

DEALING WITH DISPUTES ABOUT TAXATION IN A 'FAIR' WAY

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Alternative Dispute Resolution (ADR) processes are increasingly being used to deal with a wide range of disputes that can include regulatory disputes involving government. This article explores the use of ADR in disputes relating to taxation and involves a consideration of effectiveness, procedural justice indicators and potential issues with the use of ADR in these disputes. In particular, perceptions of fairness and outcome are contrasted as well as indicia relating to participatory features. The article is based on a study that involved a selected sample of 118 Australian tax disputes that progressed to conciliation, mediation and evaluation over a 12 month period in 2013 and 2014. The study examined the results of 340 surveys of those involved in the sample disputes. It is suggested that procedural justice factors can impact on effectiveness of an ADR process and whether a dispute will be 'finalised', however, other factors that are related to the time taken and costs expended can also be relevant in shaping perceptions with different participant groups and may impact on the outcome reached.

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1. INTRODUCTION

This article is based on research undertaken by the Australian Centre for Justice Innovation (ACJI) at Monash University, for the Australian Taxation Office (ATO). The Project outcomes were discussed and published in a December 2014 report, *Evaluating Alternative Dispute Resolution in Taxation Disputes: Exploring Selected ADR Processes that took place from 1 July 2013– 30 June 2014*.¹ The Report considers the effectiveness, cost, perceptions and approaches used in alternative dispute resolution (ADR) processes that were used to deal with disputes about taxation. The Report explored disputes (de-identified) and considered available literature as well as structured survey material (qualitative and quantitative) from those involved in ADR processes – taxpayers, representatives, experts, ATO staff and ADR practitioners.² This article considers those findings in the context of past studies and additional data from the ATO research.

This article has a particular focus on perceptions of fairness in relation to the ADR process that was attended in respect of the taxation dispute. In this regard, the processes used were either mediation, conciliation or evaluation³ and in most circumstances the participants were required to attend the ADR

¹ Tania Sourdin and Alan Shanks, *Evaluating Alternative Dispute Resolution in Taxation Disputes: Exploration of Selected ADR processes that took place from 1 July 2013 – 30 June 2014 Final Report* (Report, ACJI, Monash University, 2014) 132.

² *Ibid* 7.

³ The definitions of mediation, evaluation and conciliation for the study were based on the ATO identified processes and the process descriptions and definitions of the Administrative Appeals Tribunal, Australia. See Administrative Appeals Tribunal, *Alternative Dispute Resolution*, available on <http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution.htm> (accessed 24 June 2015).

process by a Court or Tribunal.⁴ In this discussion of fairness, this article draws on quantitative and qualitative data collected from the sample of participants in taxation disputes relating to procedural justice indicators. In this regard, the survey questions included a suite of questions relating to procedural fairness that were based on past work,⁵ work by Lind and Tyler⁶ and linked to the procedural justice work of Thibaut and Walker that suggests that if people consider that they have been treated fairly they are more likely to accept a decision and outcome.⁷

The responses were considered in the context of the timeliness of the ADR process, costs and outcomes that were reached. There were some indications that the time taken to deal

⁴ All jurisdictions in Australia have capacity to mandatorily refer disputes to ADR. In many instances, ADR may also be required as a pre-condition to commencing proceedings in a Court or Tribunal. The sample mostly involved matters where court or Tribunal proceedings had already commenced. See Monash University Faculty of Law, *Pre-action Protocols and obligations to Attempt to Resolve Disputes Before Commencing Civil Proceedings*, available on <http://law.monash.edu/centres/acji/projects/pre-action-protocols.html> (accessed 24 June 2015).

⁵ See, for example, Tania Sourdin and Alan Shanks, *Gauging the User Experience Report* (Report to Allen Consulting Group, ACJI, 2013); Tania Sourdin, *Resolving Disputes without Courts: Measuring the Impact of Civil Pre Action Obligation* (Background Paper, Monash University, 2012); Tania Sourdin, *Evaluating Mediation in the Supreme and County Courts of Victoria* (Report, Department of Justice and Australian Centre for Peace and Conflict Studies, 2008).

⁶ E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, New York, 1988).

⁷ See, for example, Kees Van den Bos, Lynn Van der Velden and Allan Lind, 'On the Role of Perceived Procedural Justice in Citizens' Reactions to Government Decisions and the Handling of Conflicts' (2014) 10 *Utrecht Law Review* 1; the base work of John Thibaut, 'Procedural Justice: A Psychological Analysis' (1978) 6 *Duke Law Journal* 1289; John Thibaut and Laurens Waler, *Procedural Justice: A Psychological Analysis* (Erlbaum, New Jersey, 1975).

