An Analysis of a Mediation Cooling Off Period at the Victorian Civil and Administrative Tribunal

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STATEMENT OF ORIGINAL AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis accepted for the award of any other degree or diploma. No other person's work has been used without due acknowledgment in the main text of the thesis. This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

All research procedures reported in the thesis were approved by the Human Research Ethics Committee La Trobe University and the Department of Justice Victoria's Human Research Ethics Committee.

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ABSTRACT

This research provides a formal, independent assessment and examination of the impact of a cooling off period in mediations at the Victorian Civil and Administrative Tribunal (VCAT). The mediation cooling off is an access to justice initiative in the civil justice system that aims to remedy disadvantage and potential inequalities in power experienced by unrepresented mediation participants in a tribunal-connected mediation process. A review of the scholarship on access to justice, mediations and cooling off periods in consumer settings establishes the context for the empirical research.

The perceptions and experiences of 47 mediation participants were obtained through semi-structured telephone interviews. Eighteen VCAT mediators provided their views by survey. The resultant data demonstrated that the unrepresented mediation participants:

- were not consistently made aware of their rights to a cooling off period
- did not seek advice about their settlements during the cooling off period
- do feel pressure during the mediation process but generally do not believe that the cooling off period reduces that pressure
- choose not to withdraw from mediated agreements despite common dissatisfaction with the outcomes.

The thesis uniquely concludes that, as it currently operates, the cooling off period does not provide any access to justice benefits to individual mediation parties. To enhance the access to justice efficacy of the cooling off period in VCAT's existing program, potential improvements to the cooling off period process are recommended. These recommendations may also be useful in designing other mediation cooling off periods.

Additional data provided information about the mediation practice experienced by the mediation participants. By highlighting the tensions between the core values of facilitative mediation and the efficiency benefits of mediation in a court or tribunal context, and linking it to these data, the findings contribute to furthering best practice mediation in court and tribunal connected settings.

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This thesis almost never made it to conclusion. Leaving La Trobe University to return to legal practice after 10 years, having failed to convert my casual but basically full-time position into a secure job, combined with a daily commute from regional Victoria to Melbourne, meant that the thought of completion was pushed far out of my mind. Ultimately, I made it to the end because of the COVID-19 pandemic. While acknowledging that for many the pandemic has been a very difficult time, it released me from the daily grind. Though retaining my employment, working from home gave me time and energy I had not known for many years. It enabled me to leave behind the guilt of a working mother that I had previously tried to make up for at weekends. Instead, I was there, present, for my sons whenever they needed. Holidays in distant places were replaced by exploratory walks close to home. A small bubble of family and a few close friends was effectively created and, ultimately, was a solid substitute for the more casual networking and social gatherings of pre-COVID times. Despite several years passing since I had last thought about this research, the pandemic enabled me to spend one final year on this thesis to pull it all together.

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ABBREVIATIONS

A2JAC	Access to Justice Advisory Committee
AAT	Administrative Appeals Tribunal
ADR	Alternative Dispute Resolution
ADRAC	Australian Dispute Resolution Advisory Council
ATSI	Aboriginal and Torres Strait Islander
CJC	Community Justice Centres
DOJHREC	Department of Justice Human Research Ethics Committee
LTUHERC	La Trobe University's Human Ethics Research Committee
NADRAC	National Alternative Dispute Resolution Advisory Council
NMAS	National Mediation Accreditation System
PIS	Participant Information Statement
VCAT	Victorian Civil and Administrative Tribunal

CHAPTER 1
INTRODUCTION

A desire for better access to justice for disadvantaged and vulnerable people has been behind the rise in alternatives to the court-based justice system to resolve civil disputes in Australia.[1] Tribunals and other Alternative Dispute Resolution (ADR)[2] processes, including mediation, have been recognised as having a number of advantages over the traditional courts, including being cheaper, quicker, flexible and more informal.[3] The access to justice benefits, combined with efficiency gains of ADR for the legal institutions that use it, has meant that mediation or another form of ADR is often now a mandated part of the procedure in most civil disputes in Australian courts and tribunals.[4] However, the bringing together of the two different approaches to dispute resolution has not always been smooth. For example, the contrast between the non-determinative mediation philosophy and the traditional adversarial legal approach to the resolution of disputes has meant that there are concerns that mediation in a court- or tribunal-connected context

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[1] Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Australian Government Publishing Service, 1994); Australian Government Productivity Commission, '*Access to Justice Arrangements*' (Inquiry Report No. 72, 5 September 2014) (Web Document) <https://www.pc.gov.au/inquiries/completed/access-justice/report>.

[2] While acknowledging that there is debate, particularly in Australian dispute resolution literature, over whether the 'A' in ADR represents 'alternative', 'assisted', 'appropriate' or 'additional', or whether ADR should simply refer to non-curial forms of dispute resolution as suggested by David Spencer, Lise Barry and Lola Akin Ojelabi, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters Professional Australia Pty Limited, 4th ed, 2018) 14, an active decision has been made in this thesis to prescribe the 'A' in 'ADR' as representing the word 'alternative'. The reasons for this are set out in Chapter 2 in the section on Alternative Dispute Resolution.

[3] Access to Justice Advisory Committee (n 1); Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 4; Hazel Genn, 'What Is Civil Justice for? Reform, ADR, and Access to Justice' (2012) 24(1) *Yale Journal of Law & the Humanities* 397 ('What Is Civil Justice for?'); Mary Anne Noone, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37(1) *Monash University Law Review* 57 ('ADR, Public Interest Law'); Mary Anne Noone and Lola Akin Ojelabi, 'Alternative Dispute Resolution and Access to Justice in Australia' (2020) 16(2) *International Journal of Law in Context* 108 ('Alternative Dispute Resolution'); Lola Akin Ojelabi and Mary Anne Noone, 'ADR Processes: Connections Between Purpose, Values, Ethics and Justice' (2017) 35(1) *Law in Context: A Socio-Legal Journal* 5; Hazel Genn, 'Tribunals and Informal Justice' (1993) 56(3) *The Modern Law Review* 393, 394 ('Tribunals and Informal Justice'); Robin Creyke, 'Tribunals and Access to Justice' (2002) 2(1) *Law and Justice Journal* 64 ('Tribunals and Access to Justice'); Trevor Daya-Winterbottom, 'Specialist Courts and Tribunals: Role and the Development of Administrative Courts' (2004) 12 *Waikato Law Review* 21.

[4] Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 560 (*Mediation*). See also Ulrich Magnus, 'Mediation in Australia: Development and Problems' in KJ Hopt and F Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2013) 869, 871.

has developed a 'distinctively legal character'[5] resulting in a more settlement-oriented approach and a loss of focus on some values core to mediation.

A concurrent phenomenon in the Australian civil justice system is the increasing number of unrepresented litigants.[6] There are several reasons for this including the escalating cost and complexity of legal services, together with funding cuts to Legal Aid and other legal support services such as Community Legal Centres.[7] The informal processes of tribunals and other ADR processes are thought to be better able to be navigated by legally unrepresented participants. However, there are challenges in ensuring that unrepresented litigants continue to experience both procedural and substantive justice while using these more informal processes, particularly when opposed to represented litigants or to regular users of the system. Consequently, additional procedural protections, such as cooling off periods in mediations, are sometimes put in place to help equalise any power imbalance between disputing parties.

US-based mediation scholar Nancy Welsh has been calling for the use of cooling off periods in court-connected mediation to enhance party self-determination since at least 2001.[8] She argues that a cooling off period provides a check on the use of coercion in mediations to pressure mediation parties to settle their disputes on the day of the mediation. Welsh also contends that the provision of a cooling off period will encourage the use of a facilitative style of mediation, as well as creating more durable settlements by ensuring that parties enter into settlements in a truly voluntary manner.[9] In Australia, there has been minimal uptake of her suggestion. Where a cooling off period has been

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[5] Boulle, *Mediation* (n 4) 560; Laurence Boulle, 'Minding the Gaps—Reflecting on the Story of Australian Mediation' (1999) 11(2) *Bond Law Review* 230 ('Minding the Gaps'); Olivia Rundle, 'Barking Dogs: Lawyer Attitudes towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77, 78 ('Barking Dogs'). See also Olivia Rundle, 'The Purpose of Court-Connected Mediation from the Legal Perspective' (2007) 10(2) *ADR Bulletin* 28 ('The Purpose of Court-Connected Mediation').

[6] Victorian Government, 'Access to Justice Review: Volume 2' (Report and Recommendations, 2016) 471 ('Access to Justice Review: Volume 2'); Australian Government Productivity Commission (n 1).

[7] Victorian Government, 'Access to Justice Review: Volume 2' (n 6) 471.

[8] Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6(1) *Harvard Negotiation Law Journal* 86 ('The Thinning Vision').

[9] Ibid.

used in mediation or other ADR processes, very little research has been done into whether they are efficacious.

In June 2009, the Victorian Civil and Administrative Tribunal (VCAT) implemented a procedural protection aimed at supporting unrepresented mediation parties in certain mandated mediations: a cooling off period of two business days. One aim of this innovation appears to have been to give unrepresented mediation parties the opportunity to obtain advice (either legal or non-legal) on the merits of any settlement reached during mediation and to be able to withdraw, without penalty, from the settlement if, on reflection or based on advice, the agreement reached was no longer appealing. The provision of a cooling off period also sought to reduce any undue pressure on unrepresented mediation parties to settle their dispute on the day of the mediation.

The establishment of VCAT itself in 1998 had been an innovative experiment. It was created to be a 'super tribunal', amalgamating more than 12 existing boards and tribunals, and with both civil and administrative jurisdiction. Its establishment was feted as an opportunity to improve access to justice for the Victorian population, including by increasing the use of ADR processes. This access to justice agenda has continued strongly in subsequent strategic plans as VCAT consolidated its position within the Victorian justice system. Despite its strong access to justice program, VCAT decided to provide an additional protection to the unrepresented by way of the mediation cooling off period. VCAT's implementation of the cooling off period pilot was both unusual and innovative.

Although introduced in 2009 as part of VCAT's access to justice agenda, the cooling off period has only been used in certain restricted types of mediations and little analysis of its use has taken place.[10] Given the increase in the numbers of self-represented parties in the civil justice system, both in Australia and other common law countries,[11] any initiative

[10] More information about both the types of mediations it applies to, and the limited analysis of its use, is available in Chapter 4 in the section titled VCAT's Pilot. More information about other access to justice innovations adopted by VCAT is set out in Chapter 5 in the section titled Background and Need for the study.

[11] Victorian Government, 'Access to Justice Review: Volume 2' (n 6) 471. Wissler in the US reports that one or both parties typically are unrepresented in a minority of filed general civil cases (3 per cent to 48 per cent), but a majority of domestic relations cases (35 per cent to 95 per cent), and in most cases in small claims and housing courts (79 per cent to 99 per cent). Roselle L Wissler, 'Representation in Mediation: What We Know from Empirical Research' (2010) 37 *Fordham Urban Law Journal* 419, 420 ('Representation in Mediation').

that aims to benefit the self-represented is to be lauded; however, without detailed research, there has been no empirical evidence that VCAT's cooling off period is providing any benefit to unrepresented mediation parties.

VCAT's own data show that less than 2 per cent of mediation parties eligible actually withdraw from their mediated agreements during the cooling off period.[12] This statistic is consistent with the one other example of cooling off periods used in an ADR process in Victoria, at the Fair Work Commission.[13] No information is available about the reasons why mediation parties do not more commonly withdraw from their mediated agreements during the cooling off periods, probably because the scarcity of cooling off periods used in ADR processes in Australia has the consequent result that little or no research has been done in this area. Court-connected[14] mediation programs are often hailed as successes because so many disputes settle at mediations. VCAT's mediation program has similar high settlement rates.[15] High settlement rates are appealing to courts and tribunals for efficiency reasons but cannot be taken to be indicative of satisfaction with either the process or the outcome. Likewise, VCAT's low numbers of withdrawals from mediated agreements during the cooling off period cannot be assumed to demonstrate the success of the cooling off period. There are many reasons why unrepresented mediation parties might choose not to withdraw from their mediated agreements during a cooling off period that do not relate to satisfaction with the outcome. These could include misunderstandings of the cooling off period, inability to obtain advice within the nominated period, fear of the dispute continuing for cost, time or other reasons, as well as behavioural psychological reasons, such as inertia.

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[12] Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2009–10' (2010) 22 ('VCAT Annual Report 2009–10').

[13] RMIT University Centre for Innovative Justice, '*Assessment of Cooling Off Period Pilot in Unfair Dismissals Conciliation Process*' (Report for Fair Work Commission, March 2013) 1–16 (Web Document) <https://cij.org.au/cms/wp-content/uploads/2018/08/cooling-off-period-assessment.pdf>.

[14] For ease of reference, throughout this thesis the terminology court-connected mediation is used to refer to any mediation that occurs in a court or in a tribunal.

[15] VCAT's 2019–20 annual report showed resolution rates for cases at mediation as 63 per cent in 2017–18, 63 per cent in 2018–19 and 65 per cent in 2019–20. Notably, resolution rates in particular lists of VCAT and for particular years are much higher. For example, in 2017–18, the civil claims list is reported to have settled 100 per cent of cases at mediation. Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2019–20' (2020), 37 ('VCAT Annual Report 2019–20').

The Research Questions

The thesis provides a formal, independent assessment and examination of the impact of a cooling off period in mediations at VCAT as well as contributing to research on best practice court and tribunal-connected mediation. The research aims to:

- Ascertain whether the unusual and innovative provision of a cooling off period following a mediation is utilised by unrepresented mediation parties.
- Establish whether the low number of people who withdraw from mediated agreements during the cooling off period is indicative of satisfaction with the outcome of the mediation or is for some other reason.
- Determine whether the provision of a cooling off period empowers unrepresented mediation parties (ie regardless of whether a mediation party speaks to anyone about the mediated outcome, do they feel less pressure to settle knowing that they can withdraw from it without penalty).
- Provide recommendations about the use of a cooling off period in mediations at VCAT and elsewhere in the justice system.

While the research was designed to determine whether the research participants,[16] who were unrepresented and mediating in a situation in which they were offered a cooling off period, experienced the hypothesised benefits of a cooling off period, it was clear that, to ensure the validity of responses to the research questions, it also needed to be determined whether the mediation participants were adequately being made aware of the cooling off period during the mediation. Consequently, the five research questions were:

Research Question 1 Were the unrepresented mediation participants adequately made aware of their rights to a cooling off period before or during their mediation?

Research Question 2 Do the unrepresented mediation participants in a mediation with a cooling off period use that time after reaching a settlement to obtain advice

[16] The terminology 'mediation participant' is used throughout this thesis when referring to non-mediators who took part in the research. 'Mediation party' is used when referring more generally to a person who participates in a mediation.

(professional or otherwise) about the settlement agreement they reached; and if so, from whom, and if not, why not?

Research Question 3 Do the unrepresented mediation participants withdraw from mediated agreements during the cooling off period if they are unhappy with the outcomes after reaching a settlement agreement at mediation, and if not, why not?

Research Question 4 Do the unrepresented mediation participants feel pressured during a mediation to come to a settlement agreement and, if so, does the provision of a cooling off period do anything to alleviate that pressure?

A final question was to ascertain how the provision of a cooling off period was viewed by mediators and why:

Research Question 5 How do mediators feel about the impact of the cooling off period on mediations they facilitated and why?

Significance

This thesis provides empirical evidence of why so few unrepresented mediation parties use the cooling off period to withdraw from mediated agreements by asking the mediation parties themselves about their motivations. The perceptions and experiences of the mediation participants are at the forefront of the research, although the perceptions of mediators are also considered. The research does not attempt to evaluate VCAT's mediation program, nor are settlement rates a focus. While the use of cooling off periods in consumer contracts is not uncommon, there are few examples of cooling off periods used in mediations in Australia. Given the dearth of research into the impact of cooling off periods in mediations, this thesis provides links to the scholarship around cooling periods in the consumer law context, demonstrating associated themes. Furthermore, this research examines concerns raised by mediation scholars about the pressures felt by mediation parties during the mediation process in a court-connected environment, and the consequent impact on party self-determination, and examines whether those concerns are consistent with the experiences of the research participants.

The research concludes that, while most mediation participants support the availability of a cooling off period, individually, very few mediation participants found it to be of any benefit. There were several reasons for this including, pertinently, that mediation participants reported inconsistent and varied information given to them about their right to a cooling off period, with some reporting not being told about it at all, despite mediators themselves recounting more constant procedures for the provision of such information. Of those who were made aware of the cooling off period, most mediation participants found that the two-day period was too short to be effective for the purpose of obtaining advice. In addition, the findings demonstrate that there was confusion around the interaction of the cooling off period with confidentiality provisions in settlement agreements that prevented advice-seeking behaviour. The research reveals that even where mediation participants were dissatisfied with the outcome of a mediation, they almost never withdrew from their settlement agreements. The two main reasons why dissatisfied mediation participants did not withdraw were fear of the cost of taking the matter further and feeling that they just wanted the matter resolved, for better or worse. Although there were no direct costs implications to unrepresented mediation participants associated with using the cooling off period to withdraw from a settlement agreement, disputes that did not settle at mediation, whether because of an inability to come to resolution, or because the cooling off period was used to subsequently withdraw from the agreement, meant that the dispute was then listed for hearing. It was the potential hearing costs (real or imagined) that mediation participants reported causing them concern.

Another key finding was that more than two-thirds of mediation participants felt that there was pressure on them to settle their dispute during the mediation, with most believing that pressure came from the mediator. The provision of a cooling off period did not appear to alleviate that pressure in most cases. Mediators' opinions were divided about the merits of a cooling off period. For those mediators opposed to a cooling off period, the positive benefits attributed to a cooling off period appeared to be less critical than ensuring the finality of the dispute on the day of the mediation. The research establishes that the presumed benefits of the cooling off period on reducing pressure and coercion on mediation participants could be improved by ensuring more rigorous requirements around the methods and timing of notification of the cooling off period to participants.

Finally, although not one of the original research questions, inquiries about pressure, satisfaction and control during the mediation led to data being obtained about mediation participants' experiences of mediation style. These data are linked strongly to the overall research, which concerns party self-determination in a court-connected mediation process. Mediation participants mostly reported a mediation experience which indicated that a facilitative mediation style had not been used. Rather, the process that mediation participants experienced was more akin to a settlement style mediation involving incremental bargaining with a focus on a financial outcome. The importance of this finding is that it is inconsistent with the expectation of a 'mediation' for many mediation participants as well as with the requirements of the National Mediation Accreditation System (NMAS) Practice Standards.[17]

The outcomes of the research add to the existing research into access to justice innovations in the civil justice system as well as providing recommendations to ensure that any future cooling off periods in mandatory court- or tribunal-connected mediation processes are established in a manner that maximise their value. The recommendations may also be used by VCAT to either expand or improve the use of the cooling off period so that it best serves unrepresented mediation parties and may also be useful for other institutions within the justice system that have mandated mediations and large numbers of unrepresented parties. The research adds to the body of knowledge associated with best practice mediation in court and tribunal connected settings.

Scope

This thesis relates to mediation practice that is occurring in a tribunal as a step towards an adjudicated outcome. It does not relate to mediation practice in general. It is based on data from a single mediation program at VCAT that has certain peculiarities beyond the

[17] In 2008, the National Mediator Accreditation System (NMAS) became operative. All nationally accredited mediators are expected to comply with the Practice Standards under the NMAS. The Practice Standards were reviewed in 2012 and 2015. A further review is being undertaken at the time of writing this thesis and is expected to be completed in 2022. Throughout this document, where reference is made to the NMAS Practice Standards, reference is to those applicable as at 1 July 2015, unless otherwise stated. The particular Practice Standards of relevance are standards 2.2 and 10.2. Mediator Standards Board, 'National Mediator Accreditation System: Part III Practice Standards' (2015) ('Practice Standards'). More detail about these mediation standards, the focus on facilitative mediation, and power imbalances in mediation is provided in Chapter 3.

provision of a cooling off period.[18] Other relevant matters are that the cooling off period is for a particularly short time, only two business days, and that the types of disputes being mediated are narrow, with the majority being building disputes. The findings are most relevant to the specific VCAT mediation program or to mediation programs with short cooling off periods aimed at empowering unrepresented parties.

Thesis Structure

This first chapter, Chapter 1, provides general introductory information about the research questions, and the background, scope and significance of the research.

Chapters 2, 3 and 4 combine to establish the overall context within which the rest of the thesis is built. Chapter 2 presents an overview of the background and general context within which the research was designed and carried out. The chapter introduces the concept of access to justice with a particular focus on the increase in the use of ADR processes in the civil justice system. While ADR processes generally refer to non-determinative processes such as mediation and conciliation, another 'alternative' to the civil justice system that developed for similar reasons to ADR processes are tribunals. Consequently, Chapter 2 also addresses reasons for the popularity of tribunals as *alternatives* to the court system. A condensed history of the establishment of VCAT, given its central place in the research, is also contained in this chapter.

Chapter 3 focuses on mediation in the Australian civil justice system. The chapter provides an overview of key concepts relevant to any consideration of mediation, including defining mediation, setting out the four major models of mediation and examining the core values of mediation. As the mediations that are the subject of this research occurred within a tribunal connected process, the chapter also contains a section on the impact of court-connected mediations on the core values of mediation, particularly party self-determination, and the role of coercion in such mediation.

Chapter 4 examines the use of cooling off periods. Given that the use of cooling off periods in the mediation context is rare, the use of a mandated cooling off period in consumer

[18] It applies only to mediations conducted by what are known as 'panel mediators' and one party must be unrepresented. More information is available in Chapter 4 in the section titled VCAT's Pilot.

law, such as door-to-door selling and real estate contracts, is initially discussed. The claimed protections a cooling off period can provide to the vulnerable and disadvantaged in the consumer contract setting is emphasised. There are strong links between these protections and the reasons why it has been suggested that cooling off periods should also be used in mediations, particularly in court-connected contexts in which party self-determination is at risk. The chapter concludes with a summary of four Australian examples of the use of cooling off periods in mediations or other ADR processes, including VCAT's cooling off period, which is the subject of this research.

In Chapter 5 the research method and methodology are presented. The research involved interviewing mediation participants about their mediation experiences, focusing on whether the provision of a cooling off period reduced the pressure to settle during mediation and/or whether and why (or why not) participants took the opportunity offered by the cooling off period to seek advice about the outcome of their mediations. The second part of the empirical research was a survey of mediators to obtain the perspectives of the mediators of the role of the cooling off period in mediations. Both qualitative and quantitative approaches were utilised to generate data as part of this research. The rationales for the qualitative and quantitative dimensions of the research are described. This chapter also sets out the recruitment procedures and data analysis methods. A discussion about the constraints and limitations of the research and how these will affect the ability to replicate the study is also included in this chapter. Finally, this chapter includes a section setting out the profile data of both the participants and the disputes to set the scene before the findings are discussed in detail in Chapter 6.

Chapter 6 presents the results themed around the five research questions set out above, and demonstrates where and how the research findings link with the theoretical underpinnings set out in the preceding chapters.

Finally, Chapter 7 presents conclusions drawn from the research together with suggestions of areas of further research arising from this study and recommendations for the use of cooling off periods in mediation.

CHAPTER 2
ACCESS TO JUSTICE, ALTERNATIVE DISPUTE RESOLUTION AND TRIBUNALS

Introduction

Access to justice is said to be among the basic rights of democratic citizenship[19] and is based on the ideal of all people being equal before the law.[20] Access to justice arguments are central to the development of tribunals as well as the increased use of Alternative Dispute Resolution (ADR) processes. Access to justice motives also drove the provision of a cooling off period in mediations at the Victorian Civil and Administrative Tribunal (VCAT) as will be seen in later chapters. The perceived advantages of informality, flexibility and responsiveness, and low cost of both tribunals and ADR aim to improve access for disadvantaged and self-represented parties; however, the question remains whether tribunals and ADR do, in fact, improve access to justice.

This chapter introduces some key concepts underpinning this research. It begins with an overview of access to justice reforms and developments before examining why ADR mechanisms, including tribunals, were embraced by proponents of the access to justice movement. A brief history of the development of tribunals in the context of access to justice concerns is provided. Given that the investigation for this thesis is situated in VCAT, this chapter also sets out the establishment of VCAT and its access to justice ideals.

While initially seen as a panacea to problems of structural and procedural inequality, the ADR system has also been criticised for entrenching inequality and for facilitating compulsion and coercion.[21] Equally, tribunals, which began with such high hopes, have

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[19] Trevor CW Farrow and Lesley A Jacobs (eds), *The Justice Crisis: The Cost and Value of Accessing Law* (UBC Press, 2020) 3.

[20] Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56(3) *The Modern Law Review* 282, 294 ('Alternative Dispute Resolution Processes'); Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2(1) *New Zealand Journal of Public and International Law* 85, 86 ('Some Thoughts on Access to Justice').

[21] Lucy V Katz, 'Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin' (1993) 1993(1) *Journal of Dispute Resolution* 1, 1.

been criticised for being overly legalistic, slow and expensive,[22] and for valuing efficiency over justice.[23] Thus, the latter part of this chapter moves from the presumed advantages of ADR mechanisms and tribunals over traditional courts and litigation processes, to examine criticisms of ADR reforms and tribunals, which have not always achieved the improvements in access to justice they set out to. The chapter concludes with a discussion about how the move towards informality in ADR and tribunals, combined with a lack of publicly funded legal services, has meant that many individuals are often self-represented in ADR and tribunal processes, exacerbating access to justice issues.

Access to Justice

The concept of equality before the law emerged at the end of the eighteenth century.[24] Before that time, civil society was divided into social strata 'and to each of them a different legal order, even different courts, applied'.[25] In the nineteenth and twentieth centuries, legal scholars and practitioners began to critically analyse the concept of equality before the law, highlighting that the equality achieved was often more a façade than reality.[26] Concerns about the legal system's inability to provide access to justice to all, and hence equality before the law, increased in the 1970s, bringing about a new approach to both legal scholarship and legal reform that attempted to more realistically explain the complexity of human society and the subsequent complexity of the interactions different groups had with the legal system.[27]

The phrase 'access to justice' embodies the proposition that each person should have effective means of protecting his or her rights or entitlements under the substantive law.[28] As Cappelletti explains, those concerned about access to justice recognised that the

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[22] Genn, 'Tribunals and Informal Justice' (n 3) 398; Rachel Bacon, 'Tribunals in Australia: Recent Developments' (2000) 7(2) *Australian Journal of Administrative Law* 69, 70; Joan Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20 *Federal Law Review* 252, 254; Louis Schetzer, R Buonamano and J Mullins, '*Access to Justice and Legal Needs*' (Law and Justice Foundation of New South Wales, 2002), 11.

[23] Farrow and Jacobs (eds) (n 19) 291.

[24] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 294.

[25] Ibid.

[26] Ibid 295.

[27] Ibid 283.

[28] Sackville, 'Some Thoughts on Access to Justice' (n 20) 86.

traditional civil and political liberties were a 'futile promise, indeed a deception' for those who, for economic, social and cultural reasons, have no capacity to 'accede to or benefit from those liberties'.[29] Legal scholars recognised that, while there was a formal right to equality before the law, the practical reality was that, for many people, equality before the law was a 'mere formal right with little substance and practical effect'.[30]

Access to justice requires that people are able to approach and use the justice system to resolve their disputes, and that each person has a fair opportunity for their rights to be determined in accordance with recognised principles.[31] Unfortunately, it has long been recognised that 'the way legal services are delivered by the legal profession, the nature of court proceedings, including procedural requirements and the adversarial basis, and the language used' have acted as barriers that have limited individuals' opportunities to obtain justice.[32] It is now also recognised that equality before the law may be restricted by a range of factors including geographic or institutional limitations, race, class or gender biases, cultural differences and economic factors.[33]

The expression 'access to justice' first gained currency as part of a reform movement that took hold in the 1960s and 1970s.[34] Concerns about access to justice are connected, at least in many Western countries, with the development of the postwar welfare state.[35] In the mid-1970s, Cappelletti and Garth surveyed access to justice developments across many Western industrialised countries and identified what they termed as three 'waves'

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[29] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 283.

[30] Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice in Mediation within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528, 529 ('Ensuring Access to Justice').

[31] Australian Government Productivity Commission (n 1) 74.

[32] Noone, 'ADR, Public Interest Law' (n 3) 59 citing the Standing Committee on Legal and Constitutional Affairs, 'Cost of Legal Services and Litigation', Trade Practices Commission's Study of the Professions – Legal – Final Report, Access to Justice Advisory Committee and the Australian Law Reform Commission's Managing Justice: A Review of the Federal Civil Justice System Report No 89.

[33] Ibid.

[34] Sackville, 'Some Thoughts on Access to Justice' (n 20) 88.

[35] Ronald Sackville, 'Law and Poverty: A Paradox' (2018) 41 *University of New South Wales Law Journal* 80, 80. Sackville says:

> The welfare state was predicated on the recognition that all people, including those unable to participate in the labour force, should be assured of a minimum if modest income and reasonable access to essential services, notably health care and a decent education. The principles underlying the welfare state reflected both a particular conception of a just society and an understanding that severe deprivation is a breeding ground for social disharmony and conflict.

in the access to justice movement.[36] Following their seminal work on access to justice, Cappalletti and Garth wrote in a 1978 essay:

> The words 'access to justice' are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system—the system by which people may vindicate their rights and/or resolve their disputes under the auspices of the State. First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just.[37]

An increasingly expansive understanding of access to justice meant that measuring access to justice moved from primarily a matter of access to lawyers and adjudicated decisions in a timely and affordable manner to embrace the idea that access to justice is about 'having paths available for citizens to prevent, address, and resolve the legal challenges and problems they face in their everyday lives'.[38] In Australia, particularly since 1975, a wide range of inquiries and reports have identified inequality in the justice system.[39] Proponents of access to justice analysed and searched for ways to overcome the difficulties or obstacles that made equality before the law inaccessible to so many people, believing it was not sufficient to have a formal right of equality before the law—there needed to be affirmative action to ensure that the right was actualised.[40]

Reforms aimed at improving access to justice have included the provision of legal services for the poor, the representation of group and collective interests by others on behalf of

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[36] Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey* (Sitjoff and Noordhoff, 1978) 21.

[37] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27(2) *Buffalo Law Review* 181, 182.

[38] Farrow and Jacobs (eds) (n 19) 3.

[39] Noone, 'ADR, Public Interest Law' (n 3) 59; Ronald Sackville, *Law and Poverty in Australia: Second Main Report, October 1975* (Australian Government Publishing Service, 1975); Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody* (15 April 1991); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No. 89, 17 February 2000) (Web Document) <https://www.alrc.gov.au/publication/managing-justice-a-review-of-the-federal-civil-justice-system-alrc-report-89/> (*Managing Justice*); Australian Law Reform Commission, *Equality before the Law* (Report No. 69, 25 July 1994); Access to Justice Advisory Committee (n 1); Australian Government Productivity Commission (n 1). This has not just occurred in Australia. For example, in Canada in 2013, the National Action Committee on Access to Justice in Civil and Family Matters reported that Canada has a serious access to justice problem. The Canadian Bar Association, in its 2013 national justice review, claimed that the state of access to justice in Canada was 'abysmal' and, further, that inaccessible justice 'costs us all'. In 2016, the Senate Standing Committee on Legal and Constitutional Affairs reached a similar conclusion regarding court delays affecting access to the criminal justice system. Farrow and Jacobs (eds) (n 19) 13.

[40] Noone 'ADR, Public Interest Law' (n 3) 61 citing Cappelletti and Garth (eds) (n 36), 5.

the whole, and the emergence of institutions and devices, personnel and procedures, used to process or prevent disputes without having to resort to the traditional legal system.[41] The latter category of access to justice developments is particularly pertinent to this research, specifically the increase in the use of ADR processes within the civil justice system in Australia, including the increased role of tribunals.

The Waves of Access to Justice Reforms

Cappelletti and Garth identified what they termed as three 'waves' in the access to justice movement.[42] The first wave followed recognition that an initial obstacle to access to justice was simple economics—as a result of poverty or lack of money, a large number of people in society have little access to legal information or to adequate legal representation.[43] Thus, the first wave of access to justice developments was the provision of legal aid and advice to those who could not afford to purchase legal services.[44] For example, in Australia in 1971, the Commonwealth Government agreed to fund the first Aboriginal Legal Service in Redfern, New South Wales.[45] In 1972, a national legal aid scheme was also established.[46] Further changes to legal aid occurred following the 1975 release of the report into legal aid by then Commissioner for Law and Poverty Ronald Sackville.[47] The theory was that the provision of government-funded legal aid schemes would assist in providing people with a legal means to seek justice regardless of their financial situation.

The second obstacle to people achieving access to justice was seen as being organisational. This was based on the idea that, in the modern world of mass production, distribution and consumption, 'an isolated individual inevitably lacks sufficient

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[41] Cappelletti and Garth (eds) (n 36) 22–54; Sackville, 'Some Thoughts on Access to Justice' (n 20) 90.

[42] Cappelletti and Garth (eds) (n 36) 21.

[43] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 283. The availability of legal expenses insurance was another aspect of this first wave of access to justice developments as it was a method of attempting to make legal services affordable to those to whom they would otherwise be financially out of reach. However, this was never really taken up in Australia and is more common in Europe.

[44] Ibid.

[45] Elizabth Eggleston, 'Aboriginal Legal Services' (1974) 1(4) *Legal Services Bulletin* 93.

[46] A comprehensive history of Australian legal aid developments is set out in Mary Anne Noone and Stephen A Tomsen, *Lawyers in Conflict: Australian Lawyers and Legal Aid* (Federation Press, 2006).

[47] Ronald Sackville and Susan Armstrong, 'Legal Aid in Australia: A Report' (1975).

motivation, information and power to initiate and pursue litigation against the powerful producer or the mass polluter'.[48] The second wave of developments therefore focused on facilitation of class or representative actions and broadening the rules of standing to allow persons who have no direct or special interest in the subject matter of the litigation, such as an Attorney-General, to take action for the greater good.[49] As part of this tranche of reforms, some organisational and governmental agencies were created and specifically given standing to take legal action on behalf of the people.[50] Examples include the establishment of the office of an ombudsman in the telecommunications field, and the establishment of the standing rights of the Australian Competition and Consumer Commission.[51]

The third obstacle to equal access to justice was deemed to be procedural, in that many of the traditional, accepted legal procedures were found to be inadequate in ensuring equality before the law.[52] It was thought that, in certain areas or kinds of disputes, the traditional adversarial court processes and litigation were not the best way to provide effective vindication of rights.[53] There was recognition that '[l]egal procedures do not in themselves provide a means of reducing the disparities of power. They may even increase them because the ability to take advantage of such procedures is not equally distributed throughout society'.[54] The response to these procedural obstacles saw the third wave of access to justice developments focus on the expansion of a range of ADR processes. The search for alternatives to traditional litigation led to the development of conciliatory, non-contentious procedures, such as mediation, as well as arbitral mechanisms, such as

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[48] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 284.

[49] Noone and Akin Ojelabi, 'Ensuring Access to Justice' (n 30) 529; Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 284.

[50] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 285–6.

[51] Sackville, 'Some Thoughts on Access to Justice' (n 20) 92; Mauro Cappelletti, 'Access to Justice: Comparative General Report' (1976) 40(3/4) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 668, 696.

[52] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 284.

[53] Ibid 287.

[54] Tony Prosser, 'Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors' (1977) 4(1) *British Journal of Law and Society* 39, 59.

tribunals. Both types of alternatives were intended to resolve disputes more speedily and at less cost than the courts.[55]

In more recent years, Parker has identified a fourth wave of access to justice developments, being competition policy reform as applied to the provision of legal services.[56] In her view, the principal objective of the fourth wave of reforms has been to strike down restrictive practices in the legal services market with the expectation that, as a consequence, legal services will become available to consumers more cheaply and in a more accessible form.[57]

While Cappelletti's imagery of 'waves' of access to justice reform may create a vision of successive 'waves' of reform coming one after another, access to justice reforms in the legal system are, in fact, more like a number of interrelated changes that have occurred concurrently and are still continuing.[58] An added factor to consider is that access to justice developments and reforms to the legal system occur at the same time as broader social and economic changes and those societal changes have also had an impact on reforms to the legal system. What all access to justice reforms have in common is that they are working towards the ideal that 'everyone, even those with severely limited financial resources, legal knowledge, and time, can navigate the legal system and obtain a just outcome'.[59]

How ADR and Tribunals Fit in the Access to Justice Movement

The third tranche of access to justice developments recognised that traditional legal procedures were obstacles to access to justice for sections of the population.[60] Thus, there was a push to move dispute resolution away from litigation and legal processes towards social processes, such as negotiation, arbitration, ombudsmen and mediation, in which

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[55] Sackville, 'Some Thoughts on Access to Justice' (n 20) 93.

[56] Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 38–41.

[57] Ibid; Sackville, 'Some Thoughts on Access to Justice' (n 20) 90.

[58] Sackville, 'Some Thoughts on Access to Justice' (n 20) 90.

[59] American Association of Law Libraries, '*Law Libraries and Access to Justice*' (Report of the American Association of Law Libraries Special Committee on Access to Justice, July 2014), 4.

[60] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 284.

control by lawyers was less strong.[61] The appeal of these processes, termed ADR, was that they were perceived to be responsive to the needs of the parties, to be consensual and to preserve relationships, as well as being quick and inexpensive.[62] These attributes made ADR processes more accessible to a wider section of the community than traditional litigation.

The development and increased use of tribunals is another manifestation of a concern for alternatives to the formal, traditional adversarial, court-based dispute resolution. The tribunal movement and ADR are closely linked both historically and in terms of their 'impatience with the more hidebound aspects of the courts and the litigation system'.[63] Justifications for the creation of tribunals, both historical and modern, rest on tribunals' presumed advantages over ordinary courts that 'echo the claims made for ADR and criticisms of conventional court adjudication'.[64] Tribunals were said to have practical advantages over courts, including being faster, simpler and cheaper,[65] but also they had the benefit of being free of the entrenched history and ideology of the traditional court system.[66]

The third 'wave' reforms have meant that tribunals are commonplace in Australia and often deal with a significant number of substantive issues for everyday Australians. ADR

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[61] See, eg, Hazel Genn et al, '*Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure*' (Ministry of Justice Research Series, No 1/07, May 2007). On Ombudsmen, see, Sharon Gilad, 'Why the "Haves" Do Not Necessarily Come Out Ahead' (2010) 32(3) *Law and Policy* 283 and Richard Moorhead, 'Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers' (2014) 67(1) *Current Legal Problems* 447.

[62] Astor and Chinkin (n 3) 4; Genn, 'What Is Civil Justice for?' (n 3); Noone, 'ADR, Public Interest Law' (n 3); Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3); Access to Justice Advisory Committee (n 1).

[63] Oliver Mendelsohn and Laurence W Maher, 'Introduction' (1994) 12 (Special Issue)(1) *Law in Context: A Socio-Legal Journal*, 6.

[64] Genn, 'Tribunals and Informal Justice' (n 3) 394. See also Creyke, 'Tribunals and Access to Justice' (n 3); Daya-Winterbottom (n 3).

[65] Sir A Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (Stationary Office, 2001), ch 2, 6. See also Robson cited in Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 41; William A Robson, *Justice and Administrative Law: A Study of the British Constitution* (MacMillan & Co., 1928) 317; Farrow and Jacobs (eds) (n 19) 214.

[66] Arvind P Datar, 'Tribunalisation of Justice in India, The' (2006) *Acta Juridica* 288, 288.

processes have also become prevalent, both within the justice system and separate from it. The merits of both ADR and tribunals are said to be:[67]

- Cost and efficiency—both tribunals and ADR processes are usually considerably cheaper for the parties than going to court. They are also considered cheaper for society.[68]
- Speed—both tribunals and ADR processes can dispense with intricate procedures or elaborate rules that are insisted upon by a court and, as a result, their procedure is generally less complicated and therefore takes less time.[69]
- Flexibility and informality—both tribunals and ADR processes have greater flexibility with which to discharge their functions. For example, tribunals are not always bound by either their own past decisions or by the decisions of any other authority;[70] ADR practitioners such as mediators can adapt the process to suit the disputants.[71]
- Expertise—both tribunals and ADR processes can be overseen by individuals possessing special experience or training in particular fields relating to the jurisdiction or type of dispute.[72]
- Non-adversarialism—an often cited benefit of both tribunals and other ADR processes is a commitment to non-adversarial processes.[73] The non-adversarial approaches usually associated with tribunal decision-making are often

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[67] These advantages have been adapted from a list created by Robson. Despite writing on the advantages of administrative tribunals in the 1920s in the UK, Robson's list is still relevant today, as has been demonstrated earlier in this chapter. The only item I have removed is social justice. Robson saw tribunals as having the ability to lay down new standards and to promote a policy of social improvement. See Robson (n 65) 263. There are also innumerable sources discussing the advantages of ADR processes, but, again choosing an older source rather than newer one, Cappelletti discusses all these advantages at Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 289.

[68] Genn, 'What Is Civil Justice for?' (n 3) 413.

[69] Robson (n 65) 265.

[70] Although they are bound by court decisions that relate to appeals from the tribunals.

[71] Robson (n 65) 275. Robson thought it was a distinct advantage for a tribunal to be able to break away from a previous ruling that was known to have worked out badly, or for which a better conclusion was now available in the light of subsequent knowledge.

[72] Ibid.

[73] Phillip Allan Swain, 'Challenging the Dominant Paradigm: The Contribution of the Welfare Member to Administrative Review Tribunals in Australia' (S.J.D. Thesis, University of Melbourne, 1998). See also, G Davies and J Leiboff, 'Reforming the Civil Litigation System: Streamlining the Adversarial Framework' [111] (1995) *Queensland Law Society Journal*, 113.

characterised by a more active role for the decision-maker, both as to control over the proceedings and participation in the investigation and collection of the evidence.[74] For example, tribunals frequently discourage or do not require legal representation of parties,[75] and the rules of evidence and procedure are often relaxed or explicitly excluded from tribunal operations.[76] Ideally, non-adversarial approaches enable parties to explore the advantages and the opportunities that may arise from finding an agreed solution to the dispute.

One additional perceived preference for ADR over traditional litigation, and one that does not apply to tribunals but which is related to non-adversarialism, is that ADR has the potential to preserve the relationship between the parties.[77] This has encouraged the use of ADR in disputes in which the relationship between the parties is critical, such as family law matters that involve children, neighbourhood disputes, or disputes within schools or places of work or living.[78] In contrast, resort to litigation often signals a final break in the relationship.

Despite the frequently cited merits of both ADR and tribunals, questions remain about whether the reforms have improved access to justice or simply created additional complexity and forms of disadvantage and inequality. The following sections of this chapter look at the history and developments of ADR and tribunals, and set out some of the key criticisms of both.

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[74] Swain (n 73) 22.

[75] This can also be seen as a benefit of the informality of tribunals.

[76] Swain (n 73) 20. Garry Downes, 'Tribunals in Australia: Their Roles and Responsibilities' (2004) (84) *Reform* 7, 8.

[77] Gay Clarke and Iyla Davies, 'Mediation—When Is it Not an Appropriate Dispute Resolution Process' (1992) 3 *Australian Dispute Resolution Journal* 78, 70; Victorian Law Reform Commission, 'Civil Justice Review' (2008), 214.

[78] Astor and Chinkin (n 3) 4; Genn, 'What Is Civil Justice for' (n 3) 5; Noone, 'ADR, Public Interest Law' (n 3); Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3); Access to Justice Advisory Committee (n 1); Akin Ojelabi and Noone (n 3).

Alternative Dispute Resolution

In 1992, Sir Laurence Street wrote that ADR had become accepted and entrenched as the acronym for 'Alternative Dispute Resolution' in the field of dispute resolution.[79] Since then, 'argument has raged within dispute resolution circles about the use of the word "alternative" in ADR'.[80] The institutionalisation of ADR in the justice system has been said to be a reason not to refer to ADR as 'alternative'.[81] Spencer, Barry and Akin Ojelabi, in their recent work, choose not to use the word 'alternative' as they believe that 'dispute resolution is not an alternative to litigation; rather it is one of a number of processes that seek to resolve disputes before a court may have to adjudicate them'.[82] Some authors, particularly in Australia, prefer the terminology 'Appropriate Dispute Resolution', which acknowledges disputes need to be matched to the most appropriate dispute resolution process available.[83] The 'A' has also been used as representative of 'assisted', 'affirmative', and 'additional'.[84] While acknowledging this debate, in this thesis the terminology 'alternative dispute resolution' has been adopted for two reasons: first, as set out in the 'Access to Justice' section above, it is a theme of this thesis that tribunals and other forms of dispute resolution, including mediation, were initially seen as *alternatives* to the traditional court-based system. Second, the focus of this research is on cooling off periods in mediation as it occurs in a court- or tribunal-connected process and, in such a setting,

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[79] Sir Laurence Street, 'The Language of Alternative Dispute Resolution' (1992) 66(4) *Australian Law Journal* 194, 194.

[80] Spencer, Barry and Akin Ojelabi (n 2) 13.

[81] Jacqueline Weinberg, 'Keeping Up with Charge: No Alternative to Teaching ADR in Clinic. An Australian Perspective' (2018) 25 *International Journal of Clinical Legal Education* 35, 37; Anne Ardagh and Guy Cumes, 'The Legal Profession Post-ADR: From Mediation to Collaborative Law' (2007) 18(4) *Australasian Dispute Resolution Journal* 205, 205.

[82] Spencer, Barry and Akin Ojelabi (n 2).

[83] Alikki Vernon, 'The Ethics of Appropriate Justice Approaches: Lessons from a Restorative Response to Institutional Abuse' (2017) 35 *Law in Context: A Socio-Legal Journal* 139, 139; Akin Ojelabi and Noone (n 3) 8.

[84] Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co., 6th ed, 2020) 2 (*Alternative Dispute Resolution*); NADRAC, 'Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution' (September 2003) Australian Government Attorney-General's Department 4; MEJ Black, 'The Courts, Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia' (1996) 7(2) *Australian Dispute Resolution Journal* 138. The Australian Dispute Resolution Advisory Council ('ADRAC') in clause 1(a) of its charter refers to ADR as 'alternative/assisted'. Australian Dispute Resolution Advisory Council, 'Charter' (Web Page) <https://www.adrac.org.au/charter>.

settling a dispute at mediation can be seen as an *alternative* to the resolution of a dispute by an adjudicator following a hearing in a court or a tribunal.

Regardless of what words underlie the acronym, ADR describes a wide range of processes. The now defunct National Alternative Dispute Resolution Advisory Council (NADRAC)[85] defined ADR as an 'umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them'.[86] ADR can also more broadly be seen as the suite of devices, whether judicial or not, that have emerged as alternatives to ordinary or traditional types of procedures.[87] ADR includes processes such as negotiation, mediation, conciliation, facilitation, neutral evaluation, case appraisal, case conferencing and variations of these methods.[88] The inclusion, within ADR, of any form of expert determination such as referencing out (or refereeing) or arbitration are more controversial.[89]

A Brief History of ADR in Australia

Processes referred to as 'alternatives' to litigation are certainly not new. Aboriginal Australians have resolved disputes without recourse to litigation or anything resembling it since time immemorial.[90] From the early years of federation, Australia has had an

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[85] NADRAC was replaced by the Australian Dispute Resolution Advisory Council in 2011. While NADRAC is not currently in existence, it has significantly contributed to the understanding of dispute resolution in Australia.

[86] National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution—A Guide for Government Policy-Makers and Legal Drafters* (NADRAC, 2006), 100. See also Sourdin, *Alternative Dispute Resolution* (n 84) 3 who describes ADR as being traditionally seen as an alternative to traditional court proceedings; Genn et al (n 61) vii describes ADR as 'an umbrella term that is generally applied to a range of techniques for resolving disputes other than by means of traditional court adjudication'.

[87] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 282.

[88] Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 3; Ardagh and Cumes (n 81) 206. Further detail about various types of ADR processes is available in Victorian Law Reform Commission (n 77) 212.

[89] Spencer, Barry and Akin Ojelabi (n 2) 24 exclude them whereas both NADRAC (before being made defunct) and Sourdin, *Alternative Dispute Resolution* (n 84) includes them.

[90] 'As in any complex society, traditional Aboriginal groups had their own legal system and methods of resolving disputes ... Such a close-knit environment necessarily required the existence of a complex workable system of resolving conflict and a method of communal decision making'. Larissa Behrendt, *Aboriginal Dispute Resolution: A Step towards Self-Determination and Community Autonomy* (Federation Press, 1995) 7. Traditional communities, as well as industrialised societies, have all used elements of facilitated consensus-building in dispute and conflict resolution. David L Spencer, 'Mediating in Aboriginal

interest in settling disputes via arbitration and conciliation.[91] However, as described above, a wave of enthusiasm for, and development of, ADR was generated in the 1970s and 1980s in many Western industrialised societies, including Australia.[92]

As part of the access to justice reforms mentioned above, Community Justice Centres (CJC) were established in Australia during the 1970s, the first being in New South Wales.[93] CJCs provided the impetus for the rediscovery of ADR processes.[94] There were multiple motivations for their establishment[95] but one stimulus in their establishment was to find an effective resolution for problems known as backyard disputes that caused 'great aggravation and often lead to serious crimes'.[96] These disputes often took up a considerable amount of justice system time, both of the police and the courts. The community justice movement recognised that the law and the legal system did not treat everyone equally.[97] The formal justice system was seen as expensive, inaccessible, promoting conflict and taking control of disputes out of the hands of disputing parties.[98] Consequently, where possible, CJCs utilised ADR mechanisms to resolve disputes because

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Communities' (1996) 3 *Commercial Dispute Resolution Journal* 245. See also Astor and Chinkin (n 3) 11; Sourdin, *Alternative Dispute Resolution* (n 84) 11. More generally see Cappelletti, 'Alternative Dispute Resolution Processes' (n 20).

[91] Conciliation and arbitration were adopted in the early twentieth century as alternative methods of resolving industrial disputes. The Australian Constitution of 1901 specifically identifies conciliation as a means of resolving industrial disputes. See section 51(xxxv) of *Commonwealth of Australia Constitution Act 1901*. In 1904, the *Conciliation and Arbitration Act 1904* (Cth) passed, which, at section 20, encouraged the settlement of disputes. See also Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24(3) *Melbourne University Law Review* 839.

[92] Noone, 'ADR, Public Interest Law' (n 3) 63 citing Cappelletti; Astor and Chinkin (n 3), 11–22; Sourdin, *Alternative Dispute Resolution* (n 84) 5; Cappelletti, 'Alternative Dispute Resolution Processes' (n 20).

[93] Victoria created similar initiatives but called them Neighbourhood Mediation Centres, then Community Dispute Settlement Centres. Other states followed suit. Frances Gibson, 'Redfern Legal Centre: A History of Social Innovation' (PhD Thesis, La Trobe University, 2020) 25–49 ('Redfern Legal Centre'); Noone and Tomsen (n 46).

[94] Astor and Chinkin (n 3) 5. The idea behind the justice centres was that they would be a local dispute resolution service using mediation to resolve disputes (which promised peaceful consensual decision-making), run by non-professionals. Basten, Graycar and Neal refer to the importance of community legal centres being 'alternatives' to the traditional legal system. See John Basten, Regina Graycar and David Neal, 'Legal Centres in Australia' (1985) 7(1) *Law and Policy* 113, 129.

[95] Community justice centres are rooted in social justice and one impetus for their development was the communities and groups within communities reacting against state control and the regulation of people's lives. See Noone, 'ADR, Public Interest Law' (n 3) 64; Astor and Chinkin (n 3) 15; Gibson, 'Redfern Legal Centre' (n 93) ch 2; Basten, Graycar and Neal (n 94).

[96] Astor and Chinkin (n 3) 14.

[97] Noone, 'ADR, Public Interest Law' (n 3) 64.

[98] Astor and Chinkin (n 3) 4.

ADR gave disputants control over their lives, whether business or personal, and allowed them to be directly involved in the resolution of their disputes.[99] CJCs and their ADR processes were supported by governments in Australia because they were viewed as a mechanism to reduce wastage of resources in the justice system, freeing police to fight serious crime, providing greater public respect for the justice system, less temptation for persons to take the law into their own hands and much lower costs for processing cases.[100]

The other impetus for development of Australian ADR was family disputes. ADR, particularly mediation, was seen as having the ability to preserve relationships[101] and it was quickly embraced, not only by counsellors, therapists and social workers, but also by the formal justice system and the family courts.[102] Since its inception in 1975, the Family Court of Australia has placed importance on resolution of disputes by means other than litigation.[103] The use of ADR was emphasised in the *Family Law Act 1975* (Cth) and has only been expanded and fortified since, with the court regarding mediation, conciliation and counselling as the first and primary method of resolving disputes, with litigation recognised as the exception rather than the norm.[104] Since the 2006 reforms to the *Family Law Act 1975* (Cth), family dispute resolution, a common form of which is family mediation, has effectively become a compulsory first step in post-separation parenting disputes that enter the family law system.[105] A recent access to justice report noted that, in the 'many contexts where maintaining an ongoing personal, professional, or business relationship is important, including relationships between landlords and tenants, colleagues, members of clubs, parents and schools, separate government agencies, businesses in a small town, neighbours, and elderly people and their families', ADR has

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[99] Noone, 'ADR, Public Interest Law' (n 3) 64; Lola Akin Ojelabi, 'Community Legal Centres' Views on ADR as a Means of Improving Access to Justice: Part I' (2011) 22 *Australasian Dispute Resolution Journal* 111, 111 ('Community Legal Centres').

[100] Astor and Chinkin (n 3) 14.

[101] Andrew W McThenia and Thomas L Shaffer, 'For Reconciliation' (1985) 94 *Yale Law Journal* 1660.

[102] Astor and Chinkin (n 3) 6.

[103] Ibid 17.

[104] Ibid. See *Family Law Act 1975* (Cth) s 60I; *Family Law Rules 2004* (Cth) ch 1, pt 2.

[105] Lola Akin Ojelabi and Judith Gutman, 'Family Dispute Resolution and Access to Justice in Australia' (2020) 16(2) *International Journal of Law in Context* 197; Rachael Field and Johnathan Crowe, 'Playing the Language Game of Family Mediation: Implications for Mediator Ethics' (2017) 35 *Law in Context: A Socio-Legal Journal* 84, 84 ('Playing the Language Game').

the ability to lead to better outcomes than litigation.[106] When interpersonal issues are both the source of the conflict and the key to resolution, litigation 'may determine the legal issues but leave the underlying relationship problems unresolved, which increases the risk of future problems'.[107]

While the increase in the use of ADR began with neighbourhood disputes and family matters, it spread quickly. Perceived shortcomings in the court system, including delays, expense, intimidating formality and an emphasis on winner-take-all outcomes (rather than compromise or agreement between the parties), encouraged the growth of ADR.[108] Despite the fact that ADR had its roots in a radical critique of the formal justice system, it quickly generated support from governments and within the formal justice system.[109] In 1994, the Australian Government appointed the Access to Justice Advisory Committee (A2JAC). The A2JAC's view of access to justice was that it involved three key elements: equality of access to legal services and effective dispute resolution mechanisms; national equity (ie access to legal services regardless of place of residence); and equality before the law (ie ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities and the removal of barriers creating or exacerbating dependency and disempowerment).[110] The focus of A2JAC was thus the goal of equal opportunity to participate in the formal justice system, both in terms of access to legal services and access to courts and tribunals.[111] In its 1994 report, A2JAC recommended the use of ADR mechanisms as one way of improving access to justice.[112]

Over the years, a range of ADR methods, including mediation, conciliation, principled negotiation, early neutral evaluation and arbitration, have been recommended and

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[106] Victorian Government, 'Access to Justice Review: Volume 1 Report and Recommendations' (2016) 1, 207 ('Access to Justice Review: Volume 1').

[107] Ibid.

[108] Sackville, 'Some Thoughts on Access to Justice' (n 20) 94.

[109] Astor and Chinkin (n 3) 4.

[110] Access to Justice Advisory Committee (n 1) xxx.

[111] Louis Schetzer, Joanna Mullins and Roberto Buonamano, '*Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW*' (Law Foundation, Background Paper, 2003), 7 <http://www.lawfoundation.net.au/report/background>.

[112] Access to Justice Advisory Committee (n 1) xxiii.

promoted at both state and federal levels.[113] There has been a steady but significant increase in the number of Australian laws that mandate, provide for or refer to various forms of ADR.[114] Courts, and even tribunals, which were themselves established as an alternative to the formal justice system, have also embraced ADR.[115] For courts and tribunals, ADR was a response to a perceived crisis of the justice system that, allegedly, had become too expensive and time-consuming.[116] ADR offered the hope of a less expensive and faster method of resolving disputes at a time that court lists were increasing.[117] Courts have utilised ADR methods in multiple ways, including as a temporary measure (eg by running 'settlement weeks'[118]) and as a more permanent inclusion in their processes (eg it has become the norm for judges to refer cases to mediation or conciliation prior to trial).[119] ADR processes that were voluntary within the courts have become institutionalised aspects of the court and tribunal process and are often a mandated requirement before a matter can proceed to adjudication.[120] Many courts are able to refer disputes to ADR without party consent.[121] Access to legal aid and advice may now come

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[113] Astor and Chinkin (n 3) 3; Access to Justice Advisory Committee (n 1); Victorian Law Reform Commission (n 77); Australian Law Reform Commission, '*Review of the Adversarial System of Litigation: ADR, Its Role in Federal Dispute Resolution*' (Issues Paper 25, June 1998*)*.

[114] Altobelli, writing in 2000 said: 'In 1990 there were but a handful of Australian Commonwealth or State laws which referred to or provided for mediation in some way or another. Within ten years there are approximately 104 statutory instruments across Australia referring in some way to mediation or mediation like processes'. Tom Altobelli, 'Mediation in the Nineties: The Promise of the Past' (2000) 4 *Macarthur Law Review* 103, 104.

[115] Astor and Chinkin (n 3), 6; Kathy Mack, 'Court Referral to ADR: The Legal Framework in Australia' (2004) 22(1) *Law in Context: A Socio-Legal Journal* 112.

[116] GL Davies, 'Civil Justice Reform in Australia' in Adrian Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999), 166. In the US see Katz (n 21) 3.

[117] Astor and Chinkin (n 3) 4.

[118] Mack (n 115) 112; Tania Sourdin and Tania Matruglio, 'Evaluating Mediation: New South Wales Settlement Scheme 2002' (2004), 1 <https://ssrn.com/abstract=2721555>.

[119] Mack (n 115); Astor and Chinkin (n 3); Sourdin, *Alternative Dispute Resolution* (n 84).

[120] For example, in the Federal Court, where the move from voluntary mediation to mandatory mediation was initiated by the judges themselves. See Altobelli (n 114) 122; Black (n 84) 138. In Victoria, s88 of the *Victorian Civil and Administrative Tribunal Act* (1998) contains provisions for the tribunal to refer proceedings or part thereof for mediation, with or without the consent of the parties, at their own cost. If the matter is settled at mediation, under the same section of the legislation, the tribunal has power to enter settlement as an order of the tribunal. In the Commonwealth Administrative Appeals Tribunal, preliminary conferences, directions hearings and mediations are all used. Another example is the National Native Title Tribunal, which has an especially strong focus on mediation. See Astor and Chinkin (n 3) 8.

[121] Mack (n 115) 126. For example, the Victorian Supreme Court, County Court and the Victorian Civil and Administrative Tribunal are all empowered to refer matters to mediation with or without the consent of the

with a requirement to first utilise ADR.[122] ADR has also spread into the commercial and corporate world because of concerns about reducing litigation costs and being able to assert further control over the resolution of disputes.[123]

Compared to the early 1970s when ADR was seen as alternative and out of the ordinary, ADR is now preferred by modern legal systems.[124] As Katz says, 'no longer an alternative, ADR is now an integral part of the very systems it sought to replace'.[125] ADR offered, and continues to offer, an opportunity for individuals to engage their rights in the legal context.[126] Increasing the use and types of ADR processes remains Australian Government policy at both state and federal levels.[127] A related aspect of this development, and also part of the move away from what has been seen as expensive, time-consuming and legalistic court adjudications, has been the increase in the number and jurisdiction of tribunals in Australia.

Tribunals

Introduction to Tribunals

While modern legislation has greatly increased the number and variety of tribunals, they are not a new phenomenon in the legal world and have existed in various forms since at

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parties, while the Victorian *Magistrates Court Act 1989* provides for referral with consent. *Supreme Court Rules 1996* (Vic) r 50.07; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) r 34A 2.1; *Victorian Civil and Administrative Tribunal Act 1998* s 88; *Magistrates Court Act 1989* (Vic) s 108.

[122] Astor and Chinkin (n 3), 8.

[123] Noone, 'ADR, Public Interest Law' (n 3) 64. See also Simon Roberts, 'Re-Exploring the Pathways to Decision Making: Alternative Dispute Resolution and the Response of the Legal Profession and the Courts' (1994) 12(2) *Law in Context* 9, 13; Black (n 84) 132. Astor and Chinkin (n 3) 6 note that, while the commercial sector had long used arbitration as an alternative to the formal justice system, other forms of ADR were adopted around the same time as the ADR movement gathered steam and clauses began to appear in commercial contracts providing for disputes to be referred to ADR before litigation could commence.

[124] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 287.

[125] Katz (n 21) 1.

[126] Noone, 'ADR, Public Interest Law' (n 3) 63.

[127] Victorian Law Reform Commission (n 77) 212.

least the eighteenth century[128] and even existed in medieval times.[129] Modern tribunals have their roots in the social, economic and political developments of the nineteenth and twentieth centuries,[130] and have also been considered part of the more recent access to justice reforms.[131] The emergence and proliferation of tribunals, particularly since the 1970s, has been in response to many of the barriers to equity and fairness inherent within the court system that other ADR processes have also sought to allay.[132] In particular, the introduction of tribunals as alternatives to courts sought to address a concern about court congestion and the associated delays and costs of court proceedings.[133] The trend was also driven by the complexity of court procedures and 'general bewildering atmosphere of the courts'.[134] In addition, arguments for establishing tribunals to deal with certain categories of dispute, rather than giving that jurisdiction to the ordinary courts have, like ADR processes, been based on allegations of systemic disadvantages in court processes against those with less money or education; practical arguments concerning lack of resources in the courts to handle new and potentially huge caseloads; and the perceived benefits of tribunals over ordinary courts in terms of speed, cheapness, informality and expertise.[135] Like ADR, tribunals have been viewed as cheap, non-technical substitute

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[128] Cane (n 65) 2.

[129] Ronald E Wraith and Peter G Hutchesson, *Administrative Tribunals* (Allen & Unwin, 1973) 18. The very word 'court', which today we associate so closely with the administration of justice, signifies etymologically the king's palace or residence, a place that was primarily the seat of executive power. See Robson (n 65) 27. Even by the end of the twelfth century, there are records of judicial officials being employed to perform administrative tasks, as well as examples of extra-judicial remedies, exercised by an administrator, gradually crystallising into judicial form through the use of judicial methods. The development of the Court of Chancery, which is now such an integral part of the English legal system, together with the system of equity that it propounded, is another example of the co-mingling of the judicial and administrative role, this time the role of administrator developing into a judicial role.

[130] Cane (n 65) 23. See also Robson (n 65) xv who says that the traditional court system, in which isolated individuals contest disputed rights of property or person, has been superseded by an entirely new type of judicial process so far as concerns controversies arising in connection with the great new social services undertaken by the state.

[131] Leggatt (n 65) Overview, 8; Genn, 'What Is Civil Justice for? (n 3) 413; Oliver Mendelsohn and Laurence W Maher (eds), *Courts, Tribunals and New Approaches to Justice* (La Trobe University Press, 1994).

[132] Schetzer, Buonamano and Mullins (n 22) 10.

[133] Swain (n 73) 20, citing Sir Richard Eggleston, 'What is Wrong with the Adversary System?' (1975) 49 *Australian Law Journal* 428, 429.

[134] Lindsay Curtis, 'Agenda for Reform: Lessons from the States and Territories' in Robin Creyke (ed), *Administrative Tribunals: Taking Stock* (Center for International and Public Law, 1992), 39.

[135] Genn, 'Tribunals and Informal Justice' (n 3) 395. There have also been constitutional arguments that relate to the jurisdiction of tribunals as compared to courts. See Wraith and Hutchesson (n 129); Cane (n

dispute resolution processes for a wide range of grievances and disputes, in which parties can initiate actions without cost or fuss.[136] Finally, tribunals have been envisaged as being able to overcome the fact that dynamics such as gender, language, culture, experience and financial resources can all have a significant impact on a party's ability to present and prove their case, as required by a court.[137]

A Very Brief History of Tribunals in Australia (and England)

While it is beyond the scope of this work to delve into the history of tribunals in detail, nonetheless it is helpful to understand how the rise of tribunals, particularly post World War II, is linked to the rise of the welfare state, access to justice reforms and, like ADR reforms, a desire to find a mechanism for the resolution of disputes that was quicker, cheaper, and more accessible than the courts. Given the influence of the English legal system on Australian law, such that the basic source of law in both countries is the same, any discussion of the development of Australian tribunals needs to begin with at least a summary of its English antecedents.[138]

Today there are multiple types of tribunals dealing with many different sorts of disputes, but tribunals have existed since at least the twelfth century, and have been created and used for similar reasons.[139] For example, the Star Chamber, which sat at the Royal Palace of Westminster from the late fifteenth to the mid-seventeenth century, had parallels with

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65); Brian Abel-Smith and Robert Bocking Stevens, *In Search of Justice: Society and the Legal System* (Allen Lane, 1968); Harry Street, *Justice in the Welfare State* (Stevens, 2nd ed, 1975); Geoffrey Marshall, 'The Franks Report on Administrative Tribunals and Enquiries' (1957) 35(4) *Public Administration* 347; Gabriel Fleming, '"Barrier-Free Justice": Access and Equity Service Commitments in Tribunals' (2004)(84) *Reform* 29.

