age-group (7.4 per cent).

**TABLE L.3: AGE OF SURVEY RESPONDENTS – SURVEY DATA**

<table>
<thead>
<tr>
<th>Age group</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>18–30</td>
<td>1</td>
<td>1.9</td>
<td>6</td>
</tr>
<tr>
<td>31–40</td>
<td>4</td>
<td>7.7</td>
<td>4</td>
</tr>
<tr>
<td>41–50</td>
<td>11</td>
<td>21.2</td>
<td>13</td>
</tr>
<tr>
<td>51–65</td>
<td>29</td>
<td>55.8</td>
<td>17</td>
</tr>
<tr>
<td>Over 65</td>
<td>7</td>
<td>13.5</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>52</td>
<td>100</td>
<td>43</td>
</tr>
</tbody>
</table>

**Court-file information**

Age information was collected for plaintiffs 1 and defendants 1 where available. The results are presented in Table L.4 and are similar to that of survey respondents, suggesting that individuals in the 51–65 age-group were most likely to access the court system, while individuals in the 18–30 age-group accessed it the least. This difference was more pronounced in the Supreme Court than the County Court.

---

1 Please note that respondents who responded on behalf of an organisation also provided their age group. Thus, Table L.3 outlines the age group of all respondents who provided it.
TABLE L.4: PARTY AGE – COURT-FILE DATA

<table>
<thead>
<tr>
<th>Age group</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>18–30</td>
<td>5</td>
<td>5.1</td>
<td>18</td>
</tr>
<tr>
<td>31–40</td>
<td>9</td>
<td>9.2</td>
<td>27</td>
</tr>
<tr>
<td>41–50</td>
<td>15</td>
<td>15.3</td>
<td>39</td>
</tr>
<tr>
<td>51–65</td>
<td>37</td>
<td>37.8</td>
<td>51</td>
</tr>
<tr>
<td>Over 65</td>
<td>32</td>
<td>32.7</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>98</td>
<td>100</td>
<td>147</td>
</tr>
</tbody>
</table>

**Party type**

**Survey respondents**

Overall, a similar number of plaintiffs (50.5 per cent; n=48) and defendants (49.5 per cent; n=47) completed the survey. Most respondents (78 per cent) were the first parties in the court case (i.e. Plaintiff 1 or Defendant 1), which is not surprising as they had most contact with the case. Just over 5 per cent of respondents were third and fourth parties (i.e. Plaintiff/Defendant 3 and 4).

**Court-file information**

As indicated in Appendix I, the Court-file sample had 625 plaintiffs and 921 defendants. Most cases had only one plaintiff (91 per cent) and one defendant (61 per cent), but there tended to be more defendants per case than plaintiffs.

**Education**

**Survey respondents**

49 per cent of survey respondents had a university degree. This is consistent with previous findings and most likely reflects the propensity of more highly educated people to respond to surveys. This finding is also related to the fact that those involved in Court proceedings and able to access the Courts are likely to be wealthier and more educated. The education level of Supreme and County Court survey respondents was very similar.

---

2 The party type of 3 respondents was not known.

3 On a number of occasions the researchers received phone calls from second and third parties who advised they had limited contact with the case and were unable to answer the survey.
TABLE L.5: EDUCATION LEVEL OF SURVEY RESPONDENTS

<table>
<thead>
<tr>
<th>Education type</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>School certificate</td>
<td>6</td>
<td>11.5</td>
<td>8</td>
</tr>
<tr>
<td>Higher school</td>
<td>5</td>
<td>9.6</td>
<td>6</td>
</tr>
<tr>
<td>certificate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAFE</td>
<td>13</td>
<td>25</td>
<td>5</td>
</tr>
<tr>
<td>Bachelor degree</td>
<td>15</td>
<td>28.8</td>
<td>10</td>
</tr>
<tr>
<td>Postgraduate degree</td>
<td>11</td>
<td>21.2</td>
<td>10</td>
</tr>
<tr>
<td>Other</td>
<td>2</td>
<td>3.8</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>52</td>
<td>100</td>
<td>42</td>
</tr>
</tbody>
</table>

**Court-file information**

Information regarding disputants’ education levels was rarely included in Court-file documents. As with the survey sample, university graduates were more prevalent in the Court-file sample. While this suggests that people with higher levels of education are more likely to access the Court system, this information needs to be interpreted with caution as information regarding disputants’ education was not available systematically.