[136] Genn, 'Tribunals and Informal Justice' (n 3) 393.

[137] Swain (n 73) 21.

[138] By the beginning of the eighteenth-century, English law had developed well-settled rules for determining the laws that should apply in territories that were newly acquired. Based on the now objectionable concept of *terra nullius* and Australia being considered an empty land without people, constitutional principles made English law the foundation of the Australian legal system. The operation of these principles provided for the transfer of a vast body of English law to each of the Australian states and ensured that the heritage of English law would be shared in Britain's Australian possessions. Effectively, up to the time of their settlement, each of the Australian states has the same legal history as Britain. Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2(1) *Adelaide Law Review* 1. See also Robin Creyke, *Laying Down the Law* (LexisNexis Butterworths, 2020) ch 2.

[139] Wraith and Hutchesson (n 129) 18; Downes (n 76) says that the origins of tribunals lie in the Roman tribune whose task was to stand between plebeian citizens and patrician magistrates.

modern tribunals because its jurisdiction was essentially discretionary.[140] Like modern tribunals, it was able to take a more informal approach and do away with traditional court procedures such as writs, pleadings and jury trials.[141] This meant that the Star Chamber was able to offer swifter and more effective remedies than ordinary courts and was less prone to influence.[142] Although the Star Chamber was instituted as a political means of maintaining the power of the Tudor monarchy, its efficiency quickly made it a popular alternative to the ordinary courts—and for the same reasons that are generally cited in justification of tribunals today: cheapness, accessibility, freedom from technicality and expediency.[143]

The quarrel between the Stuarts and the Parliament in the seventeenth century, and the victory of Parliament, meant that courts were able to assert dominance over the executive in the judicial area.[144] Tribunals largely did not survive because, having become in some cases 'a device to cloak the use of arbitrary power in the mantle of legality',[145] or worse, instruments of persecution, they were not popular. Thus, for a period, they were not considered an acceptable form of adjudication.[146] Tribunals found their way back into the English judicial system towards the end of the nineteenth century. In Britain, the industrial revolution, with its associated social and economic problems, had brought changes in

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[140] Wraith and Hutchesson (n 129) 20.

[141] Ibid 21.

[142] Ibid.

[143] Ibid. Wraith also suggests that the courts were increasingly out of touch with the social requirements of the day, having developed at a time when the main purpose of the legal system was to relieve the burdens and protect the privileges of the landowning interest, and that the courts were ill-suited to the interests of the new merchant class that was developing under the Tudors. It is also worth noting that the lack of procedural safeguards brought about by the lack of court formality arguably enabled the excesses of the Star Chamber.

[144] Although subservient to Parliament (unlike in the United States). Stuart Morris, 'The Emergence of Administrative Tribunals in Victoria' (2004)(41) *Australian Institute of Administrative Law Forum* 16, 17. Wraith and Hutchesson (n 129) 22. In fact, HWR Wade, in evidence to the Franks committee, effectively stated that this subservience of the courts to Parliament, and the fact that parliamentary protection of civil liberties was and is largely a matter of accident, led to the tangled web of tribunals and quasi-judicial procedures because Parliament was trying to fill a hole in the judicial system. The courts cannot control the innumerable minor acts of government (unless they are illegal) because of their complete separation from politics and yet these acts are things that matter most to the individuals whom they affect. Paraphrased from Franks Committee, Minutes of Evidence 544, quoted in ibid 23.

[145] Wraith and Hutchesson (n 129) 22.

[146] Ibid.

political and philosophical ideas. New tribunals in the United Kingdom[147] were purposely established with characteristics that were non-legal in character and the courts were deliberately bypassed for a system that it was hoped would be better suited to these types of disputes.[148] For example, in 1919, the large number of claims for war pensions arising from World War I generated the first pension's tribunal, designed to deal with claims as informally and inexpensively as possible.[149] There was some concern that these bodies were taking on a judicial power usually only held by courts.[150] For example, Robson wrote in 1928 that '[t]hese tribunals are not only unconnected with the courts of law, but are also for the most part outside their control'.[151] However, following the effective blessing of the Donoughmore committee,[152] tribunals in the UK took firm root.[153]

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[147] Cane (n 65) 31. The first of which was an administrative tribunal established in 1911 to review decisions about entitlements to unemployment insurance payments under the *National Insurance Act*. Wraith also cites 1911 as the beginning of administrative tribunals that are a by-product of the welfare state. Wraith and Hutchesson (n 129) 17.

[148] Wraith and Hutchesson (n 129) 35, citing Abel-Smith and Stevens (n 135) 117.

[149] Wraith and Hutchesson (n 129) 35. These tribunals consisted of a lawyer, a medical practitioner and a service member (a disabled officer or soldier of equivalent rank to the claimant).

[150] In the UK, concerns were raised about the fact that the adjudication of disputes was taking place. See, eg, Robson (n 65); Lord Hewart, *The New Despotism* (Ernest Benn, 1929); Cane (n 65).

[151] Robson (n 65) xiii; Wraith and Hutchesson (n 129) 17.

[152] The Donoughmore Committee was created in 1929 and reported in 1932. Its task was to consider the role and powers of tribunals, particularly their power to make judicial or quasi-judicial decisions, and 'to report what safeguards are necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of Law'. Its creation owed much to the fact that the then Lord Chief Justice, Lord Hewart, attacked the 'new despotism', being the ousting of the courts by tribunals and the growth of arbitrary power in the hands of the bureaucracy. Although his views were not uncommon among other judges and academics, the government could not ignore the views of the holder of such high judicial office and established the Committee. See Wraith and Hutchesson (n 129) 35.

[153] Ibid 38-9. As examples of tribunals 'taking root' Wraith describes how compulsory national service generated appeals for exemptions and claims for compensation and war damage, all of which were dealt with by tribunals. At the same time, the agricultural industry, which was vital to the war economy, was subjected to rigorous controls, which meant that there was new machinery of adjudication in the form of tribunals. This increased post-World War two, when UK domestic policy tribunals fell into two main groups: tribunals that arose from the social security program of the postwar government (these came out of four principal statutes—the *National Insurance Act 1946*, which created national insurance local tribunals, the *National Health Services Act 1946*, which established the various national health service tribunals to deal with the difficulties of incorporating medical practitioners into the national health service, the *National Insurance Industrial Injuries Act 1946*, which replaced the old system of workmen's compensation, and the *National Assistance Act 1948*, which modified the then exiting unemployment assistance tribunals); and tribunals that arose from policies of increasing regulation. The regulatory type of tribunal that had existed before the turn of the century in relation to the railways, and then into the 1930s in relation to road and air traffic (the Traffic Commissioners 1933 and the Air Transport Licensing Board 1938), was extended into new fields, notably into the supervision of independent schools and children's voluntary homes and the control of furnished rents.

Following World War II, Western governments, including in England and Australia, were faced with increased welfare and regulatory responsibilities.[154] Because of the complexity, length, and expense of hearings within the traditional legal system, the courts 'could not plug the accountability gap created by the dramatic increase in governmental responsibilities'.[155] Tribunals were chosen over courts to take on these jurisdictions because of their practical benefits of economy, greater accessibility, a faster decision-making process, informality, procedural flexibility, specialist expertise and a sidelining of legal technicalities.[156] During this same period of time in Victoria, a 'flood' of tribunals occurred: administrative tribunals to meet community demands to moderate the growing power of the government in these previously private areas of people's lives; and merits review tribunals, which were established on a needs basis, with specialist bodies created in response to discrete subject matters as they arose.[157] Reports in both the UK and Victoria in the 1960s consolidated the position of tribunals. In the UK, the 1967 Franks Committee report[158] conceptualised tribunals as essentially the same as courts but with certain advantages.[159]

The argument for the development of tribunals went much further than the supposed practical advantages of tribunals over courts. An important strand in the history of the development of tribunals in England and Australia was dissatisfaction with, and a desire to create alternatives to, the existing courts (as with the ADR developments discussed above).[160] Tribunals were needed, according to some commentators, to break away from

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[154] The welfare responsibilities were in areas of health, education and welfare schemes, while the regulatory responsibilities came from the fact that governments had begun to regulate previously unfettered areas dominated by private, rather than public, interests. Morris says: 'The statute books exploded with an array of new laws. We saw new law regulating trade practices, the environment, and discrimination. And, although town planning had been around since the 1920s, it was only given legislative teeth in the 1950s'. See Morris (n 144); Cane (n 65) 30. See also Commonwealth Administrative Review Committee, *Report* (Parliamentary Paper No. 144, August 1971) 32.

[155] Morris (n 144) 17.

[156] Cane (n 65) 41–4; Morris (n 144) 18; Leggatt (n 65) ch 2, 6; Robson (n 65) 317.

[157] Morris (n 144) 18. Examples of tribunals from this time in Victoria include the Fair Rents Board, the Town Planning Appeals Tribunal, the Drainage Tribunal and the Land Valuation Board of Review.

[158] In 1955, the UK Government set up a Committee on Tribunals and Enquiries, known as the Franks Committee, to consider, among other things, the 'constitution and working of tribunals other than ordinary courts of law'.

[159] Wraith and Hutchesson (n 129) 42.

[160] Cane (n 65) 4. See also Wraith and Hutchesson (n 129); Abel-Smith and Stevens (n 135); Genn, 'Tribunals and Informal Justice' (n 3) 394; Morris (n 144) 18.

the property-and-contract-based ideology of the courts and the common law in order to achieve the objectives of statutory programs of regulation and welfare.[161] They were also seen as undertaking a new policy of social improvement in areas in which the state had intervened.[162] Many believed that judges and courts were not best placed to promote the ideology and programs of the welfare and regulatory state.[163] Tribunals were seen as being able to provide elements of fairness and 'good administration' in new areas of dispute between state and citizen.[164] So, while part of the reason for the growth of tribunals in this postwar era was that they were seen as a good alternative to courts because they had the ability to compensate for defects in the judicial system, particularly in new areas of conflict between state and citizen,[165] the contemporary societal view held that ordinary courts of law were not capable of dealing adequately with a particular dispute or category of cases because of their entrenched history and ideology.[166]

The 1960s also saw the jurisdiction of tribunals start to extend into areas of human liberty, in particular, appeals against restriction on grounds of mental health and against refusal of permission to enter or remain in a country on the ground of nationality.[167] By 1970, tribunals in the UK were making decisions that affected many people's lives, including decisions about statutory benefits, rents, rates or redundancy payments, as well as decisions about more fundamental human rights such as deprivation of liberty by admission to mental hospitals and restrictions on the movement of migrants.[168] A similar

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[161] Cane (n 65) 34.

[162] Robson (n 65) 317.

[163] For example, Robson and his followers from the London School of Economic. See Cane (n 65) 41. Appointments to tribunals from areas other than the judiciary would avoid the institutionalisation of class bias that it was thought judges suffered from. See Hazel Genn, 'Tribunal Review of Administrative Decision-Making' in Hazel Genn and G Richardson (eds), *Administrative Law and Government Action* (Claredon Press, 1994) 252–3.

[164] Prosser (n 54) 41.

[165] Ibid.

[166] Datar (n 66) 288.

[167] Wraith and Hutchesson (n 129) 40.

[168] Wraith and Hutchesson (n 129) 14 write:

> Farmers whose ditches need draining or whose dairies are thought to be un-hygienic, bookmakers whose levy to their profession is in dispute, proprietors of independent schools whose standards are in question, pop groups the copyright of whose discs is in doubt, rose growers whose claim to an exclusive bloom is being challenged, the owners of coaches or lorries who wish to ply for hire, or to

trend occurred in Australia. For example, 1975 marked both the establishment of the Commonwealth Administrative Appeals Tribunal, with its jurisdiction over a very wide range of government decision-making, including decisions that intruded into 'every aspect of society and the lives of citizens',[169] and the Social Security Appeals Tribunal.[170]

In the 1980s there were sweeping administrative law reforms and an enormous growth in Australia in the numbers of administrative review tribunals at both state and federal levels.[171] Consistent with the history of UK tribunals, these administrative tribunals aimed to offer an alternative pathway to dispute resolution that was less complex and adversarial than traditional court-based litigation.[172] The growth of new tribunals began to peak in the late twentieth century in Australia, but existing tribunals continued to flourish.[173] In 1993, Genn reported that UK tribunals heard over a quarter of a million cases annually, representing some six times the number of contested civil cases disposed of at trial before the High Court and County Courts together.[174]

The apparently unfettered expansion of tribunals continued from the 1960s onwards.[175] In 1982, a Victoria Law Foundation Report estimated the number of tribunals in Victoria at that time to be between two and three hundred.[176] Genn wrote in 1993 of 'a remarkable proliferation' of tribunals in the UK over the 50 years between the 1940s and 1990s and that 'new tribunals are being created all the time'.[177]

> extend their service. Then there are cases where firms, public corporations or local authorities seek a fair deal from tribunals rather than justice from the courts e.g. the civil aviation authority, industrial tribunals, the Lands tribunal, the patents and trademarks 'tribunal', the traffic commissioners, the special commissioners of income tax.

[169] Downes (n 76) 8.

[170] Swain (n 73) 95.

[171] Mendelsohn and Maher (eds) (n 131), 93; Swain (n 73) 12.

[172] Because to veer down such a path would, it has been argued, reduce the administrative tribunal to 'a pale imitation of a court' or a 'defacto court'. Arun Kendall, 'Non-Lawyers and Administrative Law' (1995) *Administrative Law and Public Administration – Form vs Substance, Proceedings of the 1995 Administrative Law Forum, Australian Institute of Administrative Law*, 318, cited in Swain (n 73) 9–10.

[173] Justice Garry Downes, 'An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008) 2, 2.

[174] Genn, 'Tribunals and Informal Justice' (n 3) 393.

[175] Morris (n 144) 18.

[176] Adrian Robbins, 'Administrative Tribunals in Victoria' (1982) *Victoria Law Foundation*.

[177] Genn, 'Tribunals and Informal Justice' (n 3) 393.

Consolidation of Tribunals

While the tribunal system was described by some as 'a comprehensive and visionary system',[178] there had been calls for a consolidation of boards and tribunals from as early as the late 1960s.[179] At the federal level in Australia, in 1971 the Commonwealth Administrative Review Committee, chaired by Sir John Kerr, released a report detailing the limitations of the existing, ad hoc mechanisms through which administrative decision-makers were held to account, and recommended a suite of reforms that became known as the 'New Administrative Law' package.[180] This ultimately led to the creation of a consolidated body, the Commonwealth Administrative Appeals Tribunal, in 1976.[181] However, tribunals continued to multiply, particularly at the state level. This was a particular issue in the 1980s when, consistent with government concerns about government spending and the need for cost cutting, the multiplicity of tribunals and presumed consequent lack of efficiency became a concern.[182] The Administrative Appeals Tribunal of Victoria was created in 1984. This was closely modelled on the Commonwealth Administrative Appeals Tribunal but had much more limited jurisdiction. In Victoria in

[178] John Handley and Kathryn Cole, 'Internal Review and Alternative Dispute Resolution: The Hidden Face of Administrative Law' (1995) *Administrative Law and Public Administration – Form vs Substance, Proceedings of the 1995 Administrative Law Forum, Australian Institute of Administrative Law*, 171.

[179] In 1967–68, the Statute Law Revision Committee produced the *Report upon Appeals from Administrative Tribunals and a Proposal for an Ombudsman*, recommending a consolidation of Victoria's boards and tribunals. Mostly this was ignored although, in 1981, the Planning Appeals Board was created, which consolidated a number of planning, environment, local government and drainage tribunals. See Morris (n 144) 18.

[180] The committee was set up to examine whether there should be a further avenue of judicial review by a Commonwealth superior court, and whether Australia should introduce legislation akin to the *Tribunals and Inquiries Act 1958*, 6 & 7 Eliz 2, c 66: Commonwealth Administrative Review Committee, Commonwealth Government, Commonwealth Administrative Review Committee Report (1971) [1] ('Kerr Committee Report'). That package included the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the establishment of the Administrative Appeals Tribunal (AAT), Commonwealth Ombudsman and Administrative Review Council (ARC) and, a little later, the *Freedom of Information Act 1982* (Cth) (following several further reports).

[181] The Hon Justice Duncan Kerr, 'Reviewing the Reviewer: The Administrative Appeals Tribunal, Administrative Review Council and the Road Ahead' (Annual Jack Richardson Oration 15 September 2015). However, consolidation was not the main aim of the change. More detail is available at Simon Roberts (n 123).

[182] Robin Creyke, '"Better Decisions" and Federal Tribunals in Australia' (2004) (84) *Reform* 10 ('Better Decisions').

1987, further consolidation occurred with the Planning Appeals Board and the Administrative Appeals Tribunal being combined into one body.[183]

Nonetheless, the number of tribunals continued to increase. In 1996, the then Victorian Attorney-General, the Honourable Jan Wade, described the system as 'a perplexing mosaic of jurisdiction, confusing to lawyers, lay people and public servants alike'.[184] In 2002, Creyke wrote that there were so many tribunals in existence in Australia that it had got to the point where 'no Australian jurisdiction has managed to establish how many tribunals exist, much less how much they cost'.[185] At a federal level, in the mid-1990s, the Administrative Review Council was tasked with providing an overall assessment of the effectiveness of the evolution of the tribunal system. It recommended that, at the federal level, most specialist tribunals and the Commonwealth Administrative Appeals Tribunal be folded into a new consolidated tribunal.[186] However, this planned amalgamation did not reach the level of consolidation into one 'super tribunal' as ultimately occurred in Victoria with the establishment of VCAT.

The next section describes the formation of VCAT. While the amalgamation of a number of tribunals into the 'super tribunal' of VCAT had clear efficiency objectives, what is interesting in the context of this research is that, from its inception, VCAT was also developed to improve access to justice.

Development of VCAT

In 1998, the then Victorian Attorney-General Jan Wade, when introducing the *Victorian Civil and Administrative Tribunal Bill,* expressed the view that tribunals were an integral part of the Victorian justice system.[187] She acknowledged the fact that, in the 20 years prior, Victoria, like the rest of Australia, had seen exponential growth in the number and

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[183] Morris describes this consolidation of these jurisdictions as the link between the disconnected, ad hoc tribunal system of the postwar period and today's VCAT. Morris (n 144) 19.

[184] Quoted in ibid.

[185] Creyke, 'Tribunals and Access to Justice' (n 3) 73.

[186] Creyke, 'Better Decisions' (n 182) and Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No. 39, 1995). However, this did not occur until 2015 when the Administrative Appeals Tribunal was combined with the Social Security Appeals Tribunal (SSAT) and the Migration Review and Refugee Review Tribunals (MRT-RRT) pursuant to the *Tribunals Amalgamation Act 2015* (Cth).

[187] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 972 (Jan Wade, Attorney-General).

variety of tribunals servicing the community[188] and that tribunals had the benefit of being relatively informal, inexpensive and efficient as compared to the traditional court system.[189] She considered that the creation of the Victorian Civil and Administrative Tribunal would be the most comprehensive reform in Australia in the area of tribunals to date[190] and that 'VCAT', as it would be known, would be a 'super tribunal' and a 'one stop shop' for the community.[191] It was said to be a revolutionary change to the status quo.[192]

Twelve existing tribunals, authorities and boards were amalgamated into the new tribunal, which was also conferred some completely new areas of jurisdiction.[193] The legislation enabling the establishment of VCAT[194] was modelled to an extent on the (now repealed) Victorian *Administrative Appeals Tribunal Act 1984*[195] that, in turn, was modelled on the Commonwealth *Administrative Appeals Tribunal Act 1975*.[196] However, neither of these tribunals were designed to have the additional civil jurisdictions proposed for VCAT. The new super tribunal was part of the implementation of the then Victorian Liberal government's pre-election commitment to provide Victorians with 'a modern, accessible, efficient and cost-effective justice system'.[197] The *Victorian Civil and*

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[188] Ibid.

[189] Ibid. Although it was also recognised that the number and diversity of tribunals in Victoria was not without problems. In the lead-up to the presentation of the VCAT draft legislation, an Attorney-General's discussion paper had been released that stated:

> Despite the perceived and actual benefits of tribunals as opposed to courts, the development of tribunals has been piecemeal and has taken place without any real consideration of the overall system by which Victoria strives to administer justice. Consequently, there appear to exist a number of deficiencies in the current structure and operation of tribunals within the Department of Justice.

Department of Justice, *Tribunals in the Department of Justice: A Principled Approach* (1996) 4. See also Morris (n 144) who says that when VCAT was created in 1998, it was a new experiment, and the reforms were hailed as the most far-reaching of any jurisdiction in Australia.

[190] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 975 (Jan Wade, Attorney-General).

[191] Justice Kevin Bell, One VCAT, President's Review of VCAT (VCAT, 2009), 1.

[192] Jason Pizer, 'VCAT: The Dawn of a New Era for Victorian Tribunals' (1998) 72(8) *Law Institute Journal* 54, 61 ('VCAT'). At the time, there were no other tribunals of the scale and size projected for VCAT nor with the extensive jurisdiction proposed for VCAT in Australia nor the common law world.

[193] For instance, the retail tenancy disputes was a new jurisdiction. Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 973 (Wade, Jan, Attorney-General).

[194] *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

[195] *Administrative Appeals Tribunal Act 1984* (Vic).

[196] Jason Pizer, *Annotated VCAT Act* (3rd ed, 2007) 3.

[197] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 972 (Jan Wade, Attorney-General).

Administrative Tribunal Bill attempted to specifically address those aspirations. In the second reading of the speech, Attorney-General Jan Wade focused on her expectation that the services offered by the new tribunal would be 'relevant, responsive and efficient',[198] and would benefit all Victorians, including the business community and people living and working in rural Victoria.[199]

As part of the establishment of VCAT, there were two procedural changes of particular relevance to this research. The first was the government emphasis on the fact that common procedures and a consistent approach across all jurisdictions would produce far more beneficial results than the existing disparity in processes.[200] For example, only some of the jurisdictions to be joined under VCAT had mediation as an option available to parties to the dispute.[201] The new legislation would allow, in appropriate cases, all parties to access mediations.[202] Second, and more contentiously, the use of lawyers was to be limited. Lawyers were seen to contribute to an unnecessarily legalistic, adversarial environment, and to prolong and complicate matters.[203] The Bill allowed for only limited representation by lawyers and extended the concept of representation to include professional advocates, such as town planners, whom it was felt would assist in the settlement of matters.[204] The VCAT Act received Royal Assent on 2 June 1998. A number of sections commenced operation on that date with the remaining sections commencing operation on 1 July 1998.

Subsequent to the establishment of VCAT, the VCAT model, adapted as appropriate, has been emulated by most Australian states and territories, and has been influential in the

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[198] Ibid.

[199] Ibid. Consistent with a Liberal government philosophy, by amalgamating a number of small existing tribunals, a new super tribunal was also anticipated to be more efficient and to make more effective use of resources. Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 973 (Jan Wade, Attorney-General). Similar comments about the advantages of tribunals in the same year were made by Louise Asher, Minister for Small Business in Victoria, who said, during the Second Reading Speech of the *Tribunals and Licensing Authorities (Miscellaneous) Amendments Bill (Vic)*: 'Tribunals can offer litigants a high level of expertise in a forum which is less expensive and more accessible than the court system'. Victoria, *Parliamentary Debates*, Legislative Assembly, 19 May 1998, 1140 (Louise Asher, Minister for Small Business).

[200] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 973 (Jan Wade).

[201] Ibid.

[202] Ibid.

[203] Ibid 974.

[204] Ibid.

development of the UK's Tribunals Service and in proposals for more integrated tribunals in New Zealand and in Canada.[205] VCAT itself has grown considerably in the 21 years since its establishment and it now has a jurisdiction comprising five divisions under which sit nine lists.[206] Rather than limitations being placed on VCAT, new jurisdictions have been added since its inception.[207]

Like the twelfth-century Star Chamber mentioned above, in keeping with the desire for a tribunal that would be relatively informal, inexpensive and efficient as compared to the traditional court system, VCAT has the power to regulate its own procedures with the caveat that the proceedings must be conducted with as much expedition as possible and with as little formality and technicality as possible. Section 98(1) states:

> The Tribunal
> (a) is bound by the rules of natural justice;
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;
> (c) may inform itself on any matter as it sees fit;
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.[208]

The discretion to regulate its own procedures has been tempered by the requirement that VCAT must comply with the rules of natural justice[209] and the requirement that it act fairly and according to the substantial merits of the case in all proceedings.[210] In practice, this has meant that different divisions within VCAT have been free to develop practices and

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[205] Creyke, 'Tribunals and Access to Justice' (n 3). As an illustration, in the year following the establishment of VCAT, New Zealand undertook a review of their own disparate tribunals. New Zealand's Law Commission saw benefits in the establishment of an arrangement like VCAT, including detachment from the agencies or organisations whose decisions are being challenged, a better use of resources and a higher standard of process. Daya-Winterbottom (n 3) citing Law Commission New Zealand, '*Striking the Balance*' PP51 (2002) 78–90.

[206] Administrative (Legal Practice, Review and Regulation), Civil (Building and Property, Civil Claims, Owners Corporation), Human Rights (Guardianship, Human Rights), Planning and Environment (Planning and Environment) and Residential Tenancies (Residential Tenancies). Victorian Civil and Administrative Tribunal, 'Annual Report 2018–2019' (2019), 50.

[207] Bell (n 191), 13.

[208] Victorian Civil and Administrative Tribunal Act 1998 s 98(1)(d).

[209] Ibid s98(1)(a).

[210] Ibid s 97. Perhaps some crucial elements missing from the Star Tribunal!

procedures that most suit them. For example, the human rights division has a more informal, relaxed atmosphere than the civil division, in which matters are typically conducted in a similar manner to an adversarial contest in court.[211]

Despite having significant freedoms to develop appropriate procedures, some commentators were of the view that VCAT had been 'clothed with many of the trappings of a court'.[212] It was argued that this would eventually undermine the traditional rationale for the creation of tribunals: namely to provide a cheap, quick and informal alternative to litigation in the courts.[213] The first president of VCAT, Justice Murray Kellam, saw the task of VCAT as keeping the beneficial aspects of past tribunals, but improving accessibility and making the tribunal even more efficient.[214] In 2009, the then president of VCAT, Justice Kevin Bell, conducted a review of VCAT's first 10 years of operation and found that, while there was still work to be done, VCAT had improved access to justice and equitable outcomes for the community and the tribunal was generally cost-effective.[215]

The number of cases VCAT deals with is considerable. In 2019–20, over 80,000 cases were lodged with VCAT[216]—meaning that a considerable number of Victorians each year are interacting with the civil justice system via VCAT. VCAT continues to have an access to justice agenda and sees itself as continuing to progressively improve access to justice.[217] Its strategic plan is heavily focused on inclusive and accessible justice.[218] Mediation and other ADR processes remain a core part of its procedures.[219]

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[211] Pizer, 'VCAT' (n 192) 29.

[212] Ibid 61. See also comments in the media such as It [VCAT] was set up for the little man to represent themselves, but too often, it's Queen's Counsel doing head-to-head' in Cameron Houston, 'Naomi Milgrom Wins Legal Battle to Demolish Heritage Houses', *The Age* (Melbourne, 26 April 2014).

[213] Pizer, 'VCAT' (n 192) 61.

[214] Paddy Murphy, 'VCAT in Good Hands' (1998) 72(8) *Law Institute Journal* 52.

[215] Bell (n 191).

[216] Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2019-2020' (n 15), 12.

[217] Ibid 19–43.

[218] Victorian Civil and Administrative Tribunal, 'Strategic Plan: VCAT for the Future 2018–2022' (2018).

[219] Ibid.

Criticisms of ADR and Tribunals

While tribunals and ADR grew out of the access to justice movement and share many perceived advantages over traditional court processes, they are not universally applauded. Scholars debate whether ADR processes and tribunals actually improve access to justice for disadvantaged members of society.[220] For example, particularly in the United States, literature critical of mediation has developed.[221] Tribunals have been criticised for departing from their original role as an alternative to the legal system and adopting legalistic, adversarial models.[222] Consequently, there is a concern to ensure that future 'developments in ADR focus not only on creating alternative processes for dispute resolution, but also on the quality of outcomes achieved through the processes'.[223] Four criticisms of ADR and tribunals will be addressed in this section. While there are other criticisms in the literature,[224] these four areas are of particular relevance to this research:

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[220] Concerns about ADR processes and the growth of tribunals is not a completely new phenomenon. For example, Abel in the 1980s was vocal in his criticisms of the informality of tribunals. See Richard Abel, 'Informalism: A Tactical Equivalent to Law?' (Special Issue: Poor Clients Without Lawyers) (1985) 19(4) *Clearinghouse Review* 375; Richard L Abel, *The Politics of Informal Justice* (Academic Press, 1982). Alexander has been critical of the use of mediation especially in family disputes. See Renata Alexander, 'Mediation, Violence and the Family' (1992) 17(6) *Alternative Law Journal* 271 ('Mediation, Violence and the Family'). The Access to Justice Committee report in 1994 noted some areas of concern, including the risk of power imbalances, but endorsed the continuing development of ADR. Access to Justice Advisory Committee (n 1).

[221] Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 290.

[222] Swain (n 73) 9. For example, the Administrative Appeals Tribunal has been criticised for a tendency towards excessive formality and legalism, the use of adversarial processes to obtain evidence, delays in hearings and high costs, particularly the costs of delays involved in seeking additional information. See Dwyer (n 22). Another interesting criticism is from former finance minister, Peter Walsh, who has argued that, in making decisions that directly affect the level of government expenditure, the Administrative Appeals Tribunal is free from the constrains that every department and agency has to abide by and is thus operating in a way that is fundamentally incompatible with basic notions of official fiscal responsibility. Laurence W Maher, 'The Australian Experiment in Merits Review Tribunals' in Oliver Mendelsohn and Laurence W Maher (eds), *Courts, Tribunals and New Approaches to Justice* (La Trobe University Press, 1994) 73, 85.

[223] Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3).

[224] One dominant criticism that is not included in this chapter is the impact of ADR processes privatising the dispute. The privatised nature of ADR and the ensuing lack of precedent have been criticised for inhibiting identification and scrutiny of systemic issues, and for its inability to raise public awareness about an issue, to set a precedent concerning unjust laws or procedures and to get a determination of 'rights'. See Noone 'ADR, Public Interest Law' (n 3) 65; Denis Nelthorpe, 'Consumer Law—Class Actions: The Real Solution' (1988) 12(2) *Legal Service Bulletin* 26. Abel, 'Informalism' (n 220), commented that, while the rich and advantaged prefer to advance their claims (usually claims in the private sphere such as family matters and probate residential land transfers etc) informally to avoid publicity, 'so publicity is one of the principal weapons of the poor and disadvantaged' who tend to have significant grievances directed against the state and/or large organisations. See also Astor and Chinkin (n 3), 19. Akin Ojelabi's interviews with Community

first, concerns about tribunals and ADR's inability to deal with power imbalances and other special needs; second, pressure applied to parties to settle their cases because settlement is seen as the goal rather than just one possible outcome; third, increased, or at least not decreased, costs for parties created by involvement in ADR processes; and, finally, concern that the informal processes of both tribunals and ADR processes, including the encouragement of self-representation, can have significant disadvantages for parties to a dispute.

Power Imbalances, Class Bias and an Inability to Provide for Special Needs

Initially, the conventional view was that ADR processes could be applied to almost any dispute with beneficial results. However, some commentators argue that not all types of disputes are suitable for ADR.[225] Many of the publicised advantages of ADR assume equality of bargaining power, whereas in reality many disputes involve a power imbalance between the parties.[226] There are also research indications that ADR may actually foster racial and ethnic prejudice.[227] In the context of family mediation, there have been concerns about the existence and abuse of disparate power in informal processes, particularly where the relationship has been affected by domestic violence.[228] The

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Legal Centre lawyers highlighted their concerns that 'ADR outcomes have no ramifications for the wider community and are seen as neither addressing systemic and endemic issues, nor having any implications for law reform'. Akin Ojelabi, 'Community Legal Centres' (n 99); Mary F Radford, 'Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters' (2000) 1 *Pepperdine Dispute Resolution Law Journal* 241.

[225] Clarke and Davies (n 77) 70-80 provide a list of situations in which they say mediation should not occur. Different commentators have slightly different lists of situations. See, eg, Astor and Chinkin (n 3), 9; Boulle, *Mediation* (n 4) 314-32. Spencer, Barry and Akin Ojelabi (n 2) 219 acknowledge the concern but say that the question is not as simple as stating that a particular type of dispute is not suitable. The real question to ask, according to them, is about the circumstances of the present dispute, whether the particular form of ADR is appropriate.

[226] Astor and Chinkin (n 3), 9. See also Practice Standards (n 17) Clause 6 – Power and Safety; Radford (n 224) 246; Clarke and Davies (n 77) 70.

[227] Noone, 'ADR, Public Interest Law' (n 3) 66; Sourdin, *Alternative Dispute Resolution* (n 84) 601; Odd Tjersland, Wenke Gulbrandsen and Hanne Haavind, 'Mandatory Mediation Outside the Court: A Process and Effect Study' (2015) 33(1) *Conflict Resolution Quarterly* 19; Delgardo, Richard, Chris Dunn, Pamela Brown and Helena Lee, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' (1985) *Wisconsin Law Review* 1359.

[228] See, eg, Trina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100(6) *The Yale Law Journal* 1545; Carrie Menkel-Meadow, 'Dispute Resolution: The Periphery Becomes the Core' (1986) 69 *Judicature* 300, 302. See also Astor and Chinkin (n 3), 9. Alexander, 'Mediation, Violence and the Family' (n 220) 271 says:

detrimental effects a history of family violence against women and children can have on the fairness of agreements reached in mediation and conciliation has been highlighted by a number of critics.[229]

Power imbalances also affect courts and tribunals. The traditional adversarial court system is based on an assumption of 'equality of financial resources and quality of representation, an assumption which experience so often proves wrong'.[230] An inequality of bargaining power is also endemic to certain classes of dispute heard in tribunals: for example, welfare benefits, immigration disputes, employment disputes and detention under mental health legislation, residential tenancy disputes and consumer matters.[231] In almost all these cases, one party is an individual who is a first-time litigant; the other is a repeat litigant with informational and institutional advantages. As Davies so eloquently puts it, 'the former has an emotional interest in the outcome of the litigation; the latter only an economic one'.[232]

While power imbalances between parties to a dispute are not uncommon, they can be exacerbated if the disadvantaged participant in an ADR process has not been appropriately advised of their legal rights, creating a risk that the outcome will not be fair and equitable.[233] Repeat players at a tribunal, such as credit providers or real estate agents, are aware of their legal rights, while the other party might be a migrant worker or

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> In a relationship where there has been a history of abuse, the woman simply does not have equal bargaining power. She has typically fewer economic means and resources than her male partner and often 'ignorance' as to the full extent of the family's finances. She has been emotionally and physically beaten and has such low self-esteem, is lacking in confidence, has poor powers of persuasion and is often lacking in expression and advocacy skills to articulate what she wants and what she fears.

And at 272 '… historically, the family is a product of sex-role stereotyping, social, economic and political inequality, male domination and misogyny. Mediation replicates this power imbalance. It does not confront it'.

[229] Clarke and Davies (n 77) 78; Sourdin, *Alternative Dispute Resolution* (n 84) 101; Rachael Field, 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants Who Are Victims of Domestic Violence' (2004) 20(1) *Australian Feminist Law Journal* 65; Grillo (n 228).

[230] Davies and Leiboff (n 73) 113.

[231] Hazel Genn and Y Genn, 'The Effectiveness of Representation at Tribunals' (Lord Chancellor's Department London, 1989) (Web Document) <https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/effectiveness_of_representation_at_tribunals.pdf>.

[232] Davies (n 116) 186.

[233] Akin Ojelabi, 'Community Legal Centres' (n 99) 114.

a long-term renter with little idea of their legal rights.[234] As reported by Akin Ojelabi in relation to disputes with consumer credit providers, 'disadvantaged parties have no option but to take whatever the system throws at them because of limited resources'.[235] Back in 1977, Prosser reported that, even with relatively informal tribunals, 'a large proportion of appellants are frightened off' and less than 'half actually turn up for their hearings'.[236] This phenomena has been observed more recently in VCAT's residential tenancies list[237] and in the UK and the US.[238] Tribunals, despite their objective to increase access to justice, can potentially become a tool of the advantaged. For example, Whelan comments that, around the world, small claims disputes, often dealt with by tribunals, have degenerated in some instances into debt collection agencies acting against poor people.[239] Research into Victoria's then Residential Tenancies Tribunal (which became a part of VCAT on VCATs establishment in 1998) has shown that most actions are initiated by landlords or their agents rather than by tenants[240] despite the fact that there are considerable benefits available to tenants in the relevant legislation.[241]

Abel, in 1985, argued that other than in family matters, the poor and disadvantaged do not frequently find themselves in situations in which ADR mechanisms would have advantages. For example, Abel argues that, because of their poverty, the poor and disadvantaged are rarely involved in an ongoing commercial transaction that is of significant value to them or, conversely, of sufficient value to a vendor or creditor to allow

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[234] Marc Galanter, 'Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95; Andrew D Bradt and D Theodore Rave, 'It's Good to Have the Haves on Your Side: A Defense of Repeat Players in Multidistrict Litigation' (2019) 108 *Georgetown Law Journal* 73.

[235] Akin Ojelabi, 'Community Legal Centres' (n 99) 114.

[236] Prosser (n 54) 59.

[237] Frances Gibson, 'Alternative Dispute Resolution in Residential Tenancy Cases' (2007) 18(2) *Australasian Dispute Resolution Journal* 101 ('Alternative Dispute Resolution'); CameronRalph Navigator, '*Review of Tenants' and Consumers' Experience of Victorian Civil and Administrative Tribunal Residential Tenancies List and Civil Claims List*' (Research Report, July 2016) 14 (Web Document) <https://consumeraction.org.au/wp-content/uploads/2016/08/Research-report-Review-of-Tenants-and-Consumers-Experience-of-VCAT.pdf>; Julie Grainger, '*Litigants in Person in the Civil Justice system—Learnings from NZ, the US, and the UK*' (The Winston Churchill Memorial Trust Of Australia Report, 1 November 2013).

[238] Grainger (n 237); Hazel Genn, Paths to Justice: What People Do and Think About Going to Law (Hart Publishing, 1999).

[239] Christopher J Whelan (ed), *Small Claims Court: A Comparative Study* (Oxford University Press, 1990).

[240] Noone, 'ADR, Public Interest Law' (n 3); Gibson (n 237); Andrea Treble and Lynda White, 'Renovate or Demolish' (1993) 18(4) *Alternative Law Journal* 163.

[241] *Residential Tenancies Act 1997* (Vic).

the poor person to gain any benefit from the ADR process.[242] This effects relative bargaining positions such that touted benefits of ADR processes may not materially enhance the position of poor and disadvantaged participants. Where tribunals have jurisdiction in disputes involving poor or otherwise disadvantaged participants (such as residential tenancies, consumer credit etc), the informal processes, lower costs and lack of a need for legal representation can likewise benefit the well-resourced applicant seeking to vindicate their legal rights because it allows them to avoid the time, cost and complexity of court proceedings.

Similarly, the welfare rights argument for tribunals, argued earlier in this chapter, is not without detractors. Prosser, for example, argues that, while traditional concepts of property were given proper judicial protection by the courts, welfare rights had the status of 'a mere administrative discretion'.[243] At its simplest, the argument against tribunals is that the rich have proper judicial protection for their property rights and this should be extended to the poor in relation to welfare rights.[244] An example of this is provided by Cowan and Hitchings who describe proceedings against social tenants in England for possession for rent arrears. They report that, while the consequence for the tenant can be the loss of a home, the proceedings are 'mostly treated (by landlords and courts) as usual, mundane, ordinary, commonplace, even dull'.[245] More recently, the increased use of ADR mechanisms in the UK have raised similar concerns. For example, in response to legal aid reforms and increased mandatory use of mediation, campaigning organisation Justice issued a press release stating:

> We face the economic cleansing of the civil courts. Courts and lawyers will be only for the rich. The poor will make do as best they can with no legal aid and cheap, privatised mediation. There will be no equal justice for all—only those with money.[246]

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[242] Abel, 'Informalism' (n 220) 381.

[243] Prosser (n 54), 39; S Sedley, 'Improving Civil Justice' (1990) *Civil Justice Quarterly* 348.

[244] Prosser (n 54), 39. See also Michael Adler, 'Lay Tribunal Members and Administrative Justice' (1999) *Public Law* 172, 173.

[245] Dave Cowan and Emma Hitchings, 'Pretty Boring Stuff: District Judges and Housing Possession Proceedings' (2007) 16(3) *Social and Legal Studies* 363, 364.

[246] Justice, 'Legal Aid Reform: Danger of 'Economic Cleansing' of the Civil Courts' (21 June 2011) (Web Document) <https://files.justice.org.uk/wp-content/uploads/2015/03/06172400/press210611.pdf>.

Pressure to Settle and Exposure to Unfair Tactics

Pressure to settle a case during a court or tribunal-annexed ADR process can be high.[247] Genn comments that, '[i]n a typical mediation, one of the main tools for achieving settlement is for the mediator constantly to remind parties of the "dangers" of not settling on the day and the unpleasantness that awaits them if they continue to litigate and run the risk of proceeding through to trial'.[248] She goes on to say that, while satisfaction with the mediation process is often high, participants generally compare it with what they imagine a trial would have been like, something that is reinforced by the mediation process.[249] Consumers can be reluctant to return to a tribunal for a hearing on a day separate to their mediation, creating another indirect pressure to settle.[250] The threat of going to a hearing has also been found to have more impact on a consumer than, for example, on the credit provider who has little to lose.[251]

There is evidence that mediators can also pressure parties to settle, even where there are otherwise meritorious claims, because some mediators view settlement as the best outcome regardless of the terms of the settlement.[252] Other mediators have been found to view their 'success rate' as important and thus put pressure on parties to settle to maintain positive statistics.[253]

One of the commonly cited benefits of ADR, that it preserves relationships, is not relevant in all cases and can, in fact, work against the disadvantaged litigant. For example, in consumer credit cases, the relationship between the consumer and the credit provider may not be ongoing post-mediation or may only be ongoing in the most marginal way

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[247] Noone, 'ADR, Public Interest Law' (n 3) 76; CameronRalph Navigator (n 237).

[248] Genn, 'What Is Civil Justice for?', (n 3) 404.

[249] Ibid.

[250] Noone, 'ADR, Public Interest Law' (n 3) 76. This is a particular concern for people living in rural and regional areas who need to travel a considerable distance to get to the tribunal.

[251] Ibid 75.

[252] CameronRalph Navigator (n 237) 25; Noone, 'ADR, Public Interest Law' (n 3) 74.

[253] Welsh, 'The Thinning Vision' (n 8) 6; Bobette Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2002) 12 *Bond Dispute Resolution News* 7, 9 ('Mediator Settlement Strategies'); Kenneth Kressel and Dean G Pruitt, 'Themes in the Mediation of Social Conflict' (1985) 41(2) *Journal of Social Issues* 179, 192. This theme of mediator pressure will be addressed in the following chapter and in the results and discussion chapter later in the thesis.

because the interaction between them is completed. However, exposing the consumer to mediation can mean that the consumer will be subjected to similar psychological techniques that triggered the contract of sale in the first place and can include unfair tactics such as pressure selling and invoking feelings of guilt and embarrassment.[254] Consumer advocates at the Consumer Action Law Centre in Victoria have indicated that in consumer credit matters that went to mediation, debtors did not get better outcomes from mediations than they would have in more traditional dispute resolution processes.[255]

Cost

ADR processes are claimed to be cheaper than traditional litigation, however, the actual cost difference is difficult to quantify and has been contested by some authors, particularly where ADR processes are mandated.[256] Genn says that '[t]he perceptions of mediators, parties, and their lawyers is that successful mediation can save costs, but it is difficult to estimate how much, since, although the touchstone is always trial, the overwhelming majority of cases would not proceed to trial and would not therefore incur the costs of trial'.[257] Hensler agrees, arguing that 'ADR does not substitute for trial, but rather adds one or more procedures for facilitating settlement to the lawyer-driven negotiation process'; thus, the question that should be asked when comparing costs is: 'under what circumstances does ADR reduce costs and time to disposition, by comparison with old-fashioned negotiation?'[258]

While the commensurate reduction of litigation costs associated with the introduction of court or tribunal ADR processes remains a contested question, cases that go through an unsuccessful ADR process and then go to hearing may, in fact, be more expensive than

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[254] Noone, 'ADR, Public Interest Law' (n 3) 74.

[255] Ibid.

[256] Shahla F Ali, 'Civil Mediation Reform: Balancing the Scales of Procedural and Substantive Justice' (2019) 38(1) *Civil Justice Quarterly* 9, 11; Richard Ingleby, 'Court Sponsored Mediation: The Case Against Mandatory Participation' (1993) 56(3) *Modern Law Review* 441, 443. While not taking a position on the costs argument, the Access to Justice Review notes that ADR can increase costs in some circumstances. See Victorian Government, 'Access to Justice Review: Volume 1', (n 106) 228.

[257] Genn, 'What Is Civil Justice for?' (n 3) 405.

[258] Deborah Hensler, 'A Research Agenda: What We Need to Know About Court-Connected ADR' (1999) 6(1) *Dispute Resolution Magazine* 15, 15.

going directly to a hearing.[259] The extent of savings from an ADR process can depend on program format, timing of diversion to mediation and incidence of settlement.[260] Both this research and other studies have found that concerns about costs are influential on parties settling disputes at mediation, even within the 'cheap' tribunal setting.[261]

Informality and Self-representation as a Disadvantage

Both tribunals and ADR processes are known for their informal processes. Procedures such as cooling off periods can enhance the informality aspect because decisions made are not immediately binding. There are those who see the benefits of informality for disadvantaged litigants, particularly where they are unrepresented. For example, Engler said '[t]he simpler the substantive law and the procedure, the less likely the need for comprehensive legal advice and assistance, and the greater the likelihood that the development of forms and information systems might overcome many of the problems facing unrepresented litigants'.[262] To enhance access to justice for the most vulnerable, Rhodes calls for the increased simplification of the law, including accessible forms and streamlined procedures, more self-help initiatives, better protection of unrepresented parties, greater access to non-lawyer providers and expanded opportunities for informal dispute resolution in accessible out-of-court settings.[263]

In contrast, Simon Roberts argues that the positions of disadvantaged litigants are seldom improved, and typically worsened, where informal procedures, including those in tribunals, are substituted for formal adjudication.[264] Richard Abel, writing in the 1980s, said that informality 'has certain superficial attractions from the perspective of the poor

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[259] Victorian Government, 'Access to Justice Review: Volume 1', (n 106) 228; Genn, 'What Is Civil Justice for?' (n 3) 405.

[260] Roselle L Wissler, 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts' (1997) 33(3) *Willamette Law Review* 565, 569 ('The Effects of Mandatory Mediation').

[261] See Chapter 6. See also Tania Sourdin and Nikola Balvin, 'Mediation Styles and Their Impact: Lessons from the Supreme and County Courts of Victoria Research Project' (2009) 20(3) *Australasian Dispute Resolution Journal* 142; Linda R Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System* (Routledge, 2nd ed, 2018).

[262] Russell Engler, 'And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks' (1998) 67 *Fordham Law Review* 1987, 2045.

[263] Deborah L Rhode, 'Access to Justice' (2000) 69 *Fordham Law Review* 1785, 1816.

[264] *Re-Exploring the Pathways to Decision-Making* in Mendelsohn and Maher (eds) (n 131) 10.

and disadvantaged. Informality allows the assertion of rights by claimants who otherwise could not have afforded to do so or who might have been too fearful'.[265] However, he also notes that informality can disadvantage the already vulnerable by making a claimant who is not assisted by a lawyer more, rather than less, passive. Mediators may become more directive in the absence of lawyers, and there can be greater scope for mediator bias.[266] He argues that formalism attempts to equalise the contest, if only with limited success',[267] and that '[f]ormality is the best, often the only, defence against power'.[268]

Genn also examined whether procedural informality represented a benefit or potential trap for tribunal applicants.[269] She noted that the development of informal processes in tribunals was one of the reasons it was thought they would be beneficial for applicants who would often be from among the most disadvantaged groups in society and who, it was assumed, would be overawed and dismayed at the prospect of bringing their case to a court.[270] However, her analysis of tribunals demonstrated that:

> matters to be decided at hearings often involve highly complex rules and case law; that procedures remain inherently 'adversarial' and often legalistic; that the adjudicative function has not always adapted well to new forums; that those who appear unrepresented before informal courts and tribunals are unable sufficiently to understand the proceedings to participate effectively; and that decision-making processes for many types of problem remain traditional.[271]

Genn reported that, because of shortcomings in the tribunal system, 'in the absence of the conventional "protections" of formality, such as representation, and the rules of evidence, the cases of those appearing before informal tribunals and courts may not be

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[265] Abel, 'Informalism' (n 220) 381.

[266] Ibid 381.

[267] Ibid 281. Abel goes on to say that it can be difficult for middle-class academics and professionals, who are rarely the objects of coercion by state or capital, to imagine the advantages of legal formalism. However, in his opinion, if these people start to think about whether they would prefer formality or informality if the bank sought to foreclose their mortgages or repossess their cars, they may reconsider their opinion.

[268] Ibid 383. Abel refers to a study of South Bronx legal services lawyers who successfully mounted legalistic defences to eviction proceedings, buying their clients more time and sometimes even the right to remain in the premises and to secure corrections of housing code violation. All these advantages were lost when the landlords persuaded the state to divert evictions into an informal procedure in which cases could be handled more rapidly and legal defences carried less weight. The study was done in 1973 and reported in the following article: Geoffrey Hazzard 'Legal Services and Landlord-Tenant Litigation: A Critical Analysis' 82 *Yale Law Journal* 1495.

[269] Genn, 'Tribunals and Informal Justice' (n 3), 393.

[270] Ibid 396.

[271] Ibid 398.

properly ventilated, the law may not be accurately applied, and ultimately justice may not be done'.[272]

Self-representation is on the rise across both the civil and criminal justice systems and this phenomenon is not unique to Australia.[273] Some self-represented litigants choose to self-represent, while others are constrained to do so because they cannot afford a lawyer and are ineligible for legal assistance.[274] In Victoria, the 'Access to Justice Review' found that 'many self-represented litigants receive some legal advice along the way, however, a lawyer does not have the carriage of, or responsibility for, their matter'.[275] A common characteristic of tribunals, partly because of the informality of processes combined with the cost of legal representation, is the relative infrequency with which one or both parties are represented.[276] Some tribunals, including VCAT, actively discourage or disallow parties from having legal representation except in special circumstances.[277] As Genn says:

> [T]his absence of representation, especially for the weakest party, may be a deliberate design feature of the tribunal or informal court, and is generally justified on the grounds that the simplified processes, absence of formality and, sometimes, interventionist role permitted to the judge or tribunal renders representation either unnecessary or inimical to the spirit of the hearings.[278]

Where tribunals do permit legal representation in some or all cases, often there is no public funding for legal representation for the types of cases heard by tribunals. Similarly, parties are often unrepresented in ADR processes and again there is often no public funding for legal representation.

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[272] Ibid.

[273] Victorian Government, 'Access to Justice Review: Volume 2' (n 6) 471. Wissler reports that, in the US, one or both parties typically are unrepresented in a minority of filed general civil cases (3 per cent to 48 per cent), but in a majority of domestic relations cases (35 per cent to 95 per cent) and in most cases in small claims and housing courts (79 per cent to 99 per cent). See Wissler, 'Representation in Mediation' (n 11) 420. Engler writes about studies showing that as high as 80 per cent of parties in family disputes, and as high as 90 per cent of tenants in landlord–tenant disputes, are pro se. Engler (n 262). See also Michael T Colatrella Jr, 'Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties' (2013) 15 *Cardozo Journal of Conflict Resolution* 705.

[274] Colatrella (n 273).

[275] Victorian Government, 'Access to Justice Review: Volume 2' (n 6) 471.

[276] Genn, 'Tribunals and Informal Justice' (n 3) 398; Downes (n 76) 8.

[277] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62.

[278] Genn, 'Tribunals and Informal Justice' (n 3) 398.

The arguments against lawyers' involvement are often made on the basis of flexibility and informality of processes. There are concerns that the presence of lawyers might actually undermine the speed and informality that are the hallmarks of tribunal procedures.[279] However, access to justice proponents argue that lack of legal representation can in fact increase disadvantage, particularly in situations in which government may have afforded the poor or disempowered with significant legal protections, such as in the area of residential tenancy disputes, but the poor or disempowered are generally unaware of those protections.[280] In the 1970s, research demonstrated the benefits to disadvantaged and vulnerable litigants of legal representation, with represented parties being more successful in disputes than unrepresented parties.[281] In tenancy matters in the US, it has been found that legal representation has the potential to dramatically reduce the number of final judgements and warrants of eviction entered against tenants while increasing court efficiency.[282] Genn found evidence from empirical research in some tribunals and small claims courts that consistently indicated that, when present, representation can give an advantage to the represented party.[283]

According to Genn, the reason for the apparent advantage of representation has received very little scrutiny by researchers.[284] Her own research on four UK tribunals showed that the presence of a skilled representative significantly and independently increased the

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[279] Ibid 399.

[280] Gibson (n 237) 102, citing J Kirtzberg and J Henikoff, 'Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord Tenant Mediation' (1997) *Journal of Dispute Resolution* 53, 53.

[281] For example, Prosser notes that at the Unemployment Assistance Board there has been much greater stress placed on the representation of appellants at hearings because there is a greater success rate for represented appellants than those unrepresented (although, interestingly, his research shows that legal representatives are less successful than social workers). See Prosser (n 54). Galanter (n 234) 21 lists research that shows that parties who have lawyers do better in a number of different areas of the law. William D Popkin, 'The Effect of Representation in Non-Adversary Hearings' (1977) 62 *Cornell Law Review* 989.

[282] Gibson (n 237) 103, citing C Seron, M Frankel, G Van Ryzin and J Kovath, 'The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment' (2001) 35(2*) Law and Society Review* 419.

[283] Genn, 'Tribunals and Informal Justice' (n 3), 398. Genn includes references to a number of these empirical studies.

[284] Ibid 399.

probability that a case would succeed, by approximately 18 per cent.[285] She attributes this to four main reasons:

- because small (in value) does not necessarily equate to legal and/or factual simplicity
- because informal procedures do not equate to informal decision-making processes
- because representation provides a party with the ability to advocate for their case
- because of the classically adversarial nature of most tribunal hearings, despite the permitted flexibility of process.

Genn found that the adversarial nature of the hearings often resulted in applicants being disadvantaged. Lack of a representative meant that there was generally an imbalance of power between the parties, with the unrepresented party lacking an understanding of the law, being unaware of the need to furnish the tribunal with evidence of the facts they were asserting and being unable to present their cases coherently.[286] She also found that the perceived benefits of informality, particularly at a hearing stage, may be overestimated. The matters to be decided at hearings often involve highly complex rules and case law and decisions still need to be made in accordance with that legislation and/or case law. Applicants, therefore, must be able to present their cases in such a way that their legal rights are appropriately asserted. In her view, one of the key benefits of a representative is the ability to prepare prior to the hearing and to construct a winnable case for the applicant.[287]

According to Genn, arguments about the lack of necessity for representation in tribunals and small claims courts come in many different guises; however, at bottom, the rationale is simply one of resources that could be ameliorated by the social or political decision to subsidise the cost of lawyers to ensure that all parties are represented (or have the option of legal representation).[288] The informality of tribunals, which is associated with the lack

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[285] Genn and Genn (n 231) ch 3.

[286] Genn, 'Tribunals and Informal Justice' (n 3) 407. Genn found that, even with the best intentions, tribunals are rarely able to spend the time necessary to elicit relevant information from the undifferentiated stream in which most appellants present their stories.

[287] Ibid 398. Genn also refers to a number of empirical studies of various types of tribunals and informal courts in the UK and US.

[288] Ibid 394.

of representation, is only necessary when a prior decision has been taken that representation will not be subsidised.[289]

Lack of representation can also occur in relation to general ADR processes. In relation to the US, Sternlight says that, although the phenomenon of self-representation in courts and tribunals has received substantial attention in recent years, most commentators and policymakers have failed to focus on whether participants in mediation, arbitration or other forms of alternative dispute resolution need legal assistance.[290] This failure of focus, according to Sternlight, is likely due to an 'often unstated premise that because ADR is non-adversarial, or at least less adversarial than litigation, the need for representation in ADR is necessarily, or at least typically, less than the need for representation in litigation'.[291] She sees many benefits for participants who are represented in an ADR process, including their knowledge about strategy and process, their ability to gather and present factual information, their skill at researching and presenting legal arguments, their capacity to support and empower their clients and finally their ability to draft legal agreements.[292] In the 1970s, Sarat found that inequality in legal representation worked to the advantage of the party with legal representation even in situations in which the matter was resolved using ADR processes subsequent to filing but prior to hearing.[293] More recently, Wissler says there is some evidence that represented parties might obtain better outcomes than unrepresented parties in ADR processes, but notes the need for more research in this area.[294]

Australian Community Legal Centre lawyers interviewed by Akin Ojelabi were of the view that sending vulnerable clients to self-represent in an ADR process was not in the best interest of their clients, with one interviewee commenting: '[t]he idea that people can go into a mediation without any knowledge of their legal rights is a ludicrous proposition and

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[289] Ibid 398.

[290] Jean R Sternlight, 'Lawyerless Dispute Resolution: Rethinking a Paradigm' (2010) 37 *Fordham Urban Law Journal* 381, 382.

[291] Ibid.

[292] Ibid 405.

[293] Austin Sarat, 'Alternatives in Dispute Processing: Litigation in a Small Claims Court' (1976) 10(3) *Law and Society Review* 339.

[294] Wissler, 'Representation in Mediation' (n 11) 468.

all it does, in my opinion is it favours the existing imbalance of power'.[295] Akin Ojelabi suggests that, while one of the core beliefs of ADR is that 'everyone is capable and should be given the opportunity to resolve their disputes themselves', interviews with community legal centre lawyers demonstrate that the lawyers saw it as their role to protect their clients' best interests and did not necessarily think it appropriate for their clients, especially vulnerable clients, to enter into ADR processes unrepresented.[296] As will be seen in subsequent chapters, it is specifically because of concerns about inequality between mediating parties, often based on lack of legal representation, that some scholars have called for the use of additional procedural protections such as cooling off periods in mediations.

Conclusion

This chapter has provided an overview of access to justice reforms since the 1970s, with a particular emphasis on the 'third wave' of reforms that encouraged the use of alternative forms of dispute resolution rather than traditional litigation. Alternative forms of dispute resolution were imagined as having multiple benefits to help improve equality before the law for the vulnerable and disadvantaged, as well as practical advantages such as being cheaper and faster than traditional courts. The increasing growth in the use of tribunals during the same period was based on similar arguments.

While both ADR processes and tribunals are now entrenched in the civil justice system, criticisms of both ADR processes and tribunals remain, including the view that they do not in fact enhance access to justice for the less powerful in society. Lack of legal representation during either process can further disadvantage the very people ADR processes and tribunals are supposed to support. As Noone says, 'the challenge is how to ensure the rights of the disadvantaged and vulnerable are enhanced and protected in the context of increasing use of ADR processes that are often mandated by courts and tribunals'.[297] One way in which this can be done is to put in place procedural protections,

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[295] Akin Ojelabi, 'Community Legal Centres' (n 99) 116.

[296] Ibid.

[297] Noone and Akin Ojelabi, 'Ensuring Access to Justice' (n 30) 58.

such as cooling off periods, which aim to address any power imbalances and ensure there is at least procedural fairness, with the aim that substantive fairness may then follow.

The following two chapters focus on the procedures that are the subject of the research. Given the central place of mediation in the research, Chapter 3 examines mediation in more detail, particularly in the court-connected context. Chapter 4 then considers one potential procedural protection, the cooling off period, which aims to balance inequities in power between disputing parties and reduce the pressure to settle that may be felt by unrepresented parties.

CHAPTER 3
MEDIATION IN THE AUSTRALIAN CIVIL JUSTICE SYSTEM

Introduction

Mediation has been described as 'both the oldest and the newest form of dispute resolution'.[298] As discussed in the previous chapter, Australia was an early adopter of ADR, including mediation, within the civil justice system.[299] Current mediation practice owes its origins to the ADR reforms of the 1970s.[300] It emerged from 'dissatisfaction with existing processes, promises about what new approaches offered and changed attitudes towards conflict'.[301] While initially outside the justice system, in 1994, the Access to Justice Advisory Committee viewed mediation and other ADR programs as one solution to improving access to justice in the civil justice and family law systems.[302] By the year 2000, the Australian Law Reform Commission had accepted that mediation and other forms of ADR were a permanent feature of the federal civil litigation and legal systems.[303] The widespread adoption of mediation and other ADR processes has also occurred at state and territory levels and in both courts and tribunals.[304]

While there are many forms of ADR processes, including arbitration, conciliation and facilitation, mediation is the most ubiquitous.[305] It has been the focus of considerable

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[298] Anna Howard, *EU Cross-Border Commercial Mediation: Listening to Disputants—Changing the Frame*; *Framing the Changes* (Alphen aan den Rijn: Wolters Kluwer Law International, 2021) 1.02; Ian Macduff (ed), *Essays on Mediation: Dealing with Disputes in the 21st Century* (Wolters Kluwer, 2016) 3.

[299] Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3) 112.

[300] Rachael M Field and Jonathan Crowe, *Mediation Ethics: From Theory to Practice* (Edward Elgar Publishing, 2020).

[301] Olivia Rundle, 'How Court-Connection and Lawyers' Perspectives Have Shaped Court-Connected Mediation Practice in the Supreme Court of Tasmania' (PhD Thesis, University of Tasmania, 2010) 24. See also Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 5th ed, 2016) ch 4.

[302] Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3) 113. Boulle gently criticises the inquiry by noting that the terms of reference meant that it was starting off by *assuming* that mediation and arbitration were preferable alternatives to litigation—something he says was common during the 1990s when mediation was uncritically promoted. See Boulle, *Mediation* (n 4) 350.

[303] Australian Law Reform Commission, *Managing Justice* (n 36) Ch 6, 41–3, cited in Boulle, *Mediation* (n 4) 350.

[304] Boulle, *Mediation* (n 4) 559. See also Noone and Akin Ojelabi, 'Ensuring Access to Justice' (n 30) 528.

[305] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

research and analysis internationally and in Australia;[306] however, the practice of mediation is not uniform.[307] After developing a working definition of mediation for the purposes of this research, this chapter provides a brief overview of four different models of mediation: facilitative, transformative, settlement and evaluative.[308] Emphasis is placed on the facilitative model given its prominence in mediation practice in Australia.[309] The section that follows focuses on the core values of mediation: that is, self-determination, impartiality, non-adversarialism, responsiveness and confidentiality.[310] The most pertinent of these values is self-determination, both because of its relevance to the research, and because of its connection to the other mediation values, particularly impartiality. Self-determination in the mediation context means that a person voluntarily participates in the mediation and makes free and informed choices as to process and outcome.[311] A mediated outcome in which self-determination is present is one that is freely agreed between the parties. Mediation scholars, such as Welsh, argue that mediated outcomes that feature true party self-determination will be more appropriate and durable for the parties.[312] It follows, then, that when party self-determination is paramount in a mediation, additional procedural protections, such as cooling off periods, are not required to prevent the pressure to settle disputes.[313] The discussion of mediation values links back to the earlier section on mediation models by focusing on how particular values of mediation are stronger in some models than in others. For example, conducting

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[306] Spencer, Barry and Akin Ojelabi (n 2) 131 say: 'The topic of mediation is so complex it could take up an entire book (or two!)'.

[307] Laurence Boulle and Rachael Field, *Mediation in Australia* (LexisNexis Butterworths Australia, 2018) 136 (*Mediation in Australia*); Astor and Chinkin (n 3) ch 8; Sourdin, *Alternative Dispute Resolution* (n 84) ch 5.

[308] It is acknowledged that not all scholars accept the four models of mediation chosen here. More detail on other mediation models and the decision to use Boulle's 'paradigm model' of mediation is set out below in the section on Mediation Models.

[309] Spencer, Barry and Akin Ojelabi (n 2) 150.

[310] The first four core values of mediation listed are the values highlighted by Boulle and Field. Confidentiality has been added because, although there is debate about whether it is a value or not, there is no debate about its importance in mediation theory. There is further discussion about confidentiality later in this chapter. See Boulle and Field, *Mediation in Australia* (n 307) ch 2.

[311] Ibid 41.

[312] Welsh, 'The Thinning Vision' (n 8); Timothy Hedeen, 'Coercion and Self-determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary than Others' (2005) 26(3) *Justice System Journal* 273, 275. See also Boulle, *Mediation* (n 4) 83.

[313] See Chapter 4, The Use of Cooling Off Periods in Mediations for more detail.

a mediation using a facilitative model can enhance party self-determination whereas mediation using the settlement or evaluative model may not do so as strongly.

The third section of the chapter focuses on the use of mediation within the justice system as part of a court or tribunal process. Mediation was introduced into courts and tribunals initially to improve access to justice outcomes by addressing criticisms of the adversarial litigation process, including cost and delays, and to increase participation and participant satisfaction with court and tribunal processes.[314] However, when mediation occurs within the formal justice system, tensions can arise between the primarily adversarial legal process and the values of mediation.[315] Mediation that occurs in the 'shadow of the law'[316] generally arises in situations in which participants have little choice about their participation. Coercion can occur at multiple stages of the mediation process: at the beginning, by participants being coerced to participate in the mediation; during the mediation, by participants being coerced to continue with the mediation when they no longer want to; and at the end of the mediation, by being coerced to reach a settlement with which they do not feel comfortable. Consequently, the final section of the chapter examines the non-voluntary nature of mediation in a court-connected setting and the impact this can have on party self-determination.

Definitions of Mediation

Despite being one of Australia's most prominent mediation scholars, Boulle resists defining mediation partly because of what he sees as the 'identity paradox' of mediation, 'sitting as it does between its integration into dispute resolution, including court-based

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[314] Sourdin, *Alternative Dispute Resolution* (n 84) 296, cited in Lola Akin Ojelabi, 'Ethical Issues in Court-Connected Mediation' (2019) 38(1) *Civil Justice Quarterly* 61, 61 ('Ethical Issues').

[315] Olivia Rundle, 'Court-Connected Mediation Programmes: Implications for Courts and the Legal Profession' (2010) 60 *Practice (2nd ed, 2005)* 68 ('Court-Connected Mediation Programmes').

[316] The phrase 'in the shadow of the law' is used by many authors. Akin Ojelabi describes it as meaning situation in which an ADR process occurs as part of the justice system. See Lola Akin Ojelabi, '*Improving Access to Justice through Alternative Dispute Resolution: The Role of Community Legal Centres in Victoria, Australia*' (Research Report, Faculty of Law and Management, La Trobe University, September 2010) 32. An earlier use of the phrase occurs in Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *The Yale Law Journal* 950, 968. Mnookin and Kornhauser discuss how legal rules governing concepts such as alimony, child support, marital property and custody give divorcing parents a context in which they negotiate.

litigation, and its more traditional values and objectives'.[317] The reason for the definitional difficulties are, according to Boulle, 'partly occasioned by the fact that Australian mediation has been fashioned and shaped in contrasting, sometimes disconnected and often contradictory, circumstances with shifting objectives and goals in the minds of its different sponsors.'[318] Spencer, Barry and Akin Ojelabi also discuss the 'slippery concept of mediation' and the challenge of defining it.[319] Intriguingly, and consistently with Boulle's refusal to define mediation, very few Australian legislatures have provided an express definition of 'mediation' despite the extensive use of mediation in court processes.[320]

Not everyone agrees that mediation cannot be defined. Menkel-Meadow defines mediation as a technique 'to resolve disputes, manage conflict, plan future transactions or reconcile interpersonal relations and improve communications'.[321] However, this definition does not differentiate mediation from other forms of dispute resolution. The key difference between a mediation and a determinative court process is that the third party, neutral or not, does not have the authority to impose an outcome on the parties to the mediation, unlike a judge.[322] The differences between mediation and other forms of ADR are more nuanced. Some elements of mediation that do differentiate it from other forms of dispute resolution are 'its emphases on impartiality, confidentiality, and disputant self-determination'.[323] Consequently, a more useful definition of mediation may be that put forward by Genn—that it is a 'voluntary process in which a neutral third party

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[317] Boulle, *Mediation* (n 4) 6. Sourdin also finds it difficult to provide a final definition of mediation. See Sourdin, *Alternative Dispute Resolution* (n 84) 76.

[318] Boulle and Field, *Mediation in Australia* (n 307) 2.

[319] Spencer, Barry and Akin Ojelabi (n 2) 139.

[320] Note that Magnus (n 4) 874 says that there are no pieces of legislation in Australia that define mediation. However, section s3(2) of the *Alternative Dispute Resolution Act 2001* (Tas) reads: '"mediation", which includes conciliation, means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute'. Many scholars of mediation would reject the idea of mediation including conciliation, rather seeing them as different processes.

[321] Carrie Menkel-Meadow, *Mediation: Practice, Policy, and Ethics,* ed Lela Porter Love and Andrea Kupfer Schneider (Wolters Kluwer Law & Business, 2nd ed, 2013) xiii.

[322] Stephen B Goldberg, *How Mediation Works: Theory, Research, and Practice* (Emerald Publishing, 2017) xv.

[323] Hedeen (n 312) 274. See also Astor and Chinkin (n 3) 96.

assists disputing parties to reach a consensual solution to their dispute'.[324] Sourdin describes mediation in a similar manner stating that mediation, at its simplest, 'involves the intervention of a trained, impartial third party … who will assist the parties to make their own decisions'.[325] The Australian Dispute Resolution Advisory Council (ADRAC) has proposed the following definition: mediation is 'a process in which the parties to a dispute, with the assistance of a third party dispute resolution practitioner (the mediator), come together in an endeavour to resolve their dispute in accordance with the parties' wishes'.[326]

Some definitions of mediation are more pertinent to a particular model of mediation rather than mediation generally. For example, Folberg and Taylor define mediation based on a facilitative model as 'the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs'.[327] The Australian Mediator Standards Board, which is the body with the oversight of Australia's National Mediator Accreditation System (NMAS), uses a similar but expanded explanation, describing mediation as:

> a process in which the participants, with the support of the 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.[328]

Practice Standard 2.2 of the NMAS defines mediation in a lengthy manner some might describe as a description rather than a definition:

> Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:
>
> a) communicate with each other, exchange information and seek understanding

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[324] Hazel Genn in Marie-Odile C Dufournier Sander, 'Modern European Forms of Non-Voluntary Mediation: The Case of England in Comparative Perspective' (PhD Thesis, University of Leicester, 2017) 1.

[325] Sourdin, *Alternative Dispute Resolution* (n 84) 76.

[326] Australian Dispute Resolution Advisory Council, 'Submission to New South Wales Law Reform Commission on Consultation Paper 18' *Dispute Resolution: Model Provisions* (March 2017) 5 ('Submission to New South Wales') 5.

[327] J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (1984) 7 cited in Astor and Chinkin (n 3) 83.

[328] Mediator Standards Board '*What is Mediation*' (Web page) <https://msb.org.au/about-mediation>. Note that US literature uses the terminology 'neutral' whereas in Australia 'mediator' is preferred.

b) identify, clarify and explore interests, issues and underlying needs
c) consider their alternatives
d) generate and evaluate options
e) negotiate with each other; and
f) reach and make their own decisions.

A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.[329]

Mediation is frequently defined generically or not at all by parliaments.[330] This means that court-connected mediation is theoretically not restricted to a particular model of practice. However, VCAT does require mediators to be accredited and the NMAS practice standards are heavily focused on the facilitative model of mediation, emphasising the confidential nature of mediation, the impartiality of the mediator and importance of party self-determination with the parties generating their own options to resolve the matter.[331] Consequently, for the purpose of this thesis and its focus on mediations at VCAT, and because of the central place of the facilitative model of mediation in Australia, the NMAS definition of mediation will be adopted as the most appropriate definition.

Mediation Models

There is no one form of mediation; rather 'there are a number of models of mediation that are used in a great diversity of contexts'.[332] Moreover, a mediation may commence in one mode and then change and adopt the characteristics of another mode,[333] or mediators can shift between different models according to the needs of the disputants

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[329] Practice Standards (n 17) 9.

[330] Rundle (n 301) 47. For example, Rundle refers to the *Alternative Dispute Resolution Act 2001* (Tas) s 3(2), *District Court Act 1973* (NSW) s 163(1), *Supreme Court Act 1970* (NSW) s 110I(1) and *Mediation Act 1997* (ACT) s 3(1). However, the *Victorian Civil and Administrative Tribunal Act 1998* does not define mediation. Section 88(7) says: 'Subject to this Act and the rules, the procedure for mediation is at the discretion of the mediator'. Likewise, neither the Victorian *Supreme Court Act 1986* (Vic) nor the *Magistrates' Court Act 1989* (Vic) defines mediation.

[331] Practice Standards (n 17) 9. The now defunct National Alternative Dispute Resolution Advisory Council (NADRAC) also assumed that a 'facilitative' or a non-advisory model would operate. National Alternative Dispute Resolution Advisory Council (NADRAC), 'Glossary of ADR Terms' (Report, AGPS, 2007) <https://www.studocu.com/en-au/document/queensland-university-of-technology/dispute-resolution/nadrac-glossary-dispute-resolution/2721701>.

[332] Spencer, Barry and Akin Ojelabi (n 2) 149. Sourdin discusses how mediation can also be shaped by the cultures in which it takes place. See Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[333] Sourdin, *Alternative Dispute Resolution* (n 84) 77; Boulle, *Mediation* (n 4) 43. See also Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97, 23 ('The Mediation Metamodel').

involved in the mediation.[334] Different authors classify mediation into varying models.[335] The 'paradigm model' of mediation developed by Boulle, a leading Australian scholar, has been adopted here.[336] His paradigm model recognises four models of mediation: facilitative, transformative, settlement and evaluative.[337] As will be seen, the chief distinction between these concerns the role of the mediator and, in particular, the level of active intervention undertaken by the mediator in terms of providing opinion, advice or an evaluation of the parties' matter.[338] This section demonstrates that the model of mediation used in any particular mediation, or by any particular mediator, often means that emphasis is placed on one or more of the values of mediation, considered in more detail below, at the expense of another value.

Facilitative Mediation

Facilitative mediation has been described as the 'foundational model of contemporary Western mediation'.[339] It is thought to be the most commonly used mediation model in Australia.[340] It is the model reflected in Practice Standard 2.2 of the NMAS mediation standards as set out above,[341] and is the model most commonly taught in Australia.[342] Facilitative mediation is described by Boulle as 'mediators providing disputing parties with assistance and support in relation to the organisation, preparation, communication,

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[334] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[335] Wall and Dunne record 25 styles of mediation in James A Wall and Timothy C Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217. From an Australian perspective, there is a good description of some of the alternative models in Spencer, Barry and Akin Ojelabi (n 2) 149. See also Alexander, 'The Mediation Metamodel' (n 333) 97, who sets out six meta mediation models: settlement mediation, facilitative mediation, transformative mediation, expert advisory mediation, wise counsel mediation and tradition-based mediation. Field and Crowe describe four models of mediation, which are very similar to Boulle's four models of mediation, but replacing settlement for the narrative model. See Field and Crowe, *Mediation Ethics* (n 300) ch 2.

[336] Boulle, *Mediation* (n 4).

[337] Boulle and Field, *Mediation in Australia* (n 307) 3.

[338] Field and Crowe, *Mediation Ethics* (n 300) 13.

[339] Ibid 11. See also Mieke Brandon, 'Self-Determination in Australian Facilitative Mediation: How to Avoid Complaints' (2015) 26(1) *Australasian Dispute Resolution Journal* 44, 45.

[340] Spencer, Barry and Akin Ojelabi (n 2) 150.

[341] Ibid 141.

[342] Boulle and Field, *Mediation in Australia* (n 307) 243.

negotiation and procedural aspects of their dispute, without advising or recommending to them possible or potential outcomes'.[343]

Facilitative mediators focus on integrative interest-based negotiation rather than on distributive, positional-based bargaining, with the goal of ensuring party self-determination.[344] The objective of facilitative mediation is to 'promote negotiation in terms of underlying needs and interests, rather than legal rights or obligations'.[345] Facilitative mediators see their role as creating an optimal environment for negotiation and coaching the parties through a negotiation process.[346] The mediation value of party self-determination is key. This is enabled by mediator impartiality, such that the mediator 'does not evaluate or advise on the merits of, or determine the outcome of, disputes'.[347] In a facilitative mediation, the mediator does not necessarily presuppose any knowledge of the technical aspects of the dispute.[348]

The mediator in a facilitative mediation would generally have control over the process of the mediation and restrict their interventions in the mediation to primarily process interventions.[349] Alexander says that facilitative mediators:

> neither advise the parties on the problem—that is, the merits of the dispute—nor provide them with legal information. They tend to be selected for their process and communication skills and their lack of connection to the parties, rather than their subject matter expertise.[350]

Facilitative mediation is recognised as being useful for disputes in which the parties want to continue a relationship after the mediation, the parties have the capacity to negotiate on a level playing field but have experienced difficulty starting the process or have reached

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[343] Ibid 3. See also Field and Crowe *Mediation Ethics* (n 300) 15.

[344] Alexander, 'The Mediation Metamodel' (n 333) 16.

[345] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[346] Alexander, 'The Mediation Metamodel' (n 333).

[347] Practice Standards (n 17) 2.2. See also Field and Crowe *Mediation Ethics* (n 300) 20 who state that the mediator should be 'neutral as to the relative merits of the issues in dispute and the parties' arguments, as well as the outcome reached'.

[348] Lieselotte Badenhorst, 'Facilitative Mediation—Seeing More than the Tip of the Iceberg' (2014) 2014(539) *De Rebus* 30, 31.

[349] Rundle, 'Court-Connected Mediation Programmes' (n 315) 4.

[350] Alexander, 'The Mediation Metamodel' (n 333) 16.

an impasse in negotiations, or there are opportunities for creative and future-focused solutions to address the needs and interests of the parties.[351]

Two criticisms of the facilitative model are that it takes a greater investment of time than some other mediation styles, particularly settlement and evaluative mediation, and that it can be inadequate in situations where one party is in an inferior bargaining position.[352] For example, if parties are not informed as to their legal rights and obligations, they may not be aware of what rights they might be foregoing when compromising their position.[353] The facilitative model has also been criticised for assuming people share information in a mediation honestly when, in fact, people can be very selective about what information they share. They may be willing to share information that is self-serving but be reluctant to disclose information contrary to their interests.[354] Field and Crowe criticise the facilitative mediation model because they say that, despite the philosophy, a truly impartial and neutral mediator is not possible, but nor is it desirable if a substantively fair process is to be achieved.[355] The facilitative model encourages parties to reach a solution that they can live with—giving primacy to getting an outcome rather than establishing the extent to which a party has been wronged or the degree of injustice that has occurred.[356]

Transformative

The term 'transformative mediation' was coined by Bush and Folger.[357] While still committed to party self-determination, it is less focused on outcomes and more focused on relational matters.[358] Bush and Folger define transformative mediation as:

> A process in which a third party works with the parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for

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[351] Ibid.

[352] Ibid.

[353] Spencer, Barry and Akin Ojelabi (n 2) 160 quoting Troy Peisley, 'Blended Mediation: Using Facilitative and Evaluative Approaches to Commercial Disputes' (2012) 23(1) *Australasian Dispute Resolution Journal* 26.

[354] Peisley (n 353) 31.

[355] Field and Crowe, *Mediation Ethics* (n 300) 20.

[356] Spencer, Barry and Akin Ojelabi (n 2) 160 quoting Peisley (n 353).

[357] Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (John Wiley & Sons, 2004).

[358] Boulle and Field, *Mediation in Australia* (n 307) 163; Sourdin, *Alternative Dispute Resolution* (n 84) 84.

> resolution. The mediator's role is to help the parties make positive interactional shifts … by supporting the exercise of their capacities for strength and responsiveness, through their deliberation, decision-making, communication, perspective taking, and other party activities.[359]

The primary goals of transformative mediation are recognition and empowerment.[360] Alexander describes transformative mediation as 'transforming how parties relate to each other, healing and reconciliation of relationships, and restorative justice'.[361] Consideration of underlying causes of behaviour are part of the mediation and an outcome to the dispute that led to mediation will be a sub-goal of the process rather than the main goal.[362] Party self-determination, minimalist intervention from mediators and mediator impartiality all remain core mediation values in transformative mediation.[363] For example, in a transformative mediation, the emphasis on party self-determination would often be demonstrated by the process itself being the initial matter to be negotiated between the participants.[364] This model of mediation is commonly used in community conflict, victim-offender conferencing, some workplace disputes and in complex family conflicts.[365] It can be particularly useful in situations in which the dispute is a symptom of an underlying conflict, or where the conflict is about the parties' relationship, or where parties are arguing on the basis of values and principles.[366]

Transformative mediation is sometimes criticised for lacking both clearly articulated objectives and evidence of effectiveness.[367] Of all the models of mediation, it is the most time-consuming. In addition, it is possible for transformative forms of mediation to potentially confront parties with underlying issues and anxieties that neither they nor the

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[359] Bush and Folger (n 357) 65-6.

[360] Ibid 66.

[361] Alexander, 'The Mediation Metamodel' (n 333).

[362] Boulle and Field, *Mediation in Australia* (n 307) 3; Field and Crowe, *Mediation Ethics* (n 300).

[363] Boulle, *Mediation* (n 4) 47.

[364] Alexander, 'The Mediation Metamodel' (n 333).

[365] Sourdin, *Alternative Dispute Resolution* (n 84) 84.

[366] Alexander, 'The Mediation Metamodel' (n 333).

[367] Carrie Menkel-Meadow, 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices' (1995) 11(3) *Negotiation Journal* 217, 237; Field and Crowe, *Mediation Ethics* (n 300) 26; Lisa P Gaynier, 'Transformative Mediation: In Search of a Theory of Practice' (2005) 22(3) *Conflict Resolution Quarterly* 397.

mediator is sufficiently skilled to deal with.[368] Like facilitative mediation, there are also concerns that transformative mediation has few protective mechanisms for less empowered and weaker parties.[369] Although some disputes that come before a court or tribunal might benefit from an exploration of the parties' conflict interactions, it is not a model generally used in court-connected mediation.[370] Rundle comments that, although there is theoretical potential for transformative approaches to mediation to be adopted in a court-connected program, there are significant obstacles that would need to be overcome before this could be done effectively, including the potential impacts of both the adversarial culture of the court system and the outcomes-based orientation of current mediation practices.[371]

Settlement

Settlement mediation is common in a court or tribunal context, particularly when a financial outcome is sought and the parties do not want or need an ongoing future relationship, because it can resolve disputes relatively quickly.[372] In settlement mediation, the objective is to reach a compromise[373] and the parties adopt a predominantly positional bargaining approach.[374] Boulle describes settlement mediation as involving:

> mediators supervising patterns of incremental bargaining by disputants over quantifiable items, usually money, with each side using a range of tactics to induce more concessions from the other side then they make themselves, both expecting a compromise somewhere around the midpoint between their ambit starting positions.[375]

In settlement mediations, the mediator is responsible for establishing an encouraging environment for settlement negotiations to occur between the parties. While direct disputant participation is promoted in both facilitative and transformative mediation

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[368] Alexander, 'The Mediation Metamodel' (n 333).

[369] Ibid. See also Mary Anne Noone, 'The Disconnect between Transformative Mediation and Social Justice' (2008)(19) *Australasian Dispute Resolution Journal* 114.

[370] Field and Crowe, *Mediation Ethics* (n 300) 27.

[371] Rundle (n 301) 59.

[372] Alexander, 'The Mediation Metamodel' (n 333).

[373] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[374] Alexander, 'The Mediation Metamodel' (n 333).

[375] Boulle and Field, *Mediation in Australia* (n 307) 3.

models, it is not a fundamental characteristic of either the settlement or evaluative mediation models.[376] Settlement mediation involves a high level of mediator intervention in the problem, with the primary goals being 'efficient delivery of settlements (service delivery) and access to justice'.[377] While these goals might support speedy and legally or technically oriented settlements,[378] there is also a risk that encouragement by settlement mediators can quickly move in the direction of coercive techniques to urge parties to make concessions.[379] Settlement mediation is common in court-connected mediation processes where the goal of pragmatic settlement is the norm.[380]

Evaluative

The evaluative mediation model is characterised by mediators having an active and interventionist role in the dispute, thereby taking some control away from the parties. Some see it as akin to the settlement model of mediation,[381] with the key difference being mediator expertise in the subject matter of the dispute. The mediator's expertise enables them to provide information, advice or opinion on procedural aspects and the issues in dispute, the substantive merits of the case and/or the prospective outcome.[382] The primary focus of evaluative mediation has been said to be settlement according to legal rights.[383]

Evaluative mediation is acknowledged to be particularly useful where technical questions are involved, such as engineering processes, building standards or accounting standards.[384] In these situations, parties gain the benefit of the mediators' experience and knowledge in identifying the issues and risks in dispute, and get a qualified opinion as to the possible outcome. In addition, the advantages of evaluative mediation, particularly compared to facilitative mediation, are said to be that parties are better informed about

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[376] Rundle, 'Barking Dogs' (n 5) 78.

[377] Alexander, 'The Mediation Metamodel' (n 333).

[378] Ibid.

[379] Ibid.

[380] Boulle, 'Minding the Gaps' (n 5) 225.

[381] Field and Crowe, *Mediation Ethics* (n 300) 27-8.

[382] Ibid 28; Boulle and Field, *Mediation in Australia* (n 307) 3.

[383] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[384] Spencer, Barry and Akin Ojelabi (n 2) 160.

relevant issues, which can create a level playing field; that parties can informally debate questions of law in dispute; and that parties can better reality-test outcomes.[385]

There are multiple criticisms of evaluative mediation. One is that, once a mediator gives his or her opinion, he or she loses impartiality and the process is diminished.[386] Mediators' opinions can also put the mediator at risk of a legal claim for incorrect advice.[387] Another disadvantage is that parties can become polarised due to an excessive focus on technical and legal issues as opposed to exploration of solutions, and a mediator's opinion may be at odds with a party's lawyer. Finally, evaluative mediations may require additional safeguards to prevent mediators providing advice on areas in which they may not be qualified to advise.[388] The process of relying on the mediator for advice can also take away from some of the broader goals of mediation as a whole: parties may have lower levels of involvement in the process, they may not learn any conflict resolution skills, and the continuing relationship between the parties may not be a focus.[389]

Use of Models in Practice

It is now widely recognised that there is a divergence of mediation models in practice.[390] Additionally, as stated in the introduction to this section, a mediation process is not static and it may commence using one mediation model but then change and adopt the characteristics of another model.[391] Alternatively, mediators can shift between different models according to the needs of the mediation parties.[392]

Rundle argues that it is not appropriate to assert that the facilitative model of mediation, or any other model, is the model that 'ought' to be practised in the court-connected

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[385] Peisley (n 353), cited in ibid.

[386] Although, not everybody agrees that this is a disadvantage as seen above in the section on neutrality.

[387] Alexander, 'The Mediation Metamodel' (n 333).

[388] Peisley (n 353), cited in Spencer, Barry and Akin Ojelabi (n 2).

[389] Alexander, 'The Mediation Metamodel' (n 333).

[390] Rundle, 'The Purpose of Court-Connected Mediation' (n 5) 1; Boulle, 'Minding the Gaps' (n 5) 225; Spencer, Barry and Akin Ojelabi (n 2) 150; Boulle and Field, *Mediation in Australia* (n 307) 243.

[391] Sourdin, *Alternative Dispute Resolution* (n 84) 77; Boulle, *Mediation* (n 4) 43. See also Alexander, 'The Mediation Metamodel' (n 333) 23.

[392] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

context.[393] As mentioned above, generally, the legislative frameworks that apply to most court-connected mediation programs do not specify what type of mediation model should be used. However, it can be assumed that the facilitative model would be the most commonly practised model in the court-connected context for two reasons. First, facilitative mediation is the most commonly taught model in mediation training.[394] Second, NMAS accredited mediators are required to advise the parties before commencing mediation if they do not intend to practise facilitative mediation. Most courts and tribunals, including VCAT, require accreditation under the NMAS for mediators practising in court-connected mediation processes. The NMAS Practice Standards states at Standard 2.2 that '[a] mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes',[395] although a footnote refers to Standard 10.2, which reads:

> Where a mediator uses a blended process such as advisory or evaluative mediation or conciliation, which involves the provision of advice, the mediator must:
>
> a) obtain consent from participants to use the blended process;
> b) ensure that within the professional area in which advice is to be given, they
> c) have current knowledge and experience;
> d) hold professional registration, membership, statutory employment or their equivalent, and
> e) are covered by current professional indemnity insurance or have statutory immunity and
> f) ensure that the advice is provided in a manner that maintains and respects the principle of self-determination.[396]

Despite the NMAS standards, and although most mediators are taught facilitative mediation, at least one study found that many practising mediators may also not be able to clearly identify which model they use or, more worryingly, will say that they use one model but demonstrate practising another.[397] Research shows that there has been a move

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[393] Rundle (n 301) 48.

[394] Boulle and Field, *Mediation in Australia* (n 307) 243, say that because of NMAS's emphasis on the facilitative model of mediation, most training focuses on the structure and skills associated with this model. See also Sourdin, *Alternative Dispute Resolution* (n 84) 78. Boulle also notes that basic mediator training is rudimentary and there are concerns about the extent to which skills training deals with the philosophy, principles and ethics of mediation.

[395] Practice Standards (n 17) Clause 2.2.

[396] Ibid Standard 10.2. Some of the mediations in this research took place before the 2015 Practice Standards came into force on 1 July 2015. However, the previous Practice Standards had similar clauses to 2.2 and 10.2 at Clauses 4–7.

[397] Spencer, Barry and Akin Ojelabi (n 2) 148.

away from facilitative mediation towards the settlement and evaluative models, particularly in court-connected contexts.[398] This means that facilitative mediation may no longer be representative of the majority of mediation practice.[399] The concern for mediating parties is that adoption of a settlement or evaluative mediation model can mean that parties feel under more pressure to resolve their disputes on the day of the mediation than would be the case if a facilitative model was used.[400] Consequently, there may be a need for protections, such as cooling off periods, to be incorporated into mediation practices to enable parties to reconsider settlement proposals outside of the pressurised mediation environment.

Core Values of Mediation

Despite the difficulties in defining mediation set out above, there remain important elements of mediation that are common to all mediation forms and styles.[401] ADRAC comments that while there are an 'infinite variety of circumstances in which mediation can occur', there remain essential components of mediation that are 'extremely confined'. Boulle and Field identify four core values that inform mediation theory: party self-determination, mediator impartiality, non-adversarialism and responsiveness.[402] These four values are not universally agreed to by all mediation scholars, although the differences are nuanced. For example, Noone, Akin Ojelabi and Buchanan refer to the *traditional* core values of mediation being neutrality, self-determination, voluntariness and confidentiality, although they also note that 'these values have been subject to challenge in the mediation community, particularly as strict adherence may perpetuate disadvantage and lead to unjust outcomes'.[403] Boulle and Field acknowledge what they call the 'retiring values of voluntary participation and mediator neutrality'.[404] Most

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[398] Boulle and Field, *Mediation in Australia* (n 307) 3.

[399] Spencer, Barry and Akin Ojelabi (n 2) 150; Boulle and Field, *Mediation in Australia* (n 307) 243.

[400] Sourdin and Balvin (n 261); Rundle, 'Court-Connected Mediation Programmes' (n 315).

[401] Boulle, *Mediation* (n 4) 26.

[402] Boulle and Field, *Mediation in Australia* (n 307) 38. See also Rundle, 'Court-Connected Mediation Programmes' (n 315), who focuses on responsiveness, self-determination and cooperation in the context of court connected mediations.

[403] Mary Anne Noone, Lola Akin Ojelabi and Lynn Buchanan, *Ethics & Justice in Mediation* (Thomson Reuters, 1st ed, 2018) 5.

[404] Boulle and Field, *Mediation in Australia* (n 307) 54.

recently, Field and Crowe suggest that both neutrality and impartiality should be relegated to being tools for a mediator, while self-determination with informed consent should remain foundational.[405]

The core value of self-determination in mediation is the least contentious, particularly in relation to facilitative mediation and, as this is key to the analysis in this research, is the main focus in the following section on values. Voluntariness is considered to be an element of self-determination. Impartiality, rather than neutrality, is included in acknowledgement of the fact that the 2015 NMAS Practice Standards refers to mediators conducting the mediation in an impartial manner; previously, mediators were referred to as neutral third parties. A brief examination of responsiveness, non-adversarialism and confidentiality are also included: responsiveness in recognition of the desire for ADR processes to be responsiveness to party need as discussed in Chapter 2;[406] non-adversarialism because the non-adversarial nature of mediation is often directly contrasted with the adversarial nature of the formal legal system,[407] and because of the impact of court-connected mediation on this value in particular; and confidentiality because, regardless of its debatable status as a core value, it is accepted by many as a defining feature of mediation.

Self-Determination

Party self-determination is said to set mediation apart from other forms of dispute resolution.[408] It is a key difference between determinative court and tribunal processes, in which a judge, magistrate or tribunal member makes a decision that is imposed on the parties, and mediation, in which the parties determine a resolution that they design. Boulle and Field describe the concept of self-determination as implying that the 'parties actively and directly participate in mediation proceedings, choose and control the norms

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[405] Field and Crowe, *Mediation Ethics* (n 300).

[406] See Chapter 2 'How ADR and Tribunals Fit in the Access to Justice Movement'.

[407] Boulle, *Mediation* (n 4) 70.

[408] Field and Crowe, *Mediation Ethics* (n 300), cited in Paul Kirkwood, 'A Wake-Up Call for Mediation!' (Blog Post, 9 November 2020) (Web Document) <https://paulkirkwoodmediator.co.uk/2020/11/09/a-wake-up-call-for-mediation/>.

to guide their decision-making, create their own options for settlement and control final decisions'.[409]

Many mediation theorists believe that self-determination is the most important value of mediation.[410] Bush and Folger call self-determination 'the central and supreme value of mediation'.[411] It has been described as the 'major and most fundamental value proposition behind the mediation process',[412] the 'ultimate value of mediation'[413] and 'a critical definitional premise for the process [of mediation]'.[414] As a core value of mediation, self-determination exists across all approaches, styles and venues, although it has particular importance in the facilitative and transformative models of mediation.[415] The significance of self-determination is also emphasised in the Australian NMAS Practice Standards, which state that 'the purpose of a mediation process is to maximise participants' decision making'.[416]

Self-determination consists of several elements. Boulle and Field describe self-determination as containing 'participatory engagement, some procedural involvement, party voice, responsibility for outcomes and the ultimate consensuality of settlement agreements'.[417] Thus, in order for self-determination to be promoted, participants need to be given the opportunity and support to *voluntarily* participate directly in the

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[409] Laurence Boulle and Rachael Field, 'Re-Appraising Mediation's Value of Self-Determination' (2020) 30 *Australasian Dispute Resolution Journal* 96, 97 ('Re-Appraising Mediation's Value').

[410] Ibid; Nancy A Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice' (2002) *Journal of Dispute Resolution* 179, 180; Welsh, 'The Thinning Vision' (n 8); Robert A Baruch Bush and Joseph P Folger, 'Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination' (2014) 16 *Cardozo Journal of Conflict Resolution* 741 ('Reclaiming Mediation's Future').

[411] Bush and Folger, 'Reclaiming Mediation's Future' (n 410).

[412] Boulle and Field, *Mediation in Australia* (n 307) 40.

[413] Rachael Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18(3) *Australasian Dispute Resolution Journal* 185, cited in Boulle and Field, *Mediation in Australia* (n 307) 41.

[414] Boulle and Field, 'Re-Appraising Mediation's Value' (n 409) 96, cited in Field and Crowe, *Mediation Ethics* (n 300).

[415] Lorig Charkoudian, 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles' (2012) 5(4) *Negotiation and Conflict Management Research* 367.

[416] Practice Standards (n 17) 5.

[417] Boulle and Field, 'Re-Appraising Mediation's Value' (n 409) 97.

process,[418] and the mediated outcome needs to be the choice of, and agreed between, the parties (*empowerment*).[419]

Hedeen claims that the aspect of voluntariness 'is part of the "magic of mediation" that leads to better results than those from courts or other forums: higher satisfaction with process and outcomes, higher rates of settlement, and greater adherence to settlement terms'.[420] Voluntariness is also emphasised as an element of self-determination in the first standard in the US Model Standards of Conduct for Mediators, which reads:

> Self-determination. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.[421]

A common argument in favour of voluntary participation, used since the early days of the mediation movement, is that agreements reached in mediation are said to be more durable and fitting than court decisions because the parties design them.[422] Put another way, 'volition is the key to successful outcomes—volition validates those [mediated] outcomes; compulsion does not'.[423]

However, volition itself is only part of the picture. Bush and Folger, who are proponents of transformative mediation, passionately describe empowerment as the heart of the transformative mediator's mission and a key component of self-determination saying: '[w]e believe in the value of upholding party choice, and we also believe that increasing understanding, reaching sustainable resolution, and other goals all rest on the foundation

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[418] Rundle, 'Court-Connected Mediation Programmes' (n 315). Some may choose to have another person (such as a lawyer) speak on their behalf; provided they have been given a choice, such a decision is consistent with the principle of self-determination.

[419] Boulle and Field, 'Re-Appraising Mediation's Value' (n 409).

[420] Hedeen (n 312) 275.

[421] American Arbitration Association, American Bar Association and the Association for and Conflict Resolution, 'Model Standards of Conduct for Mediators' (2005) (Web Document) <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf>.

[422] Hedeen (n 312) 275. See also Boulle, *Mediation* (n 4) 83; 'The Mediation Metamodel' (n 333).

[423] Nicolau in Hedeen (n 312).

of genuine party self-determination.'[424] They go on to explain that the reason they value self-determination above all other values in mediation is that:

> [a] non-directive, party-driven mediation process can (and usually does) lead not only to solutions but also to positive gains in the parties' experience of their own competence, their understanding of one another, and the quality of the interaction between them, both during and after the conflict. By contrast, directive practices, even if they generate solutions, rarely enhance the parties' sense of personal capacity and competence, or their sense of mutual understanding and empathy.[425]

Boulle and Field also emphasise the link between party self-determination and empowerment, saying that self-determination 'connotes party empowerment and party autonomy and posits a procedure that engenders respect and dignity for the parties along with acknowledgement of their expertise in, and capacity to resolve, their own disputes'.[426]

Some scholars argue that the principle of self-determination leaves parties free to arrive at any outcome they choose and that whether a settlement is just or unjust is none of the mediator's business.[427] If anything trumps self-determination, even the mediator's sense of fairness or justice, party autonomy is said to be compromised.[428] However, others argue that an agreement must be free from duress and well informed for the outcomes to be said to be truly self-determined.[429] Informed consent requires parties to have access to legal information or advice and other external advice.[430] This can be a challenge in court-connected mediation where one or both parties may be unrepresented, leading to the questions: Is it the role of the mediator to provide unrepresented parties with information

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[424] Bush and Folger, 'Reclaiming Mediation's Future' (n 410) 742.

[425] Ibid 749.

[426] Boulle and Field, *Mediation in Australia* (n 307) 41.

[427] See J Stulberg, 'Mediation and Justice: What Standards Govern?' (2004) 6 *Cardozo Journal of Conflict Resolution* 213, cited in Charlie Irvine, 'What Do 'Lay' People Know About Justice? An Empirical Enquiry' (2020) 16(2) *International Journal of Law in Context* 146, 149.

[428] Irvine (n 427) 149.

[429] Rundle, 'Court-Connected Mediation Programmes' (n 315). See also Field and Crowe, *Mediation Ethics* (n 300) 193.

[430] Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1998) 74 *Notre Dame Law Review* 775 ('Informed Consent'). See also Field and Crowe, *Mediation Ethics* (n 300) 193; Kirkwood (n 408).

about their legal rights or legal processes? Does providing such advice effect the mediator's impartiality or neutrality?

Impartiality

Impartiality and/or neutrality have traditionally been defining values in modern mediation theory.[431] While the words impartiality and neutrality are sometimes used interchangeably,[432] there is a definitional difference. Impartiality is about freedom from favouritism or bias.[433] Neutrality relates to the mediator's behaviour, their perspective on the subject matter of the dispute and to the nature of the involvement of the mediator in the mediation.[434] Neutrality has been used to indicate that the mediator has no interest in the outcome of a dispute, is not biased towards either party and/or does not have a conflict of interest (ie they have no prior knowledge of the dispute and/or the parties).[435] Strict compliance with mediator neutrality means that a mediator cannot provide the parties with any information about their legal rights or about legal processes, potentially leaving the parties in an unequal bargaining position and with the uninformed party potentially providing uninformed consent to a settlement.[436]

In recent years, there has been vigorous debate about whether mediators are ever truly neutral.[437] Roberts argues that neutrality is not possible—mediators are self-evidently not neutral, inevitably having their own values, views, feelings, prejudices and interests—and that neutrality could be dangerous in situations of manifest inequality.[438] Other scholars, such as Peisley, argue that the mediator needs to be trained in the practice of affording

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[431] There is some argument that impartiality (and neutrality) are predominantly Western constructs and are less important in other cultural traditions. For example, Law says that mediators in Central American, Asian and Middle Eastern cultures are partial and must possess local knowledge and connections. See, eg, Siew-Fang Law, 'The Construct of Neutrality and Impartiality in Chinese Mediation' (2011) 22(2) *Australasian Dispute Resolution Journal* 124.

[432] Noone, Akin Ojelabi and Buchanan (n 403) 5.

[433] Practice Standards (n 17) Clause 7.1.

[434] Law (n 431) 118; Sourdin, *Alternative Dispute Resolution* (n 84) 98.

[435] Bernard S Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (John Wiley & Sons, 2004) 83; Field and Crowe, *Mediation Ethics* (n 300) 64.

[436] Field and Crowe, *Mediation Ethics* (n 300).

[437] Spencer, Barry and Akin Ojelabi (n 2) 235–45.

[438] Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (Jessica Kingsley Publishers, 2007) 98.

procedural fairness to the parties to ensure that the process has integrity, suggesting that neutrality is only compromised if the mediator displays *actual* bias, not if he or she expresses an opinion per se, unless that opinion is erroneous—just as a judge does not lose neutrality by making a binding judgement.[439] However, Roberts says that the credibility of the mediator depends not only upon being impartial, but also on being perceived to be so.[440]

There is now a preference in Australian mediation literature for impartiality, rather than neutrality, to be recognised as a core value of mediation because of the concern that, 'though relevant as a legitimising concept, neutrality is difficult to practise and, when practised, may perpetuate injustice'.[441] Impartiality, it is argued, allows the mediator to address power imbalances while still being objective.[442] As mentioned above, the 2015 NMAS Practice Standards no longer refer to mediators as neutral third parties, instead referring to them conducting the mediation in an impartial manner. Standard 7.1 states that: 'A mediator must conduct the mediation in a fair, equitable and impartial way, without favouritism or bias in act or omission.'[443] Field and Crowe go one step further and claim that mediators should abandon claims to neutrality and instead focus on maximising party control in mediation.[444]

As mentioned above, there is a tension between the importance of impartiality and the relevance of informed consent in self-determination: what role does the mediator play in ensuring the parties are properly informed of their rights? Debate around this issue means that views on mediator guidance in a mediation vary—from the view that mediators should not intervene at all,[445] to the view that mediators should intervene when agreements 'are so one-sided and unfair that they shock the conscience',[446] to the view

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[439] Peisley (n 353), cited in Spencer, Barry and Akin Ojelabi (n 2) 32.

[440] Marian Roberts (n 438) 98.

[441] Noone, Akin Ojelabi and Buchanan (n 403) 5. See also Sourdin, *Alternative Dispute Resolution* (n 84) 90.

[442] Noone, Akin Ojelabi and Buchanan (n 403) 5.

[443] Practice Standards (n 17).

[444] Field and Crowe, *Mediation Ethics* (n 300) as reviewed in Kirkwood (n 408).

[445] Joseph B Stulberg, 'Must a Mediator Be Neutral? You'd Better Believe It' (2012) 95 *Marquette Law Review* 829.

[446] Ellen Waldman and Lola Akin Ojelabi, 'Mediators and Substantive Justice: A View from Rawls' Original Position' (2014) 30 *Ohio State Journal on Dispute Resolution* 391, 423.

that mediators should be more actively involved to ensure compliance with legal norms.[447] ADRAC states that:

> In mediation it is impermissible as a matter of principle, practice and party expectation for a mediator to impose on the parties any set of values, policy, pre-conceptions or requirements for resolution of a dispute. A mediator will aim to resolve a dispute entirely in accordance with the wishes of the parties and will facilitate a resolution in any form desired by the parties so long as it is not illegal.[448]

Douglas found in a small study that a key dilemma for mediators, particularly when practising the facilitative model of mediation, was how to be neutral when one party was clearly negotiating at a disadvantage.[449] Nolan-Haley argues that, especially in court-connected mediation, in order to be well informed, participants need to understand the legal issues relevant to their dispute.[450] When mediations occur in the context of litigation, it is likely that participants, when supported by legal advice provided by their lawyer, will make informed decisions;[451] however, in situations in which parties are unrepresented, which is not uncommon in tribunal processes,[452] questions arise as to the role mediators should play in informing parties of their rights while still retaining their impartiality.

Responsiveness

Responsiveness is about tailoring the mediation process and outcomes to meet the needs and preferences of the individuals involved.[453] It means that parties to the mediation have some latitude to depart from rules or standards that exist in litigation and fashion outcomes responsive to their present and future needs.[454] Boulle describes this feature of mediation as being given effect 'through the flexibility of the process, its informality, and the fact that it is not restricted by law, judicial precedent or the restricted remedies

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[447] Neil G Carmichael, 'The Extent (or Limit) of Mediator Influence to Effect Settlement' (2013) 68(1) *Dispute Resolution Journal* 21, cited in Irvine (n 427) 150; Field and Crowe, *Mediation Ethics* (n 300).

[448] Australian Dispute Resolution Advisory Council, 'Submission to New South Wales' (n 326) 4.

[449] Susan Douglas, 'Neutrality in Mediation: A Study of Mediator Perceptions' (2008) 8(1) *Law and Justice Journal* 139, 152; Mary Anne Noone and Lola Akin Ojelabi, 'Ethical Challenges for Mediators around the Globe: An Australian Perspective' (2014) 45 *Washington University Journal of Law and Policy* 145, 151.

[450] Jacqueline M Nolan-Haley, 'Court Mediation and the Search for Justice through Law' (1996) 74 *Washington University Law Quarterly* 47.

[451] Rundle, 'Court-Connected Mediation Programmes' (n 315) 5.

[452] VCAT has limitations on legal representation as set out in the previous chapter.

[453] Rundle, 'Court-connected Mediation Programmes' (n 315).

[454] Boulle, *Mediation* (n 4) 81.

obtainable in court proceedings'.[455] Bush and Folger describe responsiveness by explaining that mediation that is not limited by legal categories or rules can help reframe a contentious dispute as a mutual problem.[456]

Responsiveness allows parties to focus on outcomes that are important to them; for example, an expedited settlement might be more important to a party than a settlement that is strictly based on legal rights. It also allows for outcomes that would simply not be possible from a court or tribunal judgement, such as one party performing a personal service for another or an employer providing a reference for an employee.[457] Mediation can also have procedural elements that make it *responsive* to the parties' needs, such as 'regular breaks, the possibility of adjourning the process and reconvening at a future time, having the disputants physically in separate rooms, use of co-mediation, variations in the role of supporters such as legal practitioners or advocates, as well as variations in the style of negotiation that is facilitated'.[458]

Non-Adversarialism

In a mediation context, non-adversarialism, which is sometimes called cooperation,[459] is about mediation's collaborative and conciliatory nature as compared to the adversarial litigation process of the formal legal system.[460] Non-adversarialism in mediation is often directly contrasted with the adversarial nature of the formal legal system, including lawyers' behaviour.[461] The adversarial nature of a determinative process gives prominence to the lawyers who present opposing arguments and positions to the court. The outcome is a win-lose situation. Mediation, on the other hand, is non-adversarial; the

[455] Ibid.

[456] Spencer, Barry and Akin Ojelabi (n 2) 142; Bush and Folger (n 357) 9-16.

[457] Boulle, *Mediation* (n 4) 81.

[458] Rundle (n 301) 85.

[459] Ibid.

[460] Boulle, *Mediation* (n 4) 69.

[461] Ibid 70.

goal is to achieve a win-win outcome.[462] To achieve a win-win outcome, parties negotiate with the support of the mediator, but control of the outcome is in their hands.

Although the structures, procedures and potential outcomes of mediation can encourage non-adversarialism, mediation itself cannot compel the parties to behave in a cooperative manner and 'parties and their advisors can be as positional, competitive and confrontational within these structures as in litigation'.[463] Some models of mediation encourage non-adversarialism more than others. For example, settlement mediation, in which parties tend to take a positional approach and focus on rights, might be more adversarial than facilitative mediation, with its focus on underlying needs and interests.[464] Nonetheless, non-adversarialism applies across all four mediation models, albeit in slightly different ways. For example, in transformative mediation, the primary aim is to cooperatively explore the interactions between the parties to achieve empowerment and recognition; in the settlement model, the aim is to resolve the dispute, an outcome that also requires some level of cooperation.

Mediation relies on non-adversarialism to achieve the values of responsiveness and self-determination. Non-adversarialism encourages greater communication between the parties who, with the help of the mediator, can explore each other's interests and concerns. This cooperative and participative approach, in contrast to litigation, can facilitate party self-determination. Agreements that are truly cooperative are going to require both parties to enter into them freely and with a view that the outcome is acceptable. Rundle highlights factors that may impede a truly cooperative approach including:

> excessive pressure applied by one participant (party, lawyer or mediator) towards another, barriers to practical access to alternative dispute resolution mechanisms such as trial (for example, where a party cannot bear the financial cost of a trial), or where agreements are reached without adequate information upon which to assess the reasonableness of the settlement terms.[465]

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[462] The terminology 'win-lose' and 'win-win' comes from the seminal work on negotiation of Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin, 1981).

[463] Boulle, *Mediation* (n 4) 69.

[464] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[465] Rundle (n 301) 115.

The first and last of these factors, as well as maintaining a focus on party self-determination, can potentially be remedied by a cooling off period being offered in a mediation, as will be demonstrated in Chapter 4.

Confidentiality

Although not described by all authors as a core value of mediation, confidentiality is considered by some as one of the most important aspects of mediation.[466] Even if not a core value, confidentiality is certainly an important characteristic of mediation.[467] While confidentiality is codified as a core value of mediation in some states in the US,[468] in Australia, the principle of confidentiality in mediation derives from common law, statues,[469] the NMAS Practice Standards[470] and mediation agreements.[471]

The confidentiality of mediation, along with aspects such as its relative informality, flexibility and privacy, make the mediation environment very different from formal legal proceedings.[472] Consequently, confidentiality is recognised as one of the advantages of mediation.[473] Confidentiality is said to promote the willingness of parties to participate in mediation, encourage parties to be more frank with the other side than they would be otherwise, and promote collaborative problem-solving.[474] The confidentiality of the process gives parties a safer haven in which to express emotions and their true interests, enabling people to better see one another's perspectives.[475] Depending upon the

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[466] Noone, Akin Ojelabi and Buchanan (n 403) 63.

[467] Spencer, Barry and Akin Ojelabi (n 2) 738.

[468] Heather Scheiwe Kulp, 'A Tightrope Over Both Your Houses: Ensuring Party Participation and Preserving Mediation's Core Values in Foreclosure Mediation' (2014) 14(2) *Pepperdine Dispute Resolution Law Journal* 203, 208.

[469] Each state has statutory privilege for dispute resolution processes that largely prevent most verbal or documentary forms of communication from being used outside the dispute resolution process particularly in a court of law in subsequent proceedings. Spencer, Barry and Akin Ojelabi (n 2) 751.

[470] Practice Standards (n 17) clause 9.

[471] Boulle and Field, *Mediation in Australia* (n 307) 314.

[472] Nolan-Haley, 'Informed Consent' (n 430) 780.

[473] Clarke and Davies (n 77).

[474] Noone, Akin Ojelabi and Buchanan (n 403) 63.

[475] Clarke and Davies (n 77).

interests or objectives of the parties, the confidential nature of mediation and this unique opportunity to express emotions, may enhance party self-determination.

The Adoption of Mediation by the Civil Justice System

Over the last 40 years, in multiple jurisdictions worldwide, there has been an increase in the number and complexity of disputes in the civil justice system.[476] As the workloads of courts and tribunals have increased, they have been criticised for being too slow, too expensive and too complex.[477] Trials are said to be too costly, lengthy and time-consuming.[478] As a result, courts and tribunals, as well as government, looked to alternative methods of resolving some of the disputes, particularly within the civil justice system.[479]

Expansive claims were made regarding the benefits of court-connected mediation, including that it would be faster, less expensive[480] and more inclusive[481], more accessible, more flexible, productive of durable solutions, more democratic, gentler, more empowering and preserving of relationships.[482] It was also seen as a way of relieving the workload of the judiciary and court administrators.[483] The advantages of ADR, including the benefits of having contentious, complex cases resolved elsewhere than in a court, were even set out in several court decisions.[484]

Beginning in the 1980s, the incorporation of mediation and other ADR processes into more formal court structures was actively encouraged by governments who saw it as one

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[476] Ali (n 265) 10; Ingleby (n 256) 441.

[477] Ali (n 256) 10.

[478] Magnus (n 4) 872.

[479] Nadja Alexander, 'Mediation on Trial: Ten Verdicts on Court-Related ADR' (2004) 22 *Law in Context: A Socio-Legal Journal* 8, 8-9 ('Mediation on Trial').

[480] If the case does not settle, it can be more costly and time-consuming for a party than if the matter had proceeded directly to a hearing. See also Sander (n 324).

[481] Nancy A Welsh, 'Do You Believe in Magic? Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation' (2017) 70(3) *Southern Methodist University Law Review* 721, 763 ('Do You Believe in Magic').

[482] Irvine (n 427) 147. See also Ingleby (n 256) 442.

[483] Sander (n 324); Ingleby (n 256).

[484] See, eg, *Waterhouse v Perkins* [2001] NSWSC 13; *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 478, both of which are provided as examples in Mack (n 115) 118.

solution to improving access to justice for the community.[485] During the late 1990s and early 2000s, mediation and other forms of ADR were introduced into the procedures of most courts and tribunals in Australia.[486] Along with many other countries, Australian courts and tribunals embraced mediation as a useful alternative to adjudication.[487] As set out in the previous chapter, one of the reasons put forward by the then Victorian Attorney-General for the creation of the super tribunal of VCAT was that the new legislation would increase access to ADR programs and allow all parties to access mediations.[488]

Court-connected dispute-resolution schemes, including mediation, have become an accepted and permanent part of the formal civil justice system in Australia.[489] This phenomenon is not unique to Australia,[490] although Australia was one of the early adopters of court-connected ADR. Of the various forms of ADR processes, mediation has established itself as the most commonly used form of dispute resolution both within the court system, as well as outside of the court system.[491] Courts and tribunals now regularly require parties to use mediation or another ADR process either as a condition before accessing the courts or as a result of a court order.[492]

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[485] Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3) 108. See also Julie Macfarlane, 'ADR and the Courts: Renewing Our Commitment to Innovation (the Future of Court ADR: Mediation and Beyond)' (2012) 95(3) *Marquette Law Review* 927, 927.

[486] Boulle, *Mediation* (n 4) 560. See also Magnus (n 4) 871.

[487] Hedeen (n 312) 273; Ali (n 256) 11.

[488] Victoria, *Parliamentary Debates*, 9 April 1998, 973 (Wade, Jan, Attorney-General).

[489] Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3) 113. See also Australian Law Reform Commission, *Managing Justice* (n 36), cited in Boulle and Field, *Mediation in Australia* (n 307) 27. See also Boulle, *Mediation* (n 4) 561; Spencer, Barry and Akin Ojelabi (n 2) 176; Boulle, 'Minding the Gaps' (n 5) 226; Akin Ojelabi, 'Ethical Issues' (n 314) 61.

[490] Alexander, 'Mediation on Trial' (n 479) 8. For example, in her doctoral thesis, Marie-Odile C Dufournier Sander examines the trend towards non-voluntary mediation in a court context in Europe, with a particular focus on England, Italy and France. See Sander (n 324). For the US position, see Roselle L Wissler, 'Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences' (2011) 26 *Ohio State Journal on Dispute Resolution* 271, 272. For a comparison of the English and Singaporean civil justice reforms, see Masood Ahmed and Dorcas Quek Anderson, 'Expanding the Scope of Dispute Resolution and Access to Justice' (2019) 38(1) *Civil Justice Quarterly* 1, 3.

[491] Magnus (n 4) 872.

[492] Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3) 114. See also Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria: Report Prepared for the Department of Justice, Victoria, Australia' (2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1395550>. Sourdin discusses

Mediation that is 'court-connected' can occur in a variety of ways, both compulsory and voluntary. As Spencer, Barry and Akin Ojelabi[493] indicate:

- it may be recommended or required before parties are permitted to file proceedings;
- it may be recommended or required before a matter is listed for trial or appeal;
- parties may be referred to external mediators (of their choice or from a prescribed list) by court officials;
- parties may be referred to mediation conducted by court officials (registrars, employed mediators or perhaps judges/judicial members);
- judges can conduct mediation in the hearing room.[494]

Consequently, court-connected mediation occurs 'within the context of the litigation process, with a degree of compulsion and under the supervision of the court'.[495]

The courts' encouragement of the use of mediation is meant to enhance access to justice and facilitate the proportionate allocation of court resources for civil litigation.[496] However, the bringing together of two different approaches to dispute resolution—the non-determinative mediation philosophy and the formal legal perspective influenced by a traditional adversarial approach to the resolution of disputes—has resulted in concerns that mediation in the court-connected context is less focused on some of its core values[497] and instead has developed a 'distinctively legal character'.[498] For example, while a mediation outside of the court context may involve a wide-ranging discussion of legal, interpersonal, emotional, social and reputational interests, mediation ordered or required by a court or tribunal may be more specifically focused on the legal claim and rights of the

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mediations carried out in the Victorian Supreme and County Courts that take place with the assistance of private mediators who are funded by litigants. She estimates that these processes are responsible for the resolution of more than 1,000 disputes each year that may otherwise have been the subject of a full hearing. See also GT Pagone 'The Role of the Modern Commercial Court' (Conference Paper, Supreme Court Commercial Law Conference 12 November 2009) 23 who says that mediation is ordered in virtually every case in the commercial list of the Supreme Court of Victoria and 'is actively considered throughout its management from inception to trial, including during trial'.

[493] Spencer, Barry and Akin Ojelabi (n 2) 176. See also Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3).

[494] For example, using a hybrid process such as used by the Queensland Civil and Administrative Tribunal.

[495] Rundle, 'The Purpose of Court-Connected Mediation' (n 5).

[496] Ahmed and Quek Anderson (n 490) 1.

[497] Rundle, 'Barking Dogs' (n 5) 78. See also Rundle, 'The Purpose of Court-Connected Mediation' (n 5) 1.

[498] Boulle, *Mediation* (n 4) 560.

participants.[499] Court-connected mediation has a tendency to be oriented to settlement and to involve an element of evaluation.[500] The prominence and importance of party self-determination is also not necessarily evidenced in court-connected mediation where lawyers often assume the role of participant.[501]

Criticisms of Court-Connected Mediation

Not all mediation scholars are comfortable with the pervasive incidence of mediation in the litigation context.[502] While it is true that mediation can greatly reduce the time and cost of litigation,[503] assuming that the matter settles or at least that the issues in dispute are narrowed,[504] from an institutional point of view, the primary purpose of court-connected mediation is often to settle disputes with minimal cost and prior to trial.[505] There is a widespread view that enthusiasm for the adoption of mediation and other ADR processes by courts and tribunals was founded primarily on the benefits of efficiency and the use of mediation as a case management tool, rather than on incorporating mediation values, including self-determination, into the formal justice system.[506] Lord Justice Neuberger's observations are pertinent in this regard:

> It should not be impossible for citizens to have proper access to the courts—i.e. with decent legal advice and legal representation. However, and I do not say this in a spirit of recrimination, but simply as a matter of melancholy fact: the legal profession's charges, the court system's procedures and government cuts and charges render it difficult if not impossible for many citizens to get access to the courts. In those circumstances, provided that its costs are proportionate to the issues involved, mediation appears in practice to be the only alternative. Whatever may be said about mediation as an alternative to litigation as a matter of principle,

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[499] Rundle, 'Court-Connected Mediation Programmes' (n 315) 4.

[500] Boulle, 'Minding the Gaps' (n 5) 224; Rundle, 'The Purpose of Court-Connected Mediation' (n 5).

[501] Rundle, 'Barking Dogs' (n 5) 78.

[502] For example Abel, *The Politics of Informal Justice* (n 220); Ingleby (n 256); Welsh, 'The Thinning Vision' (n 8); Roberts (n 438); Genn et al (n 61).

[503] Ahmed and Quek Anderson (n 490)

[504] Ingleby (n 256) 442. Ingelby cites some broad-based studies that indicate that we should be careful in relation to claims that mediation reduces costs, preserves relationships and has an impact on court backlogs.

[505] Rundle, 'The Purpose of Court-Connected Mediation' (n 5); Genn, 'What Is Civil Justice for? (n 3); Alexander, 'Mediation on Trial' (n 479) 9.

[506] Rundle, 'Barking Dogs' (n 5) 98; Boulle, 'Minding the Gaps' (n 5) 5; Alexander, 'Mediation on Trial' (n 479) 17; Astor and Chinkin (n 3) ch 2.

> it appears to be quite a satisfactory alternative in practice at any rate to many people—at least judging by the reported outcomes.[507]

A settlement focus does not necessarily sit well with mediation theory. Consequently, even in the 1980s, critics of mediation within the justice system argued that it provided a substandard form of justice.[508] There are constitutional concerns about denying citizens' rights to have disputes adjudicated by the courts.[509] There are also concerns that because mediation is occurring within the courts' domain, there can never be genuine mediation.[510] Other criticisms include arguments about the scope of the courts' involvement in, and its desire for, settlements,[511] party autonomy,[512] the impact on open justice[513] and the removal of procedural protections from the disadvantaged.[514] There are also concerns about the quality and standard of mandatory court mediation and pragmatic concerns that if mediations do not succeed they could be more costly and time-consuming for parties than had matters proceeded directly to hearing.[515]

The criticisms relevant to this research are those that impact on the core values of mediation, particularly self-determination. Welsh and others express concern that when

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[507] Lord Justice Neuberger, 'Keynote Address: A View from on High Civil Mediation Conference 2015' (12 May 2015) (Web Document) <https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf>, cited in Ahmed and Quek Anderson (n 490) 8. Studies show that there are high levels of resolution rates at mediation and high levels of satisfaction with the process.

[508] Abel, *The Politics of Informal Justice* (n 220) 267-320.

[509] Ibid 272; Boulle, *Mediation* (n 4) 561; Genn, 'Tribunals and Informal Justice' (n 3).

[510] Boulle, *Mediation* (n 4) 560. This is because the presence of judges and court officials 'pervert[s] the system so that it becomes an alternative way of litigating rather than an alternative to litigation'.

[511] For example, Genn describes the process of mediation within the justice system as requiring the parties to relinquish ideas of legal rights and focus, instead, on problem-solving saying '[t]he outcome of mediation, therefore, is not about just settlement it is just about settlement'. Genn, 'What Is Civil Justice for? (n 3), cited in Irvine (n 427) 147. See also Ahmed and Quek Anderson (n 490). Ingleby asks whether settlement is always desirable in Ingleby (n 256) 442.

[512] Not all litigants are amenable to resolving their dispute consensually in place of undergoing an adjudicative process.

[513] Ahmed and Quek Anderson (n 490) 2. This is a multifaceted argument. It includes the view that a mediated outcome denies society the chance to develop societal norms that can be obtained by public judgements (see Irvine (n 427) 148) and that it leaves 'systemic abuses by powerful corporate interests unchallenged and unscrutinised', allowing particularly large corporates to repeat behaviour without scrutiny (see Ingleby (n 256) 442).

[514] Noone and Akin Ojelabi, 'Ensuring Access to Justice' (n 30), cited in Irvine (n 427) 148.

[515] Boulle, *Mediation* (n 4) 561.

mediation is court-connected, it does not retain its core values[516] and becomes corrupted by adversarialism.[517] Many of these concerns are based around the coercive element of mediation when it occurs in a court-connected setting. When mediation occurs in the shadow of the law, the voluntary nature of alternatives are eroded, and individuals and institutions can find themselves mandated or pressured into participating in activities once considered purely optional.[518]

Coercion in Court-Connected Mediation and its Impact on Party Self-Determination

Welsh cites three reasons why the promise of self-determination in court-connected mediation has dimmed in recent years: first, courts and agencies have focused on efficiency as a primary reason to institutionalise mediation; second, lawyers and repeat players have come to dominate the issue-framing and negotiations occurring within mediation, creating a more adversarial approach; and, third, a significant percentage of parties do not possess the temperament or desire to fashion their own unique resolutions.[519] Boulle and Field state that the rise of combined processes (in which mediation and some form of determinative process are closely linked in time), the displacement of facilitative mediation by evaluative and advisory systems, and the prevalence of settlement conferencing operating under the guise of mediation all create challenges for the realisation of self-determination in court-connected mediation.[520] However, as explained above, coercion in mediation also plays a role in decreasing party self-determination in court-connected mediations.

The integration of mediation into the civil justice system in Australia has meant that parties are subjected to several forms of compulsion and/or coercion to participate in mediation.[521] Even where party consent to participate in mediation is required, there are

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[516] Welsh, 'The Thinning Vision' (n 8); Ingleby (n 256); Howard S Erlanger, Elizabeth Chambliss and Marygold S Melli, 'Participation and Flexibility In Informal Processes: Cautions from the Divorce Context' (1987), 21(4) *Law and Society Review* 585; para 2.04. Marian Roberts (n 438) 101.

[517] Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38(1) *William and Mary Law Review* 49, 72-4 ('The Trouble with the Adversary System').

[518] Katz (n 21) 1.

[519] Welsh, 'Do You Believe in Magic?' (n 481) 723.

[520] Boulle and Field, 'Re-Appraising Mediation's Value' (n 409) 96.

[521] Sander (n 324) 1.

other less direct forms of coercion. For example, the *Civil Dispute Resolution Act 2011* (Cth) requires parties to take 'genuine steps to resolve a dispute before making application to respective courts'.[522] Although mediation is not categorically mandated under the legislation, the fact that there can be cost sanctions against parties who do not reasonably attempt to settle the dispute is a strong factor in favour of attempting mediation or other forms of ADR.[523] Other courts have specific pre-action protocols that require litigants to try mediation before coming to court.[524] Another form of coercion in some jurisdictions is that legal aid may be withheld if mediation is not attempted.[525] Finally, one or both of the parties may be unable to afford any other form of dispute resolution.[526]

More direct compulsion occurs in Australian courts that have wide discretionary powers to order mediation without the parties' consent.[527] For example, in Victoria, the Victorian Supreme Court, County Court, and the Victorian Civil and Administrative Tribunal are all empowered to refer matters to mediation with or without the consent of the parties,[528] while the Victorian *Magistrates Court Act 1989* provides for referral with consent.[529] This legislative coercion to participate in mediation is not unique to Australia.[530] The result of such coercion is that, while the mediation process may stay the same, the disputants no longer have a choice about the form of the process or about whether or not to participate

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[522] *Civil Dispute Resolution Act 2011* (Cth) s 3. Family Law proceedings are exempt from this. See *Family Law Act 1975* (Cth) s16.

[523] Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) *University of New South Wales Law Journal* 929, 932.

[524] For example, in the Family Court jurisdiction in Australia, a potential litigant is required to first obtain a 60I certificate under the *Family Law Act*, which certifies that mediation has been attempted and been unsuccessful. The lack of success may be because the case is deemed unsuitable for mediation by the mediation agency or it may be because the other party has refused to participate in the mediation, or it may be that a mediation was held but the dispute was not resolved.

[525] Ingleby (n 256) 443.

[526] Ibid.

[527] Hanks (n 523) 945.

[528] *Supreme Court Rules – General Rules of Procedure in Civil Proceedings 1996* (Vic) r 50.07; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) r 34A.2 1; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88.

[529] *Magistrates Court Act 1989* (Vic) s 108; Mack (n 115) 119.

[530] For example Hedeen lists some American statutes that mandate mediation. Hedeen (n 312) 276.

in it, despite the widely expressed view that voluntariness is an important pre-condition for successful ADR.