TABLE L.6: EDUCATION OF DISPUTANTS – COURT-FILE DATA

<table>
<thead>
<tr>
<th>Education type</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>School certificate</td>
<td>9</td>
<td>30.0</td>
<td>13</td>
</tr>
<tr>
<td>Higher school</td>
<td>3</td>
<td>10.0</td>
<td>4</td>
</tr>
<tr>
<td>certificate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAFE</td>
<td>5</td>
<td>16.7</td>
<td>13</td>
</tr>
<tr>
<td>University degree</td>
<td>12</td>
<td>40.9</td>
<td>14</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>3.3</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>30</td>
<td>100</td>
<td>46</td>
</tr>
</tbody>
</table>

**Employment**

**Survey respondents**

Table L.7 presents the industry of employment of survey respondents, as well as the industry of employment of Victorians overall (obtained from the 2006 Census data). The category with the highest percentage of respondents was ‘retired or home duties’ (17 per cent of all respondents), however this was not included in Table L.7 as no comparative ABS data is available for these categories. Out of those that were employed, most classified as the ‘professional, scientific and technical services’ industry (19 per cent) and the ‘construction and manufacturing’ industry (17 per cent). The major difference between the two jurisdictions was that there were
many more County Court respondents from the ‘construction and manufacturing’ industry (30 per cent) than in the Supreme Court (5 per cent).

When compared to the figures for all Victoria, a higher proportion of survey respondents were from the ‘professional, scientific and technical services’ industry (19 per cent) than the rest of Victoria, where only 4 per cent of the population fall into this category. Once again, this may be a reflection of the propensity of more educated people to answer surveys as well as the probability that professionals are more likely to access the Victorian higher Court system (compared to other groups).

TABLE L.7: INDUSTRY OF EMPLOYMENT OF SURVEY RESPONDENTS

<table>
<thead>
<tr>
<th>Industry of employment</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
<th>Victoria (2006 Census)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Agriculture, forestry and fishing</td>
<td>1</td>
<td>2.4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Mining</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Electricity, gas, water and waste services</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2.7</td>
</tr>
<tr>
<td>Construction and manufacturing</td>
<td>2</td>
<td>4.8</td>
<td>11</td>
<td>29.7</td>
</tr>
<tr>
<td>Wholesale and retail trade</td>
<td>3</td>
<td>7.1</td>
<td>4</td>
<td>10.8</td>
</tr>
<tr>
<td>Accommodation and food services</td>
<td>1</td>
<td>2.4</td>
<td>2</td>
<td>5.4</td>
</tr>
<tr>
<td>Transport, postal and warehousing</td>
<td>3</td>
<td>7.1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Information media and telecommunications</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2.7</td>
</tr>
<tr>
<td>Financial and insurance services</td>
<td>2</td>
<td>4.8</td>
<td>5</td>
<td>13.5</td>
</tr>
<tr>
<td>Rental, hiring and real estate services</td>
<td>2</td>
<td>4.8</td>
<td>2</td>
<td>5.4</td>
</tr>
<tr>
<td>Professional, scientific and technical services</td>
<td>9</td>
<td>21.4</td>
<td>6</td>
<td>16.2</td>
</tr>
<tr>
<td>Administrative and support services</td>
<td>3</td>
<td>7.1</td>
<td>2</td>
<td>5.4</td>
</tr>
<tr>
<td>Public administration and safety</td>
<td>6</td>
<td>14.3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Education and training</td>
<td>4</td>
<td>9.5</td>
<td>1</td>
<td>2.7</td>
</tr>
<tr>
<td>Health-care and social assistance</td>
<td>6</td>
<td>14.3</td>
<td>2</td>
<td>5.4</td>
</tr>
<tr>
<td>Arts and recreation</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>42</strong></td>
<td><strong>100</strong></td>
<td><strong>37</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

**Court-file information**

Information collected from Court files focused on disputants’ occupation rather than their industry of employment. This information was available for 35 per cent of disputants and is compared in Table L.8 to Victorian data from the 2006 Census. The majority of disputants were retired, unemployed or performed home duties (20 per cent), however they are not included in Table L.8, as comparative information was not available for these categories.

As was the case with County Court survey respondents, the presence of labourers, technicians, trades workers and machinery operators within the disputant population was slightly higher than in the rest of the Victorian population. However, as occupation information was only available for 35 per cent of disputants, these figures may be skewed by compensation claims.