Ingleby argues that coercion to enter mediation is acceptable, provided there is no coercion within the mediation itself. The mediation remains voluntary as long as there is no pressure within the mediation and the parties retain the right to reject any settlements proposed.[531] The argument goes that forcing the parties to attempt mediation does not mean that the participants are forced to settle.[532] However, as well as coercing a party to participate in mediation, coercion in mediation can also occur by compelling the parties to remain in mediation despite the fact they no longer wish to be involved. This form of coercion involves mediators using pressure to keep the parties 'at the table'. Examples described by Hedeen include pressuring a woman on heart medication suffering from chest pains to continue with the mediation and a 65-year-old woman suffering from high blood pressure, headaches and intestinal pain being compelled to participate in 15 hours of mediation.[533] An Australian example is the case of *Tapoohi v Lewenberg (No 2)*[534] in which Ms Tapoohi argued that the mediator 'coerced' parties to continue the mediation late into the evening, despite the misgivings of the legal representatives, two of whom had already left for the day. Ms Tapoohi alleged the mediator recommended extending the session in such a way that Ms Tapoohi and her legal team felt it was a direction.[535]

A final type of coercion that can arise in mediation occurs when pressure is put on the parties to settle during the mediation. This may be an unintended consequence of mediators exploring a party's alternatives to an agreement, or 'reality-checking' the strengths and weaknesses of a party's case. Hedeen suggests that when 'a mediator asks questions or makes statements to encourage a disputant to appreciate these "realities" or undesirable alternatives, parties may feel badgered or coerced'.[536] This type of coercion

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[531] Ibid 277; Ingleby (n 256) 277.

[532] Christopher W Moore, *The Mediation Process: Practical Strategies For Resolving Conflict* (John Wiley & Sons, 2014) 20.

[533] Hedeen (n 312) 280. I have also been personally involved in a 10-hour mediation with an 89-year-old client where the pressure from the mediator to continue with the mediation to reach a settlement was very strong despite the elderly client becoming fatigued and physically uncomfortable.

[534] *Tapoohi v Lewenberg (No 2)* (2003) VSC 410 (Habersberger J).

[535] Ibid.

[536] Hedeen (n 312) 283.

in mediation can also occur when a mediator sees a settlement of the dispute as a success. Some studies indicate that mediators who 'get settlements' are preferred and that a mediator's settlement rate can be critically important to their employment.[537] Studies have also shown 'patterns of mediators forecasting dire outcomes for their cases if unresolved in mediation and strongly pressuring them to settle'.[538] Such coercion in mediation does not consider that settlement may not be desirable in all cases. Cases that involve fundamental rights or issues deserving a precedent or those for which there is a need for public sanctioning of conduct or when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly are examples of situations in which a confidential mediated outcome is not desirable.[539] In addition, cases where one of the parties is unable to negotiate effectively due to severe power imbalances or mental-health concerns are another category in which settlement may not be desirable. While some court-connected mediation programs screen these types of cases, that is not always the case.[540]

All these forms of coercion impact on the values underpinning quality mediation. True party self-determination does not exist if parties are coerced to enter the mediation or are pressured to accept a settlement. Only if an agreement is reached in a mediation that is free from duress and well informed can the outcome be said to be truly self-determined.[541] The importance of this is reflected in the fact that both in the US and Australia there has been an increase in litigation arising from a party's application to be released from mediation agreements made in circumstances in which self-determination was compromised.[542] While traditional mediation philosophy puts the onus on the mediator to nurture the self-determination of the parties within the mediation context, in practice, particularly in court-connected mediations, mediators can be compromised by the environment they are working in; for example, by adopting case settlement goals.

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[537] Lande in ibid 281.

[538] Ibid.

[539] Ibid.

[540] Mieke Brandon (n 339) 46.

[541] Rundle, 'Court-Connected Mediation Programmes' (n 315).

[542] Hedeen (n 312) 275; Spencer, Barry and Akin Ojelabi (n 2).

As a result, they can 'forget' about self-determination and instead bring pressure to bear on the parties at numerous different stages.[543]

Conclusion

This chapter has specified a working definition of mediation and described the four main models of mediation. The core values of mediation have been set out and there has been a discussion about how court-connected mediation can undermine those values, particularly the value of party self-determination. As Chapter 2 set out, mediation and other ADR processes were originally adopted by the justice system as a method of enhancing access to justice. For mediation to enhance perceptions and experiences of fairness and justice in a court-connected setting, mediation scholars emphasise that the core values of mediation, particularly self-determination, need to be given primacy.[544] To ensure that court-connected mediation does not further disempower those its use was aimed to improve, including the unrepresented, it needs to be valued for providing more than 'efficiency for the sake of efficiency'.[545]

Pertinently, Welsh and others[546] recommend a significant change to court-connected mediations to ensure the self-determination of parties—namely, the inclusion of a cooling off period. This cooling off period is described as a period of time between the mediation session and the date any mediated settlement is finalised in which the parties to a mediated settlement can consider their options. Such an intervention has the benefit of safeguarding party self-determination by providing parties, particularly unrepresented parties, with time to consider their decisions outside of the potentially pressurised

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[543] Hedeen (n 312) 275; Bush and Folger, 'Reclaiming Mediation's Future' (n 410) 743.

[544] Yishai Boyarin, 'Court-Connected ADR—A Time of Crisis, A Time of Change' (2012) 50(3) *Family Court Review* 993, 993; Rundle, 'Court-Connected Mediation Programmes' (n 315); Adele Carr, 'Broadening the Traditional Use of Mediation to Resolve Interlocutory Issues Arising in Matters Before the Courts' (2016)(27) *Australasian Dispute Resolution Journal* 10, cited in Boulle and Field, *Mediation in Australia* (n 307) 28.

[545] Boyarin (n 544) 994.

[546] Hedeen recommends four changes to court-connected mediation, one of which he terms as 'Welsh's cooling off period'. Hedeen (n 312) 286. The others are: referrals to mediation should be explicitly free of coercion; mediation consent forms should be executed at the outset of mediation to affirm the disputants' informed consent and understanding of a) the bounds of acceptable mediator pressure, b) their rights to terminate mediation at any time and c) the court's policy that non-settlement will not adversely affect either party's case; and a blanket prohibition on substantive mediator reports and recommendations to the court should be enforced. Nolan-Haley also refers to the potential benefits of a cooling off period in Jacqueline Nolan-Haley, 'Consent in Mediation' (2007) 14 *Dispute Resolution Magazine* 4 ('Consent in Mediation').

environment of a court-connected mediation, as well as giving them time to obtain legal advice, if required, ensuring that any settlement agreement is truly freely entered into. The next chapter examines the development of cooling off periods generally, as well as specifically in the mediation context, before leading into a discussion of the results of the research done on the mediation cooling off period offered in some mediations at VCAT.

CHAPTER 4
COOLING OFF PERIODS

Introduction

Cooling off periods are used in a number of different contexts, all with the aim of preventing decisions being made under duress or without due rational consideration.[547] Effectively, they provide a remedy for irrational decision-making or decisions made in haste, and a protection from decisions made under pressure or without all the relevant information.[548] Cooling off periods are best known from their use in consumer protection legislation; however, in more recent years, they have also been used in mediation processes.

Traditionally, there was strong support among academic researchers for the use of cooling off periods in the consumer law context.[549] Providing a cooling off period was seen as a way of increasing the equality of bargaining power between the parties, particularly in situations in which the consumer was considered to psychologically be at a disadvantage, such as door-to-door selling or franchise contracts.[550] However, the provision of cooling off periods in consumer contract legislation has also been criticised, particularly in the contract law area, for being a paternalistic protection for those that make 'rash and ill-considered promises'.[551] Another more recent criticism of cooling off periods has come from researchers in the consumer psychology field who believe that the cooling off period

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[547] Beverley A Sparks et al, 'Cooling Off and Backing Out: Understanding Consumer Decisions to Rescind a Product Purchase' (2014) 67(1) *Journal of Business Research* 2903, 2903.

[548] Consumer Affairs Victoria, '*Cooling-Off Periods in Victoria: Their Use, Nature, Cost and Implications*' (Research Paper No. 15, January 2009) i.

[549] Pamaria Rekaiti and Roger Van den Bergh, 'Cooling-Off Periods in the Consumer Laws of the EC Member States. A Comparative Law and Economics Approach' (2000) 23(4) *Journal of Consumer Policy* 371; Shmuel I Becher, 'Key Lessons for the Design of Consumer Protection Legislation' (2021) 11 *Law and Economics of Regulation* 73; Shmuel I Becher and Tal Z Zarsky, 'Open Doors, Trap Doors, and the Law' (2011) 74(2) *Law and Contemporary Problems* 63; Consumer Affairs Victoria (n 548).

[550] See, eg, Rekaiti and Van den Bergh (n 549) 371; Courtenay Atwell, 'Cooling Off Periods in Franchise Contracts: From Consumer Protection Mechanisms to Paternalistic Remedies for Behavioral Biases' (2015) 17(4) *Business and Politics* 697.

[551] Patrick Salim Atiyah, *Essays on Contract* (Oxford University Press, 1986).

does not necessarily provide appropriate or adequate protection to those it is trying to protect or that the use of a cooling off period simply does not work.[552]

The utilisation of cooling off periods in ADR contexts, including mediation, is not common. Traditionally, the process of mediation was not about creating a binding and enforceable legal agreement but, rather, as explained in Chapter 2, was an alternative means of resolving a dispute outside of the formal legal system. The ideal of a party-driven mediation process is one that leads not only to solutions 'but also to positive gains in the parties' experience of their own competence, their understanding of one another, and the quality of the interaction between them, both during and after the conflict'.[553] Nonetheless, high rates of compliance with agreements made in the mediation context was considered likely if the core values of mediation were followed, including ensuring party self-determination.[554] Conventionally, therefore, there is no need for a cooling off period in a mediation process, as the mediation is a process of improving party communication and developing a solution to the dispute to which both parties feel committed,[555] regardless of the legal enforceability of the final agreement.[556]

Nevertheless, as discussed in Chapter 2, even though the introduction of mediation and other ADR processes within the justice system was part of a suite of reforms to improve access to justice for disadvantaged and vulnerable litigants, concerns about procedural and systemic inequities led to suggestions for increased protections even within these processes. Furthermore, the increasing adoption and mandated use of mediation and

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[552] See, eg, Paul Harrison, 'Cooling-Off Periods for Consumers Don't Work: Study' (2016) *The Conversation*; Jeff Sovern, 'Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures' (2012) 75(3) *University of Pittsburgh Law Review* 333; Eric Cardella and Ray Chiu, 'Stackelberg in the Lab: The Effect of Group Decision Making and "Cooling-Off" Periods' (2012) 33(6) *Journal of Economic Psychology* 1070.

[553] Bush and Folger, 'Reclaiming Mediation's Future' (n 410) 749.

[554] See Chapter 3. See also Nancy Welsh's comments on the benefits of the use of facilitative mediation techniques and self-determination of the disputants in the strength and durability of the final agreement. Welsh, 'The Thinning Vision' (n 8).

[555] Boulle, *Mediation* (n 4) 3, describes mediation as 'a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent, without having a binding decision-making function'.

[556] For example, the *Family Law Act 1975* (Cth) strongly encourages, and, in some cases, mandates, people who have a dispute about parenting to go to family dispute resolution. However, the agreements reached at Family Dispute Resolution are not in or of themselves enforceable. See also Spencer, Barry and Akin Ojelabi (n 2) 464.

other ADR processes by courts and tribunals, as detailed in Chapter 3, has meant that some changes have occurred to the mediation process, including the perceived decline of party self-determination. Due to the legal context in which many mediations and other ADR processes now occur, the legal enforceability of agreements has become paramount.[557] It is simply not practical for courts and tribunals to have large numbers of cases in their systems with mediated settlement agreements in which there is uncertainty about whether the parties would comply with the outcomes. In addition, coercion in the mediation process has become commonplace.[558] These changes have meant that power imbalances between mediating parties, including where an unrepresented party is mediating with a represented party, can have more influence on outcomes. In recognition of potential inequalities in bargaining positions between parties and to enhance party self-determination, it has been suggested that a cooling off period be adopted into ADR processes to enable parties, particularly unrepresented parties, to have some time to consider any agreements they have reached in a court or tribunal connected ADR process, and/or to seek advice about the agreement, prior to being bound by the agreement.[559]

This chapter begins by describing cooling off periods and then sets out how and why the use of cooling off periods has developed in consumer protection law and the inequities they seek to redress. The key arguments against the use of cooling off periods in the context of consumer protection follows. The next section addresses the reasons for the call for cooling off periods in mediation and ADR processes. As is outlined, inequalities between parties in consumer transactions, combined with pressured sales techniques, mirror concerns in some court-connected mediation processes in which parties may be in positions of unequal bargaining power and be under pressure to resolve their dispute. As in consumer transactions, a cooling off period in an ADR context can protect the parties from decisions made in haste or under pressure or without all the information required. Finally, the chapter concludes by providing some Australian examples of the use of cooling off periods in ADR processes, including the cooling off period used in some VCAT mediations, which is the subject of this research.

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[557] Boulle and Field, *Mediation in Australia* (n 307) ch 9; Spencer, Barry and Akin Ojelabi (n 2) 176-217.

[558] See Chapter 3 - Coercion in Court-Connected Mediation and its Impact on Party Self-Determination.

[559] Welsh, 'The Thinning Vision' (n 8) 37-42.

What is a Cooling Off Period?

There does not appear to be one neat definition of the phrase 'cooling off period'; rather, the expression is used in a number of different contexts. While there is commonality in meaning within these contexts, there are two slightly different uses of the phrase. The first is the more colloquial use: a 'cooling off period' is a forced break from proceedings in order to 'cool down' from an aggressive, angry or emotional position. It is seen as a period 'in which tempers can be calmed'[560] and has been used in this way since at least the 1950s. In that same manner, some dispute resolution literature uses the term 'cooling off period' to describe a period of time when the parties take a break from a mediation or negotiation to calm down after conflict has escalated to an unproductive level.[561] In this context, the term 'cooling off period' has also been used in the industrial law field to indicate the period of time a union must wait until permitted to strike once notification of a workplace dispute has been made.[562]

The second usage of the term 'cooling off period' is more legalistic. In this context, traditionally a cooling off period has referred to a specified period of time within which a contractual party has the right to withdraw from or cancel or terminate a concluded contract or agreement without any penalty.[563] In such a situation, should one of the parties to the contract exercise his or her right to withdraw, all contractual obligations are extinguished.[564] Here the term is used synonymously with a right to cancellation—that is, to rescind, disaffirm or revoke a contract—or more generally as a withdrawal right.[565] The

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[560] John G Turnbull and Clara Kanun, 'Conciliation and Mediation in Minnesota' (1952) 3 *Labor Law Journal* 677, 681.

[561] For example, the terminology 'cooling off period' is used this way by Susan Summers Raines, 'Can Online Mediation be Transformative? Tales from the Front' (2005) 22(4) *Conflict Resolution Quarterly* 437, 448. See also William F Coyne Jr, 'The Case for Settlement Counsel' (1998–9) 14(2) *Ohio State Journal on Dispute Resolution* 367, 395-8.

[562] Mathew O Tobriner and Richard S Goldsmith, 'Cooling-Off and Meditation Statutes in the States' (1946) 20 *Southern California Law Review* 264. See also a more recent article by Shaunta M Knibb, 'The Jurisdictional Shadowland between the NLRB and the National Mediation Board: Who's in Charge?' (1997) 72 *Washington Law Review* 241, 246.

[563] Joasia A Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' (2014) 37(1) *Journal of Consumer Policy* 91, 91.

[564] Marco Loos, 'Rights of Withdrawal' (2009)(4) Centre for the Study of European Contract Law Working Paper Series, 3.

[565] Rekaiti and Van den Bergh (n 549) 371.

term has been used in this way in consumer protection legislation for more than 60 years.[566] Cooling off periods are mandatory or implied contract terms in some legislation for certain types of consumer contracts.[567] The key objective of the cooling off period in this context is 'to protect a consumer from making rash decisions'[568] or to 'encourage sound judgment and reduce the influence of passion and whim on the contractual commitments a person makes'.[569]

In both contexts, the objective of a cooling off period is effectively the same. It is used to ensure that important decisions are not made 'in haste or under the influence of a powerful and potentially distorting passion'[570] or while under the influence of a forceful or manipulative person.[571] Consequently, in Australia as well internationally, the use of cooling off periods has now extended beyond consumer protection legislation to other legislative contexts in which the decision to be made is thought to be highly significant or emotional, or it is thought that a buffer is needed between the impulse and the subsequent action.[572] Some examples include the time between a decision by a donor of an embryo to donate that embryo and the actual donation,[573] and the period between

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[566] Sovern (n 552) 334; Atwell (n 550) 698; Sparks et al (n 547) 2903. For example, the Australian Consumer Law provides for a 10-day cooling off period in the case of direct selling. *Competition and Consumer Act 2010* (Cth) sch 2 (Australian Consumer Law) s 86. A cooling off period has also been introduced into European consumer law. Luzak (n 563) 91.

[567] See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 (Australian Consumer Law) s 86. In Victorian property law, a three-day cooling off period is mandatory to private sales of residential or small rural properties. See *Sale of Land Act 1962* (Vic) s 31. In Victoria door-to-door sales, telemarketing, domestic building contracts, residential property not bought at auction, new and second-hand cars sold by licensed dealers, retirement village contracts and contracts with introduction agents all have cooling off periods. See Consumer Affairs Victoria (n 548) 1. Jeff Sovern notes that, in the United States, 'state legislatures have enacted hundreds of statutes directing that vendors provide written notice of a right to rescind. These statutes cover a variety of transactions, including gym memberships, dance lessons, door-to-door sales, and telephone sales'. See Sovern (n 552) 334.

[568] Loos (n 564), 3.

[569] Anthony T Kronman, 'Paternalism and the Law of Contracts' (1983) 92(5) *The Yale Law Journal* 763, 788.

[570] Ibid.

[571] Loos, (n 564) 9.

[572] Consumer Affairs Victoria (n 548) 3.

[573] Under the *Prohibition of Human Cloning Act 2002* (Cth) and the *Research Involving Human Embryos Act 2002* (Cth) a two-week cooling off period is mandatory to allow for a donor of an embryo to reconsider their decision to donate that embryo. See Julia Nicholls, 'Health Consumers and Human Embryo Research: The Donors of Embryos' (2005-2006)(2) *The Australian Health Consumer* 23, 23.

seeking a gun licence and obtaining a firearm.[574] Even a divorce requires, in most cases, the parties to be separated for a period of one year prior to application,[575] which is a form of cooling off period.

The cooling off period implemented by VCAT in the pilot project that is the subject of this research is fundamentally a version of the second type of cooling off period (ie the right to terminate a contract without penalty), as its focus is on the right to withdraw without penalty from an otherwise concluded, signed and binding settlement agreement. It is not used to allow parties to have a break to 'cool down' because emotions are running high. Settlement agreements reached at mediations that occur in a court-connected context will almost certainly result in a legally binding agreement between the parties, as one of the principal goals of court-connected mediation is to conclude the legal dispute between the parties.[576] Likewise, at VCAT mediations, when an agreement is reached at mediation, the agreement is generally put in writing and signed by all parties to the dispute.[577] This signed agreement resolves the legal dispute, avoiding the need for a contested hearing, and can be used as evidence of a contractual agreement should a party not comply with the agreement. Settlement agreements made in mediations at VCAT in the context of this research were considered binding once they were signed except insofar as where the cooling off period provided one or both parties with some time (two business days) in which to consider the agreement, including seeking advice about the agreement, and to

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[574] Advocates of the *Guns Act 1991* (Tas) hoped that the debate on firearms that accompanied the legislation would increase awareness of the dangers of firearms and that the introduction of a cooling off period of 21 days between seeking a gun licence and obtaining a firearm would have the effect of reducing the firearm suicide rate. See Kate Warner, 'Firearm Deaths and Firearm Crime after Gun Licensing in Tasmania' Third National Outlook Symposium on Crime in Australia convened by the Australian Institute of Criminology (22 March 1999).

[575] *Family Law Act 1975* (Cth) s 48(2).

[576] Olivia Rundle, 'Lawyers' Perspectives on "What Is Court-Connected Mediation For?"' (2013) 20(1) *International Journal of the Legal Profession* 33, 42; Nancy Welsh, 'Stepping Back through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value' (2004) 19(2) *Ohio State Journal on Dispute Resolution*, 573. Consequently, having parties present at the mediation who have 'authority to settle' is considered a critical factor for effective court-connected mediation and is a requirement in some cases. See Boulle and Field, *Mediation in Australia* (n 307) 286 who refer to the *Supreme Court Rules 2000* (Tas) s 519(4), as well as the following cases: *Balderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clarke Pty Ltd* [2000] SASC 159, *Barrett v Queensland Newspapers Pty Ltd* [1999] QDC 150 and *Kilthistle No 6 Pty Ltd v Austwide Homes Pty Ltd* [1997] FCA 1383.

[577] On the VCAT website, it said under the heading 'If You Come to an Agreement (Settle)': 'If you come to an agreement (that is, reach a settlement) at the mediation, the agreement is put in writing and signed by all parties'. See VCAT, 'Mediations' (Web Page) <https://www.vcat.vic.gov.au/the-vcat-process/mediations-and-compulsory-conferences/mediations>.

withdraw from it, without penalty, if desired.[578] Thus, the legalistic use of the term 'cooling off period', rather than the colloquial use, is the focus of this chapter.

The Development of Cooling Off Periods in Consumer Law

As mentioned in the introduction to this chapter, some of the reasons for the development of cooling off periods in consumer transactions, such as power imbalances and pressure to make agreements, reflect the reasons why cooling off periods have been included in some court- and tribunal-connected ADR processes. Given those similarities, and the fact that the most common use of cooling off periods, as well as the area with the most research on cooling off periods, is in consumer transactions, this section details the background to, and reasons for, the development of cooling off periods in consumer law. This material then informs the findings of the research in Chapters 6 and 7.

In the mid to late 1960s, rights of withdrawal, or cooling-off periods, began to be inserted into legislation affecting consumer contracts in a number of jurisdictions.[579] The late 1960s also marked a shift from the classical theory of contract to consumer welfarism, which was precipitated by the rise of large corporations and the resulting exploitation of the relatively powerless consumer or small enterprise.[580] The traditional legal justification for the emergence of consumer law in general was the need to promote the interests of the weak consumer in the face of the economic power and advanced knowledge of commercial entities in the marketplace.[581] Consumers have traditionally been seen as less

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[578] Ibid. The VCAT website says:

> There may also be a 'cooling off' period in some cases. This applies when:
> - one of the parties is not legally represented
> - the mediation is conducted by a mediator (not a member).
>
> The cooling off period is two full business days after the mediation when any party can change their mind and withdraw from the agreement.

[579] For example Atwell (n 550) 701 notes that in 1964 the first cooling off period appeared in federal legislation in the United States followed by state based legislation in 1965. By 1967, 14 states had legislated cooling off periods in certain statutes. Germany implemented its first cooling off period in 1969 and the Netherlands in 1970. See Loos (n 564) 3.

[580] Atwell (n 550) 697. As part of that change, in 1974 in Australia, Part V of the *Trade Practices Act 1974* (Cth) came into force and was seen as Australia's first attempt at a national consumer protection regime. See Alex Bruce, *Consumer Protection Law in Australia* (LexisNexis Butterworths, 3rd ed, 2019) 2.

[581] Rekaiti and Van den Bergh (n 549) 373; Sven Hoeppner, 'The Unintended Consequence of Doorstep Consumer Protection: Surprise, Reciprocation, and Consistency' (2012) *European Journal of Law and Economics* 1, 3.

knowledgeable and economically inferior to producers and traders and thus in need of protection.[582] Notably, the timing of this shift coincided with the moves towards access to justice reform outlined in Chapter 2, which also occurred because of recognition of structural inequalities in the justice system.[583]

Cooling off periods were part of a range of protection mechanisms aimed at safeguarding consumers.[584] The intention of the cooling off period in some consumer-type contracts was to strengthen consumer protections, mostly by shielding consumers from the consequences of their 'irrational' decision-making.[585] Concerns that 'a merchant's hard sell tactics would overwhelm consumers'[586] meant that legislators used the introduction of cooling off periods to oblige merchants to give consumers time to rescind the contract. As Sovern states: '[t]he theory is that given time to reflect, consumers will shake off the effects of the merchant's sales talk and cancel the transaction'.[587]

The cooling off period was first applied to door-to-door sales. Certain marketing and sales techniques, such as door-to-door or mail-order sales, were thought to put consumers at serious risk of making unwanted purchases.[588] Because of that apparent risk, it was successfully argued that there was a justification to move away from the traditional rules

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[582] Rekaiti and Van den Bergh (n 549) 373 cite a number of other sources: eg Hoeppner (n 581) 3; Cass R Sunstein, 'Legal Interference with Private Preferences' (1986) 53(4) *The University of Chicago Law Review* 1129, 1130.

[583] For example, Cappelletti and Garth's seminal work on access to justice came out in 1978. See Cappelletti and Garth (eds) (n 36). See also Sackville (n 39).

[584] Atwell (n 550) 699. Other protection mechanisms included disclosure documents and compulsory advisement. Implied contractual terms, some of them non-waivable (eg that goods will be of a particular quality or fit for purpose) were also introduced as part of this wave of reforms. For example, in section 54 and 55 of the Australian Consumer Law there is a non-waiverable 'consumer guarantee' that goods purchased will be of an acceptable quality and fit for purpose.

[585] Luzak (n 563) 91; Georg Borges and Bernd Irlenbusch, 'Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights' (2007) 163(1) *Journal of Institutional and Theoretical Economics / Zeitschrift für die gesamte Staatswissenschaft* 84, 84-5; James R Bettman, Mary Frances Luce and John W Payne, 'Constructive Consumer Choice Processes' (1998) 25(3) *Journal of Consumer Research* 187, 188. See also Kronman (n 569) 788.

[586] Sovern (n 552) 334.

[587] Ibid.

[588] Rekaiti and Van den Bergh (n 549) 373. Sovern describes how the pressure on consumers was seen to be particularly acute when the seller chose to visit the consumers home. The consumer might feel a host's obligation to a guest to buy something they did not want and also could not simply leave the store as they could with brick-and-mortar establishments. Sellers could also target particularly vulnerable consumers. See Sovern (n 552) 338.

of contract and have special rules to protect consumers. By the early 1970s, a cooling-off period was the most common form of direct sales regulation in the United States of America (USA).[589] However, the focus remained on these 'special' areas in need of consumer protection. Thus, for example, in the USA in the early 1970s, the cooling off period only enabled the consumer to rescind a contract to purchase goods or services when the sale was consummated at a place other than the address of the seller.[590]

There appears to be no consensus on the appropriate duration of a cooling off period. In the USA, the length of the cooling off period varied from state to state and from one business day to four business days,[591] with the most common length of three days being 'seemingly based more on "feel" than any rigorous empirical analysis'.[592] In Europe, the lengths have varied from seven calendar days to 10 calendar days to 14 working days, and have even been as long as 30 calendar days.[593] Ascertaining the appropriate length of a cooling off period requires consideration of both the problem(s) it is attempting to solve and the cost of delaying the transaction.[594] In Victoria, where consumer cooling off periods are commonly (although not universally) for a period of three working days, a study found that 'consumers strongly support cooling-off periods, with 91 per cent believing they are an important safety net',[595] and that most consumers agree that cooling off periods should be longer.[596]

The reasons why cooling off periods are seen to benefit consumers can be themed around several issues: time to consider decisions away from pressure, imbalance of power and

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[589] Orville C Walker and Neil M Ford, 'Can "Cooling-Off Laws" Really Protect the Consumer?' (1970) 34(2) *The Journal of Marketing* 53, 53.

[590] Ibid.

[591] Ibid 54.

[592] Atwell (n 550) 701 quotes from Sher's 1967 article stating that 'lawmakers in this country largely settled on 3 days seemingly based more on "feel" than any rigorous empirical analysis'. Byron D Sher, 'The Cooling-Off Period in Door-to-Door Sales' (1967) 15 *University of California Los Angeles Law Review* 717.

[593] The 30-day cooling off period was for life assurance contracts. See Loos (n 564) 6.

[594] Consumer Affairs Victoria (n 548) 23.

[595] Ibid 8.

[596] Ibid 81. The study found that almost half of respondents believed the minimum cooling off periods should be 10 days and only 20 per cent believed that three days or less was sufficient.

awareness of rights. As will be seen later in the chapter, these same themes characterise cooling off periods in ADR processes.

Time to Consider Decisions Away from Pressure

The focus on direct sales marketing at the consumer's home was based on the contention that direct selling is inconsistent with the rational consumer decision-making process: the seller initiates contact with the buyer, who must make a decision about the product on the seller's information alone. The buyer has no opportunity to compare alternative products, prices and the like,[597] and there is the possibility of the consumer feeling pressured or tricked into making an unwanted purchase.[598] There was also concern that, where selling occurred via direct or door-to-door sales or via mail orders, consumers were exposed to aggressive sales techniques and the use of consumer psychology 'tricks'[599] and, as a result, were more prone to traders' exploitation of consumers' vulnerabilities.[600] Cooling off periods were justified as a support for consumers who may be unprepared for the surprising initiatives of the trader or the sellers' tendency to engage in pressure selling and intimidation.[601] They can also be seen as protecting a consumer from the 'danger of being taken by surprise and entering contracts against his [sic] will'.[602] A mandatory cooling off period ensures that the consumer has an opportunity to reflect on his or her commitment to the contract and to withdraw from the contract if he or she wishes.[603] Hoeppner, writing in favour of the use of cooling off periods, says: 'the astonishing influence of surprise, consistency, and reciprocity on compliance … convincingly support the implementation of cooling-off periods'.[604]

Another argument in favour of cooling off periods, again related to certain marketing and sales techniques such as door-to-door or mail-order sales, is that the cooling off period

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[597] Walker and Ford (n 589) 55.

[598] Ibid.

[599] Loos (n 564) 8.

[600] Luzak (n 563) 91-2. According to Hoeppner (581) 4, other than in the US, this form of consumer protection is almost universal in direct sales.

[601] Hoeppner (n 581) 7.

[602] Rekaiti and Van den Bergh (n 549) 374.

[603] Kronman (n 569) 786.

[604] Hoeppner (n 581) 22.

allows consumers to calm down and soberly consider all the pros and cons of making a decision.[605] The use of high pressure sales techniques in these types of sales are well documented and include situations such as salespeople gaining entry into homes and then manipulating emotions by stimulating concern and anxiety and alleging that the product they are selling is scarce and likely to run out.[606] Consumer psychology research has shown that if consumers need to make decisions under severe time pressure, they are likely to change their decision-making strategies and evaluate the products from a different perspective and on the basis of different characteristics than they would normally choose.[607] Research has also shown that consumers often show instability in their preferences during a relatively short amount of time.[608] One day they will consider a good to be of value, while the next they may not value it at all.[609] The cooling off period allows consumers to soberly consider all the pros and cons of making a decision outside the pressurised environment.[610]

Cooling off periods, particularly for door-to-door sales and telemarketing, are often justified on the basis that they provide the consumer with an opportunity to inspect the goods, once they have been received, to determine that they meet their description and are of the quality expected.[611] A cooling off period may also offer the consumer an opportunity to seek independent advice on the quality or suitability of the product before it is purchased.[612] It is not always possible, however, for consumers to inspect a product prior to purchase. Short cooling-off periods have been found to be sufficient for consumers to speak to family and friends who have had similar experiences but not

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[605] Luzak (n 563) .

[606] Paul Harrison et al, '*Shutting the Gates: An Analysis of the Psychology of In-Home Sales of Educational Software*' (Deakin University, 2010) (Web Document) <https://consumeraction.org.au/wp-content/uploads/2012/04/Shutting-the-Gates.pdf>.

[607] Bettman, Luce and Payne (n 585) 200. See also Peter Wright, 'The Harassed Decision Maker: Time Pressures, Distractions, and the Use of Evidence' (1974) 59(5) *Journal of Applied Psychology* 555, 560.

[608] Rekaiti and Van den Bergh (n 549) 375.

[609] Luzak (n 563) 97.

[610] Ibid 96.

[611] Rekaiti and Van den Bergh (n 549) 380.

[612] Consumer Affairs Victoria (n 548) 14.

adequate for more detailed and complicated inspections that might be required to truly ascertain the appropriateness of the purchase.[613]

Inequality of Power

An important aspect of the use of cooling off periods in consumer law is the view that consumers have less power than the seller. Consumer protection law is usually aimed at remedying the perceived imbalance between consumers, who are seen as less skilled, less informed, economically fragile and, as a result, quasi-helpless, and with little bargaining power, as against the advanced knowledge, professional trading skills and economic power often attributed to suppliers.[614] The arguments from the traditional legal literature in favour of consumer protection law (and reiterated by the relatively recent European Union Directive relating to the cooling off regime[615]) are that instruments such as the cooling off period strengthen the bargaining position of consumers.[616] The provision of a cooling off period, combined with a right of withdrawal, is said to be one of the key tools used by consumer law to assist in avoiding the exploitation of consumers.[617] A cooling off period, and the right to withdraw from the contract, seeks to protect consumers against superior skilled and knowledgeable sellers, thus restoring the balance of power between the parties.[618]

Awareness of Rights

A common reason cited for cooling-off periods is to give consumers time to understand the implications of the contract they signed, including giving them time to read and consider the contract, reflect on its contents or seek further advice.[619] While there are remedies for misrepresentation and fraud, proponents of a cooling off period felt that many consumers, particularly low-income buyers, were unaware of their rights under

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[613] Ibid. An example provided is timeshares in foreign countries.

[614] Hoeppner (n 581) 3.

[615] Recital 14 of directive 2011/83/EU of October 25, 2011 on consumer rights.

[616] Hoeppner (n 581) 6.

[617] Ibid 4.

[618] Ibid 1.

[619] Consumer Affairs Victoria (n 548) 16. Examples include prepaid funeral contracts, motor vehicle purchases with finance and, again, door-to-door sales. In all these situations, the consumer may need time to look over the contract, reconsider its terms and perhaps seek independent advice.

such laws, or, in the event that they were aware of their rights, lacked the ability to take action against the seller.[620] Another proposed benefit of the cooling off period was that it would enable consumers to have a chance to objectively evaluate their purchase when they were no longer under the influence of the salesperson, and that having the ability to cancel would improve the chance of a consumer escaping fraudulently induced contracts.[621]

Arguments Against the Use of Cooling Off Periods in Consumer Law

Despite the perceived benefits of cooling off periods, there are also a number of arguments against their use.[622] Two key arguments against the use of cooling off periods have been highlighted below as they are significant to this research as set out in Chapter 6.

Cooling Off Periods Are Not Used by Consumers Because of Inherent Behavioural Biases, Particularly 'Inertia'

While cooling off periods have been used almost universally in direct selling legislation, as well as in many other areas since the late 1960s, commentators have been questioning whether the cooling off period adequately protects consumers, particularly low-income consumers, from unethical sales techniques.[623] Writing in 1970, Walker and Ford expressed the view that, for reasons explained by behavioural psychology, cooling off periods might protect the sophisticated middle class but were unlikely to provide protection to low-income consumers.[624] Their concerns were twofold: first, that sellers may not use written contracts or may not inform the buyer of their rights under a cooling off period and, consequently, consumers would lack awareness of their rights in relation

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[620] Walker and Ford (n 589) 54.

[621] Ibid 55.

[622] Rekaiti and Van den Bergh (n 549) describe some of the disadvantages of a cooling off period, particularly from an economic perspective, for example: if consumers can easily withdraw from concluded contracts, they may be tempted to abuse this right (eg consumers may use the product during the cooling off period and return it afterwards to the seller claiming bad quality); cooling off periods can increase the costs of carrying out transactions that may cause delay and uncertainly; and cooling off periods may cause direct harm because they give rise to counter-productive effects.

[623] Walker and Ford (n 589) 57.

[624] Ibid 58.

to cancellation of the contract.[625] Second, even when the consumer was aware of his or her rights, and particularly for low-income consumers, they may still be unwilling to rescind the agreement because of a desire or need for the product combined with a lack of means to obtain it in a more legitimate manner.[626]

As an excellent example of this buyer inertia, Sovern reports on a 1981 survey of 1,400 consumers in which not one of the respondents reported using the cooling off period to rescind, even though 8.3 per cent reported being 'not at all satisfied' with their purchases.[627] When asked why they failed to rescind the agreement despite being entitled to, 63 per cent explained that they 'weren't that dissatisfied', 19 per cent reported that action was 'too much trouble', 27 per cent expressed the view that 'it wouldn't do any good' and 27 per cent 'didn't want to offend the salesperson'.[628]

Much more recently, in 2012, Hoeppner found that many people will choose whatever option requires the least effort and thus, because it requires effort, will not use a cooling off period to withdraw from a contract even if they are not satisfied with the contract.[629] He explains: '[h]umans have a tendency to be inert to change and stick with their given situation. This is particularly so where the costs of withdrawing from the contract (eg the cost of the return of the goods) falls on the consumer'.[630] Sovern also refers to this consumer inertia, although he calls it the 'status quo' effect.[631]

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[625] Ibid 56. For example, in a study cited in this article, only one-third of consumers were aware of cancellation privileges.

[626] Ibid. Walker and Ford noted other reasons why they felt that a cooling off period was not effective in protecting consumers, including the seller may be seen as a 'friend of the family', particularly if they are someone who makes regular calls to collect money and offer more products and thus will have established themselves as trusted friend; while the consumer might be approached at the consumer's home, they might be taken to a temporary store to sign the contract documents, thus avoiding the consumer protections; and sellers may provide immediate delivery (by having stock on hand) which, in several states at the time, negated the buyer's right to cancel.

[627] Sovern (n 552) 350.

[628] Ibid.

[629] Hoeppner (n 581) 22.

[630] Ibid, cited in Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Penguin, 2009) ch 5. Evidence is provided that this tendency is promoted if it comes with the implicit or explicit suggestion that it represents the normal, desirable or recommended course of action.

[631] Sovern (n 552) 365.

Recent Australian research by Harrison, in conjunction with the Consumer Action Law Centre, has found that participants who were offered a cooling off period in a behavioural experiment universally did not change from their original decision.[632] Harrison's explanation for this is the behavioural concept of consumer inertia, which means that people who make an initial decision are very unlikely to use their cooling off right to change their mind.[633] While the cooling off period looks like it should be effective, the research found that 'inertia (sticking with what you have) overpowers consumers' desire to change'.[634] Harrison concludes that a cooling off period is therefore very unlikely to be utilised by most consumers to withdraw from their initial decision, even when they know that the option to do so is available.[635] According to him, the research also challenges the assumption that if someone does not cool off, this indicates they are satisfied with their purchase.[636]

To increase the effectiveness of cooling off periods, both Hoeppner and Harrison suggest that cooling off periods should be followed by an opt-in process rather than an opt-out process.[637] An opt-in process would involve the consumer indicating interest in the product in the presence of the seller but requiring the consumer to contact the company within one to three days to formally reinforce that commitment and effectively initiate the contract.[638]

Cooling Off Periods Dilute the Sanctity of the Contract

A key principle of contract law is *pacta sunt servanda* (agreements must be kept).[639] The right to terminate a contract during a cooling off period is an exception to that general

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[632] Harrison (n 552).

[633] Consumer Action Law Centre, 'New Research Shows Cooling Off Doesn't Work' (2016) *Research Brief*, 1 Web Document) <https://consumeraction.org.au/wp-content/uploads/2016/11/Consumer-Action-Opt-Out-Research-Briefing-Nov-2016-1.pdf> ('New Research').

[634] Consumer Action Law Centre, 'Cooling Off Doesn't Work: New Research' (2016) *Media Release*.

[635] Consumer Action Law Centre, 'New Research' (n 633).

[636] Ibid.

[637] Hoeppner (n 581) 24; Paul Harrison, Marta Massi and Kathryn Chalmers, 'Beyond Door-to-Door: The Implications of Invited In-Home Selling' (2014) 48(1) *Journal of Consumer Affairs* 195, 214; Consumer Action Law Centre, 'New Research' (n 633) 1.

[638] Harrison, Massi and Chalmers (n 637) 214.

[639] Reinhard Steennot, 'The Right of Withdrawal under the Consumer Rights Directive as a Tool to Protect Consumers Concluding a Distance Contract' (2013) 29(2) *Computer Law and Security Review* 105, 116.

contractual principle that once a contract is concluded it binds its parties.[640] While there are some circumstances in which interference in a concluded contract have traditionally been seen to be acceptable, such as where entry into the contract was compelled by force or fraud,[641] in most situations, from a contract law perspective, once parties agree on the terms of their relationship, as embodied in the contract, they uphold their bargain.[642] Interference with decisions freely arrived at by contracting parties are seen as misguided or even, by some, as 'tyrannical'.[643] Consequently, there has been strong opposition to cooling off periods on the basis that they interfere with and dilute the sanctity of a contract.

In a similar vein, the legislative insertion of cooling off clauses in agreements is also seen as government interference in private matters, raising issues of buyer autonomy and the overall efficiency of the market.[644] Such interventions are seen as paternalistic.[645] Objections include that the government ought not to be in the business of evaluating whether a person's choice will serve his or her interests except when that choice causes harm to others.[646] An alternative position, but also aligning with the premise that government should not intrude into the contract law sphere, is that the interference will be ineffectual because responses to regulation will counteract the intended effects of the 'interfering' legislation.[647]

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[640] Luzak (n 563) 91. See also Loos (n 564) 4.

[641] Sunstein (n 582) 1130.

[642] Kate Galloway, 'Legislating Conscience into Contract: How the Property Agents and Motor Dealers Act 2000 Affects Our Understanding of Contract Law in Queensland Residential Land Sales' (2007) 21(4) *Commercial Law Quarterly* 3, 7.

[643] Sunstein (n 582) 1129.

[644] Galloway (n 642) 7.

[645] Jonathan Klick and Gregory Mitchell, 'Government Regulation of Irrationality: Moral and Cognitive Hazards' (2006) 90 *Minnesota Law Review* 1620, 1636. Klick and Mitchell distinguish between the paternalism imposed before a choice is made and paternalism that is imposed after a choice is made. Cooling off periods are said to be ex ante paternalism (pre-contract) along with information disclosure requirements. On the other hand, bankruptcy protections and unconscionability challenges to contractual validity are said to be classic forms of ex post paternalism (or post contract).

[646] Sunstein (n 582) 1132.

[647] Ibid. Sunstein suggests as examples that landlords confronted with implied or statutory warranties of habitability will raise their rents and thus make tenants worse off than without such warranties and that the minimum wage will increase unemployment.

In 1983 Kronman argued that a mandatory cooling off period implied a 'moral deficiency in those to whom it applies',[648] because it is effectively saying that a person's judgement is impaired to such a degree that, like a child, they cannot be held to their contractual dealings. Kronman accepts that some decisions are made in circumstances in which one's guard is down and one is likely to be moved by a powerful passion that can cloud [one's] judgment, causing one to act in a way that will later cause regret.[649] However, he goes on to say that if a 'powerful passion' is accepted as the reason behind providing a cooling off period, there is a challenge to the foundation of 'liberal neutrality' on which our laws are based, particularly as we 'quite properly refuse to recognize lack of judgment as a general defense against the claim that one has failed to meet his contractual obligations'.[650] While Camerer agrees that cooling-off policies exemplify 'conservative paternalism', he also argues that they do 'much good for people who act impulsively and cause very little harm (an unnecessary three-day wait) for those who do not act impulsively; thus, even conservatives who resist state intervention should find them appealing'.[651]

Likewise, when discussing the provision of a mandatory three-day cooling off period in Queensland's *Property Agents and Motor Dealers Act 2000*, Galloway argues that the cooling off period has the effect not just of altering 'some of the technical aspects of contract law such as offer and acceptance but also in the underlying philosophy of freedom of contract and contact law's identity as the law of the market'.[652] Galloway's premise is that the legislation, including the amendments, which broadened the Act's residential land sales consumer protection mechanisms, including extending the cooling off period, were seen by Parliament as a means of reapportioning risk.[653] She argues that

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[648] Kronman (n 569) 795.

[649] Ibid 796.

[650] Ibid 794.

[651] Colin Camerer, 'Behavioral Economics: Reunifying Psychology and Economics' (1999) 96(19) *Proceedings of the National Academy of Sciences* 10575, 10577. See also Colin Camerer et al, 'Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"' (2003) 151(3) *University of Pennsylvania Law Review* 1211.

[652] Galloway (n 642) 1. This Queensland legislation is not unusual in allowing a cooling off period in property sales. For example, the *Sale of Land Act 1962* (Vic) s31 provides a mandatory three-day cooling off period to all provides property purchasers with a few exceptions.

[653] Ibid 11.

the Act presumes the buyer is the disempowered party and in need of protection.[654] Galloway questions whether the blanket cooling off period is an effective measure, arguing that 'even if the rationale for the cooling-off period is an attempt to pre-empt unconscionable conduct by providing procedural fairness for the buyer, the presumption of a deficiency in the buyer remains, calling their judgment into question'.[655] Her conclusion is that, while there may be a genuine consumer protection benefit to the addition of the cooling off period, the change could result in unconscionable outcomes for sellers at the hands of an unscrupulous buyer.[656]

Method of Notice

It is important to highlight one final aspect of research into the cooling off period in the consumer context. Some studies have indicated that the method of notice of the cooling off period appears to impact on the consumer use of the cooling off period. Sovern found that:

> Businesses that provide a written cooling-off period notice—and do not otherwise bring the notice to consumers' attention—overwhelmingly say that consumers rarely, if ever, avail themselves of the right to rescind. Taken together with studies conducted in the 1960s and 1980s, the survey strongly suggests that written notices of cooling-off periods are of little or no value to consumers.[657]

Sovern also found that 'consumers who receive both oral and written notice of their rights are more likely to avail themselves of those rights than those who receive only written notices, and that the differences are statistically significant'.[658] Although involving very low numbers, Sovern's study offered evidence that oral notice of the right to a cooling off period combined with written notice increases the likelihood that consumers will rescind

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[654] Ibid 7. According to Galloway, this is reflected by the second reading speeches , which demonstrated that parliamentarians felt that 'battlers' were suffering at the hands of people such as real estate agents, property developers, marketeers and lawyers.

[655] Ibid 16.

[656] Ibid. Luzak also argues, for behavioural psychology reasons, that having a mandatory right of withdrawal available to consumers can have a number of negative effects, including aversion to loss, the endowment effect, omission, commission, status quo bias, cognitive dissonances, procrastination, choice paradox and cost inefficiency. Luzak (n 563) 100-5.

[657] Sovern (n 552) 334-5.

[658] Ibid 333. Sovern found that 53 per cent of sellers who gave only written notice and did not speak of the buyer's right to cancel said that buyers never cancelled, nearly double the percentage for sellers who did tell buyers (27 per cent).

the agreement.[659] While Sovern notes that the rate of rescission is low enough to leave open questions about whether cooling off period rights are useful to consumers, he recommends that if 'lawmakers wish cooling-off periods to function better, they should require merchants to provide oral notices of the right to rescind in addition to the written notices currently mandated'.[660]

The Use of Cooling Off Periods in Mediations

Recommendations for the use of a cooling off period in mediations have mainly come from American academic Nancy Welsh,[661] although others endorse her suggestion.[662] Welsh's call for the use of a cooling off period in mediation stems from her view that there needs to be both an effective means of protecting self-determination in the mediation process and a method of preventing coercion in mediation arising from the use of high-pressure tactics. She proposes that mediation processes require a three-day, non-waivable cooling off period before mediated settlement agreements become binding.[663] She argues that this modification to the presumption that a mediated settlement agreement is immediately binding[664] 'has the potential to keep "muscle mediation" in check while also allowing the return to a vision of self-determination which is closer to that which first dominated (and inspired) the contemporary mediation movement'.[665]

In support of her argument for a cooling off period in mediation, Welsh refers to the use of cooling off periods in consumer contracts, especially situations of high-pressure sales

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[659] Ibid 333. Sovern concluded that businesses that provided both oral in-person and written notices of the right to rescind were more than twice as likely to report that their customers cancelled contracts as those that provided only written notices.

[660] Ibid 335.

[661] See Welsh, 'The Thinning Vision' (n 8). Welsh refers to the cooling off period in a number of articles but they all link back to this one from 2001.

[662] See, eg, Jacqueline Durand, 'The Institutionalizing of Mediation and Its Effect on Unrepresented Parties: Is Justice Really the Goal of Court-Mandated Mediation' (2016) 29 *Georgetown Journal of Legal Ethics* 973; Jennifer W Reynolds, 'Luck v. Justice: Consent Intervenes, but for Whom' (2014) 14 *Pepperdine Dispute Resolution Law Journal* 245; Claire Baylis and Robyn Carroll, 'The Nature and Importance of Mechanisms for Addressing Power Differences in Statutory Mediation' (2002) 14(2) *Bond Law Review* 285; John Lande, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2002) 50(1) *UCLA Law Review* 69.

[663] Welsh, 'The Thinning Vision' (n 8) 438.

[664] Ibid.

[665] Ibid 437.

tactics, such as door-to-door sales.[666] She also provides examples of the existing use of cooling off periods in the mediation context, such as in Florida where the court rules provide for a 10-day cooling-off period for agreements reached in family mediation if disputants are unrepresented in the mediation, as well as describing some examples of situations in which agreements reached in mediations do not become binding until they are reviewed by the disputants' lawyers.[667]

The Effect of Institutionalisation on Self-Determination

Welsh's foremost reason for proposing the standard use of a cooling off period in mediations is her concern that the institutionalisation of mediation in the justice system has changed the nature of self-determination in mediations.[668] As Chapter 3 explained, self-determination is considered by most mediation advocates, including Welsh, as the ultimate value of mediation[669] and what sets mediation apart from other forms of ADR.[670] Chapter 3 describes how the incorporation of mediation into court and tribunal processes has impacted on party self-determination because parties no longer have a choice about the form of the process or even about whether or not to participate in it.[671] Currently, the demands of the justice system require that if a mediated agreement is reached within a court or tribunal connected mediation process, part of that process is to create a legally binding, signed agreement. The mediation process, in this context, is not simply about repairing relationships or improving communication between the parties. Welsh expresses concern about the fact that agreements reached in court connected mediation are considered immediately binding.[672] She considers that self-determination is understood narrowly within the court-connected context and, as a result, courts are eager to enforce settlements and hold a strong presumption that a settlement reflects the

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[666] Ibid 437.

[667] Ibid 439.

[668] Ibid.

[669] Boulle and Field, *Mediation in Australia* (n 307) 41; Welsh, 'The Thinning Vision' (n 8) 5; Welsh, 'Do You Believe in Magic?' (n 481) 725-6; Bush and Folger, 'Reclaiming Mediation's Future' (n 410).

[670] Field and Crowe, *Mediation Ethics* (n 300); Boulle and Field, 'Re-Appraising Mediation's Value' (n 409) 97; Welsh, 'The Thinning Vision' (n 8) 5.

[671] See, eg, Hedeen (n 312); Sander (n 324); Welsh, 'The Thinning Vision' (n 8).

[672] Welsh, 'The Thinning Vision' (n 8) 38.

exercise of parties' free will.[673] While Welsh anticipates concerns that a cooling off period would mean that more parties would back out of mediation agreements,[674] she instead argues that the benefits of a cooling off period are that it permits the continued use of evaluative techniques in mediations and it rewards the use of facilitative techniques that increase parties' commitment to their settlement.[675] She suggests that 'the more committed parties are to their settlement, the less likely it is that they will withdraw from the settlement during the cooling-off period'.[676]

Time to Consider Decisions Away from Pressure

A focus on self-determination gives rise to concern about the pressure placed on parties to settle their cases in a mediation. With the increased incorporation of mediation into formal court processes, there has been a corresponding increase in the number of mediated settlement agreements coming before the courts for enforcement.[677] While the parties seeking to withdraw from the mediated agreements allege a variety of factors to declare the agreements void,[678] the most common attacks on mediated settlement agreements invoke issues of consent, with parties claiming they were coerced into signing a settlement agreement at the conclusion of dispute resolution.[679] Some authors term this

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[673] Nancy A Welsh, 'Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation', *Divorce Mediation: Models, Techniques, and Applications* (2004) 420, 434 ('Reconciling Self-Determination'); Welsh, 'Do You Believe in Magic?' (n 481) 726.

[674] Welsh, 'The Thinning Vision' (n 8) 39.

[675] Ibid.

[676] Ibid 40.

[677] David Lionel Spencer, 'Casenotes: The Problem with Enforcing Mediated Settlement Agreements' (2004), *15*(4), *Australasian Dispute Resolution Journal*, 221 ('Casenotes'), provides some examples such as in *Wentworth v Rogers* [2004] NSWCA 109 where the claimant sought specific performance of a mediated settlement agreement. In *Tapoohi v Levenberg* (No 2) (2003) VSC 410 the issue was whether the mediated settlement agreement was binding or subject to further taxation advice on the implications of the agreement. In *State Bank of New South Wales v Freeman* [1996] unreported (NSWSC, 31 January), Badgery-Parker J held that a settlement agreement arrived at in mediation was not a document prepared for the purposes of, or in the course of mediation, and must be classed as a document that came into existence after the mediation session and, therefore, was not protected by the statutory confidentiality provisions under the *Farm Debt Mediation Act 1994* (NSW).

[678] Spencer, 'Casenotes' (n 677) 221.

[679] Steven Weller, 'Court Enforcement of Mediation Agreements: Should Contract Law Be Applied' (1992) 31 *Judges' Journal* 13, 14; David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Company, 3rd ed, 2014). For a case regarding alleged undue influence to settle (by a party's own solicitor) see *Studer v Boettcher* [2000] NSWCA 263. For a case alleging the outcome of the mediation was unconscionable see *Pittorino v Meynert* [2002] WASC 76.

'consent litigation',[680] whereby one party refuses to comply with the terms of a mediated agreement, even though that same party consented to those terms in mediation.[681] The traditional approach of courts in dealing with such cases has been to treat the settlement agreement as having a contractual nature and thus to apply contract law principles.[682] Courts try to 'determine whether any participant in the process engaged in behaviors or threats so overwhelming that they could be classified as "coercion"'.[683] This is a high standard and rarely met.[684] More critically, the increase in this type of litigation suggests that consent in mediation may not be a reliable indicator of autonomy, agency and self-determination.[685] Welsh and others use this fact to argue in favour of a cooling off period in mediations.[686] Incorporating a cooling off period in a mediation agreement would allow the agreement to be treated differently to a standard legal contract, effectively giving parties an opportunity to rescind the agreement.[687] It also has the potential to improve the context in which the mediation takes place and allow a party's consent to be at the forefront.[688]

Welsh raises concerns that in court-connected mediation, there is a move towards mediators providing evaluations of the parties' positions, including estimates of the strengths and weaknesses of the parties' cases and suggestions regarding settlement options. She believes there is evidence that at least some court-connected mediators are engaging in very aggressive evaluations of parties' cases and settlement options with the goal of winning a settlement, rather than supporting parties in their exercise of self-

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[680] Reynolds (n 662).

[681] Ibid 252; Jacqueline Nolan-Haley, 'Mediation Exceptionality' (2009) 78(3) *Fordham Law Review* 1247 ('Mediation Exceptionality').

[682] Weller (n 679) 13.

[683] Welsh, 'The Thinning Vision' (n 8) 47.

[684] Welsh, 'Do You Believe in Magic?' (n 481) 729.

[685] Reynolds (n 662) 252.

[686] See Spencer and Hardy (n 679) 806; Nancy A Welsh, 'The Current Transitional State of Court-Connected ADR' (2012) 95(3) *Marquette Law Review* 873 ('The Current Transitional State'). Nolan-Haley, 'Consent in Mediation' (n 546), refers to calls for the cooling off period in mediation from Welsh and Weller.

[687] Nolan-Haley, 'Mediation Exceptionality' (n 681) 1248.

[688] Reynolds (n 662) 294. Effectively, the idea is to try and improve consent in the ADR process. This can be done by improving the context, which cooling off periods try to do, or by improving the mediator, making the process more professional and accountable.

determination.[689] In anticipation of objections to the wider use of cooling off periods, she notes that some mediators describe their task as 'selling' a settlement proposal. Kressel and Pruitt describe how mediator interventions, particularly late in the mediation, can have a 'somewhat coercive quality'.[690] They also state that 'mediators frequently engage in "arm twisting" in order to persuade reluctant parties to agree to specific proposals'.[691] Weller cites empirical research on the mediation process that shows that the mediator can have a great deal of influence over the parties, even becoming a potential source of undue influence.[692] The idea of mediators being settlement oriented is also supported by Australian authors.[693] Wolski describes the various sources of power and influence available to mediators in order to encourage a settlement.[694] She writes that 'pressure to settle, much of which is exerted by the mediator, exists in almost every mediation'.[695] Crowe and Field discuss mediator power in relation to the myth of mediator neutrality.[696] A cooling off period can cure any actual or perceived pressure on a party to settle a matter on terms that are unreasonable or unfair by allowing the party time to consider their decision away from any source of pressure.[697] A cooling off period would allow the parties 'time to reflect'[698] before the agreement became binding.

Imbalance of Power

A recent analysis of the use of cooling off periods in conciliations at the Fair Work Commission conducted by RMIT University's Centre for Innovative Justice argues that one way in which the availability of a cooling off period can facilitate access to justice is to redress power imbalances or inequalities that might have influenced the terms of

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[689] Welsh, 'The Thinning Vision' (n 8) 6.

[690] Kressel and Pruitt (n 253) 192.

[691] Ibid 193.

[692] Weller (n 679) 15.

[693] Wolski, 'Mediator Settlement Strategies' (n 253) 9, says that 'Generally, a mediator's primary goal is to achieve agreement between the parties'.

[694] Ibid 10.

[695] Bobette Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15(3) *Australian Bar Review* 213, 215.

[696] Field and Crowe, *Mediation Ethics* (n 300) 92-130. See also Rundle, 'Court-Connected Mediation Programmes' (n 315) 352.

[697] RMIT University Centre for Innovative Justice (n 13) 10.

[698] Nolan-Haley, 'Consent in Mediation' (n 546) 6.

settlement.[699] Baylis and Carroll, using the example of cooling off periods in the *Farm Debt Mediation Act 1994* (NSW) (FDMA),[700] remind the reader that the mechanism of the cooling off period:

> reflects the notion that a presumed 'weaker' party may have been pushed into an agreement in the heat of a mediation by the 'stronger' party and later realise they have been disadvantaged. It may also reflect that the 'weaker' party, unlike the 'stronger' party, is likely to be inexperienced in the process and therefore they are less likely to be able to negotiate as effectively.[701]

They also note that 'the ability of one party to opt out of a mediated agreement will undoubtedly have some impact on the mediation itself, as each of the parties know that there is time for the party with that option to reconsider the terms of settlement'.[702]

Awareness of Rights

While the benefits of ADR processes for unrepresented parties are clear,[703] 'concerns are nevertheless raised about the potential for existing inequalities between the parties to be perpetuated or exacerbated if one or more of the parties do not have access to legal advice or representation during the ADR process'.[704] Although Welsh does not raise the ability to obtain legal advice as one of the reasons for incorporating cooling off periods into mediation processes, it has been recognised as a key benefit of a cooling off period for unrepresented mediation parties in Australia. For example, the Centre for Innovative Justice noted that a cooling off period is conceived in some circumstances as a procedural device that may assist in facilitating access to justice, particularly for unrepresented litigants, including by providing the unrepresented party time to obtain legal advice after reaching a settlement.[705] The ability to obtain legal advice has also been cited as a reason

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[699] RMIT University Centre for Innovative Justice (n 13) 10. See also Chapter 2 where concerns about power imbalances were discussed at Power Imbalances, Class Bias and an Inability to Provide for Special Needs.

[700] Baylis and Carroll (n 662) 314. This piece of legislation is discussed further below.

[701] Ibid 315.

[702] Ibid.

[703] See Chapter 2.

[704] RMIT University Centre for Innovative Justice (n 13) 9; Akin Ojelabi, 'Community Legal Centres' (n 99) 114.

[705] RMIT University Centre for Innovative Justice (n 13) 10. This paper suggests that there should also be other forms of support for unrepresented litigants, such as improved, user-friendly websites and the facilitation of pro bono legal advice.

behind the introduction of the cooling off period into the FDMA.[706] In parliamentary debates on the amending Bill, the Minister for Agriculture, and a number of other Members of Parliament, noted that farmers often do not have legal advice during the mediation, and that the cooling off period 'is intended to allow a farmer adequate time during which he or she can seek professional or other advice on the agreement that has been reached at mediation'.[707]

Protection against misrepresentation

Authors, such as Lande,[708] have suggested that cooling off periods can provide protections against misrepresentation in court-connected mediation programs. In this context, Lande views misrepresentation as 'where some lawyers in mediation use misleading statements to smoke the other side out, to gain leverage for later negotiations, drag out litigation, increase opponents' costs, and generally wear down the opposition'.[709] After discussing some existing processes (such as good-faith requirements and warranty provisions), he suggests that 'another possible protection against misrepresentation would be a brief cooling-off period before mediated agreements become binding'.[710] He sees the purpose of this time as to allow investigations into any material facts on which the parties relied. He cites Welsh's proposal of a three-day cooling off period and notes that, even where there is no rule requiring a cooling off period, mediators or legal representatives could suggest including such provisions in mediated agreements when they might be appropriate.[711]

Concerns About the Use of Cooling Off Periods in Mediation

There is little commentary on Welsh's proposal in the literature. Reynolds, while in favour of the concept and acknowledging that a cooling off period theoretically allows a party to

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[706] See below section entitled *Farm Debt Mediation Act 1994 (NSW)* for more detail.

[707] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 April 1998, 4158 (Mr Amery, Minister for Agriculture).

[708] Lande (n 662) 137.

[709] Ibid 70, quoting Julie Macfarlane, '*Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*' (Law Commission of Canada, 2001).

[710] Lande (n 662) 137.

[711] Ibid.

ask their lawyers to review the newly mediated agreement, raises doubts about the likelihood of that happening. Her reasoning is that a party may simply be unable to afford the legal advice; however, she also raises behavioural psychology issues, similar to those mentioned earlier in this chapter, of sunk costs, loss aversion and/or deal fatigue.[712]

As mentioned above, Welsh herself concedes that one concern about the use of cooling off periods in mediation will be that it might reduce settlement rates. While acknowledging the concern,[713] Welsh nonetheless argues strongly in support of the use of cooling off periods in mediation. In her view, 'if self-determination, not settlement, is the fundamental principle underlying mediation, then the benefits provided by a cooling-off proposal would clearly outweigh the possible risks'.[714] In addition, she believes that having a cooling off period in mediations would 'reward mediators who view their role as primarily facilitative and penalize mediators who use techniques designed to force an agreement',[715] as 'mediators who use facilitative techniques are more likely to build disputants' investment in, and likely compliance with, a settlement that they view as theirs – truly an expression of their self-determination'.[716] As a result, in her view, should facilitative techniques be used by the mediator to reach a settlement agreement, the disputants would be less likely to rescind their agreement during the cooling off period, even if they could do so without penalty.[717] 'The cooling-off period would discourage mediators' coercive use of evaluation, or muscle mediation, because these behaviours would be more likely to result in parties' repudiation of their agreements.'[718]

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[712] Reynolds (n 662) 302, 305.

[713] Welsh, 'The Current Transitional State' (n 686).

[714] Ibid.

[715] Ibid.

[716] Ibid.

[717] Ibid.

[718] Welsh, 'The Thinning Vision' (n 8).

Australian Examples of the Use of Cooling Off Periods in ADR Processes

A literature search revealed only a small number of examples of a cooling off period being used in ADR processes in Australia. Beginning with VCAT's pilot, which is the subject of this research, this section describes these examples.[719]

VCAT's Pilot

VCAT first provided a 'pilot'[720] cooling off period in mediation in 2009. Discussions in 2013 with VCAT's then ADR member and VCAT's then ADR manager indicated that the cooling off period had been introduced in June 2009 following a visit to VCAT from a Canadian judge who had suggested it as an access to justice tool used in some Canadian court mediations.[721] The first mention in writing of the mandatory cooling off period in mediations is contained in VCAT's 2008–09 Annual Report that, in a section entitled 'VCAT: A Centre of Excellence in Alternative Dispute Resolution', says:

> Innovation can also contribute to improving our performance and we intend to pilot and evaluate innovative ideas. In June this year the tribunal introduced a pilot mandatory cooling off period for mediations conducted by panel mediators where a party is not legally represented. In such circumstances, where one or more of the parties are not legally represented at mediation and an agreement is reached, that agreement is now subject to a mandatory cooling off period of two business days. If any party, upon reflection, wishes to withdraw from the settlement within the two day period they can contact the tribunal by phone and advise us of their decision. The tribunal then contacts the other parties to inform them that the settlement has been revoked and the matter is usually set down for a directions hearing. The 'cooling off' period will operate for six months. It will then be evaluated and, if successful, implemented across the tribunal. By piloting, evaluating and implementing new ideas we will improve ADR outcomes and position VCAT as a centre of excellence for ADR.[722]

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[719] Researchers from RMIT University who evaluated a pilot use of a cooling off period in conciliations at the Fair Work Commission referred to cooling off periods being available in ADR processes in various other jurisdictions, either expressly in legislation or via a practice note, but did not refer to examples beyond that described below. RMIT University Centre for Innovative Justice (n 13).

[720] I have put the word 'pilot' in quotation marks because, although it was labelled a pilot project, it had been in place since June 2009 and was still operating four years later in June 2013 when conversations were held with VCAT about possible research topics, and indeed has continued operating ever since.

[721] Unfortunately, no other detail is available.

[722] Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2008/2009 Human Rights & Equal Access to Justice' (2009), 55 ('VCAT Annual Report 2008/2009').

The following year, in VCAT's 2009–10 Annual Report, under the heading of improving outcomes in the ADR area, the report says:

> In 2009–10, we also piloted a 'cooling off' period for mediations conducted by panel mediators, where parties were not legally represented. We conducted 222 such mediations over a nine month period. In five cases (or less than two per cent), parties took advantage of the cooling off period, revoking their settlement agreements. Although very few people revoked their agreements, our preliminary investigations suggest that the cooling off option may have reduced pressure so that some people felt less anxious about settling. We will undertake further analysis of results before making any formal findings in relation to the pilot.[723]

The cooling off period appears again in the 2010 *Transforming VCAT* strategic plan as initiative 69, in which the action is set out as follows:

> Continue to provide a mandatory cooling off period in mediations conducted by panel mediators where one or more of the parties is self-represented. Where appropriate the cooling off period will be extended to all VCAT mediations.[724]

No other detail about the cooling off period is provided in the document.

In 2010–11, the Annual Report states:

> In 2009–10, we piloted a 'cooling off' period for mediations conducted by panel mediators in which one or more parties were self-represented. The cooling off period (two business days) allowed parties who had reached settlement an opportunity to reconsider the settlement agreement. Our preliminary investigations suggested that self-represented parties benefited from having a cooling off period (even though very few revoked their agreements), so we will continue to offer it while conducting further analysis of the pilot results.[725]

The use of a cooling off period is mentioned in subsequent annual reports up until the 2014–15 Annual Report. More recent annual reports do not include any information about the cooling off period.[726]

While there is no documented information available about the reasons behind the introduction of the cooling off period, conversations with tribunal members and other VCAT staff, and the location of the initiative in the *Transforming VCAT* strategic plan

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[723] Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2009–10' (n 12) 22.

[724] Justice Iain Ross, Transforming VCAT: Three-Year Strategic Plan 2010/11–2012/13 (VCAT, 2010), 44.

[725] Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2010–11' (2011), 21.

[726] For example, in both the 2019–20 and 2018–19 annual reports, there is information about the numbers of mediations conducted and the settlement rates but not a word about the cooling off period.

(under improving outcomes and promoting ADR), suggested that it was seen as a method of empowering or supporting unrepresented litigants. Despite being introduced into some mediations from at least June 2009, at the time this research began in 2013, the use of the cooling off period in mediations had never been formally assessed by VCAT itself or any other organisation.

VCAT's cooling off period, both then and now, exists as part of a Practice Note.[727] It is not expressly provided for in legislation. The current Practice Note, at clause 57 states:

> 'In the circumstances when a party, or parties, are not legally represented and an agreement is reached at a mediation, and except as set out in paragraph 63, the agreement is subject to a mandatory cooling off period of two clear business days'.[728]

The exceptions, under clause 63, state that the cooling off period does not apply in any of the following cases:

a) where the mediator is a Member;
b) where all parties at the mediation are legally represented;
c) for Short Mediations and Hearings in the Civil Claims List;
d) for a mediation in the Planning and Environment List;
e) at a compulsory conference.[729]

Clause 59 says: 'No steps will be taken by the Tribunal to implement the finalisation of the proceeding during the mandatory cooling off period'.[730] The remaining clauses cover administrative matters such as how to count the two business days and what will happen if the cooling off period is used to revoke a settlement agreement.

The exceptions mean that the cooling off period only applies in mediations where the mediator is a 'panel mediator'—that is, a mediator who is an accredited mediator but not a tribunal member.[731] Panel mediators do not have to be legally trained, although they often are. Alternatively, they may be experts in a relevant field such as building or

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[727] Victorian Civil and Administrative Tribunal, 'Practice Note PNVCAT4 Alternative Dispute Resolution (ADR)' (2018), clauses 57–63.

[728] Ibid 8.

[729] Ibid 9.

[730] Ibid.

[731] There is no legislative definition of 'panel mediators' but the terminology is commonly used both by mediators themselves and in VCAT's annual reports. Panel mediators are accredited mediators who are part of a VCAT panel of contract mediators.

architecture. Mediators do have to be accredited under Australia's National Mediation Accreditation System.[732] Where applicable, the cooling off period is offered to both parties in situations in which one or both parties are not legally represented.

Fair Work Commission Trial Use of Cooling Off Periods in Conciliations

In 2013, in its unfair dismissal jurisdiction, the Fair Work Commission of Australia[733] initiated 'a trial of a short cooling off period of three days in which parties could consider their options or seek further advice'[734] after the conclusion of a voluntary conciliation. This trial was modelled on VCAT's use of the cooling off period, which is the subject of this research. The trial of the cooling off period was introduced 'as a device to increase access to justice for unrepresented parties',[735] particularly those 'unrepresented by paid agents, lawyers, unions or employer bodies',[736] and 'to mitigate concerns expressed to the Commission about perceived pressure to settle at the time of conciliation'.[737] In contrast to VCAT's use of the cooling off period, in which if one party was unrepresented both parties could invoke the cooling off period,[738] at the Fair Work Commission the cooling off period could only be invoked by the unrepresented party. Otherwise, the trial was similar to VCAT's pilot of the use of the cooling off period, whereby if a party withdrew from an agreement, the matter would be considered unresolved and would proceed to a hearing of the dispute.[739]

An evaluation of the two-month trial by RMIT University's Centre for Innovative Justice found that in only six of 222 (2.7 per cent) conciliations did an unrepresented party withdraw from the agreement reached at the conclusion of the conciliation.[740] It was also

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[732] VCAT (n 577).

[733] The Fair Work Commission is Australia's national workplace relations tribunal. It is independent from government and has a range of responsibilities relating to wages and employment conditions, industrial action and other workplace matters, including unfair dismissal claims.

[734] RMIT University Centre for Innovative Justice (n 13) 6.

[735] Ibid 4.

[736] Ibid 6.

[737] Ibid 4.

[738] Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2008/2009' (n 722) 55.

[739] RMIT University Centre for Innovative Justice (n 13) 7.

[740] Ibid.

reported that, during the period of the trial, the Fair Work Commission only received two complaints from respondents who said that they had felt pressure from the conciliator to settle the dispute. Eight complaints had been received during the comparable preceding period.[741] On the basis of this, the evaluators suggested that 'the cooling off period offered an opportunity for unrepresented parties to address any concerns they may have had or any pressure to settle they may have felt at the time of the conciliation'.[742]

The study states that 'feedback from conciliators indicates a fairly neutral response to the pilot. Some did not notice a great deal of difference in the process, and one thought it unnecessary'.[743] One conciliator suggested that there should be discretion about which unrepresented parties have access to the cooling off period, because 'large employers are often "repeat players" and have access to a great deal of experience and advice prior to their attendance at conciliation'; therefore, consideration should be given to whether they should have the same access to the cooling off period as other unrepresented parties.[744]

The evaluators endorsed the use of the cooling off period on the basis that the drop in complaints concerning perceived pressure to settle during the pilot confirmed that 'a structured period set aside for consideration can increase parties' confidence in the process'.[745] They also noted that, given the high number of parties unrepresented during conciliations, any mechanism that increases the effectiveness of the process is to be encouraged.[746] Finally, they suggested a number of process recommendations, including that the cooling off period be clarified as three business days, and that there be clear, simple and streamlined information provided about the cooling off period.[747]

There were some limitations to the pilot and its evaluation. While the methods used to conduct the evaluation are not set out in the report, the report indicates that it involved

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[741] Ibid.

[742] Ibid 8.

[743] Ibid.

[744] Ibid.

[745] Ibid 10.

[746] Ibid.

[747] Ibid 16.

a short, written survey of parties involved in the relevant conciliations.[748] Parties involved in the conciliation do not appear to have been spoken to about their experiences; therefore, it is likely that assumptions were made about their experiences. In addition, conclusions appear to have been drawn from single comments made by parties to the conciliator or other members of the Fair Work Commission, which were then passed on to the evaluators rather than responses received from multiple sources.[749]

The Fair Work Commission was apparently sufficiently convinced of the merits of the cooling off period and, from 19 March 2013, a cooling off period of three business days was offered to all parties participating in an unfair dismissal conciliation conference where one party is unrepresented.[750]

The Administrative Appeals Tribunal

The Commonwealth Administrative Appeals Tribunal (AAT) offers what is, in effect, a cooling off period for alternative dispute resolution processes, and has done so since the relevant section was inserted into the legislation in 2005.[751] Under section 34A, a proceeding or part of it may be referred to an alternative dispute resolution process.[752] Section 34D then allows the tribunal to give effect to any agreement made during the ADR process and lodged with the tribunal provided a number of pre-conditions are met, one of which is that '7 days pass after lodgement, and none of the parties has notified the Tribunal in writing that he or she wishes to withdraw from the agreement'.[753]

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[748] The report states that in 222 matters, the cooling off period was available during the pilot. However, it does not say how many surveys were completed or from whom (eg conciliation participants, lawyers, mediators).

[749] For example, the evaluators note a comment by a legal practitioner who stated that he had been contacted on numerous occasions, post-conciliation, by unrepresented applicants and had had to explain the binding nature of the agreement reached at conciliation. The legal practitioner thus felt that the use of the cooling off period had merit. The evaluators concluded from this that 'some unrepresented parties can be unsure or confused about the enforceability of an agreement reached at conciliation, and that a cooling off period procedure that clarifies the status of a settlement agreement and the circumstances in which it can be withdrawn is to be supported'. RMIT University Centre for Innovative Justice (n 13) 8.

[750] Fair Work Commission, 'Unfair Dismissal Cooling-Off Pilot' (4 July 2016) (Web Page) <https://www.fwc.gov.au/resources/research/unfair-dismissal-research>.

[751] *Administrative Appeals Tribunal Act 1975* (Cth) s 34D(1).

[752] *Administrative Appeals Tribunal Act 1975* (Cth) s 34A.

[753] Ibid s 34D(1)(c).

The legislation does not use the terminology 'cooling off period' at any point and there is no reference to it in the parliamentary second reading speeches. However, it is acknowledged as a cooling off period in other publications,[754] and clearly the effect of the subsection is that of a cooling off period. There was no material found indicating that the cooling off period was seen as a device to address power imbalances between the parties. In fact, personal communication with the AAT's ADR director indicated that the cooling off period in the context of the AAT appears to fulfil more of an administrative function, allowing complete terms of settlement to be drawn up after a mediated agreement.[755] During a presentation at the 2014 National Mediation Conference, the director of alternative dispute resolution at the AAT said that, while the AAT has a seven-day cooling off period built into the legislation, it is often circumvented by agreeing that the particular ADR process is not taking place under the legislation but separate to or outside of the legislated process.[756]

Farm Debt Mediation Act 1994 (NSW)

The New South Wales FDMA aims to provide for the efficient and equitable resolution of matters involving farm debts.[757] It provides for a structured negotiation process between farmers and creditors to resolve matters relating to farm debts, and to formalise any resolution into an agreement. The legislation specifically mandates mediation before a creditor can take possession of property or undertake other enforcement action under a farm mortgage.[758] Section 18L requires a mandatory 10-day cooling off period to be part of any mediated settlement agreement. Section 18M allows the farmer (seen as the

[754] Justin Toohey, 'Alternative Dispute Resolution in Administrative Matters: Australian National Report for the International Association of Supreme Administrative Jurisdictions' (2015), 9, 11 (Web Document) <http://www.iasaj.org/images/publications/AIHJA/pays-countries/australie-australia/australia-report_2016.pdf>.

[755] Conversation with Justin Toohey, director of ADR at the AAT on 11 September 2014 during the National Mediation Conference.

[756] Justin Toohey, 'Integrated Dispute Resolution at the AAT' National Mediation Conference (11 September 2014).

[757] See section 3 'Objects': 'The object of this Act is to provide for the efficient and equitable resolution of matters involving farm debts. Mediation is required before a creditor can take possession of property or other enforcement action under a farm mortgage'.

[758] *Farm Debt Mediation Act 1994* (NSW) s 8–9.

vulnerable party) to withdraw from the mediated agreement without penalty during the 10-business-day cooling off period.[759]

The original FDMA did not have a cooling off period; however, reviews of the legislation in 1996[760] and 1998[761] raised concerns about power imbalances in the processes laid out in the legislation.[762] In his report on the 1998 review, Altobelli noted that there is an inherent power imbalance in the relationship between lender and creditor, and that, while it is unlikely the Act can remedy this sort of structural power imbalance, 'perhaps something can be done to ensure that the procedure becomes even more sensitive to power imbalance issues'.[763] His report provides no real solutions to the power imbalance; however, while noting that the majority of farmer respondents to surveys indicated that they would not have changed their minds after reaching agreement at the mediation had they been able to do so, it does say that 'it is possible that the introduction of a cooling off period following the entering into of a provisional agreement may assist with the problem of power imbalance—it will probably do no harm'.[764]

The 1998 amendments to the FDMA introduced a 14-day cooling off period.[765] During the Farm Debt Mediation Amendment Bill second reading speech in the Legislative Assembly, the then Minister for Agriculture in New South Wales stated that the key amendment proposed to the Act was the insertion of a 14-day cooling off period to allow farmers to rescind mediated agreements within that period without stalling any of the other proceedings.[766] The Minister for Agriculture, in proposing the amending Bill, set out two main arguments about the benefit of a cooling off period in the FDMA. The first was his

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[759] Originally sections 11A and 11B, until further amendments to the Act on 3 May 2018.

[760] The Hon RJ Clough, 'Farm Debt Mediation Act Review Report 1996, Report to the NSW Minister for Agriculture by the Farm Debt Mediation Review Committee', discussed in NSW Government Review Group, Review of the Farm Debt Mediation Act 1994: Final Report, 7 and Appendix 3.

[761] Tom Altobelli and K Francis, 'Research into Farm Debt Mediation Act 1994 for the Rural Assistance Authority of NSW: Report' (1999).

[762] Ibid.

[763] Ibid 32.

[764] Ibid 32.

[765] See *Farm Debt Mediation Amendment Act 1998* (NSW); NSW Rural Assistance Authority, 'Farm Debt Mediation Act 1994 (NSW) Review: Consultation Paper' (2017), 9 (Web Document) <https://www.raa.nsw.gov.au/__data/assets/pdf_file/0008/709019/fdm-consultation-paper.pdf>.

[766] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 April 1998, 4158 (Mr Amery, Minister for Agriculture).

concern that farmers were signing agreements because they were exhausted after a long day of mediation and just wanted to get things finished. His second concern was that a cooling off period offered farmers the opportunity to obtain legal advice on their proposed agreement. He said:

> Frequently, mediation between the farmer and the creditor is a long and very exhausting process occurring over one day. At the end of a long mediation session, farmers may suffer from mediation to the point of exhaustion and may be inclined to sign an agreement to get it over and done with. Such sessions are not conducive to reality testing the agreement and in many cases, owing to cost constraints, the farmer does not have legal advice during the mediation. … The 14-day period is intended to allow a farmer adequate time during which he or she can seek professional or other advice on the agreement that has been reached at mediation.[767]

In indicating his support for the amendment, and while noting the power imbalances in mediations under the FDMA, Mr Slack-Smith on 6 May 1998 reiterated the points made by the Minister for Agriculture. He said:

> Quite often mediation between farmers and creditors is a stressful, long and difficult process. Farmers who are expected to travel to Sydney to mediate with bank officials can be absent from their farms for two or three days, which encourages them to finalise matters, sign deeds and get on with their lives. This legislation will give them a 14-day cooling off period in which to consider the mediation agreement and, more importantly, seek professional advice. That provision in this legislation is not new. When one purchases a home one is given a cooling off period. One can go away and determine whether or not the decision that one has made is right.[768]

Other members who also spoke in favour of the amendments to the Act noted that the cooling off period would enable, or was intended to allow, a farmer adequate time during which he or she could seek professional or other advice on the agreement reached at

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[767] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 April 1998, 4158 (Mr Amery, Minister for Agriculture).

[768] New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 May 1998, 4563-4 (Mr Slack-Smith). On the same day, 6 May 1998, Mr Ellis spoke of his support for the introduction of a cooling off period because mediation sessions were taking an unreasonable time, sometimes as long as 16 or 17 hours. He stated that: 'Mediation sessions generally start at 10.00 a.m. and in some cases at 2.00 a.m. or 3.00 a.m. the next day the parties will sign the documents merely to get away … The 14-day cooling-off period will enable the victims to go home, think about what happened and perhaps take some other action'. Surely, a question needs to be raised about the ethics of running a mediation until 2–3 am in the morning with parties in a distinctly unequal relationship!

mediation.[769] However, many speakers also noted that the farmers may not have obtained professional advice prior to the mediation because of cost constraints. There was no comment on how those cost constraints would be any different to farmers should they need to obtain advice during the 14-day cooling off period.

On the other hand, there was also concern that the provision of a cooling off period might have negative impacts. The Hon RTM Bull, Deputy Leader of the Opposition, noted that he was aware that one bank was opposed to the concept of a compulsory 14-day cooling off period because it believed it was 'inimical to the fundamental principle of mediation to allow a cooling-off period after an agreement is reached and that the integrity of the Act would be quickly dissipated by farmers and credit providers alike'.[770] No explanation about which fundamental principle of mediation a cooling off period was impacting upon was provided. He also added that there were problems with farmers seeking further advice after a mediation, because:

> Good advice is desirable but a farmer may get bad advice from a do-gooder, suggesting that the agreement that has been reached through the mediation process between the farmer and the creditor is not a good deal and that the adviser might be able to come up with a better deal for the farmer through another financial package through another financial institution. Taking such advice after mediation could be the worst course for a farmer.[771]

The 14-day cooling off period was changed to a 10-business-day cooling off period in further amendments to the Act in 2018, apparently to avoid confusion over terminology.[772] The change also made it consistent with the Queensland *Farm Business Debt Mediation Act 2017*.[773] It is worth noting that similar legislation in Victoria[774] does not provide for a cooling off period. It is said that, instead, in Victoria, the approach has

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[769] See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 19 May 1998, 4721 (RD Dyer, Minister for Public Works and Services). See also on the same day 4721-2 (RTM Bull, Deputy Leader of the Opposition). One member noted that, in addition to legal advice, the insertion of a cooling off period into the FDMA would give the farmer the opportunity to discuss the matter with members of their family, stated as being 'partners or future owners of the farm, that is, the children'. New South Wales, *Parliamentary Debates*, Legislative Council, 19 May 1998, 4722-3 (AB Kelly).

[770] New South Wales, *Parliamentary Debates*, Legislative Council, 19 May 1998, 4722 (RTM Bull, Deputy Leader of the Opposition).

[771] Ibid.

[772] NSW Rural Assistance Authority (n 765) 27.

[773] *Farm Business Debt Mediation Act 2017* (Qld) s 27(2)(b)(ii).

[774] *Farm Debt Mediation Act 2011* (Vic).

been to highlight the importance of parties preparing and coming to mediations with the attitude that the decisions will be final.[775] There have also been concerns that adding a cooling off period would result in further delays in a process that can be lengthy.[776]

One unusual aspect of the cooling off period in the New South Wales legislation is that, because the legislation is based on a presumed power imbalance between the creditor and the farmer, it is only the creditor who is compelled to mediate, with the farmer having the option of opting out of mediation.[777]

Conclusion

This chapter has described how the cooling off period developed in the consumer law area, particularly direct and door-to-door sales, as a method of protecting vulnerable consumers. The reasons in favour of its use were themed around relieving pressure, providing parties with time to consider decisions, remedying imbalances of power and providing consumers with time to inform themselves of their rights. The cooling off period continues to be used extensively in the consumer protection field despite not being universally accepted as a useful tool. There are two relevant arguments against cooling off periods in a consumer context. First, some consider that the cooling off period represents paternalistic government interference, raising issues of both autonomy of decision-making by individuals, and impacting on contract certainty and the efficiency of the market. Second, some authors argue that the cooling off period is ineffective as a result of consumer inertia.

As ADR is compulsory in many court and tribunal processes, there have been calls for the provision of a cooling off period to be used in mediations and other ADR processes to protect the vulnerable (legally unrepresented) party. Arguments in favour of its use are based on the concept of self-determination but are otherwise similar to those relevant in the consumer context. Although the use of the cooling off period in mediations does not appear to attract controversy by commentators, its use is still limited to only a small number of processes in Australia and there has been very little assessment of its impact.

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[775] NSW Rural Assistance Authority (n 765) 31.

[776] Ibid.

[777] Baylis and Carroll (n 662) 303 refer to sections 8-11 of the *Farm Debt Mediation Act 1994* (NSW).

The chapter concluded by setting out some Australian examples of the use of the cooling off period in mediations and other ADR processes, in particular describing VCAT's use of the cooling off period in certain mediations given its centrality to this research.

The following chapter reports on the study that was the focus of this research, describing both the method used to review VCATs cooling off period, and the reasoning behind the choice of method.

CHAPTER 5
THE RESEARCH DESIGN AND RESEARCH PARTICIPANTS

Introduction

This chapter describes the design of the empirical research component of this thesis. It begins by providing the background to the research project. It then restates the goals of the study and provides a framework for achieving those goals. The chapter goes on to explain how the methods used in conducting the research were selected based on their ability to provide answers to the research questions given some practical restrictions on the project. Details about the methods used to recruit participants, the systems used for data collection, and the reasons why the specific questions were asked of the participants are set out in some detail. The latter part of the chapter sets out the limitations in the method and methodology. Finally, demographic data about the research participants and a profile of the types of disputes the research participants were involved in is provided in order to set the scene for the following chapter, which focuses on the results.

Background and Need for the Study

In 2008, the then president of the Victorian Civil and Administrative Tribunal (VCAT), Justice Kevin Bell, was tasked by then Victorian Attorney-General with a review of VCAT.[778] VCAT was established in 1998. The terms of reference for the review of its first decade of operation directed Justice Bell to focus on access, operational and jurisdictional issues.[779] Justice Bell's review involved a large number of community consultations throughout Victoria and, in late 2009, resulted in a report titled *One VCAT*.[780] The *One VCAT* report made 78 recommendations for the consideration of government in the formulation of policy about the continued operation of VCAT.[781] The recommendations were broad and ranged in scale and cost. They covered such ground as establishing a concierge service in

[778] Bell (n 191).

[779] Ibid 1.

[780] Ibid.

[781] Ibid 103–7.

the reception area,[782] creating staff positions (including a Koori liaison officer,[783] a community education officer[784] and a litigant in person coordinator),[785] relocating the tribunal to a more suitable building[786] and establishing an appeals tribunal.[787] Of specific relevance to this research were a number of recommendations related to access to justice initiatives with a particular emphasis on the increased use of ADR processes.[788]

In 2010, then new president of VCAT, Justice Iain Ross, put in place a three-year strategic plan for VCAT titled *Transforming VCAT*, which addressed many of the recommendations made in the *One VCAT* report. *Transforming VCAT* envisaged VCAT as 'an innovative, flexible and accountable organisation which is accessible and delivers a fair and efficient dispute resolution service'.[789] The strategic plan included 77 new initiatives directed at 'realising each element of the vision statement'.[790] Shortly afterwards, a research project was conceived by La Trobe University Law School academics to investigate whether innovations, predominantly in the civil justice system, were addressing systemic disadvantage, enhancing social justice and developing sustainable communities.[791] It was proposed that one project specifically focus on a justice innovation at VCAT. One of the initiatives referred to in the *Transforming VCAT* plan was a 'pilot'[792] mediation cooling off period, offered in certain categories of mediation at VCAT. Further detail of the development of the pilot was set out in Chapter 4. The initiative clearly fitted within the original parameters of the research group's broader proposal, being an initiative introduced by VCAT that is a part of the civil justice system, with the aim of, and potential to address, systemic disadvantage and enhance social justice. The proposed initiative was

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[782] Ibid Recommendation 16.

[783] Ibid Recommendation 5.

[784] Ibid Recommendation 7.

[785] Ibid Recommendation 64.

[786] Ibid Recommendation 9.

[787] Ibid Recommendation 39.

[788] Ibid 19. See also ibid 103–7 Recommendation 73.

[789] Ross (n 724) 3.

[790] Ibid.

[791] Mary Anne Noone, 'La Trobe University, Faculty of Business, Economics & Law, Faculty Research Program Team Grant Scheme 2012 Application Form' (2012) 2.

[792] See footnote 720 for explanation about why it is referred to as a pilot.

a distinct and unique innovation by VCAT in the context of mediation programs in Australia. This research project was based on these parameters.

The Method

Specific Research Questions

It is recommended that 'all good legal research should begin by identifying the specific goal or goals which the researcher wishes to achieve'.[793] As this research topic was developed and refined, attention was given to how an individual party in a mediation might find the cooling off period to be of benefit.

VCAT limited the use of the cooling off period to mediations in which at least one party was unrepresented. Concerns about equality of access to justice for unrepresented parties in the justice system have existed for many years.[794] As discussed in Chapter 2, unrepresented parties in the justice system have been shown to be vulnerable for multiple reasons including a potential power imbalance when the other party is represented. Consequently, a party in a mediation might find the cooling off period to be of benefit in addressing the effects of power imbalances arising from their lack of legal representation when the other party is represented. However, even without a represented party on the opposing side, lack of legal representation can also point to a disparity of resources between the two parties that can lead to information inequality. The discussion in Chapter 4 demonstrates that having a cooling off period, whether in a consumer contract or a mediation, is considered a tool for redressing power imbalances. It provides parties with

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[793] Michael McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 33. See also Mandy Burton, 'Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2018) 66, 67. Burton says that the starting point should always be the research questions.

[794] Rosemary Hunter et al, 'The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia' (Report for the Victoria Law Foundation, 2002) <http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/Changing-face-of-litigation.pdf> 9; Australian Law Reform Commission, 'The Unrepresented Party', Adversarial Background Paper 4 (December 1996); Law Council of Australia, 'Erosion of Legal Representation in the Australian Justice System', Research Report (February 2004); Lord Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (1995) 119; Senate Legal and Constitutional Affairs References Committee, 'Inquiry into the Australian Legal Aid System: Third Report' (Commonwealth of Australia, July 1998); Australian Law Reform Commission, *Managing Justice* (n 36) 36; Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (Commonwealth of Australia, December 2009); Law Reform Commission of Western Australia, 'Review of the Criminal And Civil Justice System In Western Australia—Final Report Project' (1999) 92.

the opportunity to obtain legal or other advice if required. Therefore, it was hypothesised that a cooling off period might benefit an unrepresented mediation party at VCAT by providing the party with the time to obtain legal or other advice on the agreement reached at mediation before they became bound by it. This could potentially balance some of the disparity between the parties based on the unrepresented party's information inequality.

The second reason a party in a mediation might find the cooling off period to be of benefit is because of pressure. Chapter 3 highlighted the multiple pressures that can occur in a compulsory court-connected mediation process: pressure to participate, pressure to remain in the mediation and pressure to settle. Chapter 4 also addressed concerns about pressure, noting that a cooling off period can potentially eliminate any actual or perceived pressure on a party to conclude a contract or settle a dispute on terms that are unreasonable or unfair. Finally, a cooling off period provides the time to consider the agreement outside of the pressurised environment. Consequently, the cooling off period might reduce any pressure on a party who is vulnerable due to lack of legal representation. Such an individual would be able to reconsider any agreement reached during the cooling off period and to withdraw, if they so wish, without penalty. The reduction in pressure resulting from the existence of a cooling off period might also increase party satisfaction with the mediation process and/or the outcome reached.

Thus, the research was designed to determine whether parties who were unrepresented and mediating in a situation in which they were offered a cooling off period experienced the hypothesised benefits of a cooling off period. However, to ensure the validity of responses to the research questions, it became clear that an associated question had to be answered: whether unrepresented parties were made aware of the cooling off period. If mediation parties were not adequately made aware of the cooling off period at the beginning of or during the course of the mediation, the provision of the cooling off period was obviously not going to impact on any pressure they might feel to settle. If mediation parties were not made aware of the cooling off period at all, they obviously were not going to use it to seek advice if they did reach a settlement. This issue gave rise to a first research question:

Research Question 1 Were the unrepresented mediation participants adequately made aware of their rights to a cooling off period before or during their mediation?

The three main research questions targeting the hypotheses set out above were:

Research Question 2 Do the unrepresented mediation participants in a mediation with a cooling off period use that time after reaching a settlement to obtain advice (professional or otherwise) about the settlement agreement they reached; and if so, from whom, and if not, why not?

Research Question 3 Do the unrepresented mediation participants withdraw from mediated agreements during the cooling off period if they are unhappy with the outcomes after reaching a settlement agreement at mediation, and if not, why not?

Research Question 4 Do the unrepresented mediation participants feel pressured during a mediation to come to a settlement agreement and, if so, does the provision of a cooling off period do anything to alleviate that pressure?

A final question was to ascertain how the provision of a cooling off period was viewed by mediators and why, including whether they were aware of the potential access to justice importance of cooling off periods:

Research Question 5 How do mediators feel about the impact of the cooling off period on mediations they facilitated and why?

Summary of the Method

The empirical research used a combination of qualitative and quantitative approaches in its design and implementation. These included the development, design, trial, administration and analysis of:

- a series of telephone interviews with individuals who had participated, without legal representation, in a mediation at VCAT
- a short electronic survey administered to panel mediators at VCAT
- an analysis of the results using Qualtrics survey software[795] and thematic examination.

[795] More information about Qualtrics software is provided below, see: Qualtrics Software.

The interviews used a semi-structured format that ensured a set series of questions was asked but also allowed for further questioning, probing of answers and additional discussion depending upon the answers provided. The content of the survey and semi-structured interview questions and format for recruitment of participants was derived from surveys and the research and writings undertaken by respected researchers in the justice field including Sourdin,[796] Rolph and Moller,[797] Genn,[798] and Giddings and Hunter.[799] In addition, a previous research study into another of VCAT's pilot ADR initiatives guided the method used.[800]

Ethics Approval

An application for ethics approval to La Trobe University's Human Ethics Research Committee (LTUHERC) was submitted in March 2014 and approved in July 2014. In addition to university ethics approval, because the research involved VCAT, ethics approval was also required from the Department of Justice Human Research Ethics Committee (DOJHREC). It was a requirement of the DOJHREC that an application not be submitted until the university ethics approval had been granted. The DOJHREC application was submitted on 14 July 2014 and was approved in late February 2015.

The Rationale behind the Research Method

Appropriate Analytic Method—Qualitative or Quantitative Research?

While it is said that there is no universally accepted definition of 'empirical legal research',[801] there does appear to be consensus that its essential characteristics include the use of observable and verifiable data (whether quantitative or qualitative) to generate knowledge about the way in which the law applies in society and the consequences of

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[796] Sourdin and Balvin (n 261); Sourdin and Matruglio (n 118).

[797] Elizabeth Rolph and Erik Moller, Evaluating Agency Alternative Dispute Resolution Programs: A Users Guide to Data Collection and Use (RAND, 1995).

[798] Genn, 'Tribunals and Informal Justice' (n 3).

[799] Jeff Giddings, Rosemary Hunter and Cate Banks, 'Australian Innovations in Legal Aid Service: Lessons from an Evaluation Study' (2009).

[800] HLB Mann Judd Consulting, 'Evaluation of the Victorian Civil & Administrative Tribunal Civil Claims List Alternative Dispute Resolution Pilot for Small Claims' (2011).

[801] Lisa Whitehouse and Susan Bright, 'The Empirical Approach to Research in Property Law' (2014) (3) *Property Law Review* 176, 177.

that application of the law. For example, Epstein and King state that '[w]hat makes research empirical is that it is based on observations of the world'.[802] Burton describes empirical legal research as 'the study of law, legal processes and legal phenomena using social research methods, such as interview, observations or questionnaires'.[803] Empirical legal research can vary from something that is purely descriptive, to a test of a particular hypothesis or theory, to a contextual account of the law.[804] The value of empirical legal research is that it can 'shine light on areas of the law in relation to which precious little knowledge exists'.[805] This research focuses on an examination of a very particular justice innovation that had not otherwise been investigated and meets the criteria of empirical legal research. Within that broader concept of empirical legal research, consideration needed to be given to which strategies would be appropriate to investigate the matter, namely whether the research should take a qualitative or quantitative focus.[806]

Quantitative Research

Quantitative research is generally concerned with counting occurrences, volumes or associations between entities and allows for an objective comparison of performance outcomes.[807] Rather than words, which is a common output with qualitative research, quantitative research deals with numbers, statistics and hard data.[808] Typical sources of quantitative data include abstracted records and standardised survey instruments. These sources of data enable the reduction of phenomena to numerical values in order to carry out statistical analyses.[809] Quantitative research also tends to be less expensive because

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[802] Lee Epstein and Gary King, 'Exchange: Empirical Research and the Goals of Legal Scholarship' (2002) 69(1) *University of Chicago Law Review* 191, 191.

[803] Burton (n 793) 66.

[804] Whitehouse and Bright (n 801) 177.

[805] Ibid 182.

[806] Ibid. According to Whitehouse and Bright, there are a number of different strategies that empirical legal researchers can adopt, 'which broadly fall into the qualitative and quantitative research distinction'. See also Burton (n 793) 72.

[807] Jonathan A Smith, Qualitative Psychology: A Practical Guide to Research Methods (Sage, 2nd ed, 2008) 1.

[808] Wing Hong Chui, 'Quantitative Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 46, 48.

[809] Smith (n 807) 1.

it can be less time-consuming, so it is relied upon heavily in social research.[810] It also enables cause and effect analysis.[811] In the law, quantitative research is common in research relating to criminal law and criminology, corporate law and family law.[812]

A potential difficulty with quantitative research is that, to be meaningful, the study population must be of suitable size and the data must be of a quality sufficiently high to support a statistical analysis.[813] A disadvantage of quantitative research can also be that it does not uncover the subtleties of program implementation or participant reactions.[814] It lacks the flexibility and the nuance to determine what drives decision-making in the participants. Its rigidity, the very thing that makes it desirable for its repeatable, predictable outcomes, is of limited use when researching relatively emergent fields where it is new ideas, and not the prevalence of old ones, that are of more use and importance.

A quantitative-only approach to this research would provide answers to some of the research questions. Some questions that would need to be asked of mediation participants were relatively straightforward: for instance, did the participant speak to anyone about the settlement they had reached in the time between the conclusion of the mediation and the end of the cooling off period? A quantitative method could yield yes/no responses and could distinguish the types of advice sought (eg legal, family friend etc). It would allow for percentages to be obtained and comparisons to be made. Because less time would be needed with each individual to obtain quantitative results, quantitative research methods might also allow for a larger number of participants to be involved in the research, providing a more statistically robust outcome.

Qualitative research

Qualitative methods yield data on the behaviour and perceptions of participants in the process. Qualitative methods are appropriate for getting information on the internal dynamics of the program, identifying unintended consequences and gaining insights into

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[810] Ibid. See also Rolph and Moller (n 797).

[811] Chui (n 808) 52.

[812] Ibid 47.

[813] Ibid 52.

[814] Rolph and Moller (n 797); Peter Cane and Herbert Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 933.

possible causal links between program design, implementation and outcomes.[815] They are useful in understanding processes (as opposed to outcomes).[816] A key benefit of qualitative research is that it enables the researcher to understand experiences and explain complex situations.[817] Qualitative studies 'are designed to go beyond description to find meaning', even if that meaning is related to an individual's experiences of the justice system rather than a population's experience.[818] They can also investigate how individuals interpret and make sense of their experiences and elicit contextual data in order to improve the validity of quantitative tools such as surveys.[819]

Qualitative research generally involves collecting data in the form of naturalistic verbal reports, such as interview transcripts or written accounts.[820] In simple terms qualitative research can be defined as non-numerical.[821] The analysis of the data then enables the researcher to look at what the text means, rather than finding its numerical properties, as would occur in quantitative research. It fits more with the 'law in context' legal tradition, in which the law can be both a contributor and/or a part of the solution to a social problem.[822] Qualitative approaches enable an exploration and interpretation of the personal and social experiences of participants, where an attempt is usually made to understand a relatively small number of participants' own frames of reference or view of the world.[823]

A disadvantage of a qualitative methodology is that the conclusions of a qualitative study are less likely to be defensible than those of a quantitative study because it can be difficult

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[815] Rolph and Moller (n 797).

[816] Erin Horvat, The Beginner's Guide to Doing Qualitative Research: How to Get into the Field, Collect Data, and Write Up Your Project (Teacher's College Press, Columbia University, 2013).

[817] Juliet M Corbin and Anselm L Strauss, *Basics of Qualitative Research* (Sage, 3rd ed, 2008) 8.

[818] Cane and Kritzer (n 814) 934.

[819] Australian Government National Health and Medical Research Council and Australian Vice-Chancellors' Committee, 'National Statement on Ethical Conduct in Human Research' (2007), 26.

[820] Smith (n 807), 2.

[821] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007), 17.

[822] Mark Findlay and Ralph Henhan, 'Integrating Theory and Method in the Comparative Textual Analysis of Trial Process' in Michael McConville and Wing Hong Chui (eds), *Research Methods in Law* (Edinburgh University Press, 2007), 118.

[823] Smith (n 807), 2.

to generalise from the results of a small qualitative study.[824] The reason for this is that the sample sizes are seldom sufficiently large to be statistically representative of a wider population. Qualitative researchers can aspire to 'theoretical' rather than statistical generalisations of their findings.[825] However, qualitative researchers still maintain that their findings are generalisable[826] and that, even without representativeness, it is still possible for the research to be valuable in expanding knowledge about 'the things that can happen and how they are interpreted in a particular social world'.[827] This means that, while they would not expect their findings to be exactly replicable in any other sample or context, they would assert that the insights they derived from studying one context would prove useful in similar contexts.[828] Qualitative research in law is particularly appropriate for certain research topics involving problem, policy and law reform.[829] A complex research question can also lend itself to a qualitative study.[830] Qualitative methods are also useful when the study population is too small or diffuse to permit the use of quantitative methods. Qualitative research can also give useful insights into themes for future research.

For this research, richer data would be able to be gathered using qualitative methods. Using the example questions above, a qualitative methodology would lead the researcher to ask *why* the participant did or did not speak to a lawyer about the outcomes of the mediation and to delve into any reasons given. There was a desire for this research to be not merely a search for information, but also to be a 'struggle for understanding'[831] and for such an outcome, a qualitative process would be more suitable.

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[824] Rolph and Moller (n 797).

[825] JM Johnson, 'Generalizability in Qualitative Research: Excavating the Discourse' in JM Morse (ed), *Completing a Qualitative Project: Details and Dialogue* (Sage, 1997).

[826] As Yardley says: 'There would be little point in doing research if every situation was totally unique and the findings in one study had no relevance to any other situation'. Lucy Yardley, 'Demonstrating Validity in Qualitative Psychology' in Jonathan A Smith (ed), *Qualitative Psychology: A Practical Guide to Research Methods* (Sage, 2nd ed, 2008), 238.

[827] Burton (n 793) 73.

[828] Yardley (n 826) 238.

[829] Dobinson and Johns (n 821) 41.

[830] Jane Ritchie et al, Qualitative Research Practice: A Guide for Social Science Students and Researchers (Sage, 2nd ed, 2014), cited in Irvine (n 427) 153.

[831] MJ Lynch, 'An Impossible Task but Everybody Has to Do It—Teaching Legal Research in Law Methods' (1997) 89 *Law Library Journal* 415.

Decision to Use Mixed Methodology

Two foci informed the design of the research. The first was a desire for the outcomes to be useful for wider application. It was hoped that with research along broad themes, recommendations could be drawn that would give VCAT, as the institution that implemented the innovation, sufficient information to determine whether the practice was achieving its aims, and, if not, to implement improvements. The second focus was to achieve data rich enough to identify reasons for people's behaviour and not only the raw numbers of people who undertook certain actions. The aim was to obtain sufficient information to enable an understanding of the participants' frames of reference or experiences of mediation and the cooling off period.

To achieve the first focus, ideally the numbers involved in the research needed to be sufficiently large to enable the research not just to be interesting and informative but also to be statistically significant. Making the research representative is not an uncommon concern for empirical legal researchers.[832] Representativeness would enable VCAT (and potentially other justice institutions) to use the outcomes of the research to make decisions about the continued use of the cooling off period. Those decisions would obviously depend upon the outcomes and could vary considerably: for example, from honing the way the program worked, to extending it to all mediations without the existing restrictions, to abolishing the program, to commissioning further research. Nonetheless, research that was solely quantitative was likely to be lacking in depth and richness. The second focus would be better served by a qualitative aspect to the research. This would enable the researcher to delve behind the simple responses that come from closed questions and hopefully provide a better understanding of participants' motivations and actions or inactions. It might also produce new ideas for trial or future recommendations.

While some guidance from similar studies was available, in the 'relatively small field of mediation research' theoretical studies into mediation practice are far more common than empirical studies.[833] When empirical research of mediation is undertaken, most research data are collected from mediation participants using surveys or interviews,

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[832] Burton (n 793) 73.

[833] Alysoun Boyle, 'What Is an Effective or Good Mediator: Exploring Empirical Research on Mediator Attributes and Behaviours' (PhD Thesis, Law, University of Newcastle, 2020) 38.

occasionally supplemented by direct observation of the services in action.[834] The focus of the research is often on whether 'the mediation process can be predicted to produce settlements in a timely and cost-effective way, and whether participants are consistently satisfied with the process and its outcomes, as well as with the mediator'.[835] Mediation research that specifically asks participants about their experience within the mediation setting occurs but is less common.[836]

One important additional consideration is that a key practical difficulty with empirical legal research can be access to the research subjects.[837] In this regard, once the topic was finalised, it was fortunate that VCAT was willing to provide and facilitate access to the research subjects, both mediation participants and mediators themselves, alleviating this concern. VCAT's facilitation meant that both survey and interview-based research methodologies would be feasible; further detail about the process of recruitment of research subjects is provided below.

In summary, to achieve both foci of the research design, manageable access to a sufficient number of participants to ensure statistical validity of the results, and an opportunity to speak with participants in person, were both necessary to enhance data quality. Quantitative and qualitative studies are not mutually exclusive.[838] This mixed method has been said to be beneficial because it provides more reliable information than using one technique.[839] The National Statement on Ethical Conduct in Human Research makes it clear that qualitative research can have quantitative elements or aspects to it.[840] It is

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[834] Ibid 45. See, eg, Sourdin and Matruglio (n 118); Sourdin and Balvin (n 261); Giddings, Hunter and Banks (n 799); Tania Sourdin, 'Dispute Resolution Processes for Credit Consumers' (2007) <http://dx.doi.org/10.2139/ssrn.1134483> ('Dispute Resolution Processes'); Swain (n 73); Genn et al (n 61).

[835] Boyle (n 833) 41.

[836] Genn's research is a good example of where it does occur. See Genn et al (n 61).

[837] Burton (n 793) 74.

[838] Whitehouse and Bright (n 801) 182; Jennifer Mason, *Qualitative Researching* (Sage, 2017); LB Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), 951-75.

[839] Nielsen (n 838) 953.

[840] Australian Government National Health and Medical Research Council and Australian Vice-Chancellors' Committee (n 819) 25.

recognised that socio-legal research,[841] such as this, can include a combination of quantitative, qualitative and ethnographic methods.[842] In this case, given the research questions, it seemed inappropriate to utilise a single methodology. Thus, the final decision on the project was for it to be a mixed method research project.

Recruitment of Participants

In seeking to answer the research questions, two key groups of research participants were identified. The first were people who had a mediation at VCAT during the relevant time period and were unrepresented at a mediation conducted by a panel mediator.[843] These pre-conditions meant that those individuals would be offered a cooling off period as part of the mediation process. The second group consisted of panel mediators at VCAT who had conducted mediations at VCAT in which a cooling off period was offered to the parties.

Group One: Mediation Participants

Group one consisted of participants in mediations at VCAT from 11 March 2015 for a 12-month period. A potential participant was any person who had a mediation at VCAT that would be eligible for the cooling off period.[844] When a mediation participant attended at the VCAT registry counter on the day of their mediation, VCAT staff would ask them if they

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[841] Creutzfeldt describes socio-legal studies as a fluid and continually developing area of scholarship. Although she resists defining it, she says it could be described as 'the study of how law is made, interpreted, enforced and experienced by those on whom law acts'. Naomi Creutzfeldt et al, *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 2019). Menkel-Meadow says that social-legal research 'provides theories, concepts, testable hypotheses and robust empirical findings to understand the interaction of laws, legal actors (judges, lawyers, policy, juries, litigants and lay people) and legal institutions with the people and other institutions that are affected by law'. Carrie Menkel-Meadow, 'Uses and Abuses of Socio-Legal Studies' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 2019).

[842] Creutzfeldt et al (n 841); Cane and Kritzer (n 814); Sarah Blandy, 'Socio-Legal Approaches to Property Law Research' [166] (2014)(3) *Property Law Review* 166 168.

[843] A panel mediator was an accredited mediator who was employed as a mediator at VCAT but who was not a VCAT tribunal member. VCAT's requirements then and now around the availability of cooling off periods in mediations were that the mediator had to be a panel mediator rather than a tribunal member and at least one party had to be unrepresented. There are also some other restrictions about the type of dispute. See Chapter 4, which provides more information about VCAT's cooling off period and Victorian Civil and Administrative Tribunal, 'Practice Note PNVCAT4 Alternative Dispute Resolution (ADR)' (n 727) clause 63.

[844] As stated above, VCAT's requirements around the cooling off period were that the mediator had to be a panel mediator rather than a tribunal member and at least one party had to be unrepresented.

intended to appear at the mediation without legal representation. If, during that contact, a person informed VCAT that they did intend to appear at the mediation without legal representation and the VCAT staff member was aware that their mediation otherwise met the pre-conditions of a mediation with a cooling off period, the individual was identified as a potential participant in the research.

Once identified as a potential participant, the VCAT staff member conveyed information to the individual about the research project following a script provided by the researcher. The potential participants were asked if they were willing to participate in research. Those who agreed to participate were given a form to sign (prior to their mediation beginning), confirming their consent to be contacted by the researcher and providing their contact details. The script for VCAT staff made it clear that they should inform potential participants that interpreters were available if required. Information was also provided on the consent form noting that a telephone interpreting service could be used to conduct the interview if required. A copy of the script and consent form, which is one document, is available at Appendix 1. VCAT staff then scanned and emailed these consent forms to the researcher on a fortnightly basis. This concluded the involvement of VCAT staff in the process.

This strategy to obtain participants is considered a convenience sample, whereby respondents are identified from a predefined source and the researcher cannot make choices about who to include in the sample.[845] Though it is recognised that this approach will not necessarily yield a representative sample of the entire population of VCAT mediation participants, recruitment aimed for as much variation as possible in terms of the demographic and socioeconomic characteristics of participants. Potential participants were not targeted but were drawn from a group made up of any person with a mediation at VCAT that fitted the criteria for a cooling off period.

There was no quota sample for the number of interviews, although initially a soft target was set at n=100. This aimed to reflect the estimation of the 'saturation point' for qualitative data; in other words, when the variation in participants' stories begins to

[845] Corbin and Strauss (n 817) 153.

decrease and the researcher has a reliable sense of 'thematic exhaustion'.[846] However, more important than a quota sample was the aim that the participant group would provide a broad enough sample to give the outcomes validity while also being within the time scope for the project. A decision was made late in 2015 to round off the project to a 12-month period. It was considered that analysis of the data obtained using a thematic analysis would still result in a comprehensive study and that any novel, additional themes that may have been identified in further interviews would only be illustrative of outlying, atypical cases.[847]

In that 12-month period, from 11 March 2015 to 11 March 2016, 69 consent forms were signed by potential participants. No later than eight weeks after receiving the signed consent (to be contacted) forms from VCAT staff, the researcher emailed or posted a copy of the 'Participant Information Statement' (PIS) to all potential participants using contact details provided on the consent form. The PIS provided more information about the research and notified the participant that the researcher would next contact them by telephone. A copy of the email/letter and PIS is at Appendix 2.

Again, following a script, each potential participant was then telephoned by the researcher to ask if they would be willing to participate in a telephone interview to discuss their mediation experiences. A copy of the script for the first telephone contact is at Appendix 3. Telephone interviews could happen immediately at the time of first contact, or at a future mutually convenient time. Participants had the option of declining to participate at all stages in the process. If a telephone interview took place, a semi-structured script was followed. A copy of the interview script is at Appendix 4.

Attempts were made to contact all 69 people who signed consent forms. Of the original 69 people who agreed to participate in the study at the first instance:

- nine people proved to be uncontactable with more than four attempts being made to contact each person, usually by both email and telephone

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[846] Greg Guest, Arwen Bunce and Laura Johnson, 'How Many Interviews Are Enough? An Experiment with Data Saturation and Variability' (2006) 18(1) *Field Methods* 59.

[847] Primary data collection focused on the development of *typical cases* of participants experiences after mediation. Typical cases exemplify the circumstances and conditions of an everyday or common situation, rather than being extreme or unusual in some way. See, eg, Alan Bryman, *Social Research Methods* (Oxford University Press, 2016).

- eight people did not participate because when they were contacted they declared that they were no longer interested in participating or were too busy to participate
- five people were happy to participate in interviews but, for one reason or another, including that the opposing party had not turned up to the scheduled mediation or their mediations had not commenced on the relevant day (nor by the time of contact with them), they were unable to provide any meaningful information to the study.

As a result, the final number of people who participated fully in a telephone interview was 47 (see Table 1).

Table 1: Breakdown of potential interview participants

Total number of potential participants who signed consent forms allowing for contact	69	100%
Number of actual interviews	47	68.1%
Number of potential participants who proved to be uncontactable	9	13.0%
Number of potential participants who declined to participate once contacted	8	11.6%
Number of potential participants who were willing to be interviewed but mediation had not commenced	5	7.3%

Group Two: Mediators

VCAT's preferred method for the researcher making initial contact with panel mediators was for an email to be drafted by the researcher that provided a brief introduction to the research and included an electronic link to the survey. This email would then be sent to the panel mediators by VCAT's principal mediator—not directly by the researcher. This provided a level of confidentiality and anonymity for the mediators, as their contact details were not provided to the researcher. This method was adopted. A template email was prepared by the researcher for VCAT's principal mediator to circulate to all VCAT panel mediators asking them to complete an online survey accessible via an electronic link in the email. A copy of the email sent to mediators is at Appendix 5.

As part of the design and development of the mediator survey, before circulation to mediators, a draft of the proposed mediator survey was sent to the principal mediator at VCAT, another VCAT mediator, a non-VCAT mediator and a non-mediator for feedback. Based on feedback received, minor changes were made, and the final version of the

questionnaire was submitted to both LTUHERC and DOJHREC for approval. The survey itself was set up using Qualtrics survey software and clicking on the link took the participant straight into the survey. The first part of the questionnaire incorporated the mediators' PIS, outlined the research process and the principal type of information sought, and gave appropriate guarantees of confidentiality and anonymity. Each panel mediator was able to participate or choose not to participate in the research without the knowledge of the researcher or VCAT personnel. A copy of the survey is at Appendix 6.

The timetable for distribution of the survey was as follows:

- Late March 2015: initial email sent to all panel mediators at VCAT by VCAT's principal mediator, which included the researcher's introductory email and an electronic link to the questionnaire.
- Mid-April 2015: two weeks after the initial email was sent, a reminder email was sent to all panel mediators at VCAT by the principal mediator at VCAT, again attaching the link to the questionnaire and noting that the questionnaire would close in one week.
- Late April 2015: the survey link closed and no further responses were accepted.

Unfortunately, it was not possible to know how many mediators were sent the email and survey link by the principal mediator and thus how many chose not to complete the survey. At the time the survey was to be emailed to mediators, VCAT indicated that there were approximately 26 panel mediators 'on the books' at VCAT to whom the survey would be sent.[848] Eighteen responses were ultimately received.[849] Assuming that VCAT's estimate of 26 panel mediators was correct or close to accurate, 18 responses is

[848] This information was provided during a meeting with the VCAT's then ADR program manager on 27 February 2015. Neither the 2015–16 Annual Report nor the 2014–15 Annual Report provide numbers of mediators. However, in the 2013–14 Annual Report, there is reference to VCAT having 26 specialist panel mediators. See Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2013/2014' (2014) 7. In a handout from a conference presentation, there is reference to there being 29 accredited panel mediators. Genevieve Nihill, 'Mandatory Cooling Off Periods in Mediation' National Alternative Dispute Resolution Advisory Council 4th National ADR Research Forum.

[849] In fact, 19 responses were received; however, one survey was only partially completed and the responder reported that they had not conducted any mediations using a cooling off period. Consequently, all of the responses from this nineteenth survey were not included in the results.

equivalent to a response rate of 68 per cent, which compares favourably to similar studies.[850]

Data Collection Methods

Once the mixed method approach had been adopted, a decision was made, based on the concept of inter-method mixing,[851] to use mixed questionnaires to survey both the mediation participants and the mediators. A mixed questionnaire includes both standardised closed-ended questions as well as open-ended (exploratory) questions, enabling both qualitative and quantitative data to be obtained.[852] The difference was that the mediation participants, who were the focus of the research, would be interviewed by telephone following a semi-structured script, whereas the mediators would be surveyed using a more standard mixed method online questionnaire.

Although it would have been possible to ask the planned questions of the mediation participants by survey without the need for an interview, there were a number of reasons this approach was rejected. First, written surveys posted or emailed to potential participants typically achieve low response rates.[853] Second, while the removal of all potential for bias was unlikely, it was considered that if a survey was provided to mediation participants shortly post-mediation, the main responders might be participants who had either had a very good or very bad experience during the mediation, skewing the outcomes.[854] Third, there was concern that responders would answer the closed questions, because they take less effort (generally requiring simply ticking a box), but would only provide limited written responses to more open-ended questions. This would mean that the research would not elicit responses to the 'why' questions. Such an

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[850] For example Swain's response rate of 48 per cent from tribunal members at the AAT and SSAT. See Swain (n 73) 89.

[851] A method of obtaining both quantitative and qualitative data through the creative use of a single method of data collection, in this case, a survey. Abbas Tashakkori, R Burke Johnson and Charles Teddlie, *Foundations of Mixed Methods Research: Integrating Quantitative and Qualitative Approaches in the Social and Behavioral Sciences* (Sage, 2020) 181.

[852] Ibid.

[853] For example, Burton (n 793) 73 says that: 'Questionnaires have notoriously low response rates, even when follow-up requests are sent. The obvious issue then becomes whether the responders are different in some way from those who did not respond'.

[854] Stevens H Clarke, Laura F Donnelly and Sara A Grove, *Court-Ordered Arbitration in North Carolina: An Evaluation of its Effects* (Institute of Government, The University of North Carolina at Chapel Hill, 1989) 18.

approach would not allow any deeper understanding of the reasons why the participants did what they did. Fourth, there were concerns that a written survey would limit the participants to only those with strong literacy skills and good English language skills. This final concern was forefront of mind given that the research addressed an access to justice initiative. Of particular concern was the fact identified in the literature that people who cannot afford a lawyer and are unrepresented in court are particularly likely to have limited literacy skills.[855] This concern is heightened for people from a non-English speaking background. Research that involved speaking directly to the participant in an interview format, rather than requiring written responses or completion of a survey, was preferred, as it was hoped it would improve the chance of the research reaching less literate participants as well as providing richer qualitative data.

The interview method meant that the only writing a potential participant was required to do was to sign the consent form agreeing to be contacted post-mediation. Admittedly, reading the consent form might also be problematic. However, this issue was mitigated by the fact that a VCAT staff member spoke directly to the person about the research and explained the project to them. The consent form signed by a potential participant allowed for the person to indicate if an interpreter was needed and, if so, what language assistance was required.

Literacy was not a major concern in relation to mediators. It was felt that their professional roles required high-level literacy skills.[856] Consequently, in the case of the mediators, it was decided that an interview would not be necessary to obtain the richer, qualitative responses to open questions.

Group One: Mediation Participants

There is a body of literature addressing satisfaction and other positive outcomes of mediation and other ADR processes in comparison to adversarial processes.[857] At the time

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[855] Giddings, Hunter and Banks (n 799) quote from ABS data in 2006, which found that 46 per cent of the Australian population were able to perform only basic or relatively simple prose-based literacy tasks. Only 1:3 reached the minimum literacy level required to meet the demands of everyday life and work in the emerging knowledge-based economy, while only 16 per cent had complex or high-level literacy skills.

[856] Mediators all came from professional backgrounds; they were required to have tertiary degrees, have completed a mediation course conducted in English and have conducted mediations in English.

[857] Boyle lists multiple examples of such studies. See Boyle (n 833) 39.

the research was being designed in 2014, there was no other research identified that assessed the use of cooling off periods in mediations. Consequently, there was no specific model to follow in relation to the design of the interviews. Instead, the semi-structured interview questions designed for this group drew strongly from the design of questionnaires by Rolph and Moller,[858] and Sourdin.[859] These researchers were chosen because their research had significant strengths in the evaluation of ADR programs. There has been more research done in relation to cooling off periods in consumer contract scenarios.[860] Much of that research came from the perspective of behavioural psychologists who observed behaviour but did not necessarily ask participants to explain the reasons for their behaviour. However, in 2014, Sparks, while noting that there was 'limited research which investigates how consumers react to, and use, consumer protection laws to withdraw from sales transactions', undertook a small study involving a qualitative, semi-structured interview-based approach similar to the approach taken in this research in relation to mediation participants.[861]

A script was developed for the interviews that included both closed questions and open-ended questions. The closed questions were to enable the collection of general statistical data. The open-ended questions allowed for participant comments and reflections. While the plan was for interviews to follow a similar structure, it was also decided that the script should be seen as a guide for the interview rather than something that had to be strictly followed. This was because the research was designed to allow for more than just the obtaining of statistical data but was intended to elicit the reasons people did what they did or felt what they felt. Additional questions were to be asked if a response warranted it. Responses could also be probed. This provided an opportunity to gather more nuanced and detailed data, adding depth to the research.

All 47 interviews were recorded. Some were recorded by taking contemporaneous handwritten notes on a copy of the interview script, which allowed for generous notes to

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[858] Rolph and Moller (n 797).

[859] Sourdin and Matruglio (n 118); Sourdin, 'Dispute Resolution Processes', (n 834).

[860] See, eg, Jan M Smits, 'Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind' (2010) 29 *Penn State International Law Review* 671; Harrison (n 552); Harrison et al (n 606); Atwell (n 550).

[861] Sparks et al (n 547).

be taken as well as boxes to be ticked for quantitative responses to assist in ensuring data accuracy. In addition, in these circumstances, mediation participants were told that handwritten notes were being taken and, at times, asked to wait while notes were completed before the next question was asked. In such cases, as soon as possible following the interview, handwritten notes were then typed to create an interview record. Other interviews were recorded using a sound-recording device. These interviews were transcribed from the recording.[862]

Group Two: VCAT Panel Mediators

A review of work by other researchers indicated two potential concerns in relying on a survey to obtain data: low response rates, and limited involvement of parties with low or no literacy or with limited or no English language skills.[863] In relation to a potential low response rate, it was anticipated that the response rate would be as high as 60 per cent. Swain, who used a much more detailed questionnaire, had a response rate of 46 per cent of tribunal members from the Mental Health Review Board and the Social Security Appeals Tribunal.[864] It was thought that this research project's survey, being considerably shorter and requiring less detailed answers, might get a higher response rate. It was also hypothesised that mediators asked to complete a survey directly related to their work, sent to them by their employer and supported by the organisation employing them would be more likely to complete it than the average person emailed a survey link, thereby giving higher response rates than might be otherwise expected.

A survey rather than an interview was seen as a less invasive manner of getting a snapshot of mediators' opinions. As mediators were busy, it was anticipated that a straightforward survey that could be completed in their own time was more likely to get responses than interviews, which would take more time.

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[862] The reason for the different approaches was that some participants were not available when they were initially called and they called back at times when recording was not possible. Given the difficulty in getting people to participate in interviews, it was deemed better to do the interviews, even when the equipment to record them was not available. I carried copies of the interview script with prompts around with me to ask questions and make handwritten notes to ensure I was able to get as full a record of each interview as possible. Ultimately, 25 interviews were sound recorded and transcribed and 22 interviews were recorded using handwritten notes.

[863] Giddings, Hunter and Banks (n 799); Swain (n 73).

[864] Swain (n 73) 89.

Qualtrics Software

Data from both the recorded and non-recorded interviews was inputted into Qualtrics survey software. Qualtrics offers a cloud-based subscription software platform for experience management[865] and allows for the design of advanced surveys, including piping of text, graphics and experimental treatments, simple branching and compound branching logic, looping and piping of answers, question and treatment blocks, quota fulfilment, randomisation of answer choices, questions and treatment blocks, and alternative questionnaire forms.[866] Prior to the interview with the mediation participants, a survey had been prepared in Qualtrics using the semi-structured interview questions. Both quantitative and qualitative responses were able to be recorded. Links sent to the mediators led directly to the Qualtrics software program, which meant that the data did not need to be entered, as the responses were recorded automatically.

Reports based on both groups of participants were generated and analysed. The results were also imported to Excel for tabulation and further interrogation using thematic analysis—looking for common themes among verbatim responses. Pivot tables enabled the comparison of multiple categories. Most data in this research have been reported using descriptive statistics, such as percentages. It was felt that it was not appropriate to conduct statistical analyses due to the small sample sizes of both data sets, but particularly the mediator survey.[867]

Questions Asked

Group One: Mediation Participants

The interview questions were divided into four parts.[868] The first part of the semi-structured interview questions asked administrative questions about the mediation such as what type of dispute it was, whether the person was the applicant or the respondent, whether they or the other party were represented or not, and whether they had any prior

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[865] Qualtrics, [Home Page] (Web Page) <https://www.qualtrics.com>.

[866] Scott M Smith and Gerald S Albaum, *An Introduction to Marketing Research* (2010) 153.

[867] While the estimated response rate of completion of the surveys by mediators was high, at 68 per cent, the overall number of responses was only 18.

[868] A copy of the script is at Appendix 5
Semi-Structured Interview Questions for Mediation Participants.

mediation experience. Participants are also asked to provide a summary of how the dispute came to be at VCAT. This question was designed to get the participant in a storytelling mode and to limit the question–answer format.

The second section of the interview questions asked about the outcome of the mediation and satisfaction with the outcome. Participants were asked about their sense of control during the mediation, including whether they felt pressured to settle. The third part asked specifically about the cooling off period and included questions about whether the person understood what the cooling off period meant, how they were told about it, whether they actually spoke to anyone (and to whom) about the outcome of the mediation, and whether they decided to withdraw from the agreement and why or why not. Those participants who reported not being offered a cooling off period (usually because the matter did not settle although occasionally for no obvious reason) were provided with an explanation of what a cooling off period was and asked if they thought having a cooling off period would have made any difference to their mediation experience. In the final part of the interview, participants were asked a number of questions designed to obtain demographic information. Participants were reminded that there was no obligation to answer these questions but if they chose to do so, that any information used in the research would be de-identified.

Group Two: Mediators

The mediator survey questionnaire design asked questions that allowed for a yes or no response or one of a series of responses (quantitative responses), followed up by a question seeking further information (allowing for qualitative data to be obtained).[869] Minimal demographic data was sought from the mediators because it was not relevant to the research questions. The only questions of that kind related to the length of time the person had been a mediator and how long they had been at VCAT as a mediator. These questions aimed to explore if there was any difference between experienced and less experienced mediators in their views of a cooling off period. Some consideration was given to asking about their professional background (eg law, social work, building surveyor etc) but, ultimately, it was not included because all panel mediators were required to be

[869] A copy of the mediator survey is at Appendix 7
Mediator Survey.

accredited under the National Mediation Accreditation Scheme. What was deemed important was their views in their role as mediator, regardless of any other professional background.

Rolph and Moller, in their User's Guide to Evaluating ADR Programs,[870] recommend that, when conducting an evaluation of an ADR program, the researcher should ask some key questions including '[i]s the program accomplishing the goals set for it?' and 'how can the program's performance be improved?' Although this research provides some answers to specific research questions around the benefit of the cooling off period to unrepresented mediation participants, it does not pretend to be an extensive and thorough evaluation of VCAT's cooling off period project. This would have required performing a cost-benefit analysis and, ideally, comparing the initiative to an alternative model.[871] Nonetheless, some data collected provided commentary on possible improvements to the program.

As set out above, there is minimal information in VCAT literature about the goals or aims associated with the initial establishment of the cooling off period. Consequently, it was felt that a necessary component of this research was determining whether the key players in the implementation of the program, the mediators themselves, knew why they were required to offer a cooling off period. As a result, while the introductory material provided to the mediators with the survey link gave some details of the research, no statement about the purpose of the cooling off period was provided (in contrast to the information provided to participants). This was to ensure that none of the material provided suggested a response to the question about why the mediator thought the cooling off period had been introduced. A working hypothesis was that if a mediator was aware that VCAT had introduced the cooling off period for access to justice reasons, the mediator might be more positive about the use of the cooling off period, and this would be demonstrated in their answers to other parts of the survey.