The proportion of professionals was similar to the rest of the Victorian population, leaving the above trend of seemingly more professionals accessing the Victorian higher Courts inconclusive. The overall picture suggests that there is a slightly higher presence of manual workers in the Supreme and County Courts of Victoria than in the rest of the Victorian population. This is likely to be because such workers are more likely to be injured in their job and seek compensation.

**TABLE L.8: PARTY OCCUPATION – COURT-FILE DATA**

<table>
<thead>
<tr>
<th>Income</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
<th>Victoria (from ABS)6</th>
</tr>
</thead>
<tbody>
<tr>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Professionals</td>
<td>17</td>
<td>17.2</td>
<td>26</td>
<td>21.5</td>
</tr>
<tr>
<td>Clerical and administrative workers</td>
<td>6</td>
<td>6.0</td>
<td>8</td>
<td>6.6</td>
</tr>
<tr>
<td>Technicians and trades workers</td>
<td>22</td>
<td>22.2</td>
<td>19</td>
<td>15.7</td>
</tr>
<tr>
<td>Managers/directors</td>
<td>11</td>
<td>11.1</td>
<td>20</td>
<td>16.5</td>
</tr>
<tr>
<td>Sales workers</td>
<td>3</td>
<td>3.0</td>
<td>8</td>
<td>6.4</td>
</tr>
<tr>
<td>Labourers</td>
<td>23</td>
<td>23.2</td>
<td>16</td>
<td>13.2</td>
</tr>
<tr>
<td>Community and personal service workers</td>
<td>7</td>
<td>7.1</td>
<td>11</td>
<td>9.1</td>
</tr>
<tr>
<td>Machinery operators and drivers</td>
<td>10</td>
<td>10.1</td>
<td>16</td>
<td>13.2</td>
</tr>
<tr>
<td>Total</td>
<td>99</td>
<td>100</td>
<td>121</td>
<td>100</td>
</tr>
</tbody>
</table>

5 Based on first plaintiff and first defendant information collected from Court files. Supreme Court sample: plaintiffs n=76, defendants n=23; County Court sample: plaintiffs n=93, defendants n=25.
Income

Survey respondents

The most frequent income category of survey respondents (22 per cent) was in the range of $41,600–$67,599 per annum, however a similar proportion were from the top earning category of $104,000 or more per annum (21 per cent). When compared to the Victorian statistics from the 2006 Census (see last column in Table L.9), the percentage of high income earners ($104,000 or more) among survey respondents was much higher than the percentage of high income earners in the general population. Furthermore, the percentage of low-income earners (nil–$20,799), which is quite high in Victoria (46 per cent), was comparatively low amongst the survey respondents (17 per cent). This trend suggests that high-income earners are more likely to respond to surveys than low-income earners. This is consistent with the education results above, which show that a high proportion of respondents have a university degree and therefore are more likely to fall into a higher income category. However, this finding may also reflect the demographics of those who access the Victorian Court system, that is, high-income earners are more likely to use the Court system and low-income earners may be less likely.

TABLE L.9: INCOME OF SURVEY RESPONDENTS

<table>
<thead>
<tr>
<th>Income</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
<th>Victoria (from ABS)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Nil–$20,799</td>
<td>7</td>
<td>15.2</td>
<td>8</td>
<td>20</td>
</tr>
<tr>
<td>$20,800–$41,599</td>
<td>9</td>
<td>19.6</td>
<td>7</td>
<td>17.5</td>
</tr>
<tr>
<td>$41,600–$67,599</td>
<td>10</td>
<td>21.7</td>
<td>9</td>
<td>22.5</td>
</tr>
<tr>
<td>$67,600–$103,999</td>
<td>10</td>
<td>21.7</td>
<td>8</td>
<td>20</td>
</tr>
<tr>
<td>$104,000 or more</td>
<td>10</td>
<td>21.7</td>
<td>8</td>
<td>20</td>
</tr>
</tbody>
</table>

Court-file information

To explore whether high-income earners are more prevalent among those who access the Victorian higher Court system – rather than just those who respond to surveys – information about income collected from Court files was subjected to the same analysis. However, just as the survey response data may be biased by people with higher education levels, the information from Court files is influenced by the type of income information that was available from Originating Motions, Writs, Affidavits and other documents. The researchers noticed that this information was often available for compensation claims, which were usually made by manual workers, but was less available for other types of claims. Furthermore, this information was rarely available for defendants and for this reason only the incomes of plaintiffs are analysed. The income results in Table L.10 are
likely to be biased by information on plaintiff manual workers seeking compensation.