Rolph and Moller also stressed the need to look at the implementation characteristics of the program.[872] Their reasoning was that if a program fails to achieve its goals, the researcher should be able to work out whether the failure stemmed from a weakness in

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[870] Rolph and Moller (n 797).

[871] Ibid.

[872] Ibid.

the design of the program itself or if there had been some failure to implement it effectively.[873] Some examples of implementation characteristics they provide are training of staff and eligibility requirements. This was also discussed by Clarke, Ellen and McCormick.[874] Such characteristics were not important to answer the research questions, but it was important to ensure that mediators were informing participants about their rights under a cooling off period. For the cooling off period to be effective for one of its stated aims—reducing pressure during the mediation—participants needed to be aware of it from the beginning of the mediation. Finding out about the cooling off period at the time a settlement was reached might still enable the participant to seek advice on the outcome but could not assist the participant by reducing any pressure on them to settle throughout the mediation. For that reason, mediators and participants were asked about what information was given or received about the cooling off period prior to or during the mediation.

Rolph and Moller identified that conducting an evaluation too early in the process of a pilot program could produce inaccurate results, as it could pick up on issues that would be resolved as part of the settling-in period of the program.[875] Positively, in this case, the cooling off period had been in place for over five years at the time the field research began and, as a result, the maturity of the program was not likely to be an issue.

The questions asked of mediators were themed around:

1. how and when the mediator provided information to the mediation participants about their rights to a cooling off period and whether the mediator felt those methods were adequate
2. whether the availability of a cooling off period in a mediation increased the chance of settlement or affected the mood or style of the mediation or had any other benefits or disadvantages

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[873] Ibid.

[874] Stevens H Clarke, Elizabeth D Ellen and Kelly A McCormick, *Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of its Effects* (Institute of Government, University of North Carolina at Chapel Hill Chapel Hill, 1995).

[875] Rolph and Moller (n 797).

3. whether the limitations on the use of the cooling off period in mediations at VCAT were good, bad or otherwise
4. why the cooling off period was introduced.

Constraints and Limitations on the Research Design

It is acknowledged that the methods used for this research mean that there are limitations to the results. There were constraints upon the way in which the research could be conducted that affected decisions about the design of the final method. These are set out below. Nonetheless, even with these constraints and limitations, there is value in the data collected for 'it remains possible for researchers to contribute to a deeper understanding of social organisations even where they are forced to conduct their research under considerable constraints'.[876]

Control Group

Theoretically, the research could have involved either a before and after design or a true control group.[877] However, the cooling off period initiative had already been in place for five years at the time the research began, so it was not possible to design research using this comparative method. In addition, in the context of a busy functioning tribunal where procedures needed to be consistent and smooth, it was not possible to have some participants mediate with a cooling off period and some without. Such an approach may also have raised ethical concerns.[878]

Defined and Justified Sample

Literature on methodology design recommends that, whenever possible, randomisation be used to select the sample rather than a sample of convenience.[879] It is also recommended that the sample be as large as possible because the larger the sample, the

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[876] Michael McConville, 'Development of Empirical Techniques and Theory' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 207, 214.

[877] See, eg, Clarke, Donnelly and Grove (n 854).

[878] Ross F Conner, 'Ethical Issues in the Use of Control Groups' (1980) 7 *New Directions for Program Evaluation* 63.

[879] Dean G Pruitt, 'Commentary 1' (2012) 5(4) *Negotiation and Conflict Management Research* 384, 388.

more likely the research is to be representative of the entire population group, rather than being skewed by outliers.[880]

The size of the mediator group was fixed by the number of panel mediators employed by VCAT to perform the mediations relevant to the study. This was a relatively small group of people. All of them were approached to participate in the research. While there was a high response rate to the survey, it remained a small overall number.

In relation to mediation participants, the restrictions placed on obtaining participants was that the individual had to have a mediation at VCAT using a panel mediator within a specific time frame (11 March 2015 – 11 March 2016). It was initially anticipated that all those people, whether they had legal representation or not, would be asked to participate. However, in the implementation of the project, only those who indicated that they would attend the mediation without legal representation were asked to participate. This was because contact with unrepresented participants was part of VCAT's process in the lead up to a mediation and it was easy for them to identify such people to participate in the research.

It was recognised in the design that:

- People who were not approached directly were less likely to engage in the research process.
- People who were further away in time from the day of the mediation were less likely to engage.[881]
- People who had a complaint about the process or who were unhappy with the outcome and, conversely, those who had had a big 'win' were more likely to respond.[882]

The method used meant that VCAT staff obtained an individual's consent to being contacted by the researcher by speaking directly to them. This contact was made shortly

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[880] Rolph and Moller (n 797).

[881] Clarke, Donnelly and Grove (n 854) 18. She ensured that participants and attorneys were interviewed six to eight months after disposition of the cases they were asked about. The waiting period was said to be short enough so that the experience would still be fresh in the respondents' minds but not sooner than six months after the disposition of the case, lest the respondents emotions about the outcome distort their appraisal of the process.

[882] Ibid.

prior to them participating in the mediation. This reduced the risks outlined above. It is impossible to know whether the potential participants who initially indicated that they would participate but who ultimately were either uncontactable or, when telephoned, no longer wanted to participate[883] were of a particular type (eg those that were particularly unsatisfied). However, as can be seen in the following chapter, the results indicate that there was a mix of participants involved in the research from highly satisfied to highly dissatisfied.

The 69 people who initially signed consent forms allowing the researcher to contact them cannot be assumed to be the totality of unrepresented people eligible to participate in the research. As the project progressed, it became obvious that the numbers of potential participants consenting to being contacted was lower than anticipated. For example, the 2009–10 VCAT Annual Report indicated that, in that financial year, 222 people had participated in mediations involving a cooling off period.[884] VCAT staff involved in the identification of potential participants were unable to state how many potential participants were asked if they were willing to participate but declined to be contacted. VCAT staff also noted that not all unrepresented parties were able to be contacted by VCAT prior to a mediation commencing and, therefore, that some would not have been told about the research. However, VCAT's verbal and anecdotal advice was that these numbers were relatively small in the context of the total number of mediations during the 12-month research period.

Consequently, there are multiple reasons why the numbers consenting to participate in the research were lower than originally anticipated. Those reasons include:

- fewer mediations occurred during the timeframe of the research than in the 2009–10 financial year[885]
- potential participants did not mention that they were planning to attend the mediation unrepresented and so were not identified by VCAT staff

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[883] As the results chapter sets out, out of 69 signed consent forms, nine people were uncontactable and eight were 'too busy' to participate when they were contacted. This represented 25 per cent of the total.

[884] VCAT Annual Report 2009–10 (n 12) 22.

[885] To recap, the limits of the research were that there needed to be a cooling off period offered. VCAT only offered a cooling off period as part of this pilot project, which involved mediations conducted by panel mediators (not VCAT members) and where one party identified as attending the mediation unrepresented.

- issues with the process of recruiting potential participants by VCAT staff (eg not all staff knew about the research)
- potential participants did not agree to being part of the research.

While conducting the interviews, it became clear that, in at least one case, separate interviews were conducted with two applicants in the same matter, and, in at least one case, both the applicant and the respondent in the one dispute were interviewed. There may have been other cases where this occurred, although none were identified. It is not thought that this impacted on the results in any way, particularly the second scenario; however, it is worth noting as having a possible impact on the results.

Satisfaction with Mediation

VCAT had its own process in place for surveying participants about their mediation experience. As a result, VCAT were concerned about duplication of process if participants in this research were asked the same or similar questions. Nonetheless, it was felt that asking participants about satisfaction with the process would have an overriding benefit in obtaining valuable data in the context of this study.

Several options were canvassed, including incorporating VCAT's standard questions in the surveys associated with this research and sharing the data or accessing the data from the standard surveys from VCAT databases to minimise duplication. However, these options were rejected in the interests of closer management of the process and separation of data. Ultimately, a compromise position was reached: some questions would be asked about mediation satisfaction but these questions would be limited. The questions included were based on studies by Rolph and Moller, who recommended using objective questions to quantify what is an inherently qualitative measure.[886] The answers were able to be enlarged upon because of the methodology of a semi-structured interview.

Limited Variability in Types of Disputes

When VCAT launched the cooling off period in June 2009, it did so with restrictions on the mediations to which it would apply. The established parameters were that a cooling off period would only be offered in mediations where one or both of the parties were

[886] Rolph and Moller (n 797).

unrepresented and where the mediator was a panel mediator.[887] These constraints meant that the types of mediated disputes in which the cooling off period was offered were relatively limited. Based on both participant and mediator reports, the results demonstrated that the majority of mediations in which the cooling off period was offered were domestic building type cases within VCAT's Building and Property List, with occasional cases in the Human Rights List and the Owners' Corporation List.[888]

The majority of disputes (87 per cent, being 41 out of 47 matters) were dealt with by the Building and Property List of VCAT. Of the remaining six, three were from the Human Rights List (6 per cent), and one each came from the Civil Claims List, the Planning and Environment List and 'other' (see Table 2).[889] This categorisation was based solely on information provided by interviewees and was not able to be checked for accuracy; however, there is no reason to doubt the interviewees' reports.

Table 2: VCAT list in which the mediated dispute was filed

VCAT List	Number of mediation participants	Percentage
Building and Property List	41	87.2%
Civil Claims List	1	2.1%
Human Rights List	3	6.4%
Planning and Environment List	1	2.1%
Other	1	2.1%
Total	47	100%

Mediators were asked about the types of disputes in which the mediation had a cooling off period. They reported mediations occurred in four of VCAT's lists with the majority in the Building and Property List. Other lists were the Owners' Corporation List, Human Rights List and Civil Claims List (Table 3). These responses were generally consistent with

[887] Based on mediation participants' reports. The reasons for this distinction were never clarified.

[888] For a full list of VCAT's divisions and practice lists, see VCAT, 'Our Structure' (Web Page) <https://www.vcat.vic.gov.au/about-vcat/our-structure>. At the time of writing, there were five divisions and 11 lists. However, at the time of the research, there had been four divisions and nine lists. See Victorian Civil and Administrative Tribunal, 'VCAT 2014–15 Annual Report' (2015) 4; Victorian Civil and Administrative Tribunal, 'VCAT 2015–16 Annual Report' (2016), 5.

[889] This was recorded in the data as 'other' because the interviewee was unsure of which list it was in. However, the description of the dispute by the interviewee made it likely that this was a dispute from the Retail Tenancy List or the Building and Property List, as it involved the tenant of a retail premises initiating action against the owners for plumbing problems.

the types of disputes reported by the participants interviewed as part of the research, although no mediation participant interviewed had a matter in the Owners Corporations List.[890]

Table 3: VCAT lists in which mediators reported conducting mediations with a cooling off period

VCAT List	Number of mediations	Percentage
Building and Property List	17[891]	55%
Owners Corporation List	5	16%
Human Rights List	7	23%
Civil Claims List	2	6%

It is recognised that the variability of type of disputes was limited, and this may mean that the outcomes are not able to be generalised to mediations in other jurisdictions within VCAT or elsewhere.[892]

Limited Geographical Spread

Eleven of the 47 interviewees lived in rural or regional locations; however, they all had their mediations run through the main metropolitan head office of VCAT in Melbourne and attended their mediations in Melbourne. In the early stages of developing the research, it was envisaged that the research might be able to investigate differences between mediations that occurred outside Melbourne compared to those in Melbourne. Research shows that is not uncommon for people in rural and regional areas to have less access to justice initiatives than their metropolitan counterparts.[893] It quickly became

[890] See Table 2.

[891] One response was recorded as 'real property'; however, in the relevant time period, the real property matters were classified under the Building and Property List. See Victorian Civil and Administrative Tribunal, 'VCAT 2014–15 Annual Report' (n 888) 4.

[892] VCAT's jurisdiction is considerable. Over 87,000 cases were finalised in the 2015–16 financial year. The busiest part of VCAT was the Residential Tenancies List with over 60,000 cases. A further 10,000 were in the Guardianship List. The remaining cases were spread across Building and Property, Owners Corporation, Civil Claims, Human Rights, Planning and Environment, Review and Regulation, and Legal Practice. Victorian Civil and Administrative Tribunal, 'VCAT 2014–15 Annual Report' (n 888) 5.

[893] Parliament of Victoria, 'Review of Legal Services in Rural & Regional Victoria' (2001) (Web Page) <https://www.parliament.vic.gov.au/publications/fact-sheets/314-lawreform/review-of-legal-services-in-rural-and-regional-victoria>; Morry Bailes, 'Access to Justice in RRR Australia' Symposium of Constitutional Law, Malaysia (11 January 2018). Schetzer, Mullins and Buonamano (n 111). There are many more sources.

apparent that the cooling off period was rarely used by VCAT in its regional locations, mainly because tribunal members rather than panel mediators worked in those locations.[894] Where relevant, and despite the small numbers, the experiences of the 11 interviewees from rural and regional locations has been compared to the interviewees residing in metropolitan locations. Nonetheless, there is considerable scope for further work in this area.

Lack of Access to VCAT Databases for Privacy, Practical and Cost Reasons

When the methodology for this research was in the development phase, consideration was given to, and discussions were held with VCAT about, whether access could be provided to VCAT's databases about the specific mediations (with the mediation participant's consent). The rationale for inclusion of this in the research design was twofold. First, some information would be able to be obtained without having to ask the individual participant, reducing the time taken for the interview and the potential imposition on the participant's time. Second, in terms of terminology and familiarity with legal concepts, the information was more likely to be accurate if it came from VCAT itself, rather than from the mediation participant. This information included the VCAT list for the participant's case, the legal characterisation of the dispute and whether the participant was represented. Given that participants can be very unfamiliar with processes like a tribunal mediation, and there can be a variety of people involved including support people, lawyers and non-legal representatives (eg building experts), combined with the fact that participants are often anxious or stressed by the process, it was anticipated that some participants might not be fully aware of the role of all the people in the mediation itself.

In addition, my own experiences as a solicitor, practising in rural and regional Victoria and Western Australia, was consistent with this. For example, there was never a drug court in any of the locations I worked in, nor was it possible to apply for a client to be granted a home detention order in regional areas, as they only operated in metropolitan locations.

[894] This is not meant to disparage VCAT. As a result of the *One VCAT* report, they did make some significant attempts to improve access to justice in regional areas by, for example, locating a VCAT registrar at outer suburban and country courts (eg in Bendigo). However, just like their criminal justice colleagues, practical and economic restrictions, as well as the absence of purpose built VCAT buildings in rural and regional areas, meant that many initiatives were not routinely implemented in rural and regional Victoria.

For several reasons, it was not possible to access VCAT's databases. VCAT itself expressed reservations, as providing access would involve either significant time from one or more staff members to extract the relevant information, or, alternatively, would involve giving the researcher access to confidential information. There were also concerns about costs. Just prior to the time the research took place, VCAT had significantly increased the cost for the public to access files and they were uncertain if that cost could be waived in the case of this research.[895] If the cost was not waived, the process would be unaffordable. In addition, it was anticipated that university ethics approval would be more difficult to obtain if the research involved accessing data held by VCAT, even with the individual's consent.[896] As it was, the ethics approval process was exacting and time consuming.

Profile Data of Participants and Disputes

As alluded to at the beginning of this chapter, some profile and demographic data about the mediation participants and mediators is discussed in this chapter, rather than in the results chapter, to provide a general overview of the participants before their responses are discussed in more detail. This will facilitate understanding of the scope of the study in advance of the discussion of the research questions.

Demographic Information—Mediation Participants

As set out above, 47 telephone interviews were conducted with mediation participants. At the conclusion of the body of the interviews, participants were asked questions that enabled the collection of demographic information. This information was collected for two reasons: first, to give a general overview of the participants and, second, to ascertain whether any characteristics impacted on responses. The demographic data are set out in Tables 4–14 and additional comment is added where relevant. Analysis of some of the thematic results in the context of these demographics is covered in the following chapter.

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[895] At the time of writing, the fee for a non-party to view a file is $120. See VCAT, 'View a VCAT File' (Web Page) <https://www.vcat.vic.gov.au/the-vcat-process/privacy-and-access-to-information/view-a-vcat-file>.

[896] It is recognised among socio-legal researchers that access to research subjects has become progressively more difficult. See, eg, Blandy (n 842), 172; Caroline Hunter, Judy Nixon and Sarah Blandy, 'Researching the Judiciary: Exploring the Invisible in Judicial Decision Making' (2008) 35(1) *Journal of Law and Society* 76; Michael S Mopas and Sarah Turnbull, 'Negotiating a Way in: A Special Collection of Essays on Accessing Information and Socio-legal Research' (2011) 26(3) *Canadian Journal of Law and Society* 585.

Gender

Approximately two-thirds of the participants interviewed were male (68 per cent).

Table 4: Gender of mediation participants

Gender[897]	Number of participants	Percentage
Female	15	31.9%
Male	32	68.1%
Total	47	100%

Age

The participants were older rather than younger. Nearly 80 per cent of participants were over the age of 40. Slightly more participants were aged between 51 and 65 than aged between 41 and 50 (41 per cent compared to 37 per cent). One participant chose not to answer this question.

Table 5: Age of mediation participants

Age	Number of participants	Percentage
18–30	3	6.5%
31–40	4	8.7%
41–50	17	37.0%
51–65	19	41.3%
Over 65	3	6.5%
Total	46	

Given that the majority of the disputes were in the domestic building list of VCAT (see Tables 2 and 3 above), it is perhaps not surprising that the participants were in the 41–65 age bracket, as these disputes involve the building or renovating of a residential home, either as a builder or as the home owner.[898] As a general rule, younger people tend not to

[897] Participants were asked their gender. No responses were received other than binary genders.

[898] VCAT describes disputes in this list as 'Domestic or commercial building disputes between a property owner, builder, sub-contractor, architect, engineer or other building practitioner—or any combination of these. Disputes between a property owner and a warranty insurer'. See VCAT, 'Building and Construction Disputes' (Web Page) <https://www.vcat.vic.gov.au/case-types/building-and-construction>. VCAT's 2011–12 Annual Report described the list as having 'unlimited jurisdiction to hear and determine disputes relating to domestic buildings, ranging from small projects, such as bathroom and kitchen renovations, to disputes concerning high-rise apartment blocks. The List also hears applications for review of decisions by warranty insurers in relation to domestic building contracts.' Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2011–2012' (2012) 27.

be in a financial position to build their own home or own their home; equally, perhaps, those post-retirement age are also less likely to be building or renovating.

Given the low number of people under 40 years old, when analysis occurred based on age, a split was made between two groups: 50 and younger and over 50s (Table 6).

Table 6: Age of mediation participants split as under and over 50 years of age

	Number of participants	Percentage
50 and under	24	52%
Over 50	22	48%

Geography

Most of the mediation participants (77 per cent) resided within the Melbourne metropolitan area, with slightly more living in inner Melbourne[899] than in outer Melbourne (Table 7).

Table 7: Mediation participants' residence location

Region	Number of participants	Percentage
Inner Melb (zone 1)	20	42.6%
Outer metro	16	34.0%
Regional centre	3	6.4%
Smaller regional city	4	8.5%
Rural location	4	8.5%
Total	47	

Given that all the intakes for the interviews occurred at VCAT's main Melbourne central business district location, the high number of participants coming from the Melbourne metro region is not surprising. The furthest that any mediation participant lived from Melbourne was approximately three hours' drive.

Again, given the low overall numbers, analysis of the results took place using a Melbourne/non-Melbourne split (Table 8).

[899] Defined as Zone 1 on the Melbourne public transport network.

Table 8: Mediation participants' residence location as Melbourne/non-Melbourne split

Location	Number of participants	Percentage
Melbourne	36	77%
Non-Melbourne	11	23%

Aboriginal or Torres Strait Islander Identity

Only one participant identified as being an Aboriginal or Torres Strait Islander (Table 9).

Table 9: ATSI status of mediation participants

ATSI Status	Number of participants	Percentage
Not ATSI	46	97.9%
ATSI	1	2.1%
Total	47	

Given the low number of ATSI interviewees, no additional analysis was done on this data set.

English Language Skills

Most of the participants (85 per cent) were native English language speakers. Only 15 per cent, or seven participants, reported that they spoke a language other than English at home (Table 10).

Table 10: Main language spoken at home by mediation participants

Language spoken at home	Number of participants	Percentage
English	40	85.1%
Language other than English	7	14.9%
Total	47	

All the participants, even those who were not native English speakers, had very good English language skills. Despite the fact that nearly 15 per cent of the interviewees spoke a language other than English at home, only one requested the use of an interpreter for the purpose of the interview. In addition, all the participants who reported speaking a language other than English at home, including the one who used an interpreter for the interview, described their English language skills as either excellent or very good on a four-point sliding scale. Participants were not asked what language they spoke at home, but a

number volunteered it, and those languages were Hindi, Fijian, Greek, German and Persian/Farsi.

Table 11: English language rating of NESB mediation participants

English language skills (self assessment))	Number of mediation participants from Non-English speaking backgrounds	Percentage
Excellent (native speaker or equivalent)	4	57%
Very good	3	43%
Total	7	

Although only supposition, the low number of people with poor English language skills may be because:

- As the intake process for the study allowed people to consent or not consent to being contacted, those who would have required an interpreter to participate may have been more inclined not to consent to be contacted to participate in the study in the first place.
- People with poorer English skills may be less litigious because they do not want to be caught up in the legal system in a foreign language.[900]
- Many of the interviewees were builders. It is assumed that a reasonable level of English language skill is required to operate a building business in Victoria.

Highest Level of Education

Forty-two per cent of interviewees had an undergraduate degree or higher. An additional 24 per cent had TAFE qualifications. Thirty-one per cent had no further qualifications than secondary school, with three individuals (7 per cent) reporting going no further in school than Year 10. One person chose not to answer this question (Table 12).

[900] There is considerable literature on the difficulties of accessing justice for people from cultural and linguistically diverse backgrounds. See, eg, in Australia, Schetzer, Buanamano and Mullins (n 22) 10. Boyarin (n 544) mentions the inaccessibility of the court system to non-English speakers in the US.

Table 12: Mediation participants' level of education

Highest level of education	Number of participants	Percentage
Year 10 or lower	3	6.5%
Year 11 or Year 12	11	23.9%
TAFE qualifications (diploma)	11	23.9%
University undergraduate or post graduate	20	43.5%
Other[901]	1	2.2%
Total	46	100.0%

Analysis based on education was performed based on a two-level split between those with a University education and those without a university education.

Gross Household Income Level

The majority of participants (42 per cent) had a household income level of more than $100,000 (Table 13). Four people chose not to answer the question. Two people were not asked this question as they appeared at the mediation as representatives of businesses. One of these was a property manager who was attending the mediation on behalf of the property owner. The second was a general manager of a very large building company, representing the company. In neither case did the individual's income level have any relevance to the reason the question was asked.

Table 13: Gross household income of mediation participants

Estimated household income	Number of participants	Percentage
Nil–$20,000	5	12.1%
$20,001–$40,000	1	2.4%
$40,001–$60,000	7	17%
$60,001–$80,000	5	12.1%
$80,001–$100,000	4	9.7%
More than $100,000	19	46.3%
Total responses	41	

In the original design of the semi-structured interview questions, there was a question about the individual's income level. However, as part of the ethics approval process, the question was amended to reflect the household income level. On reflection, there should

[901] The one person recording in the 'other' category was an individual who was a Churchill scholar.

have been more income brackets available after the $80,000–$100,000 bracket, as a considerable proportion of interviewees (43 per cent) stated that their joint household income was more than $100,000. With the benefit of hindsight, this would not be uncommon for dual income families given that the median household income in Australia in 2016 was just over $90,000.[902]

In addition, the information intuitively feels unreliable for a number of reasons, including the fact that many responses answered quickly and without much thought. Some interviewees may have under or overestimated the amounts or used a figure that was based on their own income rather than their household income. For example, five people stated that they earned between Nil and $20,000 as their total gross household income. At least some of these reported during earlier parts of the interview that they were on the pension and were a couple. A pension for each individual in a couple as at 20 September 2015 was $15,451.80 per person[903] and therefore over $30,000 for the household. Even an individual pension was $20,498.40.[904] Therefore, the information collected for this question around gross household income is somewhat unreliable and comparisons have only been done based on two income groups: those reporting a gross household income of over $100,000, and those reporting a gross household income of under $100,000 (Table 14). This unreliability is unlikely to have affected any other demographic data because other questions were more general in nature.

Table 14: Gross household income of mediation participants split as over and under $100,000

Income groups	Number of participants	Percentage
Gross household income over $100,000	22	54%
Gross household income under $100,000	19	46%
Total who answered question	41	

[902] Australian Bureau of Statistics, '2016 Census QuickStats' (2017) (Web Page) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036>.

[903] Australian Government, '5.2.2.10 Maximum Basic Rates of Pension—July 1909 to Present Date: Summary' (2021) (Web Page) <https://guides.dss.gov.au/guide-social-security-law/5/2/2/10>.

[904] Ibid.

Applicants or Respondents?

Approximately two-thirds of the mediation participants interviewed were applicants (the party that had initiated the VCAT case), while approximately one-third were respondents (Table 15).

Table 15: Breakdown of applicants and respondents

	Number of participants	Percentage
Applicants	32	68.1%
Respondents	15	31.9%

Building Disputes—Builders or Homeowners?

As set out above in the constraints and limitations section, in 41 out of the 47 interviews (87 per cent), the participant reported that their dispute was in the Building and Property List of VCAT. Some additional analysis of these cases was done. Of the cases in the Building and Property List, the majority of the interviewees were builders or homeowners (62 per cent). While the remaining interviewees' cases were still considered building disputes, they did not fit as neatly into the category of builder versus home owner or vice versa. Some examples of these types of disputes are a home owner against a neighbouring property owner with drainage issues, a tenant of a commercial property in dispute with the landlord about the building, a home owner against the builder's insurer, a home owner and a kitchen joiner. The 'other' category includes the non-building disputes as well as the building list cases that did not fit neatly (Table 16).

Table 16: Breakdown of builders and homeowners

	Number of participants	Percentage
Builder spoken to, other party homeowner	11	23.4%
Homeowner spoken to, other party builder	18	38.3%
Builder spoken to, other party subcontractor	2	4.3%
Other	16	34.0%
Total	47	100.0%

All the builders interviewed (whether as respondents or applicants) were the owners of the businesses with one exception. In that case, the interviewee held a senior executive-level role in a very large residential building company and was representing the company.

A small number of cases involved a person acting on behalf of the owner. For example, in one case, the interviewee was a property manager who was representing the owner at the mediation.

Mediator Experience

One final piece of demographic information obtained from the research was about the experience of the mediators. The 18 mediators had varying levels of experience as mediators, but most generally had significant experience. The least experienced mediator still reported three years of mediator experience, and there were two mediators who reported more than 30 years of mediator experience (Table 17).

Table 17: Mediator experience

Years of experience as a mediator	Number of mediators
Less than 10	3
Between 10 and 19	5
Between 20 and 29	8
More than 30	2

The mediators' years of experience at VCAT also tended to more experience than less, and the mediators were also evenly spread from less than two years' experience at VCAT to more than 15 years at VCAT (Table 18).

Table 18: Mediators' years at VCAT

Years at VCAT as a mediator	Number of mediators
Less than 2 years	4
2–6 years	4
7–15 years	3
More than 15 years	7

All 18 mediators had conducted a mediation with a cooling off period in the last 12 months, with seven conducting between one and five mediations, three conducting between six and 10 mediations, and four each conducting between 11 and 20 mediations, and more than 20 mediations over the preceding 12-month period (Table 19).

Table 19: Number of mediations with a cooling off period conducted per mediator in the preceding 12 months

Number of mediations per mediator with a cooling off period	Number of mediators
None	0
1–5	7
6–10	3
11–20	4
More than 20	4
Total responses	18

Conclusion

This chapter detailed the reasoning behind the design of this research. It outlined the background to the project and the specific research questions settled upon. It also described the methods used for data collection and analysis, and discussed the constraints and limitations on the research. Finally, general profile and demographic data obtained from the research were provided to give the reader a summary of the participants before the results are discussed in the following chapter.

CHAPTER 6
RESULTS, DISCUSSION AND FINDINGS

Introduction

As discussed in the previous chapter, this thesis examines whether participants who were unrepresented and mediating in a situation in which they were offered a cooling off period experienced the hypothesised benefits of such a period. The five key research questions are:

Research Question 1 Were unrepresented mediation participants adequately made aware of their rights to a cooling off period before or during their mediation?

Research Question 2 Do unrepresented mediation participants in a mediation with a cooling off period use that time after reaching a settlement to obtain advice (professional or otherwise) about the settlement agreement they reached; and if so, from whom, and if not, why not?

Research Question 3 Do unrepresented mediation participants withdraw from mediated agreements during the cooling off period if they are unhappy with the outcomes after reaching a settlement agreement at mediation, and if not, why not?

Research Question 4 Do unrepresented mediation participants feel pressured during a mediation to come to a settlement agreement and, if so, does the provision of a cooling off period do anything to alleviate that pressure?

Research Question 5 How do mediators feel about the impact of the cooling off period on mediations they facilitated and why?

This chapter addresses each of the research questions in turn, detailing the relevant data from both the mediation participants' interviews and the mediators' surveys. The data for question one, which answers whether participants knew about their cooling off period rights, sets the scene for the results of the remaining research questions, which are dealt with chronologically as set out above. For each research question, a brief discussion about the findings follows the data, drawing in relevant material from Chapters 2, 3 and 4.

Where there is a significant variation in participant responses to selected questions based on demographics factors, these are pointed out.[905] Conclusions, recommendations and areas for additional research are covered in the final chapter.

Research Question 1

Were unrepresented mediation participants adequately made aware of their rights to a cooling off period before or during their mediation?

Mediation participants were asked whether they were made aware of the cooling off period and how that occurred. Mediators were also asked how they informed mediation participants about the cooling off period.[906] There were dual reasons for this. First, as explained in Chapter 5, it was important to understand the process and practice of mediators—*how* mediators ensured mediation participants were informed about the cooling off period—and to obtain some insight into *when* mediators informed participants about their cooling off rights during the mediation. Mediation participants obviously cannot benefit from a cooling off period if they are unaware of its existence. Second, as discussed in Chapter 4, Sovern's research found that, in a consumer contract context providing only *written* notice of a cooling off period was of little or no value as consumers almost never rescinded the agreement, whereas providing both verbal and written information about the cooling off period increased the likelihood of consumers availing themselves of their rights.[907] Given the low numbers of mediation participants who rescinded their agreements both in this research and as set out in VCAT's data on the cooling off period,[908] establishing the methods used to notify mediation participants of their cooling off rights enables consideration of Sovern's findings in the context of mediation.

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[905] See Appendix 8 Demographic Data Analysis for a table of selected questions in which participant responses have been analysed against participant demographic characteristics. Because of the small numbers in each group, statistical significance testing has not been performed. Further information is available in Chapter 5.

[906] See question 6.2 in Appendix 5 Semi-Structured Interview Questions for Mediation Participants and question 5 in Appendix 7 Mediator Survey.

[907] See Chapter 4, Method of Notice.

[908] See below the section about Question 3 - How Many Mediation Participants Used the Cooling Off Period to Revoke Their Agreement?

How Was Information About the Cooling Off Period Provided?

All mediators reported that they provided information directly to the mediation participants about the cooling off period during the mediation and most provided it verbally.[909] The most common method of providing information about the cooling off period to mediation participants was verbally at the start of the mediation, with 17 out of the 18 mediators stating that they used at least this method. One mediator reported providing information about the cooling off period in all four methods available to them, seven provided it in three ways and six in two ways. One mediator reported not providing any information, in any form, at the beginning of the mediation, although that mediator did report providing information about the cooling off period both verbally and in writing at the end of the mediation (Table 20).[910]

Table 20: Mediators' advice on cooling off period

Advice on cooling off period	Number of mediators
By the mediator verbally at the start of the mediation	17
By the mediator verbally at the end of the mediation	9
In writing, provided by the mediator at the start of the mediation	7
In writing, provided by the mediator at the end of the mediation	9
Other method	2[911]

Table 21 shows that all except one of the mediators provided information to the mediation participants about the cooling off period during the mediation using more than one method, with most providing information using two or three different methods.

[909] Of the six options available in the survey, four included information provided by the mediator. Information about the cooling off period was also available on the VCAT website and in a form detailing the mediation process. The form was sent out by the registry prior to the mediation occurring. See Appendix 7 Mediator Survey.

[910] Mediator 16.

[911] One responder (Mediator 4) described the 'other method' as information provided to the parties by VCAT's mediation coordinator. The second mediator who ticked the 'other' category provided no explanation about this particular response despite the survey prompting an explanation.

Table 21: Number of procedures utilised by mediators to provide information to participants about the cooling off period

Number of procedures	Number of mediators
One	1
Two	8
Three	8
Four	1

However, a contradiction existed between the results of the participants' survey and the results of the mediator survey. Of the 47 mediation participants, all of whom theoretically should have been made aware of the cooling off period,[912] only 37 (78.7 per cent) recalled being told about the cooling off period. The other 10 participants (21.3 per cent) either reported that they were not told about the cooling off period or were unsure about whether the cooling off period had been explained to them (Table 22).

Table 22: Number of participants who reported being told about the cooling off period during the mediation

	Number of participants	Percentage
Offered a cooling off period	37	78.7%
Not offered a cooling off period	7	14.9%
Don't know/not sure	3	6.4%
Total	47	100%

A higher proportion of participants said they were not told about the cooling off period or were not sure about whether they were told about the cooling off period in situations in which the dispute did not settle at mediation. Thirty of the 47 interviewees reported that the dispute had settled at mediation (64 per cent).[913] Of the 30 matters that settled, 28 people reported being told about the cooling off period, with only two (6.6 per cent) saying that they were not told about the cooling off period. One of these was quite adamant that they were not told about the cooling off period even at settlement and instead described the situation in the following terms:

[912] Because all of them fit the criteria for the eligibility for a cooling off period, including being unrepresented at the mediation.

[913] More detail about settlement rates and other settlement related information is provided under the section in later in this chapter at the section titled Status of Dispute at Time of Interview.

> once the mediation was completed and the documents were signed, that was it.[914]

The other participant in this category reported not being told about a cooling off period and stated that, while the matter did settle and a settlement agreement was signed, there was nothing in the terms of settlement about a cooling off period.[915]

The 37 interviewees who said that they were told about the cooling off period were asked when and how they were told about it. Not all could recollect when or how they were told and there were mixed responses from those that could remember. The responses varied from:

- being told verbally at the beginning of the mediation
- being told verbally during the mediation
- being told verbally at the end of the mediation
- the cooling off period being included in writing in the settlement agreement
- being given a slip of paper that explained the cooling off period in writing by the mediator.

Some participants recalled being informed about the cooling off period in more than one of the manners described. The most common memory was that the cooling off period was included in writing in the settlement agreement, with 17 participants (46 per cent) reporting this. Only 12 participants (32 per cent) reported being told about the cooling off period verbally at the beginning of the mediation. Five (14 per cent) reported being told verbally during the mediation and five more said they were told verbally at the end of the mediation. Only two (5 per cent) remembered being told in writing about the cooling off period at the start of the mediation. Another three (8 per cent) reported being told in writing during the mediation.

Only a few participants described a process that involved multiple explanations of the cooling off period. To give one example:

> It was verbal and I think that was done during the very initial kind of orientation to the process. That was done by the mediator. And then, as the day progressed I'm pretty sure that I remember seeing it in one of those VCAT settlement forms or

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[914] UI 53. To ensure anonymity, all mediation participants have been given a number that is unique identifier. This has been shortened to 'UI' for each of the participants.

[915] UI 11.

> agreements or whatever it was that was produced when it was thought we were getting close.[916]

The participants who remembered being provided with information in writing about the cooling off period *after* they had reached, or were close to reaching, a settlement agreement said things like:

> … once we'd reached a sort of … provisional agreement if you like … they did give us a piece of paper that explained how it works … because then we had to write it all out … and they did give us a slip of paper which said that any agreement must have this and that … and I think there was mention of a cooling off period in that.[917]

> It was after we'd settled really before we were told about it.[918]

Did Participants (Both Mediators and Mediation Participants) Think the Methods of Informing Mediation Participants about the Cooling Off Period Were Adequate?

Most mediators (78 per cent) were satisfied with the existing procedures to alert mediation participants to the existence of a cooling off period; indeed, a number commented that the procedures were clear and that nothing further was required. For example:

> I feel that all the Parties I have dealt with have all been competent to listen to, hear and understand the information about the cooling off period and able to act on it if they wanted to. No further or other information would add to their capacity or understanding in any significant way.[919]

Only four mediators (22 per cent) thought that the existing procedures were not adequate, and that more or other information should be provided. Of those, two mediators thought that parties should be told about the cooling off period prior to the mediation commencing. One of those mediators commented:

> It would be more efficient if the participants are sent a kit with the Notice of Mediation attaching a flier on what Mediation is—including a paragraph on the Cooling Off period for the self-represented litigants. Then, at the Mediation, the process can be reinforced verbally.[920]

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[916] UI 50.

[917] UI 49.

[918] UI 22.

[919] Mediator 5.

[920] Mediator 9. The capital M for mediation is because it is a direct quote.

A third mediator thought that the information sheet about the cooling off period that is apparently given to the parties should be adapted to include:

> something about what happens to the signed agreement and what to expect as the next steps in the process for the matter should the cooling off period be utilised.[921]

The fourth mediator thought that the VCAT documentation about cooling off periods should be clearer about the meaning of 'unrepresented party'. That mediator described the reason for their concern:

> Sometimes a party or parties will take advice from their respective legal advisor/s to attend a mediation without the legal advisor being in attendance and for a party to keep in touch with its legal advisor by telephone to take advice with regard to progress toward settlement during the process. It seems to me that this action is a state of being represented. In these circumstances, if one of the parties has his legal advisor present, the mediator could be placed in a difficult position in deciding how to handle the meaning of 'legal representation' or whether he should mention the cooling off period at all in a joint session. I think confirmation or otherwise is required as to whether this action constitutes legal representation as described in the VCAT Cooling Off document. That undoubtedly is a difficult step for the VCAT to take.[922]

The concern about when a party to a mediation should be considered legally represented persisted through this mediator's responses to the survey and came up in responses from one other mediator. This is discussed more fully below and in Chapter 7.

Again, there was a contradiction between the information provided by mediators and the experience of the mediation participants. Despite the overwhelming view by mediators that the cooling off period was adequately explained, as set out above, the results of the participants' interviews demonstrated that about 20 per cent of mediation participants came out of the mediation unaware of their entitlement to a cooling off period. In addition, the interviews with mediation participants demonstrated that several of them had an inaccurate understanding of the cooling off period, particularly of its length. The cooling off period offered by VCAT was for two business days. This is demonstrated in the following examples:

- Mediation participant UI 9 said that they thought the cooling off period was well explained by the mediator and in the written material that was available but then

[921] Mediator 12.

[922] Mediator 19.

said that they thought the length of the cooling off period was 'a couple of weeks'.[923]

- Mediation participant UI 6 said that they knew there was a cooling off period but did not think that the cooling off period was adequately explained and sought clarification from the researcher if it was for 30 days or three months.[924]
- Mediation participant UI 62, who actually used the cooling off period to withdraw from the agreement, thought it was only available for 24 hours.[925]
- A considerable number of participants thought the cooling off period was for three days[926] (which happens to be the more traditional, well-known length of time for a cooling off period in Victoria, required for both the purchase of residential property not bought at auction[927] and the purchase of a new or second-hand car[928]).

As set out in the previous chapter, the vast majority of the disputes were from the Building and Property List of VCAT.[929] However, three cases were from the Human Rights List of VCAT; it is significant that in all three of these cases, the mediation participants reported not being informed about the cooling off period.

Discussion

The data clearly demonstrate some areas of concern in relation to adequacy of notice of the cooling off period to mediation participants. Approximately 20 per cent of participants either did not recall or were not told about a cooling off period. It may be that those participants were simply not told about the cooling off period. Alternatively, it may be that, at the time of the interview, they did not remember being told about the cooling off period. It was beyond the scope of this research to explore why so many mediation

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[923] UI 9.

[924] UI 6.

[925] UI 62.

[926] UI 1, UI 22, UI 54, UI 60, UI 64. UI 16 couldn't recall if it was for seven or three days. Responses were not interrogated to ascertain whether the participant thought it was business days or calendar days.

[927] *Sale of Land Act 1962* (Vic) s 31.

[928] *Motor Car Traders Act 1986* (Vic) s 43.

[929] Chapter 5 sets out the types of disputes reported by participants. Forty-one out of 47 (87 per cent) were building and property disputes, three (6.5 per cent) were from the Human Rights List of VCAT, and there was one each from the Civil Claims List, the Owners Corporation List and the Environment and Planning List.

participants could not recall being told about the cooling off period during their mediation. Nonetheless, the impact was that these participants reported participating in the mediation unaware of their rights to a cooling off period. Consequently, they were unable to profit from either of the presumed benefits of a cooling off period: reducing pressure to settle or enabling them to obtain advice about their settlement agreement after the mediation. Indeed, one participant who settled her case and reported not knowing there was a cooling off period said that she had wanted time to think about whether to accept the settlement offer and ideally to get some advice from a lawyer about the offer. She said that knowing about a cooling off period would have made a big difference to her.[930]

As mentioned earlier in this section and in Chapter 4, Sovern found that providing both verbal and written information about a cooling off period increased the likelihood of consumers availing themselves of their rights. While acknowledging that Sovern's research on cooling off periods was not in a mediation context, given the limited research into cooling off periods in mediations, it was reassuring that this study demonstrated that mediators were not relying solely on written notice to inform mediation participants of the cooling off period. The results indicate that, at least from the mediators' perspective, mediation participants are being informed about their rights to a cooling off period using both written and verbal methods, thus giving mediation participants the best opportunity to avail themselves of those rights. As detailed below under the section on Question 3, only one participant in the study, UI 62, used the cooling off period to withdraw from her agreement. She reported that she was only told about the cooling off period once during the mediation, and that was verbally, at the end of the mediation. While this one example supports the findings of Sovern's research, it is not representative.

Although it was positive that almost all mediators reported that they were providing information about the cooling off period to mediation participants in multiple ways, it is of interest that there was a lack of consistency of practice from the mediators about how mediation participants were being informed about the cooling off period. It seems likely that this lack of consistency means that, depending upon which mediator is allocated to hear a particular matter, mediation participants may have different emphasis placed on

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[930] UI 11.

the cooling off period during their mediation. It is also significant that one mediator reported not informing parties of their rights to a cooling off period at all until the end of the mediation. This raises questions about the effectiveness of a cooling off period in reducing pressure to settle since it would mean that mediation participants are not aware of the right until the end of the mediation, presumably after agreement.

It is unclear why there is inconsistency between the reports by the mediation participants and the reports by the mediators. An issue with the methodology is that it relies on self-reporting by the mediators and recall by the mediation participants. While it is assumed that most mediators have developed and generally adhere to a procedure, the reliance in this research on their self-report means that the results may be skewed if mediators respond with what they consider best practice rather than their actual process. It is possible that some mediators forego best practice in certain circumstances. Hypothetically, it could be that the early attitude of one of the parties makes a mediator assume that the dispute will not settle and, as a result, the mediator does not think there is value in providing information about the cooling off period. Alternatively, a mediation may take an unexpected turn early on—perhaps with the parties being particularly belligerent or particularly amenable to settlement: either way, the mediator could be thrown from their usual practice and forget or fail to mention the cooling off period.

Another possible reason arises from the response from Mediator 19, set out above,[931] who expressed concern about whether a party should be considered unrepresented if they had legal advice prior to, or by phone during, the mediation. Under such circumstances, it is conceivable that, if a mediator is unclear about whether a party should be considered unrepresented, they may assume that they are in fact represented. Having made that decision, the mediator may actively choose not to provide information about the cooling off period because the party would not then be entitled to it as a represented party.

In the three cases from the Human Rights List, all participants stated they were not told about the cooling off period or were unsure whether they were told. This may be attributable to several causes. It is possible this occurred by chance. Alternatively, it may

[931] See footnote 922.

be that the mediator/s who attended to matters in the Human Rights List during that period was/were not aware that the cooling off period applied to their list, or that one or more mediators chose not to alert parties to the existence of the cooling off period. The VCAT staff who were recruiting participants must have believed that the cooling off period applied to those mediations to proceed with the recruitment. Further research on that VCAT list could ascertain whether the results were a coincidence or a systemic issue. The only way to determine what actually happens in mediations is to have a researcher observe the mediation and speak to the parties and the mediator immediately after the process to ask questions about what occurred. That was not possible with this research.

The following chapter will provide recommendations for improving notification of the cooling off period to unrepresented mediation participants to ensure more consistency of practice and to offer mediation participants the best opportunity of benefiting from its provision.

Research Question 2

Do unrepresented mediation participants in a mediation with a cooling off period use that time after reaching a settlement to obtain advice (professional or otherwise) about the settlement agreement they reached; and if so, from whom, and if not, why not?

Of the 28 instances in which the matter settled at the mediation and the participant recalled being told about the cooling off period, only four participants (14 per cent) spoke to someone about the settlement during the cooling off period. Of those four participants, none sought advice about whether the mediated agreement was a good one or about utilising the cooling off period to get out of the agreement. Rather, they informed associated parties about the outcome of the mediation. One emailed their lawyer with the result (not to seek advice but to let them know the outcome) and spoke to a person they said was partially involved in the dispute to advise them about the outcome,[932]

[932] UI 4.

another told a person who was partially involved in the dispute about the outcome,[933] one told their wife the outcome[934] and one spoke to their boss.[935] For example:

> UI 52: I'm the regional manager here. I report to a general manager who reports to the COO. I certainly spoke to my general manager about the outcome, but I think in terms of how I was briefed and knowing where our company position is on some of these things, I was confident that the outcome was within the parameters that we would be happy with to make it go away.
>
> Interviewer: So, it was more like you were reporting what had occurred rather than seeking advice?
>
> UI 52: Correct. There was never a conversation of should we invoke the cooling off period, it was more a case of yeah we've done it, we've dealt with it, it's fixed, move on.[936]

Participants who settled their cases and were aware of the cooling off period were specifically asked *why* they did not seek advice about the outcome, given that they had the opportunity. The reasons were varied but fitted into four themes, although responses could potentially fall within more than one theme:

1. They were satisfied with the outcome.
2. They just wanted the dispute finalised.
3. They had concerns about the interaction between confidentiality clauses in the settlement agreement and the cooling off period.
4. There was insufficient time in which to obtain advice.

Satisfied with the Outcome

A number of participants stated that they did not need to seek advice during the cooling off period because they were quite satisfied with the outcome reached at mediation. When responding to a question about why they did not seek advice about their settlement agreement, mediation participants made comments such as:

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[933] UI 1.

[934] UI 27.

[935] UI 52.

[936] UI 52.

> We'd already received the settlement cheque on the day of the mediation (after the mediation was over). We were also happy with the outcome.[937]

> We sort of evaluated all our options. And what we got … just be happy with that.[938]

> Well, I mean, I didn't feel it necessary. As I said, I went into mediation with a figure in mind—an absolute maximum that I wanted to pay. So, I knew I was going to be up for something. The amount that we came up with was towards my maximum. So, I felt comfortable. I felt comfortable in moving forwards. I didn't have to question it. I didn't question it after it, the mediation. That was it. It was done. I got back to work straight away.[939]

> Other people probably would [seek advice about the settlement]. For me, no because I'd already fully understood what had happened and we'd come to an agreement.[940]

Wanted the Dispute Finalised

Other participants did not seek advice about the settlement because they were simply pleased that the dispute was over and they did not want it to continue. This group of participants were not necessarily satisfied with the outcome reached.[941] Their responses included:

> We would have liked to have seen more money but I also know that if it went to a hearing everyone would lose so there was no point.[942]

> I felt forced into a corner—that something was better than nothing. Didn't look like there was any benefit in trying to fight it. The other party had so much resources. The dispute for him was only a tiny dint in the balance sheet. They didn't care. I just didn't have the money. I'd already lost enough. Felt that 'this needs to end today'.[943]

> I did think about withdrawing but something was better than nothing. I felt as though I'd been completely screwed over—five years of my life, financial damage and emotional damage.[944]

For several participants, part of the reason that they wanted the dispute finalised on the day of the mediation was that they were concerned about the cost of taking the matter

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[937] UI 55.

[938] UI 32.

[939] UI 60.

[940] UI 69.

[941] More detail about satisfaction is provided below in response to Question 3 - Satisfaction with Outcome.

[942] UI 53.

[943] UI 16.

[944] UI 16.

further. They specifically described being concerned about the expense and/or complexity of a hearing. These comments were not necessarily in response to the question about why they did not use the cooling off period to seek advice about their settlements, but rather occurred during the course of the interview. These participants, although unsatisfied with the outcome, still thought it better that the matter was resolved. For example:

> Because to take advantage or to utilise that three [sic] day cooling off, then refuse [the offer] we would have to start the process again and it would mean, you know, more expense, more heartache. It was just too much trouble.[945]

> No point really. I'd got what I wanted. I've got a couple of mates that are fairly smart. They're not lawyers. I was married to a lawyer 20 years ago. I had a fair idea from the law perspective what would carry on and how it would carry on, you know and the costs. That's the worst thing. You come up with a costs agreement with a lawyer—that means diddly really. It just ends up how many hours they put in, how many phone calls they make, how many letters they write as to how much it's going to cost you. I just didn't want to go down that track.[946]

> No, No. we just left with our tail between our legs. We couldn't afford to go the next step.[947]

Concerns about Confidentiality Provisions

Three participants were concerned about how the confidential nature of the agreement they had reached at the mediation interacted with the cooling off period, and so thought it best not to seek advice about the outcome, despite being aware that they had the option of a cooling off period. One participant said that he believed that what was settled on was confidential, which meant that he could not discuss it with anyone during the cooling off period.[948] Another said:

> Interviewer: During that cooling off period, the two business days, did you talk to anyone about the agreement that you'd made?
>
> UI 47: The agreement contained a confidentiality clause.
>
> Interviewer: Did that wipe out the cooling off period in terms of talking to someone?

[945] UI 64.

[946] UI 65.

[947] UI 37.

[948] UI 7.

UI 47: No, it just said that we weren't to talk to anyone about the settlement, the details. So we didn't.

Interviewer: Did you want to? Would you have liked to?

UI 47: Yes. As I mentioned we are two units on a block. We've got a neighbour at the back who's got similar problems to ours and the resolution, as I explained, does involve digging trenches and installing new drain works so it's going to affect our neighbour.

Interviewer: So, you would have preferably liked to have talked to them about it.

UI 47: Yes, just to let them know.

Interviewer: And you felt you couldn't because of the confidentiality clause?

UI 47: Yes.[949]

The third participant stated:

> I had also already signed a confidentiality agreement and wasn't sure how that worked with the cooling off period. Our credit cards were maxed. We were paying rent and a mortgage. This payment was going to get us out of serious financial trouble. Felt that if I spoke to a lawyer about the outcome, I wouldn't get good advice about the outcome because of their own interest. Lawyers make money from people with problems. At the end of the day, if I lose, I lose big.[950]

Lack of Time in Which to Seek Advice

One participant specifically commented that the reason she did not seek advice during the cooling off period was that it was 'the weekend' and she had other things pre-planned, including a grandchild's birthday. She was also of the view that she could not have got hold of a lawyer in the time allowed by the cooling off period.[951] She said:

> The mediation was on Friday and I had to tell them by Monday morning if I was going to withdraw. It wasn't long enough to digest. I needed at least five days.[952]

UI 20 also said that if the cooling off period had been longer, it would have made a difference to him. He would have had more time to seek advice and would have had a bit more of a think about the settlement. However, the two-day cooling off period did not

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[949] UI 47.

[950] UI 16.

[951] UI 49.

[952] UI 49. The mediation participant seemed unaware that the cooling off period was two *business* days and thus the weekend days would not have been included in the time.

provide enough time to get in to see a professional for advice. He felt that the cooling off period needed to be at least a week in order to be able to obtain legal advice.

These two participants were the only ones who specifically addressed the short time frame of the cooling off period in answer to the question about why they did not seek advice about their settlement agreement. However, later in the interviews, mediation participants were asked if it would have made any difference to them if the length of the cooling off period was longer. Given the fact that some of the participants had wildly varying views about the length of the cooling off period (as set out above), these responses should be considered with caution. Four additional participants commented that the cooling off period was not long enough to obtain advice from a lawyer. The length of time they thought appropriate varied from three days to one week. For example:

> I think at least three days because if someone has to consult friends or with a solicitor or something like that, they can't do it immediately. Three days would be fine.[953]

> I think it should be longer. If a person wants to go to solicitors, and sometimes you have to wait a couple of weeks, a week anyway for an appointment with a solicitor, don't you?[954]

Not everybody thought that a longer cooling off period would have been a positive thing. Some felt that once an agreement was made, that should be the end of the dispute. For example:

> No, honestly, I think probably not a good idea. People sign documents then say shit I didn't know what it said, so can I have it back? So I don't think that's a particularly good plan. So there should be a bit more responsibility taken? It would be good. Yeah.[955]

> I don't see the point in agreeing something and then going away and changing your mind, it just gets you to have to come back again and start it all over again.[956]

> If the cooling off period had been longer, would have just caused more anxiety. Once the two days was over, it was over. Had closure.[957]

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[953] UI 55.

[954] UI 62.

[955] UI 53.

[956] UI 52.

[957] UI 4.

This belief that agreements made in the mediation needed to be final also came through strongly in the survey of the mediators—in particular, from mediators who were not in favour of there being a cooling off period in mediations. More discussion of this issue is included below in the section on Question 5.

Discussion

The disadvantage of being unrepresented in the legal system has been demonstrated by Genn and others and a summary is set out in Chapter 2. Concerns about ensuring that unrepresented parties are adequately aware of their rights, particularly when opposed to represented parties, are one of the two main reasons for suggesting a cooling off period be provided as part of a mediation process.[958] A cooling off period provides parties with the option of seeking legal advice before being bound by the agreement reached at mediation. However, the results of this study show conclusively that, in relation to these mediations at VCAT, participants did not use the cooling off period to seek advice about their settlement agreements. Therefore, the answer to Research Question 2 is no: unrepresented mediation participants in a mediation with a cooling off period *do not* use that time after reaching a settlement to obtain advice (professional or otherwise) about the settlement agreement they reached.

Naturally, some participants were simply happy with the outcome and did not feel that they needed to seek any advice. However, the other themes in the data demonstrate that the cost of a hearing, including the probability of needing expensive legal representation should the dispute continue, was a major deterrent for some people to even consider withdrawing from their agreements. The results also demonstrated that the costs of running a dispute to hearing were, at times, emphasised by the mediator to such an extent that the individual participant felt pressured to settle. This mediator pressure is addressed further under Research Question 4 below.

Of interest was the fact that several participants, despite being dissatisfied with the outcome, did not take the opportunity to seek advice about the outcome during the cooling off period. This behaviour is demonstrated further in the next section, which

[958] The other being to reduce pressure and the use of coercive tactics. See Chapter 4 and, in particular, the discussion about the Farm Debt Mediation Act 1994 (NSW).

considers findings relating to Research Question 3: why did mediation participants not use the cooling period to withdraw from mediated agreements despite dissatisfaction with the outcome? Insights can be drawn from the consumer context in which consumers may not utilise cooling off periods because of inherent behavioural biases such as inertia or the 'status quo effect' as set out in Chapter 4.

Participants also indicated that the cooling off period was of insufficient length to obtain legal advice. The scholarship around cooling off periods in door-to-door or tele-sale contracts focuses less on the ability to obtain advice about the deal made and more on the inability of the consumer to inspect or compare the goods or cost of the goods at the time the deal is made. However, where bigger purchases are being made, such as a car or real estate, there has been more of a focus on the cooling off period being long enough for the purchaser to obtain expert advice.[959] Some scholars, however, have raised questions about the capacity for cooling off periods to allow for adequate information gathering: for example, whether three days is enough time for a purchaser to investigate serious concerns they might have about a property.[960] There appears to be little information about whether purchasers use the time available to them to seek advice.[961]

Sovern notes that the length of cooling off periods in the consumer context varies from 30 minutes to more than two weeks, but he does not recommend a 'right' length.[962] He suggests that notice and awareness of rights is more important than the length of a cooling off period. In the context of mediations, given that one of the purposes of the cooling off period is to enable unrepresented litigants to obtain legal advice in order to correct an imbalance of power, particularly when one party is unrepresented, the practical ability to obtain legal advice within the cooling off period is important. Objectively, two business days is probably an insufficient time in which to get an appointment and advice from a lawyer unless the lawyer was already engaged in the matter prior to the mediation.

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[959] Consumer Affairs Victoria (n 548) 14; Rekaiti and Van den Bergh (n 549).

[960] Peter Mericka, '"Cooling Off" Is a Poor Alternative' (Blog Post, 1 May 2007) <https://www.reic.com.au/2007/05/01/cooling-off-is-a-poor-alternative/>, cited in Consumer Affairs Victoria (n 548) 15.

[961] For example, in the Consumer Affairs Victoria study, despite extensive questions being asked, the report does not indicate that consumers were asked who they sought advice from or why.

[962] See Chapter 4 - Method of Notice; Sovern (n 552). Sovern notes that a length of three days is common for cooling off periods in the US.

If a lawyer was already engaged in the matter, then the question arises again about whether the participant was truly unrepresented. For participants with no prior legal relationship, advice would be difficult to obtain within a two-day period. A Victorian study into consumer cooling off periods found that most people thought that cooling off periods should be more than three days, with nearly half recommending at least 10 days.[963] Welsh, in advocating a cooling off period in mediations, suggests a three-day cooling off period, while also referring to 10-day mediation cooling off periods in at least one US mediation program.[964] There is an obvious need to balance the time in which to obtain legal advice with the need for finality of the settlement; however, consideration needs to be given to the practicalities or availability of appropriate advice within the allotted period to ensure that the cooling off period provides the intended benefits.

For the three participants who indicated that they were uncertain about the interaction between the cooling off period and a confidentiality provision, this confusion effectively nullified one of the benefits of the cooling off period, as all three nominated this as the reason they did not seek any advice during the relevant period. This interaction has not been reported in the consumer context because confidentiality provisions typically relate to legal matters. Nonetheless, the fact that the confusion existed reinforces the results set out in response to Research Question 1 and concerns that the cooling off period is not being adequately explained to mediation participants, thus reducing or nullifying its impact.

Research Question 3

Do the unrepresented mediation participants withdraw from mediated agreements during the cooling off period if they are unhappy with the outcomes after reaching a settlement agreement at mediation and if not, why not?

[963] Consumer Affairs Victoria (n 548) 81.

[964] Welsh, 'The Thinning Vision' (n 8).

How Many Mediation Participants Used the Cooling Off Period to Revoke Their Agreement?

Only one of the 30 mediation participants (3 per cent) interviewed who settled their dispute at the mediation used the cooling off period to withdraw from the mediated agreement. This participant, who reported utilising the cooling off period in the interview, described a unique set of circumstances. The participant, UI 62, the applicant in the case, had received a settlement offer by letter before the mediation but failed to take that letter to the mediation and could not remember the exact terms of the offer it contained. At the mediation, UI 62 agreed to settle after a three-hour mediation during which she described the respondent as refusing to negotiate:

> … the actual problem was never addressed. These are the ceiling leaking and the tiles broken and all this. That was never discussed. It was just a discussion of 'I won't pay' and I was saying that you should pay because that's the honourable thing to do. And he just would say 'I don't pay' and we didn't discuss the actual thing. It was just a standoff between this person and myself. And you see, the mediator—there was nothing much he could say. You just can't go any further with it. You can't force a person to pay if they don't want to.[965]

However, upon returning home after the mediation, UI 62 re-read the letter she had been sent prior to the mediation and felt that the letter offered a larger amount than had been accepted at the mediation. Consequently, UI 62 invoked the cooling off period to withdraw from the mediated agreement.[966]

Why Didn't Mediation Participants Use the Cooling Off Period to Withdraw?

Only cases that settled at mediation were able to use the cooling off period to revoke the settlement agreement. Logically, participants who settled their cases and were satisfied with the outcome would be very unlikely to invoke the cooling off period to withdraw from their agreement. Consequently, the satisfaction level of mediation participants with the outcomes was relevant data to obtain from the participants. Some related data arising

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[965] UI 62.

[966] According to the participant, later discussions between the parties made it clear that the letter including the settlement offer was badly worded and capable of multiple interpretation. She accepted that the respondent had not actually meant for it to be interpreted as offering more than was offered at mediation. Nonetheless, the fact that the cooling off period had been invoked and the case set down for hearing provoked an additional settlement offer, higher than the amount initially agreed to at mediation, and higher than the amount she had interpreted the letter as offering, and the case subsequently settled (again).

from the interviews reveals the status of the dispute at the time of the interview: whether the participant felt the outcome was better or worse than expected prior to the mediation, and whether the settlement terms had been complied with.

Status of Dispute at Time of Interview

As mentioned above, 30 of the 47 interviewees reported that the dispute had settled at mediation (64 per cent). A further seven cases had settled subsequent to the mediation but prior to the interview. Two had gone to a hearing and been resolved at the hearing with a decision by a tribunal member and eight cases remained unresolved at the time of the interview (ie had not settled and had also not yet gone to a hearing), as shown in Table 23.

Table 23: Status of dispute at time of interview

Status of dispute	Number of participants	Percentage
Settled at mediation	30	63.8%
Settled after mediation	7	14.9%
Went to a hearing	2	4.3%
Not yet resolved	8	17.0%
Total	47	100%

At the time of interview, the terms of settlement had been complied with in 26 cases. In nine cases there was still time in which to comply. In two cases, the terms of settlement had not been complied with and the participant was contemplating what they should do next.

Better or Worse Outcome Than Expected

Participants were asked whether the outcome of the mediation (regardless of whether it settled) was better, worse or the same as they had expected going into the mediation. There were 43 responses to that question. Approximately 35 per cent felt that the outcome was as expected, 21 per cent felt that the outcome was better than expected and 44 per cent felt that the outcome was worse than expected.

People who lived regionally were more likely to think that the outcome was the same as they had expected going into the mediation than people who lived in the city (93 per cent and 7 per cent, respectively). Participants with lower family incomes (less than $100,000 per annum) were more likely to think the outcome was worse than expected than people

with higher incomes (81 per cent and 19 per cent, respectively). Men were more likely than women to think that the outcome was better than expected (78 per cent and 22 per cent, respectively); however, because of the small numbers overall, men were also more likely than women (although with less disparity) to think that the outcome was the same as expected (67 per cent and 33 per cent, respectively) and worse than expected (67 per cent and to 33 per cent, respectively).

Satisfaction with Outcome

Participants were asked how they felt about the settlement at the time of the interview, which was weeks later for some and months later for others. There were mixed emotions. Mediation participants were asked to describe their satisfaction or dissatisfaction on a sliding scale, but many found it difficult to do so. As a result, answers were simply recorded as satisfied or unsatisfied. In total, from the 30 cases that settled at mediation, 17 participants were satisfied with the outcome (57 per cent) and 13 (43 per cent) were unsatisfied with the outcome.

Some participants were genuinely happy with the outcome. For example:

> Everyone was happy. Everyone walked out of there going yep no problems at all. All done. Thank you very much.[967]

However, these people were in the minority. Much more commonly, and in keeping with why participants did not seek advice about the outcome during the cooling off period, participants discussed feeling like it was not worth taking the matter any further. For example:

> It just wasn't enough money to make it worth going to a hearing if we were going to pay our own costs, just not worth it. Settlement was effectively a financial decision. Felt forced into it.[968]

> We would have liked to have seen more money but I also know that if it went to a hearing everyone would lose so there was no point.[969]

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[967] UI 66.

[968] UI 4.

[969] UI 53.

> Because I got sick of it. I felt that I was hedged in—there was nothing else I could do. He said I won't pay anymore. There was nothing I could do about it. I couldn't force him to pay more. So I said OK.[970]

> Obviously, we'd rather not have to pay anything at all and not be out of pocket … we went in there with a figure in mind that was an absolute maximum that we were prepared to pay and we stood for that ... at the end of the day, I was happy to pay what I had to pay and move on.[971]

Although 15 women were interviewed (32 per cent of the total), only one woman indicated that she was happy with the result and so did not consider withdrawing, compared to 12 men (92 per cent of those happy with the result).[972] Younger people (under 50) were more likely to be happy with the outcome than older people (75 per cent and 25 per cent, respectively), as were participants who lived in regional areas (92 per cent and to 8 per cent, respectively). Older people were more likely than younger people to have considered withdrawing because of the costs of proceeding (75 per cent and to 25 per cent, respectively).

Reasons for Not Withdrawing Despite Dissatisfaction

The reasons participants did not withdraw from their agreements despite dissatisfaction were similar to the reasons they did not seek advice about their settlement: they wanted the dispute finalised and/or they were concerned about the cost of proceeding to a hearing. There is some crossover in the responses to the two questions. Eleven of the 13 participants who settled and were dissatisfied with the outcome indicated that they did not consider withdrawing because they wanted the matter finalised, and four (multiple answers permitted) said they did not consider withdrawing because of the costs associated with taking the dispute further.

Despite being dissatisfied with the outcome, UI 4 did not consider withdrawing because:

> The decision was made and we did it knowingly.[973]

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[970] UI 62.

[971] UI 60.

[972] See Appendix 8 Demographic Data Analysis.

[973] UI 4.

UI 7 said that she did not consider withdrawing from the agreement because she knew that there was no option to return to mediation and going to a hearing would incur more costs.[974] Others gave reasons such as:

> As long as he does what's in the agreement that should fix the problem and we'll be happy to be rid of him.[975]
>
> It wasn't fair but it was an outcome I could live with.[976]

Some participants took a more commercial approach. For example, UI 21, who was getting rectification work done as the settlement terms, ensured that there was a right of reinstatement in the settlement terms.[977] UI 22 did not withdraw during the cooling off period as he did not want to take the dispute to a hearing. He said:

> we thought we'd compromised our position to avoid going to a hearing and avoid costs and time of a hearing. We thought it would cost about $20,000 to go to a hearing so we gave them an ex gratia payment to avoid that and get them to put it on the market. On a commercial basis we were satisfied with the outcome; on a personal basis we were livid that we'd had to pay them anything extra.[978]

Discussion

The answer to the first part of Research Question 3—do unrepresented mediation participants withdraw from mediated agreements during the cooling off period if they are unhappy with the outcomes after reaching a settlement agreement—is no. With one exception, participants who were unhappy with the outcome of the mediation did not use the cooling off period to revoke their agreement. The 3 per cent revocation rate found in this study (based on disputes that settled at mediation) is consistent with VCAT's own data. In the early days of the adoption of the cooling off period pilot, VCAT reported on the numbers of participants who utilised the cooling off period. For example, VCAT's 2009–10 Annual Report states: 'We conducted 222 such mediations over a nine-month period. In five cases (or less than two percent), parties took advantage of the cooling off period, revoking their settlement agreements'.[979] The following year VCAT did not provide

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[974] UI 7.

[975] UI 47.

[976] UI 1.

[977] UI 21.

[978] UI 22.

[979] VCAT Annual Report 2009–10 (n 12) 22.

specific numbers but reported that very few self-represented parties revoked their agreements.[980] These figures are also consistent with the only other identified Australian study into the use of cooling off periods in alternative dispute resolution processes (set out in Chapter 4). In the evaluation of the Fair Work Commission's cooling off period trial in conciliations, the withdrawal rate within the two-month period of the study was 2.7 per cent.

The evaluators of the Fair Work Commission's trial noted that the availability of the cooling off period did not undermine the high rate of success of the conciliation process while still offering 'a small category of parties who may feel uncomfortable with the settlement reached at the conciliation a chance to avoid what they would consider to be an *unfair* agreement'.[981] However, in that study, it was unclear why the parties withdrew or what the satisfaction rates were. In this research, 13 participants (43 per cent) were unsatisfied with the settlement reached but only one participant (3 per cent) actually used the cooling period to revoke their agreement.

The results indicate that satisfaction (or dissatisfaction) was only one of a number of reasons why people chose not to withdraw from agreements, and that level of satisfaction was only one small aspect of participants' decision-making processes. The participant extracts above illustrate the complex decision-making that unrepresented people face in mediation. Cost and uncertainty of outcome at a hearing, as well as wanting the dispute finalised, were other key factors in participants' decision-making. As suggested by Irvine, mediation participants must 'juggle their sense of how much they are entitled to, the practical challenges they face in recovering it ("the aggro"), the risk of failure ("no guarantees") and the effort already expended in getting the other party to offer anything at all—the sunk costs of time spent on the case'.[982] As with research in the consumer context, the data in this research challenge the assumption that not using the cooling off period is equivalent to satisfaction with the outcome.[983]

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[980] Victorian Civil and Administrative Tribunal, 'VCAT Annual Report 2010–11' (n 725) 22.

[981] RMIT University Centre for Innovative Justice (n 13) 11 (emphasis added).

[982] Irvine's research is discussed in Chapter 3. See also Irvine (n 427) 155.

[983] See Chapter 4. See especially Consumer Action Law Centre, 'New Research' (n 633).

As reported in Chapter 4, in the scholarship on cooling off periods in consumer contexts, Sovern, Hoepener and Harrison all found that humans have a tendency to be inert and stick with a given situation, particularly when the cost (such as returning the goods) falls on the consumer. Sovern reported on a survey of 1,400 consumers in which not one of the respondents reported using the cooling off period to rescind, although 8.3 per cent reported being 'not at all satisfied' with their purchases.[984] When asked why they failed to rescind the agreement despite being entitled to, 63 per cent explained that they 'weren't that dissatisfied', 19 per cent reported that taking action was 'too much trouble', 27 per cent expressed the view that 'it wouldn't do any good' and 27 per cent 'didn't want to offend the salesperson'.[985] Hoeppner's research found that many people will decide on whatever option requires the least effort and thus, because it requires effort, will not use a cooling off period to withdraw from a contract even if they are not satisfied with the contract.[986] Finally, Harrison found that participants who were offered a cooling off period in a behavioural experiment universally did not change their original decision.[987]

This inertia or status quo effect[988] may also be in play in the mediation context for two reasons. First, significant costs will be incurred if the participant withdraws from the mediated agreement and the dispute progresses to a hearing. Second, withdrawing during the cooling off period takes effort and, given the finding on cooling off periods in consumer contexts that people make decisions based on least effort, it can be predicted that the provision of the cooling off period is unlikely to be utilised, regardless of satisfaction level.

Research Question 4

Do the unrepresented mediation participants feel pressured during a mediation to come to a settlement agreement and, if so, does the provision of a cooling off period do anything to alleviate that pressure?

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[984] Sovern (n 552) 350.

[985] Ibid.

[986] Hoeppner (n 581) 22.

[987] Harrison (n 552).

[988] See Chapter 4 - Cooling Off Periods Are Not Used by Consumers Because of Inherent Behavioural Biases, Particularly 'Inertia'

Participants were specifically asked if they felt pressure to settle the dispute on the day of the mediation. Thirty mediation participants (65 per cent) reported feeling pressure to settle, while 16 mediation participants (35 per cent) reported not feeling any pressure to settle. Of the 30 mediation participants who reported feeling pressure to settle their dispute during the mediation, 23 (50 per cent) described the pressure as coming from the mediator, with the remaining seven (15 per cent) describing the pressure as being something they put on themselves (Table 24).

Table 24: Pressure to settle (version 1)

Did you feel pressured to settle?	Number of participants	Percentage
No	16	34.8%
Pressure from the mediator	23	50.0%
Self-pressure	7	15.2%
Total	46	100.0%

The explanations given by some of the seven participants who described feeling internal pressure indicated that they also experienced pressure from the mediator, usually in the context of emphasising the costs of a hearing. For example, UI 20 reported feeling self-pressure; however, his description of the pressure indicated that the mediator was also exerting pressure on him. He described feeling 'ambushed' by the production of an expert report at the mediation. He said that he had been very upset and stressed on the day of the mediation and that the mediator had been very kind and helpful. Nevertheless, when discussing the pressure he felt on the day of the mediation, he said:

> I knew if I didn't settle I'd have to come back and pay a lawyer … and the mediator was stating that it had to settle today, or it would cost a huge amount of money. I was going to be in all sorts of financial trouble if I didn't settle. So the pressure was definitely there.[989]

Another example is as follows:

> Pressure probably from myself. In terms of I just want to settle it and move on. I don't want to come back kind of thing. Not that I felt pressured into making a decision on that day. I was told by the mediator that if I didn't settle it that day it would go to trial and that I'd have my solicitor there and it would be costing me in excess of $5,000 for the day. So, I mean, I … for me, I wanted to get it sorted then and there and move on.[990]

[989] UI 20.

[990] UI 60.

Table 25 takes these responses into account.

Table 25: Pressure to settle (version 2)

Did you feel pressured to settle?	Number of participants	Percentage
No	16	34.8%
Pressure from the mediator (and may also have felt self-pressure)	27	58.7%
Self-pressure only	3	6.5%

Pressure from the Mediator

The level of pressure exerted by mediators, as described by the mediation participants, varied from minor to quite significant. Some participants reported feeling pressured to settle the case but did not think that was inappropriate in any way. For example, one participant reported that the mediator put appropriate pressure on both sides about the costs of the hearing should the matter proceed and described that as part of a 'healthy conversation'.[991] UI 2 said that he 'sort of' felt pressure from the mediator to settle and that he felt the mediator would like the parties to settle, as 'they don't want the matter to take up court time—it's less expensive and less effort for everyone'.[992] Other descriptions of what participants appeared to find as minor or appropriate levels of pressure were:

> While there was no overt pressure to settle, we always understood that it would be better for everyone if we settled on the day.[993]

> I did feel pressure to settle, in the last hour especially. The mediator was a quiet, gentlemanly fellow but I felt that he really wanted a decision made and thought that it could all be sorted out.[994]

A number of participants felt there was pressure put on them by the mediator about the costs of taking the matter further:

[991] UI 4.

[992] UI 2.

[993] UI 9.

[994] UI 14.

> There was a little pressure to settle. Taking it further was a bit scary. The scariest option was taking it further and getting lawyers involved in the dispute. Might win but wouldn't get enough money to pay the lawyers, let alone fix the problem.[995]

> Felt pressured by the information about the stages and being told how much this will cost. There was pressure put on to make sure that it settled that day.[996]

For some participants, this pressure caused them significant distress:

> Did feel pressure to settle. The mediator was saying if it doesn't settle today it's GOT to go to court. More pressure than needed. Dreaded the thought of having to go to court. Frightened the heck out of me to go to court.[997]

In fact, it was apparent from the interviews that, for some participants, the experience of mediation was very distressing. Some mediation participants still felt that level of distress some weeks and months later when discussing the matter. For some participants, the distress was based on the interactions with the opposing party. For example:

> I was getting blamed for stuff I didn't do. It was really, really unsettling to me. They used to be good friends with me. They live in the same small country town as me.[998]

> They had a barrister and we didn't. He was an absolute pig. He was intimidating and a deliberate bully. Not at all professional. Not factual. Rude. He made snide remarks about the mediator. … My husband was beside himself for 4–5 days after. He was mightily offended by the process.[999]

For other participants, the impact of the mediator's style of mediation or approach to the mediation was at least part of what caused the distress. The below extracted comments were from people who, unsurprisingly, were unsatisfied with the overall process and found the mediation process troubling. The mediation participant in the first excerpt (UI 37) remembered being offered the cooling off period. The second (UI 54) did not. UI 37 stated:

> I didn't think it was going to be so final and so heavy. Mediation to me is you get in there, you discuss your issues and you work out a solution with a third party. Not realising—I realised this afterwards—that I had to go in there with all guns blazing and state my case to a finality and pretty much prove it and have expert witnesses so that I could have mediation. It's not what I understood it to be at all. I was quite shocked at what I faced … We kind of put our tail between our legs and said, yes,

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[995] UI 17.

[996] UI 16.

[997] UI 49.

[998] UI 20.

[999] UI 4.

> we'll take it and go. Pretty much they just gave us 10 grand and said rack off. But we knew we couldn't go the next step because I'd blown the first step. Because I wasn't ready, not realising I wasn't ready for the first step, I couldn't afford to go the next step. So I'd blown the chance I had. That's how I felt … I'm just annoyed that I blew the chance. I blew it because I do have a case. I do have a case, I should have won, but I can't afford to take it any further.[1000]

UI 54 recalled:

> He started out by saying that this $65,000, it's really just a number of a piece of paper. We just really need to work this out as quickly as we can. I said 'to some people $65,000 is … they might work two years after tax to earn that. You can't say this is nothing, this is a trifling matter'. He kept playing it down … 'It's nothing', 'Just agree to disagree', 'let's just finish it and get out of here'. He was not at all, well, he was very moderate, he was very legally disinterested in the process, he didn't take sides. I'm not sure what sort of cases he deals with on a day-to-day basis but when people are talking about their personal money and he's saying that $65,000 is insignificant. I was really offended by that. And that's how he spent the day—treating it like it really was nothing.[1001]

Mediation participants also had concerns about mediator impartiality, which contributed to dissatisfaction and distress about the process. In the first example, the mediation participant believed the mediator was biased against builders:

> UI 53: He was an architect, which is why unfortunately … the way he spoke to me was basically he said it's always the builder's fault and I think they were more or less his exact words. I was like … 'Wow'.
>
> Interviewer: That's not a very good start.
>
> UI 53: No, it's not a good start for somebody who's meant to be impartial. We had quite a lengthy discussion about it … yeah, he had his opinion and that's where he was going to stay.[1002]

In the second example, the mediation participant felt that the mediator had a pre-existing relationship with the other party which biased the mediator towards the other party:

> He [the mediator] advised that he had some experience in this sort of matter before so you know he kind of, he said to us (my brother and I who own the property), there's a slight, good chance that they'll win this case. So I just felt like that was really being said to pressurise us into making a decision. He kind of tried to explain the points of law and then kind of you know the way he termed it I felt wasn't impartial. It was applying pressure to us who aren't, you know, we're new to this game, to resolve it as quickly as possible rather than extend it and go to the hearing

[1000] UI 37.

[1001] UI 54.

[1002] UI 53.

> and all that sort of stuff … he [the mediator] said they have legal experience and by the report there are other points of law they could bring up in the case and you won't necessarily win this. Settlement is in your best interests. … I mean, he knew the main guy from the insurance company that we were dealing with. … He'd obviously been there before so there was some kind of relationship there and it was quite apparent to us that the insurer had obviously been there before, had experience in this, there was some kind of relationship. It didn't make us feel that comfortable I've got to say … I think the primary concern was to expedite the matter and I don't think the mediator truly had both parties' interests at heart. I think there was a pre-existing relationship between the mediator and the insurer or the insurer's representative. I think that the insurer—sorry, the mediator—tried to scare us … into settling unfairly by, not threatening, but kind of suggesting that the odds were stacked against us because it was David v Goliath, and again I think that was all in the interests of expediting the matter so that it wouldn't go to a hearing.[1003]

For other mediation participants, the pressure was not about the costs of running their case to a hearing or about the merits of their individual case but, instead, was about the mediator themselves and the mediator's reputation. For example:

> He said something or other like, most times that I have mediation, my record's about 99 per cent or 98 per cent or something like that.[1004]

The following mediation participant reported a similar experience:

> Interviewer: During the mediation did you feel pressure to settle on the day?
>
> UI 47: Yes
>
> Interviewer: Where was that coming from?
>
> UI 47: Well, the mediator.
>
> Interviewer: Can you explain how that was put forward to you?
>
> UI 47: Yes. She explained she was there to mediate, she doesn't take sides, she doesn't offer advice but by the way I have the best resolution record of anyone of the mediators at VCAT so if you don't sort of fix it here today, I was made to feel as if we were casting some sort of stain on her record. … I don't care if she's got the best resolution rate of any mediator in VCAT. She could have a bad day. Why mention it? It's not important to us. Just because you've got a good record of mediating settlements, that doesn't mean you've provided justice and it doesn't mean that it'll work in our case necessarily. It did seem to me to be a bit of an ego trip.[1005]

[1003] UI 64.

[1004] UI 69.

[1005] UI 47.

In two other cases, the pressure applied by the mediators appeared to become quite inappropriate. For example:

> I was put into a different room because it was getting a bit too hot and heavy, and they were in the other room and he comes back and he [the mediator] says 'Let go. I can see grief over there. They've lost a daughter and blah, blah, blah'. And I was … what has that got to do with the price of fish? Yes, I sympathise with him, and I believe that nobody needs to go through that. But can you not see that the opposite party is now clutching at straws? To bring back the death of a child that happened two years ago into this negotiation to plead justice? Why any blind man could tell you that this chap was playing a game. And yet the mediator was trying to force that on to me. He says 'I am jury. I am seeing grief there and tears. Believe me, you should be accepting this or you'll be suffering in the long run'.[1006]

In the second case, the mediation participant described being subjected to 'emotional blackmail':

> You know, when we got to the point where we were in one room and the builder and his lawyer was in the other room and the mediator was moving between us [and saying] 'there was something really major going on in the other room' and whatever was happening there I think was driving the mediator to settle. I felt that part of it was really unfair because I felt we didn't get the whole picture. You know, the mediator would come in and say 'He's really unravelling in there. I'm very worried for his mental situation'. Well, you know I feel sorry for the guy. I'm actually a nice person. But that's not why we're here. So, I really kind of felt that the whole thing was driving us to say OK, he owes us, as he did, $64,000 but we're happy to take $6.40. I felt that kind of pressure and that sort of … it was almost a little bit emotionally blackmailing. I mean that's really a tough thing to say and it's not, I don't mean that in a literal sense but 'He's unravelling. I'm worried about him. There's a lot more going on in there than you understand'. Well, OK, tell us about it, which obviously he couldn't do, but don't just say that we're contributing to this guy's mental breakdown which was kind of implied in how it was being run. That gave me pressure.[1007]

Pressure on Themselves

The three participants who only felt self-pressure reported feeling pressure from themselves to settle the dispute as they wanted the matter finalised. Once again, concerns were expressed about the cost of taking the matter to a hearing. For example:

> But you don't want to drag your name through it all and you don't want to drag your reputation through it all. No, I didn't feel any pressure from the mediator.

[1006] UI 25.

[1007] UI 47.

> From a company point of view, I felt that the brief to me was do everything you can to avoid this going any further.'[1008]

Impact of Cooling Off Period on Pressure to Settle

Despite the levels of pressure put on participants to resolve their disputes on the day of the mediation, out of 37 responses, 30 participants (81 per cent) reported that they felt that they were able to make decisions that were in their best interests during the mediation and only seven (19 per cent) participants did not.

Of the 36 mediation participants who responded to the question about whether they thought having a cooling off period impacted on their experience of the mediation, only three participants (eight per cent) thought that having a cooling off period reduced pressure to come to an agreement, while 33 participants thought having a cooling off period did not make any difference to their mediation experience (Table 26).

Table 26: Impact of cooling off period on experience of mediation

Did having a cooling off period impact on your experience in the mediation?	Number of participants	Percentage
Greater control	0	0.0%
Reduced pressure to come to an agreement	3	8.3%
Didn't make any difference	33	91.7%

Of the three participants who thought having a cooling off period helped to reduce pressure to settle, two thought it made only a minor difference and may have 'only very slightly' reduced the pressure to come to an agreement.[1009] Another said:

> It probably did. I didn't … I hadn't thought about that aspect until you asked me this minute. But yeah, I think it probably did.[1010]

For those who did not think having a cooling off period made any difference, comments included:

> Didn't feel that the cooling off period had an impact on the mediation. Just wanted the dickhead out of my life. The cooling off period had no impact.[1011]

[1008] UI 52.

[1009] UI 9.

[1010] UI 50.

[1011] UI 19.

> To me, the only time things like that is going to get addressed is when you're in the same room with each other, or next door, but broadly in the same room with each other talking it through. I don't see the point in agreeing something and then going away and changing your mind, it just gets you to have to come back again and start it all over again.[1012]

> No, not really. We wanted to settle on the day. We understood that there would be a cooling off period but given all the palaver that had gone on for the previous eight years we were pretty confident that if we reached an agreement, even if there was a cooling off period, the builder wasn't going to go back on it ... because there's always the consequence hanging over you of going to a full hearing and all the cost that's involved in that.[1013]

Disputes Where Participants Reported They Were Not Told about the Cooling Off Period

Of the eight participants whose disputes did not settle at mediation and who also reported not being told about the cooling off period, six thought that if they had known about the cooling off period during the mediation, it would not have made any difference to the outcome. UI 24 felt that the two sides were so far apart that a cooling off period would not have made any difference to the outcome.[1014] UI 10 reported along similar lines:

> It bewildered me that they couldn't see that they'd done the wrong thing. They kept bringing up other things that were not relevant. They were not willing to negotiate on anything. There was no offer from them at all.[1015]

Another participant was of the view that a cooling off period was not required because:

> I went in with a plan and I stuck to it. Cooling off periods are for people who make impulse buys. They're the ones who are going to get their fingers burnt. I think it's appropriate to have it but I didn't need it.[1016]

There were two interviewees who thought a cooling off period would have made a difference. One thought it would have encouraged a low offer:

> You know what? It might have. I might have thrown a really low ball offer at them, just to say if you accept that, I'll think about it.[1017]

[1012] UI 52.

[1013] UI 47.

[1014] UI 24.

[1015] UI 10.

[1016] UI 54.

[1017] UI 35.

The other described the pressure he was feeling at the end of the mediation and how he would have liked a chance to consider a settlement outside of the mediation. UI 16 was the builder in a dispute initiated by the home owner. He described a mediation that went on all day and did not settle. He said he was not provided with any information about a cooling off period and thought that it would have been useful because he felt he could not talk through the offers with his spouse or business partner:

> I had a sense of I had to decide now otherwise the window of opportunity closes. By the end of the mediation, I was very tired and a bit upset and I didn't trust myself to make a good decision. If we'd met in a couple of days for an hour or just phoned up, it would have been good. If I'd even just had a chance to sleep on it, I'd have done the figures and might have decided it was worth settling right then.[1018]

In one mediation that did settle, the participant was adamant that there was nothing in the written agreement drawn up at the mediation that referred to a cooling off period. They wished that there had been. That participant said that he had felt under pressure to settle on the day and that a cooling off period would have given him more control and an ability to assess the proposed outcome properly.[1019]

Benefit to Others

A much more common response from participants was that, while the cooling off period did not benefit them or reduce pressure for them at all, it was still a useful thing to have as part of the mediation process, because it would benefit 'other people'. For example, UI 36 said:

Interviewer:	Do you think that it [the cooling off period] helped reduce the pressure to settle in any way?
UI 36:	No, because if I was going to do something I am a person that makes a decision and I'd feel uncomfortable even walking out thinking that I was probably going to cool off anyway. I think it's a good idea the cooling off thing, but I think once I make a decision, I think I'm stuck, I'd be pretty well locked in.
Interviewer:	So what sort of people do you think it might be good for?
UI 36:	People that don't know what they're talking about. Perfect for them, perfect. They can go home, ring up a builder, friend, whatever and say this is what it is, and they say no, don't do

[1018] UI 14.

[1019] UI 11.

> that. Me I've been doing it for 40 years, I should know what I'm talking about.[1020]

UI 60 reported a similar experience:

> I suppose it can be a little bit daunting. I know what it's like, being a real estate agent, I know what it's like in negotiating and having somebody come back and forth, to a buyer, to a vendor and negotiating. So that aspect of things I was used to. The mediator come back to me saying John,[1021] you need to come up a little bit more. Well, to me it was like, you know what I do what you do in a different scenario. So, I didn't feel pressured. But I can understand how someone else, your average Joe, would have felt pressured and probably would have cracked a little bit. But to me, being in that position, I did feel comfortable because it's a position that I do for work.[1022]

UI 46 also felt that cooling off periods did not apply to them:

> UI 46: I would say that's always a good idea to have that.
>
> Interviewer: Why do you think so?
>
> UI 46: Because if someone was in a position where they felt maybe cornered into accepting something that they weren't really happy with, that helps that pressure to do that at the time. It would give them time to think about it later on or maybe get some other advice.
>
> Interviewer: For you it didn't apply? In your situation?
>
> UI 46: No.[1023]

For UI 66, cooling off periods were a good idea in general, but not relevant to them:

> I suppose I can understand from a perspective if you don't have legal representation and it doesn't turn out the way you want, you don't settle or you decide to settle on the day because you're thinking it's the right thing to do and then go 'well hang on maybe it's not, maybe I should take legal advice' then I can see it as a reasonable thing to have. But in our case, everyone happy and walked away out of there. I think for general, yes, I think it's quite a good idea.[1024]

There was some indication that demographic factors played a part in feeling pressure to settle from the mediator. Although the numbers were small, more men than women felt pressure to settle from the mediator (78 per cent and 22 per cent, respectively) and more

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[1020] UI 36.

[1021] Name changed.

[1022] UI 60.

[1023] UI 46.

[1024] UI 66.

participants who lived regionally compared to those who lived in Melbourne felt pressure to settle from the mediator (83 per cent and to 17 per cent, respectively).[1025]

Discussion

The results clearly demonstrate that pressure to settle was a very real experience for participants in the mediation process. Additionally, very few participants (only three) thought that the cooling off period had any impact on the pressure they felt during their mediation. However, the fact that they felt pressure, particularly when it related to the cost of running a hearing, seemed to reduce the likelihood of the participant considering using the cooling off period to withdraw from the agreement.

Although some pressure might be considered normal given the context in which the mediations were occurring, it was unexpected that so many participants reported experiencing pressure from the mediator to settle their dispute on the day of the mediation. Notably, and consistent with the findings of researchers such as Welsh[1026] and Wolski[1027] who observed that some mediators are very settlement oriented and judge their effectiveness based on whether the dispute settles, the results in this research demonstrate that, in a number of cases, the pressure on the participants to settle arose from the mediator expressing their desire to maintain a high settlement rate. This challenges the concept of mediator impartiality. As discussed in Chapter 3, mediator impartiality is a core value of mediation.[1028] Among other factors, impartiality has been used to indicate that the mediator has no interest in the outcome of a dispute.[1029] Once a mediator has an interest in settling the dispute for personal reasons, it seems likely that they have lost their impartiality.

Although few in number, some participants' experience of the mediator was that s/he was partial to the opposing side, whether because the mediator identified with the other side

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[1025] See Appendix 8
Demographic Data Analysis.

[1026] See Chapter 4 - The Use of Cooling Off Periods in Mediations; Welsh, 'The Thinning Vision' (n 8) 6.

[1027] See Chapter 4 - The Effect of Institutionalisation on Self-Determination***;*** Wolski, 'Mediator Settlement Strategies' (n 253) 9.

[1028] See, eg, Boulle and Field, *Mediation in Australia* (n 307) 38. See Chapter 3 for more on impartiality and neutrality at Impartiality.

[1029] Mayer (n 435) 83; Field and Crowe, *Mediation Ethics* (n 300) 64.

professionally, or because they were affected by an emotion the opposing side was apparently experiencing. As a result, the mediator appeared to be invested in a particular outcome. Together with the situation described in the paragraph above, these examples raise questions about mediator impartiality (freedom from bias) and neutrality (the mediator's behaviour, their perspective on the subject matter of the dispute and the nature of the involvement of the mediator in the mediation[1030]).

The literature around court-connected mediations also shows that pressure impacts on party self-determination—'the central and supreme value of mediation'.[1031] Chapter 3 discussed concerns about the impact of court- and tribunal-annexed mediation on self-determination, and the ability of mediation to empower parties and focus on party autonomy. As Rundle explains, only if an agreement is reached in a mediation that is free from duress and well informed can the outcome be said to be truly self-determined.[1032] Parties that are under pressure to settle, particularly when that pressure comes from the mediator rather than themselves, are not free from duress. While this might seem to be a philosophical problem, as Chapter 3 explains, it can ultimately have a practical impact if it produces an increase in litigation because people seek to be released from mediation agreements made when self-determination was compromised.[1033]

The results also demonstrate that the existence of the cooling off period had little to no impact on whether mediation participants experienced pressure to settle. However, it is important to note that most participants, despite not valuing the cooling off period in their own disputes, thought that it was a worthwhile process to have available because of its perceived benefits. The Consumer Affairs Victoria study[1034] found a similar result, whereby 91 per cent of consumers thought cooling off periods were an important safety net and a good idea, despite low numbers using it when offered.[1035]

[1030] See Chapter 3 - The Effect of Institutionalisation on Self-Determination; Sourdin, *Alternative Dispute Resolution* (n 84) 98.

[1031] Bush and Folger, 'Reclaiming Mediation's Future' (n 410) and Chapter 3 - Self-Determination.

[1032] Rundle, 'Court-Connected Mediation Programmes' (n 315).

[1033] Hedeen (n 312) 275; Spencer, Barry and Akin Ojelabi (n 2).

[1034] Referenced in Chapter 4.

[1035] Consumer Affairs Victoria (n 548) 8.

Although most participants who were offered a cooling off period did not find it of value to them personally, the results also demonstrate that there were some participants who were not offered the cooling off period and felt that it would have been of benefit to them. In relation to cooling off periods in the consumer context, Camerer argued that cooling off periods do 'much good for people who act impulsively and cause very little harm for those who do not act impulsively; thus, even conservatives who resist state intervention should find them appealing'.[1036] In the mediation setting, the data indicate the perceived cost or inconvenience of the cooling off period is low compared to the potential benefits, and thus the use of the cooling off period appears to be warranted, even if only provides a benefit to a small number of mediation parties.

Research Question 5

How do mediators feel about the impact of the cooling off period on mediations they facilitated and why?

VCAT reported that the introduction of the cooling off period was met with 'some scepticism and a degree of resistance by some mediators'.[1037] The principal concern expressed in 2010 was that the availability of a cooling off period would result in a collapse in the rate of settlement.[1038] By the time this research was conducted in 2015, it must have been clear to mediators that the provision of a cooling off period had not created a wave of revocations of settlement agreements. Nonetheless, the results of the mediators' survey indicated that some mediators held diametrically opposed views as to the merits or otherwise of having a cooling off period.

Mediators' Views on Why the Cooling Off Period Was Introduced

As explained in Chapter 5, mediators were specifically asked if they knew why the cooling off period had been introduced into mediations, as it was hypothesised that meditators who understood the access to justice philosophy behind the introduction might be more open to the use of the cooling off period. Of the 18 mediators, six reported simply that

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[1036] Camerer (n 651) 10577. See also Camerer et al (n 651).

[1037] Genevieve Nihill (n 848) 2.

[1038] Ibid.

they were not aware why the cooling off period had been introduced. The other 12 mediators stated they were aware of the reason/s why the cooling off period had been implemented. Several mediators provided explanations that referred to unrepresented parties being opposed to represented parties. For example:

> My recollection is that unrepresented parties should not be disadvantaged by being unrepresented and that represented parties should not be disadvantaged vis a vis an unrepresented party.[1039]

> From what I have been told it was to give unrepresented parties the opportunity to consult with others about their decision or obtain legal advice following the mediation in order to reduce the power imbalance when confronted with other parties that are represented.[1040]

One mediator commented on the disadvantage of being unrepresented against a represented party; however, they also saw the benefit of the cooling off period in situations in which there were two unrepresented parties:

> The perception of imbalance of power between the parties—where one party might have a solicitor or barrister present but the other may not—unfair on the party who could not afford to pay for lawyers even though they may have a legitimate claim. Or two unrepresented parties where none of them may be experienced in the mediation process, and to some degree might be intimidated by the judicial process. So better to give them the opportunity of agreeing to settle—but have a couple of days to discuss the settlement with family or friends and if they believe that they did not get a 'fair deal' then have the option of cooling, and returning to VCAT for a Hearing.[1041]

Another, much more detailed, response indicated that there had been some pressure on VCAT to make changes to ensure that unrepresented parties were less disadvantaged in the mediation process as compared to those who did have representation:

> There were a number of discussions with a wide variety of groups about the issue that some unrepresented parties were being disadvantaged in the process and felt that they were pushed into a settlement by the process and the represented parties i.e. the disadvantaged party was and possibly could not be 'protected' in the process of mediation, and was making a decision that was unfair or disadvantaged them. Parties were suggesting that the process overall was skewed giving advantage to those who could afford legal representation as opposed to those who could not. Thus nothing a mediator could do would even this imbalance. His Honour Judge Ross decided that something needed to be done to openly address this imbalance and introduced the pilot scheme. Also at the time VCAT was revisiting it

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[1039] Mediator 15.

[1040] Mediator 7.

[1041] Mediator 9.

> terms of reference and reason for being, as it is supposed to do from time to time usually called a review. Public perception also seemed to indicate that many people thought that you got a favourable decision if you could get legal representation. Improving public perception of fairness was also under review.[1042]

A similar number of responses referred to concerns about pressure being placed on parties to settle. For example:

> Parties were complaining that they felt pressured into reaching an agreement or had not been given adequate time to obtain legal advice prior to a mediation. Sometimes parties complained that they could not afford to be represented at the mediation but when they showed the Terms of Settlement to their lawyer, they were told it was not a good outcome for them. Parties hated feeling pressured into make a binding decision at the mediation and want some time to think about the agreement.[1043]

> … complaints of being pressured: not ready.[1044]

> To give a party that may have a problem with power control have the opportunity to back out of an agreement where he/she believes the settlement was agreed to under duress.[1045]

Only one response specifically mentioned that pressure to settle may have come from the mediators rather than the opposing side in a dispute (or their lawyers):

> Concern that unrepresented parties would be subject to excessive pressure or make poorly informed decisions when confronted with the power imbalance of a represented party on the other side or a coercive style of mediation. Also, to allow the opposing counsel the freedom to participate effectively despite the absence of a representative on the other side.[1046]

Two mediators referred to consumers:

> Meeting consumer demand to ensure that if a party felt at a disadvantage during the mediation, they could change their mind about settlement.[1047]

> Consumer protection reasons.[1048]

[1042] Mediator 12.

[1043] Mediator 8.

[1044] Mediator 15.

[1045] Mediator 14.

[1046] Mediator 5.

[1047] Mediator 11.

[1048] Mediator 18.

One mediator suggested that the cooling off period was introduced to create a process that was both more democratic, as well as cheaper and quicker:

> Considered to be a more democratic process to encourage unrepresented parties in the settling of disputes on a more economical and timely basis than formal hearings.[1049]

Mediators' Views on Whether Having a Cooling Off Period Changed the Mediation

Mediators were asked if they thought the provision of a cooling off period changed the mood, conduct or speed of the mediation or the behaviour of the parties. Multiple answers were permitted. The responses are set out in Table 27.

Table 27: Mediator response to whether the provision of a cooling off period changed the mediation

Does the fact that one or more of the parties has access to a cooling off period in a mediation you are conducting change the mood or style of the mediation in any way (compared to a mediation in which there is no cooling off period)?	Number of mediators
No, it changes nothing	7
It changes the way I conduct the mediation	3
It changes the mood of the mediation	5
It changes the speed of the mediation	3
It changes the behaviour of the parties to the mediation	5
Other	5

Of the five mediators who responded using the 'other' box, two indicated some change in the mediation by also ticking another box. The remaining three mediators who ticked 'other' had ticked one of the other options; however, their written explanations indicated that they thought the cooling off period did have some impact on the mediation process. Their written explanations were:

> An unrepresented party may be more inclined to work towards a settlement knowing their [sic] is an opportunity to withdraw.[1050]

> It probably takes pressure off parties to conclude on the day. It may lead to game playing or posturing, but this is not my experience.[1051]

[1049] Mediator 19.

[1050] Mediator 3.

[1051] Mediator 10.

… may change the end of a mediation.[1052]

Taking those responses into account, 11 of the 18 mediators (or 61 per cent) thought that having a cooling off period did have an impact on the mediation in some way or another.

Although more than half the mediators considered that having a cooling off period did impact the mediation in some way, when asked if the provision of a cooling off period enhanced the chance of reaching a settlement, nearly three-quarters of the mediators reported that having a cooling off period did not increase the likelihood of settlement (Table 28).

Table 28: Mediator responses to whether having a cooling off period impacted on the likelihood of a settlement

In mediations where one or more of the parties have access to the cooling off period, do you think that fact assists in the settlement of the dispute on the day of the mediation?	Number of mediators	Percentage
Increases the likelihood of a settlement	5	28%
Decreases the likelihood of a settlement	2	11%
Makes no difference to the likelihood of a settlement	11	61%

Mediator Style

A possible reason why mediators did not think that having a cooling off period increased the likelihood of settlement is based on the style of mediation that was practised by the mediators. While not a key aspect of the research, the results revealed noteworthy data in relation to variations in style of mediation used by the mediators. These findings are consistent with the concerns outlined in Chapter 3 that court-connected mediation is moving away from a facilitative style of mediation to a settlement-focused mediation and that the core values of mediation (being self-determination, impartiality, non-adversarialism and responsiveness) are being affected by the adversarialism and focus on settlement that exists in a court-connected setting.[1053]

Unsurprisingly, given that the mediations were occurring in the context of a tribunal process, the experience of mediation participants indicated that, in fact, many mediators were conducting mediations using a settlement style of mediation. These data are

[1052] Mediator 15.

[1053] Menkel-Meadow, 'The Trouble with the Adversary System' (n 517) 72-4.

supported by research on court-connected mediations.[1054] In settlement mediation, the objective is to reach a compromise[1055] and the parties adopt a predominantly positional bargaining approach.[1056] It usually involves seeking a financial settlement that is acceptable to both parties and does not focus on the relationship between the parties or non-financial outcomes, unlike the facilitative style of mediation.[1057] Some mediation participant comments that demonstrate this include:

> It really just came down to money. It was backwards and forwards about how much money he was going to get from me … The short answer to the question—there was a discussion on both [money and the underlying issue], but predominantly about what it was going to take to settle. Certainly the mediator focused more on 'Ok, the issue is the issue but what is it going to take to settle'. That was what he was primarily concerned about.[1058]

> My impression was that the whole process and I think this is actually correct … the whole process was about … was directed towards getting a resolution and a settlement on the day. I mean that is obviously the whole focus of it. And the … I think that some of my, and certainly even more so my partner's feelings on the day was that there was no consideration given to the fact that actually we were … victims is a strong word… but we hadn't done anything wrong. You know, it was really clear. It was such a clear cut case. You know, they just wanted, the mediator just kind of wanted a quick fix to it. There was no sense of justice in the whole process.[1059]

Although most of the mediation involved building disputes, and, on the face of it, might have appeared to be commercial or financial disputes, it was clear that, in many instances, the relationship between the parties was still considered important by the participants, despite not being a focus of the mediation. As discussed below, this was also reflected in the settlement terms, which, in many cases, involved more than just the payment of money.

Settlement terms

Of the 30 cases that settled at mediation:

[1054] See Chapter 3 - Criticisms of Court-Connected Mediation.

[1055] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[1056] Alexander, 'The Mediation Metamodel' (n 333).

[1057] See Chapter 3 - Settlement style of mediation.

[1058] UI 61.

[1059] UI 50.

- more than 70 per cent involved at least partially the payment of money from one side to the other side
- 19 (54 per cent) involved only the payment of money
- 20 per cent involved the payment of money and something else (eg the performance of remedial work and the provision of a certificate of electrical safety).

Twenty-six per cent of cases did not involve the payment of money in the resolution, but did involve some other form of agreement (such as remedial work, sale of the property and division of the proceeds of sale). Two of the cases in this category settled on the basis that both parties would simply 'walk away' from the dispute, foregoing any further claims.

In UI 1's case, the parties had a relationship. The case revolved around a house owned by a number of different couples who had all been friends, and the house was going to be developed as a shared holiday house. UI 1 said that, despite the fact that he did not know what had caused the fractured relationship between the parties, there was no attempt by the mediator to explore, or attempt to improve, the relationship between the parties.[1060]

Some other examples where the focus of the settlement was not the relationship between the parties are:

> They were willing to come back into my place actually, in fact they expressed they were prepared to come back and finish the job. It was the mediator that made it really clear 'You wouldn't want them back'. He was about, this dispute has gone way too far, this will not be resolvable, and you wouldn't want them back in. So it was all about putting this outstanding, supposed debt to bed.[1061]

> I felt like the mediator was playing a bit of a game. I felt that I couldn't really say what I thought. And the mediator kept making comments like 'I can't advise you about that' or 'I can't tell you about that'. When I asked for clarification about why he felt that he couldn't say what he really thought, he said that while he'd hoped for open discussion and steps to a conclusion, it was actually about placing demands on us. Didn't discuss what was allegedly wrong with the building works but instead talked about how much I'd have to pay. I don't really know if that was normal. Don't really feel it was helpful. I thought we'd look at what the real problem was and discuss how to fix it and why the ex-client had taken it to VCAT rather than just giving me a call. Instead it went very quickly to discussing how much I was willing to pay.[1062]

[1060] UI 1.

[1061] UI 29.

[1062] UI 14.

At least one mediation was conducted in an evaluative manner and may not be considered a mediation at all. The mediation participant, who was a home owner, reported that the builder did not turn up for the mediation. The mediator managed to contact the builder by telephone and began conducting the mediation by telephone. However, the mediation was adjourned to allow the mediator to attend the property with the builder and for the mediator to write up a report addressing who was responsible for which parts of the claim.

In the participant's own words:

> UI 46: The mediator wanted to view my property. So, it was adjourned for another date when the mediator and builder attended my property and viewed the damage and took photos and everything then. The mediator looked at the photos, looked at house, all that sort of thing, and went through everything and then wrote up an agreement and his decision sort of thing.
>
> Interviewer: And then, literally did the mediator make like a decision like a judge would? You know, 'He will pay you to do this but the roof claim isn't a strong one so he won't pay you to do the roof'?
>
> UI 46: Yeah, it's all written out like that. With each thing sort of thing, each part of the damage, it's all written down.
>
> Interviewer: His decision about who should be responsible for it?
>
> UI 46: Yep.[1063]

In Chapter 3, concerns about the impact of a court-connected setting on the core values of the mediation process are discussed. Boulle and Field describe the displacement of facilitative mediation and the prevalence of settlement conferencing operating under the guise of mediation as creating a challenge for the realisation of self-determination in court-connected mediations.[1064] These data, which indicate that at least some mediations in this VCAT context are not being conducted in a facilitative style, provide support for such concerns.

The discussion in Chapter 4 about the reasons behind calls for a cooling off period to be used in mediations is also relevant. Welsh argues that having a cooling off period in mediations rewards mediators who view their role as primarily facilitative.[1065] Should

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[1063] UI 46.

[1064] See Chapter 3; Boulle and Field, 'Re-Appraising Mediation's Value' (n 409) 96.

[1065] Welsh, 'The Current Transitional State' (n 686).

facilitative techniques be used by the mediator to reach a settlement agreement, the disputants would be less likely to rescind their agreement during the cooling off period, even if they could do so without penalty.[1066] The data from this study show that very few mediation participants rescind their mediation agreements, despite some mediations being conducted in a non-facilitative style. Consequently, the capacity of a cooling off period to enhance party self-determination must be questioned. This is discussed further in the following chapter.

Mediators' Views on Whether the Cooling Off Period Should Be Continued

Mediators were evenly split as to whether or not cooling off periods should continue to be offered in mediations at VCAT (Table 29).

Table 29: Mediator response to whether a cooling off period should continue to be offered in mediations at VCAT

Do you think cooling off periods should be extended to other mediations run by VCAT	Number of mediators
Cooling off periods should be ceased for all mediations at VCAT	8
Cooling off periods should only be continued to be offered in the current limited circumstances (panel mediators, unrepresented parties)	1
Cooling off periods should be offered in all mediations where there is an unrepresented party regardless of the status of the mediator	8
Cooling off periods should be offered in all mediations regardless of whether the parties have legal representation or not	1

More detailed reasons were sought from mediators although not all survey responses included these additional comments. Many of the mediators who would prefer not to have cooling off periods in mediations focused on the fact that parties should be coming to the mediation prepared, and if a settlement is reached on the day of the mediation, that should conclude matters between the parties. For example:

> Parties should obtain legal advice before the mediation ... not after the mediation … After negotiating a matter, the parties want the matter to be finished. They can't celebrate the end of the matter until the cooling off period has ended … Most parties are not completely happy with their agreements a few days after the mediation, but in the long term, they are content that the matter is over. The cooling off period causes people to second guess whether they obtained a good result so they exercise the cooling off period thinking the nagging feeling in their 'gut' is good evidence that they should have obtained a better result. Parties who

[1066] Ibid.

> have exercised the cooling off period do not obtain a better result if the matter goes to a hearing. In every other jurisdiction, a release is considered a release![1067]

Another mediator said:

> The ideal is for parties to come prepared and with authority to resolve the matter on the day of the mediation. If a cooling off period is factored into their thinking and preparation there is a risk that they will be less prepared and resort to external advisers who have not had the benefit of the mediation event. This may undermine the work done by another party to be ready for the mediation and/or undo the achievements of the mediation.[1068]

As mentioned earlier in this chapter, there was concern from two mediators that parties to a mediation who were represented either at the mediation or had obtained legal advice prior to the mediation were inappropriately obtaining the benefit of a cooling off period:

> Parties should be made aware at intake that mediation is part of a legal process. It may result in a party compromising their position. They would be well advised to attend with representation if substantial interests are involved. Where one party is represented I do not see why they should have the advantage of a cooling off period. The inequality in the negotiation stage of the mediation is not addressed by giving the represented party a cooling off period.[1069]

And:

> If one party is represented, and the other party is not represented at the mediation but has had a lawyer at other times, there is suspicion that the lawyer has instructed the party to attend the mediation alone for strategical purposes.[1070]

As can be seen from Table 29 above, of the nine mediators in favour of a cooling off period in mediations, only one felt that it should be available for both unrepresented and represented parties. The remainder were of the view that it should only be available for unrepresented parties and their comments indicated that it was particularly warranted where one party was unrepresented and the other was represented:

> I don't think it is appropriate to have the [cooling off] period in every situation, especially where there is a balance of negotiating power and parties are legally represented. In these circumstances it is beneficial to conclude the matter at the mediation meeting.[1071]

[1067] Mediator 8.

[1068] Mediator 10.

[1069] Mediator 3.

[1070] Mediator 8.

[1071] Mediator 10.

And:

> If a party is unrepresented, then chances are that they have not sought legal advice prior to Mediation and hence they need the protection of the Cooling off period if the other party has its lawyers present at the Mediation. If both parties are unrepresented, the field is more level, but there could be an imbalance of power—i.e. the Builder might be more experienced or intimidating or manipulative compared with the other party—say the owners. This is more relevant where the owners are of non-English speaking ethnic background—where they may not know the system as well as the Builder. So, to give the cooling off period allows them to speak with a friend or 'cousin' and decide whether they want to continue with the settlement or to cool off and come back to VCAT for determination by a Tribunal Member.[1072]

Several comments from mediators in favour of the cooling off period focused on the fact that a cooling off period can help to reduce pressure on an unrepresented party:

> The basis for my thinking is that, as I understand it, withdrawal during the cooling off period is relatively rare. Therefore, I would think that the unrepresented party who made the agreement at the mediation is under a lot of pressure from family members or friends that they made a very bad bargain and are under a lot of pressure to withdraw. This can place a huge psychological pressure on that person for a long time. The cooling off period means that this pressure is relieved at, what I consider to be, a relatively low cost to the VCAT process. It may be that some lists would have parties that are more interested in reaching a specific outcome and withdrawals increase to an unacceptably high figure.[1073]

And:

> The underlying principle of the cooling-off period is to protect the disadvantaged litigant, 'the little man'. Many unrepresented litigants are struggling financially and are quite emotional at mediation. In some cases, they are confused, teary, cross etc. The very idea that they can take away the settlement document and think about it, means that they are not 'bullied' into a settlement by a stronger party, whether represented or not. The cooling-off mechanism (whether in reality or by perception), addresses any possible alleged unconscionable conduct levied by the stronger party and even the mediator.[1074]

Two comments focused on the fact that the process of mediations across VCAT should be consistent and, therefore, there should be a cooling off period offered in all mediations at VCAT, rather than just mediations presided over by panel mediators.[1075]

[1072] Mediator 9.

[1073] Mediator 16.

[1074] Mediator 2.

[1075] The use of the cooling off period in mediations at VCAT is limited to mediations run by panel mediators, not mediations presided over by tribunal members.

> I think all mediations should be run under the same conditions. There is potential for role confusion among mediators if some VCAT mediations have cooling off periods and others do not. I think the increase in the comfort for unrepresented parties is significant enough, and that levelling the playing field by allowing time for review with trusted advisers is important enough that the process should be generally available to unrepresented parties in VCAT mediations.[1076]

And:

> By not doing this it purports an idea that some mediators are somehow different. Anyone who is mediating, be it a staff member, panel member, or judicial member when acting in the role of mediator the process should be the same. The idea that members or judicial members do not use Mediation but some mixed process, or that they make some suggestion of how they might rule in the matter if they were hearing it, is not mediation but a mixed process where parties may be deemed not to be self-determining, but being reliant on the comments of the member.[1077]

Reasons for Lack of Legal Representation

The concerns of some mediators about whether mediation participants were truly unrepresented appears to have some merit based on data from mediation participants. While none of the 47 participants were legally represented at the mediation, the fact that the participants were unrepresented at the mediation did not mean they had not sought legal advice prior to the mediation. Eight of the participants mentioned that they had consulted a lawyer prior to the mediation (17 per cent). In addition, one participant had a building expert with him at the mediation.[1078]

Participants were asked why they chose to be unrepresented at the mediation. Multiple answers were permitted. Unsurprisingly, the main reason for not having a lawyer was the anticipated cost of legal representation. Twenty-eight participants (60 per cent) cited this as one of the reasons they were unrepresented. Thirteen participants reported that at least part of the reason they had not obtained legal representation for the mediation was that they had either been advised not to bring a lawyer or thought that disputes at VCAT did not require legal representation. As an example, UI 9 said that, prior to the mediation, he had spoken to many people, lawyers and non-lawyers, about the process and all said

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[1076] Mediator 5.

[1077] Mediator 12.

[1078] UI 14. He described the building expert's role as providing support for his case—not as representing him or speaking for him. His reasons for choosing the building expert over a lawyer were: the expert had already been involved in the dispute at an earlier stage, the expert knew the work that was the subject of the dispute well, he was cheaper than a lawyer and he knew the VCAT process well.

that having a lawyer present at the mediation would be a bad idea and would make it harder to settle. He also reported that the mediator told him during the mediation that having a lawyer represent him would have made it more difficult to settle.[1079] Other comments included:

> Well, look, VCAT is supposed to be a … and I stress, supposed to be … a vehicle where an ordinary consumer can go and be heard without legal cost or implications arising. Frankly I know it's abused and a lot of people now go with lawyers but it just costs too much you know the legal wrangles, the games they play, the way they use the law it just becomes a mess. … We went in there hoping that the person who would be hearing the case would guide us along because we thought we were justified in making the claim.[1080]

> Why did we choose not to [have a lawyer present]? It's a good question. I think we … certainly my understanding from going to the VCAT website was that we did not need to be represented and there was also a flavour from reading the website that perhaps it was preferred that we were not represented. It was not a financial issue at all. We could have easily been represented if we chose to do that.[1081]

> I did ring a lawyer about the dispute and was told that I didn't need a lawyer at the mediation but could get one later if I wanted.[1082]

> Well, mediation is that you sit down, and you chat about it, and you have a person that mediates and isn't on either one's side, and they try to come to a resolve, an amicable resolve. And we didn't feel that lawyers were necessary for that.[1083]

Nineteen interviewees stated they felt they did not need legal representation because they were confident they could represent themselves. For some, their confidence was based on a combination of factors, including the size of the dispute, their understanding of the issues and concern about the cost of legal representation. For example:

> The dispute was only about $10,000. It wasn't financially worth getting a lawyer involved.[1084]

> I didn't think it was necessary, because it was such a small matter. It was so obvious. I mean leaking tiles, is leaking tiles. I just didn't bother. I didn't think it was important enough.[1085]

[1079] UI 9.

[1080] UI 64.

[1081] UI 50.

[1082] UI 17.

[1083] UI 48.

[1084] UI 19.

[1085] UI 62.

For others, they simply felt confident that they were right:

> Because I was in the right. I knew that I was absolutely, take you, how far you want to go, High Court, I was still going to win. I was absolutely right.[1086]

> I felt I'd done sufficient research. I knew exactly where I stood. They didn't have a leg to stand on.[1087]

Such levels of confidence may also have been reflected in the perceived lack of need for the cooling off period by these mediation participants.

Representative Status of Other Party to the Dispute

Interestingly, and despite the comments from some mediation participants about the good reasons not to have lawyers at the mediation, more than 40 per cent of participants were opposed by parties that had either legal or other representation. Seventeen mediation participants reported that there was lawyer with the other party at the mediation, including two who had both a lawyer and another person (one a building expert and one from the insurance company). In addition, three mediation participants reported being were opposed by parties represented by non-legal representatives: in one case, the other party was represented by a director of the building company; in another, the repressentative was from the Building Registration Board; and one mediation participant reported that there were 'three men in suits' on the opposing side who they thought might be the company's internal legal representation but they were not sure. In total, 43 per cent of mediation participants were opposed by a represented party (Table 30).

Table 30: Other party's legal representation status

Status of other party	Percentage
No representation on the opposing side	57 per cent
Legal representation on the opposing side	36 per cent
Other representation on the opposing side	6 per cent

[1086] UI 69.

[1087] UI 6.

Effect of Experience on Mediators

Consideration was given to whether less experienced mediators (or perhaps newer, more recently trained mediators) had different opinions about the cooling off period from those who had been mediating for a long time. The 18 mediators had varying levels of experience as mediators, but generally most had significant experience. The least experienced mediator still reported three years of mediator experience, and there were two mediators who reported more than 30 years of mediator experience (see Table 17). The mediators' number of years of experience as VCAT mediators also tended to more experience rather than less, and the mediators were also evenly spread from less than two years' experience at VCAT to more than 15 years at VCAT (see Table 18). All 18 mediators had conducted a mediation with a cooling off period in the last 12 months, with seven conducting between one and five mediations, three conducting between six and 10 mediations, and four each conducting between 11 and 20 mediations, and more than 20 mediations, over the preceding 12-month period (see Table 19). Overall, the years of experience of the mediator did not have any discernible impact on their views of the cooling off period.

Discussion

The responses to the survey of mediators set out above illustrate three key points about the cooling off period at VCAT. The first key point is that half of the mediators in this study do not view the cooling off period as a good thing and would like to see it abolished. The positive benefits attributed to a cooling off period, such as improving access to justice by providing opportunities for equalising power imbalances and party self-determination[1088]—particularly for unrepresented parties opposed to represented parties—appeared less important to mediators than finality of the dispute on the day of the mediation. Although this desire for finalisation of the dispute was also mentioned by mediation participants who were not in favour of a cooling off period, it was anticipated that the mediators who had studied mediation theory as part of their mediation training[1089] would have been more in favour of an access to justice tool, especially one

[1088] See Chapter 4 - The Use of Cooling Off Periods in Mediations.

[1089] See Chapter 3 - Use of Models in Practice.

that did not result in large numbers of settlements being revoked, as had initially been feared.

It was not within the scope of this research to examine whether this negativity towards the cooling off period flowed from the mediator to the mediation participants and thus influenced the way it was explained to the parties or the view that the parties had of it. Nonetheless, it seems likely that the perceived efficacy of the cooling off period would affect the mediators' approach, and the mediators' views would have an impact on their practice, for instance, in informing the participants of their rights.

A second key point is that nearly three-quarters of the mediators thought that having a cooling off period affected the mediation in some manner, despite not necessarily enhancing the likelihood of settlement. Most did not articulate how the cooling off period impacted on the mediation despite being asked. This information appears critical to a better understanding of the first key point—why such a large proportion of mediators were opposed to the cooling off period.

The final key point is that only one mediator thought that the cooling off period should apply in mediations involving represented parties. Of the mediators that were in favour of having a cooling off period in mediation, it was seen as a benefit for unrepresented parties to help create a more equal relationship when an unrepresented party was opposed to a represented party. This is certainly an important factor in achieving substantive justice.[1090] However, a more nuanced understanding of the philosophy behind mediations, based on the concept of self-determination, which encourages parties to come to a settlement freely, and the view that such settlements are more durable,[1091] suggests it is important for parties to agree to a settlement and, some days later, still be willing to comply to the settlement entered into, regardless of whether or not the party was represented. This is a more desirable outcome than a situation in which 'most parties

[1090] Genn, 'Tribunals and Informal Justice' (n 3) 398.

[1091] Hedeen (n 312) 275. See also Boulle, *Mediation* (n 4) 83; Alexander, 'The Mediation Metamodel' (n 333).

are not completely happy with their agreements a few days after the mediation, but in the long term, they are content that the matter is over'.[1092]

Conclusion

This chapter addressed the five research questions, detailing data from the interviews and surveys. It presented the raw numbers of responses to various questions and considered the qualitative answers—why mediation participants chose to do what they did and what their experiences of mediation were. It also examined mediators' views on the cooling off period. Discussion of the responses drew on scholarship on mediations and cooling off periods from Chapters 2, 3 and 4. The final chapter of this thesis, Chapter 7, brings together these results with the themes from the preceding chapters, and provides recommendations for further use of the cooling off period as well as recommendations for further study.

[1092] Mediator 8. The full quote is:

> Most parties are not completely happy with their agreements a few days after the mediation, but in the long term, they are content that the matter is over. The cooling off period causes people to second guess whether they obtained a good result so they exercise the cooling off period thinking the nagging feeling in their 'gut' is good evidence that they should have obtained a better result. Parties who have exercised the cooling off period do not obtain a better result if the matter goes to a hearing. In every other jurisdiction, a release is considered a release!

CHAPTER 7
CONCLUSIONS AND RECOMMENDATIONS

Introduction

This final chapter begins by recapping the context in which this research sits. The contextual summary brings together material from preceding chapters, particularly Chapters 2–4, which grounded the research in the relevant scholarship. This is followed by a section on the key findings in which the research aims are restated and answers to the five research questions are provided. Achievement of the first three research aims is demonstrated by the responses to the research questions. In line with the fourth and final aim of the research, this chapter then provides recommendations for improvements to the use of the cooling off period in mediations at VCAT and elsewhere in the justice system. The research indicates that, with relatively simple improvements to VCAT's cooling off processes and procedures, the effectiveness of the cooling off period could be improved. Finally, the chapter concludes by underscoring the significance of the research.

Contextual Summary

Recognition that the law and legal system failed to accord equal treatment to all people was one of the principal themes of the 1975 Poverty Commission's Second Main Report, 'Law and Poverty in Australia'.[1093] Since then, proponents of access to justice have searched for ways to overcome the difficulties or obstacles that have made equality before the law inaccessible to many people.[1094] The increase in the use of Alternative Dispute Resolution (ADR) processes, including mediation, in the civil justice system in Australia, combined with the increased role of tribunals as adjudicators of both civil and administrative disputes, has been part of access to justice reforms. The appeal of both these 'alternatives' was that they were perceived to be quick and inexpensive, have informal and thus easy to navigate processes, particularly for unrepresented disputants,

[1093] Douglas McDonald-Norman, 'Law and Poverty in Australia: 40 Years after the Poverty Commission' (2017) 23(3) *Australian Journal of Human Rights* 410, 410.

[1094] Cappelletti and Garth (eds) (n 36).

and be more responsive to the needs of the parties. Mediation and other ADR processes had the added apparent benefit of being consensual and preserving relationships.[1095]

The institutionalisation of ADR processes in courts and even tribunals, which were themselves established as an alternative to the formal justice system, has been pervasive.[1096] In court and tribunal processes, the increased use of ADR was a response to a perceived crisis in which civil justice had allegedly become too expensive and time-consuming.[1097] ADR, most commonly in the form of mediation, offered the prospect of a less expensive and faster method of resolving disputes at a time when court lists were increasing.[1098] On the other hand, in contrast to determinative justice system processes, proponents of mediation theory saw mediation as a way in which party-centred empowerment concepts could make disputants the principal actors and creators of any resolutions reached.[1099]

The establishment of the Victorian Civil and Administrative Tribunal (VCAT) in 1998 was promoted as another step in the access to justice reforms of the civil justice system in Australia. VCAT's implementation was part of the then Victorian Liberal government's pre-election commitment to provide Victorians with 'a modern, accessible, efficient and cost-effective justice system'.[1100] Mediation would be offered to all parties and the need for legal representation would be limited.[1101]

However, the institutionalisation of ADR in the Australian civil justice system has not necessarily equated to greater access to justice.[1102] Over time, concerns have arisen about ADR's inability to address power imbalances and the special needs of certain parties, especially disadvantaged and vulnerable members of society. Related concerns about ADR

[1095] Astor and Chinkin (n 3) 4; Genn, 'What Is Civil Justice for?' (n 3) 5; Noone, 'ADR, Public Interest Law' (n 3); Noone and Akin Ojelabi, 'Alternative Dispute Resolution' (n 3); Access to Justice Advisory Committee (n 1); Akin Ojelabi and Noone (n 3).

[1096] Astor and Chinkin (n 3), 6; Mack (n 115).

[1097] Davies (n 116) 166. For the US see Katz (n 21) 3.

[1098] Astor and Chinkin (n 3), 4.

[1099] Welsh, 'The Thinning Vision' (n 8) 6; Boulle and Field, 'Re-Appraising Mediation's Value' (n 409) 97.

[1100] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 972 (Jan Wade, Attorney-General).

[1101] Ibid.

[1102] Bobbi McAdoo and Nancy A Welsh, 'Look before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation' (2004) 5 *Nevada Law Journal* 399, 400.

in a court-connected setting include pressure being applied to parties to settle their cases because settlement is seen as the goal rather than just one possible outcome, and increased, or at least not deceased, costs for parties created by mandatory ADR processes. The informality of ADR and tribunals, including the encouragement of self-representation, while initially championed by access to justice scholars, has also been shown to disadvantage unrepresented parties to a dispute, potentially significantly.[1103]

For mediation in particular, the resulting tensions between the values of self-determination, impartiality, confidentiality, responsiveness and non-adversarialism, and the legal adversarial settings of court-connected mediation, combined with the desire for time and cost efficiencies by justice institutions, has led mediation theorists to argue that court-connected mediation is not true mediation. There are concerns that, in court-connected settings, the practice of facilitative mediation, which is considered the 'foundational model of contemporary Western mediation'[1104] and which promotes negotiation in terms of underlying needs and interests, rather than legal rights or obligations,[1105] has been displaced by settlement-style mediations. Settlement-style mediations favour positional bargaining, usually over money, with the goal being the efficient delivery of a settlement.[1106]

One response to such concerns was a call for the use of a cooling off period in mediations.[1107] Cooling off periods are commonly utilised as a consumer protection mechanism—they provide both a remedy for irrational decision-making or decisions made in haste, and a protection from decisions made under pressure or without all the relevant information.[1108] Similar to the consumer context, the cooling off period implemented by VCAT effectively provides a mediation party with the right to terminate a contract without penalty, as its focus is on the right to withdraw without penalty from an otherwise concluded, signed and binding settlement agreement reached following a mediation.

[1103] See Chapter 2 - Criticisms of ADR and Tribunals.

[1104] Field and Crowe, *Mediation Ethics* (n 300) 11.

[1105] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[1106] Alexander, 'The Mediation Metamodel' (n 333); Boulle and Field, *Mediation in Australia* (n 307).

[1107] Welsh refers to the cooling off period in a number of articles but they all link back to this one from 2001: Welsh, 'The Thinning Vision' (n 8).

[1108] Consumer Affairs Victoria (n 548) i.

While it could be argued that there is an element of paternalism in the adoption of a mediation cooling off period,[1109] cooling off periods in the consumer context have been found to be of benefit to those who feel under pressure, or are ill advised, while causing very little harm to those who do not.[1110]

Calls for the use of a cooling off period in mediation stemmed from the view that there needs to be both an effective means of protecting self-determination in the mediation process and a method of preventing coercion in mediation arising from the use of high-pressure tactics.[1111] When using a cooling off period to support specifically legally unrepresented mediation parties, such as in the VCAT program that is the subject of this research, factors such as time to consider decisions (and seek legal advice if needed) and awareness of (legal) rights also come into play.

As set out in Chapter 5, the research questions were designed around the hypothesis that a mediation cooling off period could provide unrepresented parties with two possible benefits. The first was that a mediating party might find the cooling off period to be of benefit to help remedy a power imbalance because of their lack of legal representation when the other party is represented. The second was that the cooling off period might reduce any pressure put on a mediation participant during the mediation, as the individual would know they had time to consider any agreement outside of the mediation process and seek advice if desired. The five research questions were designed to ascertain if these hypotheses were accurate.

Over a 12-month period, the perceptions and experiences of 47 legally unrepresented mediation participants, all of whom were eligible for a cooling off period, was obtained through semi-structured telephone interviews. Eighteen VCAT mediators provided their views by survey. Data from both the interviews and surveys were inputted into Qualtrics

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[1109] This is because acceptance of the need for a cooling off period is effectively saying that a person's judgement may be impaired to such a degree that they should not be held to their settlement agreement. See Chapter 4, especially Kronman (n 569) who highlights the arguments around paternalism in relation to cooling off periods in a consumer context.

[1110] The data from both this research and other research demonstrate very small numbers of withdrawals from settlement agreements. See Chapter 4. See also Camerer who argues that, while cooling off policies do exemplify 'conservative paternalism', they also do 'much good for people who act impulsively and cause very little harm for those who do not act impulsively; thus, even conservatives who resist state intervention should find them appealing'. Camerer (n 651) 10577. See also Camerer et al (n 651).

[1111] Welsh, 'The Thinning Vision' (n 8).

survey software that generated reports based on both groups of research participants. Those reports were analysed and imported to Excel for tabulation and further interrogation using thematic analysis.