Nevertheless, the information in Table L.10 shows that a low percentage of Victorians from the lowest income category (nil–$20,799) accessed the Court system, with most plaintiffs (on whom income information was available) falling into the second income category ($20,800–$41,599).

With the income information from survey data likely to be influenced by people with formal education and the Court-file information likely to be influenced by manual workers seeking compensation, the truth about the average income of those who access the Court system probably lies somewhere between the two estimates. In both estimates the lowest income earners are underrepresented in their access to the higher Court system.

**TABLE L.10: INCOME OF PLAINTIFFS – COURT-FILE DATA**

<table>
<thead>
<tr>
<th>Income</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
<th>Victoria (from ABS)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Nil–$20,799</td>
<td>7</td>
<td>20.6</td>
<td>7</td>
<td>17.1</td>
</tr>
<tr>
<td>$20,800–$41,599</td>
<td>8</td>
<td>23.5</td>
<td>24</td>
<td>58.5</td>
</tr>
<tr>
<td>$41,600–$67,599</td>
<td>11</td>
<td>32.4</td>
<td>9</td>
<td>22.0</td>
</tr>
<tr>
<td>$67,600–$103,999</td>
<td>4</td>
<td>11.8</td>
<td>1</td>
<td>2.4</td>
</tr>
<tr>
<td>$104,000–or more</td>
<td>4</td>
<td>11.8</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**English as first language**

92 per cent of all survey respondents had English as their first language. However, almost 12 per cent more of the County Court survey respondents had English as their first language than Supreme Court survey respondents.

According to the 2006 Census, 74.4 per cent of Victorians speak English only at home. This statistic is lower than that of the survey respondents and may indicate that those from non-English speaking backgrounds (NESB) are less likely to answer surveys. It is also possible that Victorians from NESB are less likely to access the higher Court system.

Cumming and Wilson identified these and other areas which describe disputants’ challenges in participating in processes such as mediation. Examples of other factors that pose challenges are the disputants’ numeracy and literacy levels.  

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MEDIATION IN THE SUPREME AND COUNTY COURTS OF VICTORIA

## TABLE L.11: IS ENGLISH THE FIRST LANGUAGE OF RESPONDENTS?

<table>
<thead>
<tr>
<th>English as first language</th>
<th>Supreme Court</th>
<th>County Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>Yes</td>
<td>44</td>
<td>86.3</td>
<td>42</td>
</tr>
<tr>
<td>No</td>
<td>7</td>
<td>13.7</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>51</td>
<td>100</td>
<td>43</td>
</tr>
</tbody>
</table>

Appendices
Appendix M: Days and Times of File-based Data Collection at the Supreme and County Courts of Victoria

The researchers manually collected information from 243 Supreme Court files and 310 County Court files. The dates and times of data collection are outlined in Table M.1.

The researchers wish to thank Supreme Court and County Court Registry staff and management for their helpful assistance with this task.

TABLE M.1: DAYS AND TIMES OF DATA COLLECTION AT THE SUPREME COURT AND COUNTY COURT OF VICTORIA.

<table>
<thead>
<tr>
<th>County Court data collection days</th>
<th>Supreme Court data collection days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>Time</td>
</tr>
<tr>
<td>Monday, 21 April</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Tuesday, 22 April</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Wednesday, 23 April</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Thursday, 24 April</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Monday, 28 April</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Tuesday, 29 April</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Wednesday, 30 April</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Thursday, 1 May</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Thursday, 15 May</td>
<td>9 am – 6 pm</td>
</tr>
<tr>
<td>Total files reviewed:</td>
<td>310</td>
</tr>
<tr>
<td>Date</td>
<td>Time</td>
</tr>
<tr>
<td>Friday, 2 May</td>
<td>9 am – 5 pm</td>
</tr>
<tr>
<td>Tuesday, 6 May</td>
<td>9 am – 5 pm</td>
</tr>
<tr>
<td>Wednesday, 7 May</td>
<td>9 am – 5 pm</td>
</tr>
<tr>
<td>Thursday, 8 May</td>
<td>9 am – 5 pm</td>
</tr>
<tr>
<td>Friday, 9 May</td>
<td>9 am – 5 pm</td>
</tr>
<tr>
<td>Tuesday, 13 May</td>
<td>9 am – 5 pm</td>
</tr>
<tr>
<td>Wednesday, 14 May</td>
<td>9 am – 5 pm</td>
</tr>
<tr>
<td>Total files reviewed:</td>
<td>243</td>
</tr>
</tbody>
</table>