Key Findings

Chapter 1 set out the four research aims of this thesis:

- Ascertain whether the unusual and innovative provision of a cooling off period following a mediation is utilised by unrepresented mediation parties.
- Establish whether the low number of people who withdraw from mediated agreements during the cooling off period is indicative of satisfaction with the outcome of the mediation or is for some other reason.
- Determine whether the provision of a cooling off period empowers unrepresented mediation parties (ie regardless of whether participants speak to anyone about the mediated outcome, do they feel less pressure to settle knowing that they can withdraw from it without penalty).
- Provide recommendations about the use of a cooling off period in mediations at VCAT and elsewhere in the justice system.

Keeping those research aims forefront, the data collection and analysis was designed around five key research questions.[1112] In summary, the results provided the following answers to the five research questions.

Research Question 1: Were the unrepresented mediation participants adequately made aware of their rights to a cooling off period before or during their mediation?

Answer: While most unrepresented mediation participants were made aware of their rights to a cooling off period before or during their mediation, a significant proportion were not. For those mediation participants that were advised of their cooling off period rights, the methods used to do so were varied and inconsistent. Notification of the cooling off period commonly occurred at the end of the mediation, thereby nullifying one

[1112] The methodology and method, as well as details of the data collection and analysis, are set out in Chapters 5 and 6.

potential benefit of having a cooling off period—that of reducing pressure to settle during the mediation.

Research Question 2: Do the unrepresented mediation participants in a mediation with a cooling off period use that time after reaching a settlement to obtain advice (professional or otherwise) about the settlement agreement they reached; and if so, from whom, and if not, why not?

Answer: Unrepresented mediation participants who settle their dispute at mediation do not use the time provided by the cooling off period to obtain advice (professional or otherwise) about the settlement agreement reached. The reasons for not doing so, as reported by the mediation participants, were generally for one (or more) of four reasons: they were satisfied with the outcome, they wanted the matter finalised, they had concerns about the interaction between confidentiality clauses in the settlement agreement and the cooling off period, and/or there was insufficient time in which to obtain advice within the period allowed.

Research Question 3: Do the unrepresented mediation participants withdraw from mediated agreements during the cooling off period if they are unhappy with the outcomes after reaching a settlement agreement at mediation, and if not, why not?

Answer: Only one unrepresented mediation participant withdrew from their mediated agreement during the cooling off period despite many other mediation participants having high levels of dissatisfaction with the outcomes of the mediation. The reasons for not withdrawing despite dissatisfaction were that the unrepresented mediation participants wanted the dispute finalised and/or they were concerned about the cost of proceeding to a hearing.

Research Question 4: Do the unrepresented mediation participants feel pressured during a mediation to come to a settlement agreement and, if so, does the provision of a cooling off period do anything to alleviate that pressure?

Answer: While not all unrepresented mediation participants felt pressured during a mediation to come to a settlement agreement, more than two-thirds did. More than 60 per cent of participants felt that there was pressure on them to settle during the mediation and that pressure came from the mediator. The provision of a cooling off period did not appear to alleviate that pressure in most cases. Despite the general view of mediation participants that a cooling off period is beneficial, over 90 per cent did not feel that having a cooling off period made any difference to them.

Research Question 5: How do mediators feel about the impact of the cooling off period on mediations they facilitated and why?

Answer: Mediators held diametrically opposed views about the merits of a cooling off period, with half holding the view that it should be continued and half believing that it should cease being used. For those mediators opposed to the cooling off period, the positive benefits attributed to a cooling off period appeared to be less critical than the importance of the finality of the dispute on the day of the mediation. Although approximately 60 per cent of mediators felt that having a cooling off period as part of the mediation affected the mediation in some way, approximately the same number of mediators felt that a cooling off period had little impact on the likelihood of a settlement. Some mediators expressed strong concerns about the cooling off period benefiting mediation participants who were not truly unrepresented. Mediator self-reports of how they informed mediation participants about the cooling off period did not match with participant recollections.

The answers to the research questions demonstrate that the first three of the research aims have been met. The following section addresses the fourth research aim by providing recommendations for improvements to the use of the cooling off period in mediations at VCAT and elsewhere in the justice system.

Recommendations to Enhance Cooling Off Periods in Mediation

Several recommendations for improving the way the cooling off period operates at VCAT are made in this section of the chapter. The recommendations are based on the data obtained as part of this research and, as such, are specific to VCAT's mediation cooling off

period. However, for those considering the use of a mediation cooling off period in other contexts, it is anticipated that these recommendations will also be relevant and provide suggestions and considerations.

While no mediation participants in this study used the time provided to them by the cooling off period to seek advice about their settlement agreements, and very few mediation participants acknowledged that the cooling off period had any impact on the pressure they felt during the mediation, some simple procedural improvements may assist in achieving the hypothesised benefits of having a cooling off period. To recap, the hypothesised benefits of having a cooling off period in a mediation are that parties in a mediation might find the cooling off period to be of benefit to help remedy a power imbalance because of their lack of legal representation when opposed to a represented party, and/or the cooling off period might reduce any pressure put on a mediation party during the mediation as the individual would know they could consider any agreement outside of the mediation process.

The Length of the Cooling Off Period

The length of the cooling off period in VCAT's mediations was two business days. This is shorter than the more common three business days used in the Victorian consumer context.[1113] Three business days is also common in the US[1114] and is the length suggested by Welsh.[1115] Several mediation participants in the research, when interviewed, thought that the cooling off period was for three days and others thought it was for longer.[1116]

There is no ideal length of time for a cooling off period. The appropriate length should be ascertained with reference to the problems that the cooling off period are attempting to solve and the cost of delaying transactions.[1117] One of the purposes of the cooling off period as used by VCAT is to enable unrepresented mediation parties to obtain legal advice. This is to ensure that unrepresented mediation parties are not disadvantaged by

[1113] Consumer Affairs Victoria (n 548) 5-7.

[1114] Sovern (n 552).

[1115] Welsh, 'The Thinning Vision' (n 8).

[1116] See Chapter 6.

[1117] Consumer Affairs Victoria (n 548) 23.

settling their cases without appropriate knowledge of their rights. Consequently, the cooling off period needs to be of sufficient length for an individual to obtain legal advice. As suggested in Chapter 6, two business days is an insufficient amount of time in which to obtain an appointment and advice from a lawyer unless the lawyer is already engaged in the matter prior to the mediation (and if the lawyer has already been consulted about the dispute, the question arises about whether the mediation party is truly unrepresented).[1118]

Although the concerns raised by some mediation participants and some mediators about the need for finality of the dispute are noted, this desire must be balanced with the ability for each party to obtain legal advice, thus optimising their ability to provide informed consent to settlement. Given the low numbers of withdrawals from settlement agreements, and the fact that it appears unlikely that an unrepresented mediation party could obtain legal advice within the time currently allowed, it is recommended that the length of the cooling off period should be extended. Failure to do so undermines the support supposedly being afforded to unrepresented mediation parties by providing a cooling off period. Additional research could and should be done on how long it takes to get an appointment for legal advice with an appropriately skilled lawyer. In the absence of that research, it is recommended that the length of the cooling off period be immediately extended to at least a calendar week. Seven days, or a calendar week, is the length of time of the cooling off period used by the Administrative Appeals Tribunal.[1119] This length of time was suggested by some mediation participants in the study.[1120] More than two-thirds of consumers in Victoria recommended that five business days *or longer* be the minimum length for a consumer cooling off period.[1121] Cooling off periods with lengths longer than a calendar week are not unheard of.[1122] Consequently, and without undertaking additional research, a calendar week appears to strike the right balance

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[1118] The issue about whether a mediation party is truly unrepresented was discussed in chapter 6 in the section titled Mediators' Views on Whether the Cooling Off Period Should Be Continued and is also raised below in the section called The Definition of Unrepresented Party.

[1119] Administrative Appeals Tribunal Act 1975 (Cth) s 34A.

[1120] See Chapter 6 - Lack of Time in Which to Seek Advice.

[1121] Consumer Affairs Victoria (n 548) 81.

[1122] Welsh refers to a Florida mediation program with a 10-day cooling off period. See Welsh, 'The Thinning Vision' (n 8) 439. In the consumer context, cooling off periods can be as long as 30 days. Loos (n 564) 6.

between participant expectations, comparative examples and avoiding lengthy delays to the finality of the disputes.

The Methods by Which Information Is Provided

Evaluation of the use of the cooling off period in the Fair Work Commission, as detailed in Chapter 4, suggested that a mandated, consistent process for mediators to follow regarding informing mediation participants about the cooling off period would be likely to benefit parties.[1123] The results from this research demonstrate that such a requirement also seems pertinent to VCAT's processes. Although the results demonstrate that the majority of mediators, based on their self-reporting, are complying with best practice and informing parties to the mediation about the provision of a cooling off period at the beginning of the mediation, this was not consistent with the experience of the mediation participants.

Overall, mediation participants reported that the methods of notification of the cooling off period were inconsistent and varied. Some reported not being notified at all. Some were notified only at the end of the mediation when settlement had already been reached. The data revealed that more mediation participants whose cases *did not* settle at mediation reported not being told about the cooling off period than those whose cases did settle.[1124] This evidence is consistent with the reports of several mediation participants whose cases did settle that they were only told about the cooling off period when they were close to, or had reached, an agreement.

There are several reasons why varied and inconsistent procedures are problematic. As Chapter 4 demonstrated, one of the reasons for having a cooling off period is that it can reduce the pressure on parties during a mediation. Consequently, if a party is to obtain the full benefit from knowledge about the cooling off period, they should be informed about it prior to or at the very beginning of the mediation. While learning about the cooling off period at the end of the mediation might reduce pressure in the moment, and

[1123] See Chapter 4 - Fair Work Commission Trial Use of Cooling Off Periods in Conciliations; RMIT University Centre for Innovative Justice (n 13) 15.

[1124] Chapter 6 shows that 80 per cent of interviewees whose disputes settled at mediation reported being told about the cooling off period during the mediation. However, this number decreased to only 53 per cent when the mediation did not result in a settlement.

might ensure that the party can obtain some advice about the settlement, it does not reduce pressure during the mediation. It is possible that, in some cases, the fact that mediation participants did not know about the cooling off period during the mediation may have contributed to disputes not settling. Some participants may have been more likely to make offers or settle had they known in advance that they had some time in which to seek advice after settlement.

The results of the interviews with mediation participants showed that attending mediation can be a stressful process for people not familiar with it, particularly where the other party has legal representation.[1125] Repeating information and providing it in multiple formats (orally and in writing) should help to ensure that parties fully understand how the cooling off procedure may benefit them. Although there are no studies on the effectiveness of the method of notice of the cooling off period in mediations, based on Sovern's research of cooling off periods in consumer transactions, which showed that it is not effective to provide notice in writing only,[1126] it is recommended that any mandated notification process ensure that notice of a cooling off period be provided verbally at the beginning of the mediation, as well as in writing. A mandated and consistent process may alleviate inconsistent practices by mediators and ensure that all mediation parties are aware of the rights afforded them.

The Interaction between Confidentiality Provisions and the Cooling Off Period

The results demonstrate that some mediation participants were confused about how the confidentiality provisions in their settlement agreement interacted with the cooling off period. Examples in the research illustrated that some mediation participants thought that the confidentiality provisions overrode the cooling off period.[1127] Consequently, some mediation participants did not seek advice during the cooling off period, despite reporting that they would have liked to have obtained advice.[1128] For the cooling off period to be of benefit, it is important that mediation participants are not confused about

[1125] More than 12 people spoke about being nervous and intimidated at the beginning of the mediation.

[1126] See Sovern's research highlighted in Chapter 4 - Method of Notice.

[1127] For example, see UI 7 in Chapter 6 - Concerns about Confidentiality Provisions.

[1128] See Chapter 6 - Concerns about Confidentiality Provisions.

the interaction between a confidentiality provision in a settlement agreement and the capacity to seek advice in the cooling off period.

Confusion about how the cooling off period interacts with confidentiality provisions could be easily remedied. As part of the recommendations above to mandate the process to inform mediation parties about the cooling off period, mediators could also provide information to mediation parties about the interaction between confidentiality provisions and the cooling off period. Mediators would then, as part of the process of explaining the cooling off period to the parties, include an explanation about how the confidentiality of any mediated agreement reached could be maintained while still allowing parties to seek advice about the outcome. This information could additionally be provided in written form both before and after the mediation.

The Definition of Unrepresented Party

While the cooling off period as it currently stands is only available to unrepresented parties in mediation, several mediators raised concerns that there was sometimes a lack of clarity over representation status. For example, Mediator 19 expressed uncertainty about whether a mediation party who had had legal advice prior to the mediation or during the mediation by telephone should be considered unrepresented. It was discussed in Chapter 6 that this issue may affect whether a party is informed about the cooling off period by the mediator.

Certainty and a desire for equivalent processes for individuals coming before VCAT means that there should be no inconsistency between mediators on this issue. A definition of 'unrepresented party' should be agreed by VCAT and directions provided so that individual mediators are not using their discretion about which parties should be categorised as unrepresented and which should not. Given that the cooling off period is an access to justice tool, its use should be encouraged for unrepresented parties. It is recommended that any party without a lawyer physically present with them at the mediation should be assumed to be unrepresented and thus entitled to the cooling off period.

Of course, an alternative approach would be to have the cooling off period available for all parties to a mediation, regardless of whether they are represented. This would be the simplest approach with the least possibility of confusion. Such an approach raises the

question of what makes a party less powerful or puts a party at a disadvantage. As demonstrated in Chapter 2, not all unrepresented parties are equally vulnerable. A repeat player, such as a real estate agent in a residential tenancies dispute, despite being unrepresented, by virtue of their prior experience, let alone their privilege, education and other factors, generally will be in a more powerful position than a tenant. In a mediation, pressure from the mediator is likely to influence the less experienced and less powerful party more significantly than one that has experienced mediation multiple times before. A cooling off period has the potential to empower the more vulnerable mediation party. Consequently, ideally, representation status should not be the deciding factor in relation to whether a cooling off period applies.

The Reasons for a Cooling Off Period

As demonstrated in Chapter 6, the results of the survey of mediators indicated that there was inconsistent knowledge among the mediators as to the reasons for the introduction of the cooling off period. The evaluation of the use of a cooling off period in conciliations at the Fair Work Commission[1129] discussed in Chapter 4 recommended that the Commission articulate the purpose and rationale of the cooling off period for several reasons, including that it would 'educate conciliators about the reason for introducing a procedural step which, according to the feedback provided in response to the pilot, several conciliators consider to be unnecessary'.[1130]

Even though the cooling off period has now been in place in VCAT for many years, it is recommended that VCAT provide mediators with a statement clearly articulating the purpose and rationale of the cooling off period. This would educate those mediators who are unaware of the rationale for the cooling off period and ensure that mediators have a better understanding of the dual purpose of a cooling off period—to both relieve pressure in the mediation and provide time to seek advice about proposed settlement. It could also provide a reminder for mediators of the importance of self-determination in mediation.

[1129] Discussed in Chapter 4 - Fair Work Commission Trial Use of Cooling Off Periods in Conciliations.

[1130] RMIT University Centre for Innovative Justice (n 13) 15.

Additional Findings and Recommendations

Although this research did not set out to study mediation style, the nature of the semi-structured interviews, which included questions about pressure and satisfaction, led to data being obtained about the mediation participants' experiences of mediation style. These data about mediation style (detailed in Chapter 6 and summarised below) are relevant to the aims of this research insofar as they relate to party self-determination.

As stated above, it was the lack of focus on party self-determination in mediations that first led to the calls by Welsh and others for a cooling off period to be used in mediations. It was found that the risk of pressure being exerted on parties by mediators was greater in settlement-style mediations, which often take place in court-connected settings. It was felt that settlement-style mediations were leading to an increase in 'consent litigation',[1131] in which one party refuses to comply with the terms of a mediated agreement, even though that same party consented to those terms in mediation.[1132] In settlement-style mediation, consent—either to participate in the mediation in the first place or to settle the dispute—may not be a reliable indicator of autonomy, agency and self-determination.[1133] The use of settlement-style mediation may also effectively negate the potential benefits of the cooling off period, as the very objective of the mediation is to push parties into a settlement. In comparison, a key aim of the cooling off period is to reduce pressure on mediation participants to settle and to foster party control and decision-making.

Facilitative Mediations or Settlement Conferences?

As set out in Chapter 3, in Australia, the facilitative style of mediation is recognised as the most common; it is also the style recommended by the National Mediation Accreditation System's (NMAS) Practice Standards.[1134] The objective of facilitative mediation is to 'promote negotiation in terms of underlying needs and interests, rather than legal rights

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[1131] Reynolds (n 662).

[1132] Ibid 252; Nolan-Haley, 'Mediation Exceptionality' (n 681).

[1133] Reynolds (n 662) 252.

[1134] Practice Standards (n 17) clause 2.2; Spencer, Barry and Akin Ojelabi (n 2) 141.

or obligations'.[1135] The NMAS practice standards require a mediator to specify to the parties before commencing a mediation if they are not intending to practise facilitative mediation.[1136] Consequently, as a result of both the terminology of 'mediation' used by VCAT and the practice standards applying to VCAT's mediators,[1137] a party in a mediation at VCAT should expect that any mediation they participate in will be conducted in a facilitative style.

The data from this research suggest that, in many of the mediations involving the research participants, facilitative mediation did not occur. The process that mediation participants experienced was more akin to a settlement-style mediation or simply a settlement discussion. As explained in both Chapters 3 and 6, in settlement-style mediations, the objective is to reach a compromise[1138] and the parties adopt a predominantly positional bargaining approach.[1139] Settlement-style mediations lack focus on the core values of mediation, including self-determination, responsiveness and non-adversarialism.[1140] Such mediations usually involve seeking a financial settlement that is acceptable to both parties. They generally do not focus on the relationship between the parties or on non-financial outcomes, unlike facilitative mediation.[1141] The descriptions of the mediation processes experienced by many mediation participants had many or all of these settlement-style characteristics.[1142] The number of mediation participants in this research study who experienced a mediation that did not appear to be conducted as a facilitative mediation suggests that this experience is the norm.

There is nothing inherently wrong with the use of settlement-style mediation. In fact, in a court-connected setting, such mediations may well be exactly what the justice organisation wants—a process that results in a high percentage of settlements. Facilitative

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[1135] Sourdin, *Alternative Dispute Resolution* (n 84) 77; Boulle and Field, *Mediation in Australia* (n 307) 3; See also Field and Crowe, *Mediation Ethics* (n 300) 15.

[1136] Practice Standards (n 17).

[1137] As accredited mediators, they are required to comply with the NMAS charter and standards.

[1138] Sourdin, *Alternative Dispute Resolution* (n 84) 77.

[1139] Alexander, 'The Mediation Metamodel' (n 333).

[1140] Boulle, 'Minding the Gaps' (n 5) 226.

[1141] See Chapter 3 - Mediation Models.

[1142] See Chapter 6 - Mediator Style.

mediations tend to be more resource intensive[1143] and, consequently, may not be desired by judicial institutions keen on the efficiency gains promised by ADR processes. However, what is problematic is that participants in VCAT's mediation process are not necessarily expecting the mediation to be predominately settlement focused. This was particularly evident from mediation participants who did not have prior mediation experience. One particularly pertinent example was UI 37 who said:

> I didn't think it was going to be so final and so heavy. Mediation to me is you get in there, you discuss your issues and you work out a solution with a third party. Not realising—I realised this afterwards—that I had to go in there with all guns blazing and state my case to a finality and pretty much prove it and have expert witnesses so that I could have mediation. It's not what I understood it to be at all. I was quite shocked at what I faced.

Mediation parties need to be aware of the type of mediation they are entering in to. As set out at the beginning of this section, the expectation of a facilitative mediation is quite appropriate, both because of the terminology utilised by VCAT and because this is what the NMAS standards require. A mediation party should not attend a mediation expecting a negotiation based on the issues in dispute and the needs and interests of the parties, and instead find themselves negotiating solely over money.

There are two alternative solutions to this situation. The first option is that VCAT could commit to improving the existing mediation process to ensure that facilitative mediation is consistently occurring. This would require a commitment to a process that has the potential to deliver benefits beyond positional bargaining and monetary settlements, such as maintaining relationships and focusing on party interest and needs. The data reveal that, if VCAT decides on this course of action, significant work will be required with the current mediators to ensure this occurs in practice.

The alternative is that the existing pre-hearing process, currently called a mediation, should be renamed to more accurately reflect the process that this research indicates is occurring. More appropriate terminology such as a 'settlement conference' or 'case conference' could be used. Renaming the ADR process should not be considered a lesser

[1143] Alexander, 'The Mediation Metamodel' (n 333).

or inadequate option. The important point is to ensure that parties are better prepared for the process.

Pressure in Mediation

Related to the question of mediation style is the issue of pressure in mediation. The data demonstrated that many mediation participants felt pressured during the mediation. More than 60 per cent stated that the mediator put pressure on them to settle their dispute during the mediation.[1144] Examples from the data in Chapter 6 show that the pressure can be as blunt as a mediator telling a participant that he or she has a high settlement rate and implying that they do not want that impacted by a non-settlement.[1145]

One of the possible explanations for these data is that some mediators appeared to assess their effectiveness as mediators based on their ability to produce a settlement. This is consistent with findings by researchers such as Welsh[1146] and Wolski[1147] that court-connected mediation can result in mediators becoming very settlement oriented and judging their effectiveness as mediators based on whether the dispute settles.

It is impossible to say based on this research which came first—a move towards settlement-style mediation or mediators measuring their effectiveness as mediators on settlement rates. The issue is largely circular. Nonetheless, the outcome for mediation parties either way is that essential features of facilitative mediation, such as self-determination, non-adversarialism, mediator impartiality and responsiveness to the needs of the parties, are weakened by settlement-style mediation and/or by mediators who are focused on a particular outcome from the mediation (a settlement). The use of a cooling off period can also be impacted by such a phenomenon, as it may influence when and how a mediator chooses to tell a mediation party about the cooling off period. A

[1144] See Chapter 6 - Pressure from the Mediator.

[1145] For example, UI 47, as reported in Chapter 6 said: 'She explained she was there to mediate, she doesn't take sides, she doesn't offer advice but by the way I have the best resolution record of anyone of the mediators at VCAT so if you don't sort of fix it here today, I was made to feel as if we were casting some sort of stain on her record'.

[1146] Welsh, 'The Thinning Vision' (n 8) 6.

[1147] Wolski, 'Mediator Settlement Strategies' (n 253) 9.

mediator focused on a settlement may only emphasise the cooling off period when it is not likely to impact on a settlement.

Naturally, the impact of pressure from mediators will vary depending upon the personal circumstances of the mediation party. The party's prior experience in mediation or courts, their level of support, their financial circumstances and the representation status of the opposing mediation party can all impact on how they respond to the pressure put on them. However, if mediators believe (rightly or wrongly) that they are being assessed or evaluated on their settlement rates, then it seems likely that settlement-style mediations and pressure on mediation parties to settle will continue. A new or different way of assessing mediator ability needs to be considered.

One final point to make in relation to mediator pressure is that the data showed that many participants were concerned about the cost of taking the dispute beyond the mediation to a contested hearing. These cost pressures were sometimes exacerbated by mediators.[1148] One of the reasons cooling off periods were initiated in the consumer context was because it was recognised that salespeople could manipulate emotions by stimulating concern, anxiety and scarcity. Consumers were found to be prone to exploitation by sellers[1149] who used aggressive sales techniques and consumer psychology 'tricks'.[1150] An issue raised by the data is whether mediators' emphasis on the costs of taking the matter to a hearing influences mediation parties in a similar manner.

Reality testing is said to be a common and effective mediator technique for empowering mediation parties to assess the equities of a dispute more objectively;[1151] however, whether emphasising the costs associated with a hearing is acceptable depends on the mediators' motivation for providing the information as well as the accuracy of the

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[1148] For example, UI 16, as reported in Chapter 6, said they 'felt pressured by the information about the stages and being told how much this will cost'.

[1149] Luzak (n 563) 91-2. According to Hoeppner, other than in the US, this form of consumer protection is almost universal in direct sales see Hoeppner (n 581) 4.

[1150] Loos (n 564) 8.

[1151] Dwight Golann, *Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates* (American Bar Association, 2009) 27, cited in Colatrella (n 273) 760. See also Joan B Kelly, 'Mediation and Psychotherapy: Distinguishing the Differences' (1983) *Mediation Quarterly.* 33; Koh Zhen Yang, 'Manipulation in Mediation' (2016) 1 *Contemporary Issues In Mediation* 73; Mary Anne Noone, 'Lawyers as Mediators: More Responsibility?' (2006) 17(2) *Australasian Dispute Resolution Journal* 96, 103.

information. For example, research is needed on the accuracy of the mediators' estimates of the costs of taking a matter to hearing, whether the costs are exaggerated to encourage settlements, and how necessary cost estimates are in the context of a truly facilitative mediation in which the focus should be on interests and needs rather than a settlement. More information about the types of pressure exerted by mediators would also be beneficial. None of this information was available from this research; however, investigation on these matters appears to be urgently needed in the context of court-connected mediations.

Summary of Recommendations

As stated above, all the recommendations made in this chapter are based on data obtained through research into VCAT's mediation cooling off period. As such, they are specific to this context. However, as the recommendations also provide information about features that should be considered to guarantee that the full value of a cooling off period is achieved, they will be relevant in other mediation contexts too.

The recommendations are as follows:

1. Increase the length of the cooling off period to a minimum of five business days or a calendar week.
2. Mandate the methods by which information is provided by mediators to parties in a mediation about the cooling off period to ensure consistent practice among mediators.
3. Ensure that advice about the cooling off period is provided to mediation parties both in writing and orally and at multiple times, including prior to and at the beginning of the mediation.
4. Require mediators to provide mediation parties with a clear explanation about the interaction between the cooling off period and confidentiality provisions both in writing and orally.
5. Provide clarification when a party to a mediation should be considered unrepresented and communicate this to all mediators or, alternatively, offer the cooling off period to all mediation parties, regardless of their representation status.
6. Inform and educate mediators about the rationales for having a cooling off period.

7. Either commit to a practice of facilitative mediation or rename the existing pre-hearing process from ‘mediation’ to ‘settlement conference’ to more accurately represent the process that occurs in practice.
8. Begin a discussion about mediator value and effectiveness that does not reference settlement rates.

Possible Changes to the Study Should it be Repeated

At the time of finalisation of this thesis, almost seven years after initial interviews, no significant alterations have been made by VCAT in relation to the processes associated with mediations which are eligible for a cooling off period as far as the researcher is aware. Mediations run by a panel mediator continue to allow unrepresented mediation participants a cooling off period of two business days.

Constraints and limitations on the research design have been identified. Analysis of the data nevertheless suggested potential additional processes and useful additional questions to be asked of participants if the study were to be repeated. In particular, interviews with the mediators rather than surveys would yield informative data. A semi-structured interview method allowing for follow up questions would enable better understanding of the views of mediators on the use of the cooling period.

In relation to the first four research questions, if the study was reproduced it would be useful to more specifically focus on why some mediation participants wanted the dispute finalised, despite dissatisfaction with the outcome. More probing questions about the concerns of mediation participants about the dispute going to a hearing would be then relevant. Mediators would be asked additional questions, potentially by survey, associated with the timing and method of notification of mediation participants about the cooling off period, including whether there were occasions in which they did not alert mediation participants to the cooling off period. Similarly, a different research question focussing on mediation participants regardless of representation status could also yield informative data to analyse potential power imbalances between the parties.

The additional, unexpected findings relating to the style of mediations used and the pressure in mediations were not part of the original research questions and so the

research methodology was not tailored to interrogate those issues. Future research opportunities are therefore identified by these findings, including a focus on mediators' aims from a mediation (is their focus the conduct of a facilitative mediation or to encourage settlement of the dispute), the level of pressure on parties that is considered appropriate, how party self-determination in viewed in practice by the mediators, and reality testing of costs estimates made by mediators.

Conclusion

VCAT's strong emphasis on access to justice, both in its establishment and subsequently, meant that it was an appropriate venue for a novel and innovative trial of a mediation cooling off period. This was also an acknowledgement that neither ADR processes, nor tribunal alternatives to the traditional justice system could, by themselves, guarantee access to justice. Rather, the introduction of the mediation cooling off period was recognition that further supports were required to address inequalities between mediating parties, particularly when unrepresented parties were opposed to represented parties—even when the ADR process of mediation occurred in a tribunal setting, itself an alternative to the traditional justice system.

The widescale adoption of ADR processes in the resolution of civil disputes has benefited judicial institutions by both supporting access to justice ideals that underpin ADR and facilitating the efficient resolution of disputes. High settlement rates and a subsequent reduction in resource-intensive hearings have been among the key reasons for the enthusiastic implementation of ADR processes by courts and tribunals.[1152] However, the third wave of access to justice developments, which called for the use of ADR processes, including mediation, was not motivated by efficiency concerns. Rather, it reflected recognition that traditional legal procedures were obstacles to access to justice for certain sections of the population and a desire to move dispute resolution to a process in which control by lawyers was less strong.[1153]

[1152] Boulle and Field, *Mediation in Australia* (n 307) 301.

[1153] See discussion in Chapter 2 - Access to Justice. For examples, see also Cappelletti, 'Alternative Dispute Resolution Processes' (n 20) 284; Genn et al (n 61).

Juxtaposition of the rationales for mediation and judicial institutions reveals markedly different emphases. As highlighted in the first chapters of this thesis, the bringing together of two different approaches to dispute resolution in court-connected mediation has not been without tension. There is a clear strain between non-determinative mediation philosophy, with its focus on self-determination and non-adversarialism, and the adversarial legal approach to the resolution of disputes in court and tribunal settings.[1154] A pertinent example is the eagerness of courts to consider that agreements reached in court-connected mediations are immediately binding and therefore should be enforced, as this fails to take into consideration the fact that mediated settlements may not reflect a true exercise of self-determination and free will.[1155] Consequently, while a successful mediation process for a court or tribunal might be demonstrated by a high percentage of cases settled at mediation, a successful mediation process for a mediation scholar is one that accords with the core values of mediation and where the outcome is one that the parties come to freely, regardless of whether settlement is achieved.

It was Nancy Welsh, in 2001, who suggested the use of cooling off periods in mediation.[1156] Although a strong supporter of mediation in the resolution of disputes, Welsh noted the loss of party self-determination in court-connected mediations as they became more settlement focused.[1157] She argued that cooling off periods were one way to redress this trend.[1158] Welsh and other mediation theorists who shared her concern[1159] anticipated that the cooling off period would allow a return to a more facilitative model of mediation, with a focus on party self-determination. She also predicted that a cooling off period could keep 'muscle mediation' in check, reducing pressure on mediation parties to settle—again a win for party self-determination.[1160]

[1154] Boulle, *Mediation* (n 4) 560; Boulle, 'Minding the Gaps' (n 5); Rundle, 'Barking Dogs' (n 5) 78. See also Rundle, 'The Purpose of Court-Connected Mediation' (n 5) 1.

[1155] Welsh, 'The Thinning Vision' (n 8) 38; Welsh 'Reconciling Self-Determination (n 673) 434; Welsh, 'Do You Believe in Magic?' (n 481) 726.

[1156] Welsh, 'The Thinning Vision' (n 8).

[1157] Ibid.

[1158] Ibid.

[1159] Such as Durand (n 662); Reynolds (n 662); Baylis and Carroll (n 662); Lande (n 662).

[1160] Welsh, 'The Thinning Vision' (n 8).

In recent years, the question of unrepresented mediation parties making informed settlement choices has become an issue of increasing importance to both mediation policy and practice.[1161] Cooling off periods in ADR processes have been championed for, in addition to potentially reducing pressure to settle, their ability to provide unrepresented mediation parties with time in which to seek legal or other advice about agreements they reach before being bound by those agreements.[1162]

The answers to the research questions reveal that the existence of a cooling off period, as it currently operates at VCAT, is ineffectual as an access to justice innovation, and that the cooling off period has not achieved anticipated goals.[1163] It is not the low numbers of withdrawals from settlement agreements per se that determines its lack of effectiveness; rather, it is that, despite high levels of dissatisfaction with settlement outcomes, unrepresented mediation participants do not withdraw from their mediated agreements. Mediation participants do not use the cooling off period to seek advice about their settlement agreements, notwithstanding the high number who feel pressured during the mediations. The existence of a cooling off period does not reduce that pressure for most mediation participants. Lastly, the research has shown that the cooling off period does not enhance party self-determination,[1164] with the mediation style used in the VCAT mediations, as described by mediation participants, often focused on settlement rather than being a facilitative mediation style with party needs and interests paramount. Although the low number of withdrawals might be considered a success from an efficiency point of view, the data clearly show that VCAT's goals in implementing the cooling off period (ie supporting unrepresented mediation participants) have been less successful than might be hoped.[1165]

[1161] Colatrella (n 273) 1; Nolan-Haley, 'Informed Consent' (n 430).

[1162] See Chapter 4 - The Use of Cooling Off Periods in Mediations; RMIT University Centre for Innovative Justice (n 13); Baylis and Carroll (n 662).

[1163] Welsh, 'The Thinning Vision' (n 8).

[1164] Described by Boulle and Field as implying that the parties actively and directly participate in mediation proceedings, choose and control the norms to guide their decision-making, create their own options for settlement and control final decisions. Boulle and Field, 'Re-Appraising Mediation's Value' (n 409) 97.

[1165] See Chapter 4 - VCAT's Pilot, which show that VCAT's aims in including a mediation cooling off period in mediations were to give unrepresented mediation participants the opportunity to obtain advice (either legal or non-legal) on the merits of any settlement reached at the mediation and to be able to withdraw, without

This research, which examines the novel and innovative introduction of a cooling off period into a tribunal-connected mediation program, provides empirical evidence on whether a procedural protection designed to empower unrepresented mediation parties had the desired effect. Although the data and subsequent analysis have demonstrated that the cooling off period, as it is currently set up, does not support unrepresented mediation parties, this research suggests that the aims of this access to justice initiative could be fulfilled with several simple changes to institutional processes. This final chapter has recommended potential improvements to the way the cooling off period is offered to mediation participants that should enhance its use. Small changes could improve the likelihood of the cooling off period yielding positive benefits without necessarily impacting significantly on settlement rates and efficiency gains.

This research is a unique addition to the body of evidence around cooling off periods in mediation. The analysis underscores some of the areas of conflict between mediation philosophy and ADR within the civil justice system. Cooling off periods can be offered in multiple manners and the results of this study are not necessarily generalisable across mediation programs. However, this research will hopefully stimulate further debate and encourage the nuanced use of the cooling period in other mediation programs.

penalty, from the settlement if, on reflection or on the basis of advice, the agreement reached was no longer appealing, and to reduce any undue pressure on unrepresented mediation participants to settle their dispute on the day of the mediation.

APPENDIX 1

SCRIPT FOR VCAT STAFF WHEN CONTACTING POTENTIAL MEDIATION PARTICIPANTS

When eligible litigants register at VCAT reception for their scheduled mediation:

- VCAT is currently working with a La Trobe University PhD student to do a review of certain aspects of VCAT's mediation service.
- Your dispute fits the category of the review.
- Would you be interested in receiving a letter and then being contacted by the researchers to confirm your interest in participating and to arrange a time to discuss your experiences and how the process may be improved? If you require an interpreter, the interviews can be conducted using a telephone interpreting service.
    - If yes, proceed.
    - If No, thank you for your time.
- If yes, we will pass your contact details on to the researcher who will then contact you. Please complete the attached form (example below).
- Thank you

I give permission to the Victorian Civil and Administrative Tribunal (VCAT) to provide the researcher, Rebecca Edwards of La Trobe University, with my name, address, email address (if relevant) and telephone number, for the purpose of the review.
I understand that the researcher will contact me within the next 8 weeks to inform me about and discuss the project and invite me to participate.
Name:
Address:
Phone number:
Email address (if relevant):
Date:
Signature:

Interpreter required YES / NO If yes, what language?

_____

APPENDIX 2

CONSENT TO BEING CONTACTED FORM – MEDIATION PARTICIPANTS

LA TROBE UNIVERSITY

FACULTY OF BUSINESS, ECONOMICS AND LAW
Bendigo campus

Mailing address
PO Box 199
Bendigo Victoria 3552
Australia

T + 61 3 5444 7931
F + 61 3 5444 7998
E FBEL@latrobe.edu.au
latrobe.edu.au/fbel

MELBOURNE CAMPUSES
Bundoora
Collins Street CBD
Franklin Street CBD

REGIONAL CAMPUSES
Bendigo
Albury-Wodonga
Mildura
Shepparton

Consent to being contacted with further information about the research project being run by La Trobe University on mediations at VCAT

I give permission to the Victorian Civil and Administrative Tribunal (VCAT) to provide the researcher, Rebecca Edwards of La Trobe University, with my name, email address (if available), postal address and telephone number, for the purpose of being contacted with further details of the research being undertaken.

I understand that the researcher will contact me within the next 8 weeks to provide me with more information about the research, details about what would be required of me, and invite me to participate.

Name:

Email address (if available):

Postal address:

Best contact phone number:

Date:

Signature:

Interpreter required YES / NO

If yes, what language? _____

ABN 64 804 735 113
CRICOS Provider 00115M

APPENDIX 3

EMAIL TO POTENTIAL MEDIATION PARTICIPANTS AND PARTICIPANT INFORMATION STATEMENT

LA TROBE UNIVERSITY

FACULTY OF BUSINESS, ECONOMICS AND LAW

Mailing address
La Trobe University
Victoria 3086 Australia

T + 61 3 9479 1667
F + 61 3 9479 3278
E fbel@latrobe.edu.au
latrobe.edu.au/fbel

Dear ,

My name is Rebecca Edwards. I am a La Trobe University, School of Law, PhD student, currently conducting research into the use of cooling off periods in mediations at VCAT.

At your recent mediation at VCAT you agreed to me contacting you regarding your potential participation in the research. To that end, I am attaching a document entitled "Participant Information Statement" which sets out the details of the project.

I would ask you to read the attached Participant Information Statement carefully.

The next step in the process is that I will telephone you. During that conversation, I can tell you more about the project and answer any questions you might have. I will also ask you to participate in a telephone interview regarding your experiences. We can arrange to do the interview either then and there when I ring you or at another time more convenient to you.

If you have any questions about the research in the meantime, you can contact me on r.edwards@latrobe.edu.au or

I note that the project has been approved by the La Trobe University Human Research Ethics Committee.

ABN 64 804 735 113
CRICOS Provider 00115M

APPENDIX 4

SCRIPT FOR INITIAL CONTACT WITH POTENTIAL MEDIATION PARTICIPANTS

- Dial the telephone number of a potential participant (a person who has given their written consent to being telephoned)

Process if a person other than the potential participant answers the phone

1. The interviewer will provide her name to the recipient and ask whether the potential participant is present
2. If present, the interviewer will then speak directly to the potential participant. If not, the interviewer will ask whether there is a more appropriate time to call the potential participant.
3. If asked by the call recipient about the reason for the call, the interviewer will state that she is unable to provide that information for privacy reasons.

Process when speaking to potential participant

- Good morning / afternoon / evening. My name is Rebecca Edwards. I'm from La Trobe University.
- I'm calling about an evaluation that is being conducted by me as part of a PhD research project regarding mediations held at VCAT. I understand that you recently participated in a mediation at VCAT and agreed to being contacted by me. Is this correct?
    - If Yes, proceed
    - If no, apologise and withdraw invitation to participate
- Is now a good time to talk to you about it?
    - If yes, proceed
    - If no, make a mutually agreeable alterative time to talk
- I mailed/emailed you some information to you about this research project. Did you receive it?
    - If yes, note this and proceed.
    - If no, note this and proceed.

Purpose of interview

- With the consent of VCAT, the research I am undertaking is a review of some aspects the mediation process offered by VCAT particularly as it relates to unrepresented people, that is, people who don't have a lawyer with them at the mediation.
- I am calling a number of participants to gauge their views on the mediation process through a 30-45 minute telephone interview. The purpose of the interview is to hear about your experience with the process, to help identify what is working well and areas for improvement.
- The interview questions will be about your attitudes to the process, how you engaged in the process and how it worked for you.

- I will not be asking any questions about the content of your dispute or the issues that were in dispute other than asking about the category of dispute.
- There is no obligation on anyone to participate regardless of whether you signed the form agreeing to me contacting you. If you decide not to participate, there will be no disadvantage, penalty or adverse consequences whatsoever. VCAT will not receive any information about whether or not you choose to continue to participate in the research.
- Should you wish to participate, I can do the telephone interview either now or at a time that suits you within the next week.
- Would you like any further information about the research or do you have sufficient information?
    - If yes, go to heading "Further information about the research" below
    - If no, continue

Do you wish to proceed with the telephone interview now?

- If yes, proceed
- If no, schedule a later time for the interview (ensuring it is a time that also suits me)
- If doesn't want to participate at all, thank them for their time so far and say Good bye and withdraw invitation to participate in the research.

Consent to participation

- As I mentioned before, I sent you information about the project in the form of a document called a Participant Information Statement. Do you have any further questions or do you require any further clarification about anything in it such as confidentiality, anonymity of results, use of data or the risks or benefits of the research?
    - If yes, ask for questions and provide answers
    - If no, continue.

- I just wish to reiterate, there is no compulsion on you to participate in this research. Regardless of whether your dispute is finalised or not, if you decide not to participate, there will be no disadvantage, penalty or adverse consequences whatsoever.

- To participate further, I need you to provide your verbal consent. Are you satisfied with the explanation given in relation to the project as it affects you and your consent is freely given?
    - If No, thank them for their time so far and say Good bye and withdraw invitation to participate in the research.
    - If Yes, continue.

- It is my preference to record the interview. This will enable me to have a more detailed transcript of your answers than if I simply take notes. If you consent to me recording the interview, I can provide you with a transcript of the interview if you wish, once it has been prepared. Do you consent to the interview being recorded?

- If Yes, ask if they would like a transcript of the interview sent to them once it is prepared
    - Note their answer
- If no, explain that I will therefore only make handwritten notes during the interview.

Potential further information about the research to provide

- The aim of this project is to examine whether the use of a cooling off period in mediations where one party is unrepresented has achieved the goal of empowering people who are unrepresented. It is hoped that this information may then be used to develop programs to support unrepresented people in all parts of the justice system.
- People who have been involved in mediations at VCAT are being asked to participate in a variety of ways. Some of these people have had access to cooling off periods, some have not. Mediators who have been involved in mediations with cooling off periods are also been asked to participate.

APPENDIX 5

SEMI-STRUCTURED INTERVIEW QUESTIONS FOR MEDIATION PARTICIPANTS

1. **The dispute**
   - **1.1.** Confirm that the discussion is about the mediation the participant attended at VCAT in _____ month in _____ list about _____ dispute.
   - **1.2.** Invite the participant to give a summary of how the dispute arose.

2. **Representation status**
   - **2.1.** Where you represented by a lawyer?
     - **2.1.1.** If they were unrepresented, discuss why they were unrepresented.
     - **2.1.2.** If they were represented, discuss why they choose the representative they did.
   - **2.2.** Was the other party represented?
   - **2.3.** How did having a lawyer (or not having a lawyer) make you feel about the proceedings at the mediation. Eg confident, nervous, uncertain of role etc
   - **2.4.** Did you feel in control / able to make decisions that were good for you / in your best interests?
   - **2.5.** Ask "was the other party to the dispute legally represented?"

3. **Mediation experience**
   - **3.1.** Had you ever attended a mediation before the VCAT one the subject of this interview?
   - **3.2.** Discuss the depth of prior mediation
   - **3.3.** Were previous mediation experiences also un/represented?
   - **3.4.** Was the previous mediation similar to this mediation? If not, why not?
   - **3.5.** If it was different to this mediation, ask about whether it felt different / better / worse.

4. **Resolution of the dispute**
   - **4.1.** Did the dispute settle on the day of the mediation?
   - **4.2.** If yes:
     - **4.2.1.** Clarify if the settlement involved only money or also non-monetary stakes. Compare with what is recorded in the file.
     - **4.2.2.** Have the terms of the settlement been complied with?
     - **4.2.3.** How do you feel about the settlement that was reached now – some ____ weeks afterwards?
   - **4.3.** If it did not settle:
     - **4.3.1.** Why do you think it did not settle?

4.3.2. How do you feel about the result now some _____ weeks after the mediation? Do you regret not settling? Do you think the other party was never going to settle? Do you feel differently about the result now?

5. Satisfaction with the mediation

5.1. Do you think that you won or lost? Why?

5.2. How satisfied were you with the resolution of this dispute (if hasn't already been canvassed).

5.3. Were the outcome of the dispute was better / worse than expected?

5.4. Did you feel you understood what was going on during the mediation?

5.5. Did you feel you were adequately able to participate in the process?

5.6. How did you feel about the length of the mediation? Was it too short / too long / just right?

5.7. Was the mediation fair? Why?

5.8. Did you feel you have control of the process during the mediation? Why?

5.9. Were you comfortable during the mediation? Why?

5.10. Did you feel pressured to settle? Why?

6. Cooling off period (for those that had a cooling off period)

6.1. Explain that the VCAT file indicates that a "cooling off period" applied to the mediated agreement.

6.2. Ask them how well the concept of the cooling off period had been explained to them and by who.

6.3. If they settled at mediation ask them:

6.3.1. Did you use the time of the cooling off period to speak to anyone about the agreement you had entered into

6.3.1.1. who that was?

6.3.1.2. why did you choose that person?

6.3.1.3. what sort of advice were you given?

6.3.2. Did you consider withdrawing from the agreement at any point? Why / why not?

6.3.3. Would it have made any difference if the cooling off period had been longer? If so, how long might have been appropriate?

6.4. Regardless of whether they settled or not:

6.4.1. Did you feel that the fact you had access to a cooling off period gave you greater control / power in the mediation / reduced pressures to come to an agreement?

7. Cooling off period (for those that did not have a cooling off period)

7.1. Would you have liked to have had time to think about the implications of your settlement at VCAT subsequent to the mediation? Why?

7.2. Would you have felt more in control / less pressure, ask if you could have spoken to anyone about the agreement you had made after the mediation?

7.3. Explain what a cooling off period is in relation to a mediation at VCAT and ask if they would have liked one

7.4. Ask how long an appropriate time for a cooling off period might be

7.5. Ask whether a cooling off period should apply to all mediations or only those where someone is unrepresented?

8. About you

If any of the following pieces of information are missing from the VCAT file, ask about it. Confirm that it will be de-identified.

☐ Male ☐ Female

☐ Under 18 ☐ 18-30 ☐ 31-40 ☐ 41-50 ☐ 51-65 ☐ Over 65

☐ Inner metropolitan Melbourne (Zone 1) ☐ Outer metropolitan Melbourne (Zone 2)

☐ Regional centre ☐ Smaller regional city ☐ Rural location

☐ Aboriginal or Torres Strait Islander ☐ speak a language other than English at home.

English skills: ☐ Excellent (native speaker or equivalent) ☐ Very good

☐ Satisfactory but I find it difficult to understand in a legal setting ☐ Limited

Occupation at the time the dispute arose

☐ Manager / administrator ☐ Professional ☐ Other

☐ Trades person ☐ Clerk

☐ Sales person / service worker ☐ Machine / plant operator

☐ Labourer or related ☐ Home duties or retired

Time off work to attend the mediation?

☐ Yes, unpaid leave ☐ Yes, paid leave

☐ No, not working ☐ No, employer permitted attendance

Highest level of education?

☐ Year 10 or lower ☐ Year 11 or Year 12

☐ TAFE qualifications ☐ University undergraduate or postgraduate degree

Household gross, or before tax, income at the time of the mediation?

☐ Nil-$20,000 ☐ $20,001 - $40,000 ☐ $40,001 - $60,000

☐ $60,001 – $80,000 ☐ $80,001 - $100,000 ☐ More than $100,000

9. Conclusion

Explain that I have concluded my questions. Ask them if there is anything they would like to add. Thank them for their time and for agreeing to participate in the research. Find out if they want sent to them: transcript of interview, results of study.

APPENDIX 6

EMAIL SENT TO MEDIATORS ATTACHING SURVEY LINK

Email to VCAT mediators attaching survey link. Email was sent to panel mediators by VCAT's Principal mediator

Dear VCAT Mediator,

La Trobe University, School of Law, PhD student, Rebecca Edwards, is currently conducting research into the use of cooling off periods in mediations at VCAT. This research has the full support of VCAT including its principal mediator, Ian DeLacy, ADR member, Genevieve Nihill, and the ADR Program Manager, Emma Fray.

The research will provide a formal, independent examination and assessment of the cooling off period innovation introduced by VCAT in June 2009. It is also an opportunity for VCAT to contribute to research into best practice mediation techniques. It is anticipated that the results of the research may benefit future litigants in mediations at VCAT, particularly those who are unrepresented. It may also assist in improving mediation practices throughout the justice system if information about the study is made public through journal articles and conference papers.

All panel mediators at VCAT are being asked to complete an on-line survey as part of the research. It is estimated that the survey will take only 15 to 20 minutes to complete. Given VCAT's support for the project, and the anticipated benefit to VCAT from an assessment of the initiative, all panel mediators are strongly encouraged to complete this survey. However, participation is not mandatory and neither the Principal Mediator nor any other VCAT staff will be able to obtain information about which individual mediators did or did not participate in the research. The only information available to VCAT will be the raw numbers in terms of participation rates and unidentified, consolidated and analysed data from the surveys.

Please click on the link below to access the survey:
Follow this link to the Survey: ${l://SurveyLink?d=Take the Survey}
Or copy and paste the URL below into your internet browser: ${l://SurveyURL}

More information about the research will be provided through the on-line link.

If you access the link, read the participant information and then decide not to participate, there will be no disadvantages, penalties or adverse consequences for not participating or for withdrawing prematurely from the research.

Any questions about the research can be directed to Rebecca Edwards on r.edwards@latrobe.edu.au or 0427 722 286. The project has been approved by the La Trobe University Human Research Ethics Committee and the Department of Justice Human Research Ethics Committee.
Follow the link to opt out of future emails: ${l://OptOutLink?d=Click here to unsubscribe}

APPENDIX 7

MEDIATOR SURVEY

Mediators' survey
Start of survey

Q1 Please continue with this survey if you have conducted a mediation at VCAT since June 2009 in which one or more of the parties was entitled to a cooling off period, during which they could withdraw from a mediated settlement without penalty. Please answer each question by checking the appropriate box. Any additional information you can provide in the spaces provided will be gratefully received as it will substantially add to the understanding of the researcher and the ability of the researcher to provide detailed recommendations to VCAT at the conclusion of the research. Please be assured that the information you provide will be kept strictly confidential and will not be provided to VCAT except as unidentified, consolidated data at the conclusion of the research project.

Have you conducted a mediation at VCAT since June 2009 in which one or more of the parties was entitled to a cooling off period?

- ❍ Yes
- ❍ No

If No Is Selected, Then Skip To End of Survey

Q2 **PARTICIPANT INFORMATION STATEMENT**

An Analysis of Mediation cooling off periods at VCAT

What is the aim of the project?
The aim of this project is to examine whether VCAT's use of cooling off periods in mediations where one party is unrepresented has achieved its goals.

Who is conducting this research?
This study is being conducted by Rebecca Edwards as a Doctor of Philosophy student in the School of Law, La Trobe University. She can be contacted on 5444 7931 or r.edwards@latrobe.edu.au. Her supervisor, Senior Lecturer Francine Rochford, can be contacted on 5444 7967 or f.rochford@latrobe.edu.au. This study is being done with the full knowledge and support of the VCAT.

Who is being asked to participate?
You are being asked to participate in this study because you mediated one or more disputes at VCAT in which a cooling off period applied. Participants in mediations at VCAT are also being asked to participate in the research.

What will the research involve?
You are being asked to complete an on-line questionnaire. The time commitment required of you to complete this questionnaire is estimated to be between 15-20 minutes. You can also elect to nominate yourself for an interview and/or focus group at the conclusion of the survey by providing your contact details for the researcher to contact you directly.

What about privacy?
Participants who complete the questionnaire will remain anonymous and data collected will be kept strictly confidential. Participants will not be asked to provide their name or any identifying information that may link them to their responses. All electronic data collected will be stored electronically in a password protected file, only accessible by the researcher and her supervisors. Hard copies of data will be securely stored in a locked filing cabinet, in a locked office at the La Trobe University's Bendigo campus, Business Building with only the researcher and

supervisors having access to the cabinet. The raw data will be disposed of after 5 years.

Are there any risks?

It is unlikely that completion of the questionnaire will cause you to experience any unpleasant or distressing feelings. However, in the event of feeling uncomfortable, you may stop completing the questionnaire at any time. You can also call Lifeline, the free 24 hours telephone counselling service on 13 11 14.

What are the benefits of this research?

This research will not initially benefit you individually as the participant. However, the outcomes will potentially benefit future litigants at VCAT or in other institutions in the justice system, particularly those who are unrepresented. In addition, the benefit of participating in this research will be that it provides a formal, independent assessment and examination of the impact of the introduction of the cooling off period into mediations at VCAT. You will also be participating in an opportunity to contribute to research into what constitutes best practice mediation.

What if I change my mind?

You have the right to withdraw from active participation in this project at any time by simply not completing the questionnaire. There are no disadvantages, penalties or adverse consequences for not participating or for withdrawing prematurely from the research. However, due to the anonymity of data collected, once questionnaires have been submitted, it will no longer be possible to withdraw from the research project.

How will the results of this research be used?

The data will be used primarily for reporting results in a thesis. In addition, research findings may be published in academic journals and/or presented at conferences. The individual questionnaires will not be included in any publications. Once developed, group findings from this research can be provided to participants upon request to the researchers. You may obtain a copy of your completed questionnaire by printing a copy prior to submission. A copy of the completed questionnaire cannot be provided at a later date because of the anonymity of the responses. The data may be used as a basis for further studies by the researcher should the results permit. Access to data preserved for possible future use in another project will be available for use by the specific researcher and her research partners only. No general dissemination of information will be provided.

How can I get access to the results of the study?

A report will be provided to VCAT at the conclusion of the study. In addition, the principal mediator will be asked to email all mediators with a copy of a summarized version of the outcomes of the study at the conclusion of the research. You can elect to receive a personal version of the results at the end of the survey.

Will I be contacted again?

In the three month period following initial contact, reminders may be sent by email encouraging completion of the questionnaire.

How can I get further information?

Any questions regarding this project may be directed to Rebecca Edwards, Faculty of Business, Economics and Law, Bendigo Campus, on telephone number 5444 7931 or email r.edwards@latrobe.edu.au.

What if I have complaints or concerns about the project?

If you have any complaints or concerns about your participation in the study that the researcher cannot answer to your satisfaction, you may contact the Secretary, Human Ethics Committee, Research Services, La Trobe University,

Victoria, 3086, (P: 9479-1443, E: humanethics@latrobe.edu.au). This project has been approved by the La Trobe University Human Research Ethics Committee. The application reference number is 04-020.

- ❍ I have read the Participant Information Statement and agree to continue with the survey
- ❍ I do not wish to continue with the survey

If I do not wish to continue w... Is Selected, Then Skip To End of Survey

Q3 Approximately, how many mediations have you conducted in the last 12 months in which one or other of the participants has had access to the cooling off period?

- ❍ None. They were all prior to 12 months ago
- ❍ 1 - 5
- ❍ 6 - 10
- ❍ 11 - 20
- ❍ More than 20

Q4 In which lists have you conducted mediations in which one or other of the participants has had access to the cooling off period? (Please tick all that apply).

- ❑ Domestic Building List
- ❑ Owners Corporation List
- ❑ Human Rights List
- ❑ Other (Please specify) _____

Q5 What procedures exist to give the disputants information about the cooling off period? (Please tick all that apply)

- ❑ None that I am aware of
- ❑ Information from other VCAT staff (please specify who) _____
- ❑ Oral information from you at the BEGINNING of the mediation
- ❑ Oral information from you at the END of the mediation
- ❑ Written information from you at the BEGINNING of the mediation
- ❑ Written information from you at the END of the mediation
- ❑ Other (please specify) _____

Q6 Do you think that the procedures for providing disputants with information about their rights to a cooling off period are satisfactory?

- ❍ Yes
- ❍ No

Q7 Why?

Q8 In mediations where one or more of the parties have access to the cooling off period, do you think that fact assists in the settlement of the dispute on the day of the mediation?

- ❍ Yes, it increases the likelihood of a settlement
- ❍ No, it decreases the likelihood of a settlement
- ❍ It makes no difference to the likelihood of settlement

Q9 Please add here any comments you have about the benefits or disadvantages of the cooling off period in relation to settling disputes.

Q10 Does the fact that one or more of the parties has access to a cooling off period in a mediation you are conducting change the mood or style of the mediation in any way (compared to a mediation in which there is no cooling off period)? Please tick all boxes that apply.

- ❑ No, it changes nothing
- ❑ Yes, it changes the way the way in which I conduct the mediation
- ❑ Yes, it changes the mood of the mediation
- ❑ Yes, it changes the speed of the mediation
- ❑ Yes, it changes the behaviour of the parties to the mediation
- ❑ Other (please specify) _____

Answer If No, it changes nothing Is Not Selected

Q11 Please explain in a little more detail why you think access to a cooling off period can change the mediation.

Q12 Do you think cooling off periods should be extended to other mediations run by VCAT?

- ❑ No, I think cooling off periods should be ceased for all mediations at VCAT
- ❑ No, I think cooling off periods should only be offered in the current circumstances (panel mediator and one or more unrepresented litigants)
- ❑ Yes, I think cooling off periods should be offered whenever there is one or more unrepresented litigant, regardless of who the mediator is
- ❑ Yes, I think cooling off periods should be offered in all mediations regardless of whether the parties are represented or not

Q13 Why do you think so?

Q14 Are you aware of the reasons behind why the cooling off period pilot was introduced by VCAT in June 2009?

- ❍ Yes
- ❍ No

Answer If Are you aware of the reasons behind why the cooling off period pilot was introduced by VCAT in June 2009? Yes Is Selected

Q15 Please explain your understanding of why the cooling off period pilot was introduced by VCAT in June 2009.

Q16 For approximately how many years have you worked as a mediator at VCAT?

Q17 For approximately how many years have you worked as a mediator in total?

Q18 Would you would be willing to discuss the benefits and/or disadvantages of cooling off periods in more detail with the researcher either in an interview or focus group situation?

- ❑ Yes
- ❑ No

Answer If Would you would be willing to discuss the benefits and/or disadvantages of cooling off periods in more detail with the researcher either in an interview or focus group situation? No Is Not Selected

Q19 Thank you very much for agreeing to participate further in this research. Please provide your name and contact details so that the researcher can contact you to arrange a time for this to take place.

Name
Email
Phone number

Q20 Would you like to personally receive a summary of the results of the study (and details of where to access the entire study) at the conclusion of the research?

- ❑ Yes
- ❑ No

If Yes is selected

Please provide your contact details so that the researcher can contact you to arrange for this to take place.

Email

APPENDIX 8

DEMOGRAPHIC DATA ANALYSIS

*Some percentages may not add to 100 due to rounding	8.1 Gender (n=46)					8.2 Age (n=46)					8.3 Regionality (n=47)					8.7 Qualifications (n=45)					8.8 Income (n=41)				
	Tot	F		M		*Tot*	=<50		>50		*Tot*	Metro		Rural/regional		*Tot*	Uni		Other		*Tot*	=<100k		>100k	
TOTAL	***46***	**14**	**30%**	**32**	**70%**	***46***	**24**	**52%**	**22**	**48%**	***47***	**36**	**77%**	**11**	**23%**	***45***	**19**	**42%**	**26**	**58%**	***41***	**22**	**56%**	**19**	**49%**
Q 2.1.1 Unrepresented: Cost	*16*	4	25%	12	75%	*16*	9	56%	7	44%	*16*	11	69%	5	31%	*15*	7	47%	8	53%	*13*	8	62%	5	38%
	35%	29%		38%		*35%*	38%		32%		*34%*	31%		45%		*33%*	37%		31%		*32%*	36%		26%	
Q 2.1.1 Unrepresented: Confidence/ prior experience	*20*	6	30%	14	70%	*19*	11	58%	8	42%	*20*	18	90%	2	10%	*20*	8	40%	12	60%	*18*	8	44%	10	56%
	43%	43%		44%		*41%*	46%		36%		*43%*	50%		18%		*44%*	42%		46%		*44%*	36%		53%	
Q 2.1.1 Unrepresented: other	*10*	4	40%	6	60%	*11*	4	36%	7	64%	*11*	7	64%	4	36%	*10*	4	40%	6	60%	*10*	6	60%	4	40%
	22%	29%		19%		*24%*	17%		32%		*23%*	19%		36%		*22%*	21%		23%		*24%*	27%		21%	
Q 2.1.1 Total	***46***	**14**	**30%**	**32**	**70%**	***46***	**24**	**52%**	**22**	**48%**	***47***	**36**	**77%**	**11**	**23%**	***45***	**19**	**42%**	**26**	**58%**	***41***	**22**	**54%**	**19**	**46%**
Q 5.3 Outcome: Better	*9*	2	22%	7	78%	*9*	4	44%	5	56%	*9*	6	67%	3	33%	*9*	5	56%	4	44%	*9*	4	44%	5	56%
	21%	15%		24%		*21%*	19%		24%		*21%*	18%		30%		*21%*	28%		17%		*24%*	20%		29%	
Q 5.3 Outcome: Same	*15*	5	33%	10	67%	*14*	8	57%	6	43%	*15*	14	93%	1	7%	*15*	5	33%	10	67%	*12*	3	25%	9	75%
	36%	38%		34%		*33%*	38%		29%		*35%*	42%		10%		*36%*	28%		42%		*32%*	15%		53%	

Q 5.3 Outcome: Worse	*18*	6	33%	12	67%	*19*	9	47%	10	53%	*19*	13	68%	6	32%	*18*	8	44%	10	56%	*16*	13	81%	3	19%
	43%	46%		41%		*45%*	43%		48%		*44%*	39%		60%		*43%*	44%		42%		*43%*	65%		18%	
Q 5.3 Total	***42***	**13**	**31%**	**29**	**69%**	***42***	**21**	**50%**	**21**	**50%**	***43***	**33**	**77%**	**10**	**23%**	***42***	**18**	**43%**	**24**	**57%**	***37***	**20**	**54%**	**17**	**46%**
Q 5.10 Pressure to settle: No	*15*	6	40%	9	60%	*16*	7	44%	9	56%	*16*	11	69%	5	31%	*16*	6	38%	10	63%	*12*	9	75%	3	25%
	33%	46%		28%		*36%*	30%		41%		*35%*	31%		45%		*36%*	33%		38%		*30%*	41%		17%	
Q 5.10 Pressure to settle: Yes from mediator	*23*	5	22%	18	78%	*22*	12	55%	10	45%	*23*	19	83%	4	17%	*21*	11	52%	10	48%	*22*	10	45%	12	55%
	51%	38%		56%		*49%*	52%		45%		*50%*	54%		36%		*48%*	61%		38%		*55%*	45%		67%	
Q 5.10 Pressure to settle: Yes from self	*7*	2	29%	5	71%	*7*	4	57%	3	43%	*7*	5	71%	2	29%	*7*	1	14%	6	86%	*6*	3	50%	3	50%
	16%	15%		16%		*16%*	17%		14%		*15%*	14%		18%		*16%*	6%		23%		*15%*	14%		17%	
Q 5.10 Total	***45***	**13**	**29%**	**32**	**71%**	***45***	**23**	**51%**	**22**	**49%**	***46***	**35**	**76%**	**11**	**24%**	***44***	**18**	**41%**	**26**	**59%**	***40***	**22**	**55%**	**18**	**45%**
Q 6.3.2 Considered withdrawing: No - happy	*13*	1	8%	12	92%	*12*	9	75%	3	25%	*13*	12	92%	1	8%	*13*	6	46%	7	54%	*11*	4	36%	7	64%
	50%	25%		55%		*44%*	64%		23%		*46%*	57%		14%		*48%*	50%		47%		*42%*	40%		44%	
Q 6.3.2 Considered withdrawing: No - just wanted it over	*10*	3	30%	7	70%	*11*	4	36%	7	64%	*11*	7	64%	4	36%	*10*	4	40%	6	60%	*11*	4	36%	7	64%
	38%	75%		32%		*41%*	29%		54%		*39%*	33%		57%		*37%*	33%		40%		*42%*	40%		44%	
Q 6.3.2 Considered withdrawing: costs	*3*	0	0%	3	100%	*4*	1	25%	3	75%	*4*	2	50%	2	50%	*4*	2	50%	2	50%	*4*	2	50%	2	50%
	12%	0%		14%		*15%*	7%		23%		*14%*	10%		29%		*15%*	17%		13%		*15%*	20%		13%	
Q 6.3.2 Total	***26***	**4**	**15%**	**22**	**85%**	***27***	**14**	**52%**	**13**	**48%**	***28***	**21**	**75%**	**7**	**25%**	***27***	**12**	**44%**	**15**	**56%**	***26***	**10**	**38%**	**16**	**62%**

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