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with a dispute (measured from the date the dispute arose and also the date that proceedings commenced) played an important role in shaping perceptions about fairness and that essentially the longer it took to resolve a dispute, the less likely that participants would consider that the process was procedurally fair. Whilst other factors were also important in shaping perceptions, such as dispute complexity and past experience in dispute resolution processes, where a dispute was ‘old’ it was less likely to be perceived to be dealt with ‘fairly’.

This dichotomy between levels of satisfaction with procedural and outcome fairness is demonstrated by past research that has explored procedural fairness perceptions of mediation compared to perceptions of more formal adjudicatory procedures. For example, Bingham, Raines, Hedeem and Napoli conducted a study relating to dispute design systems in 2010, which included measurement of respectfulness, impartiality, fairness, and performance for supervisors and employees involved in employment disputes which underwent EEOC Mediations (as opposed to the traditional more formal EEOC proceedings or other grievance procedures including arbitration). Employees were more frequently satisfied or very satisfied with the mediation process overall (fifty-nine percent) than with the more formal grievance arbitrations or traditional EEO processes (forty-six percent and thirty-five percent, respectively). In particular, and in the context of procedural fairness indicators, they were satisfied with their control over mediation, their ability to participate in it, and the fairness of the mediation process. On these indicators, mediation outperformed other more legalistic and adjudicatory processes. However, satisfaction with the fairness of the outcome was slightly higher for the grievance procedure (forty percent) than for mediation (thirty-six percent).⁸

⁸ Lisa Blomgren Bingham, Susan Summers Raines, Timothy Hedeem and Lisa Marie Napoli, ‘Mediation in Employment and Creeping Legalism: Implications for Dispute Systems Design’ (2010) 1 *Journal of Dispute Resolution* 6, 147.

In this research it was not possible to compare perceptions of fairness with outcome and procedural fairness in groups of matters that progressed through an ADR process compared to those disputes that progress to an adjudicated process partly because the sample size of disputes in the tax area of disputes progressing to adjudication is so low. Although taxation disputes in Australia can cover a wide spectrum from simple administrative corrections to complex negotiations involving complex interpretations of law the number of disputes that progress beyond an ‘internal’ discussion stage or are resolved at some form of ADR numbers around 1000 disputes per year and only about 150 disputes are finalised through an adjudicated hearing.⁹ Disputants come from a wide range of market segments from individuals and non-businesses (with annual turnover of less than AUS \$2 million per annum), to large corporations (annual turnover exceeds AUS \$250 million) and highly wealthy individuals (estimated net wealth of AUS \$30 million or more).¹⁰ In 2013–14, just under 28,000 disputes were lodged with ATO arising from the 19 million activity statements and 16.5 million tax returns lodged during that financial year.¹¹ Despite being a small percentage of the total number of transactions, the number of disputes is significant and their impact can be long lasting.¹²

The research task was also specifically directed at exploring ADR rather than comparative analysis of matters progressing to a litigated outcome. In 2012, the Inspector-General of Taxation in Australia conducted a review into the ATO’s use of Alternative Dispute Resolution (ADR). Recommendation 5.4 of the review

⁹ Debbie Hastings, *Reinventing the way we manage tax disputes* (Address to the Tax Institute of Australia Financial Services Conference 2015, Surfers Paradise, 20 February 2015), available on <https://www.ato.gov.au/Media-centre/Speeches/Other/Reinventing-the-way-we-manage-tax-disputes/> (accessed 9 March 2015).

¹⁰ Sourdin and Shanks, above n 2, 23-24.

¹¹ Hastings, above n 10.

¹² *Ibid.*

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recommends that, for the purpose of identifying opportunities to enhance its dispute resolution capability, the ATO should:

... implement an independent system to collate and assess feedback from all parties, their representatives and ADR practitioners as to the effectiveness of the process, including the conduct of the ATO's representatives when engaging in ADR and any suggestions for improvement; [and] publish this feedback to imbue public confidence in the use of ADR, internally recognise good performance of ATO representatives and to identify areas for improvement.¹³

The ATO agreed to recommendation 5.4 in its entirety and further suggested that given successful ADR depends on the effective participation of all parties, the feedback mechanism should include feedback regarding the conduct of all parties involved.¹⁴ ACJI was engaged by the ATO to design and implement a mechanism for independently evaluating the ATO's use of ADR in taxation disputes.¹⁵ Data was collected from a sample of taxation and superannuation disputes involving 118 finalised ADR processes that were conducted between July 2013 and June 2014¹⁶ and the research was focussed on ADR processes (although some matters in the sample may have progressed to a hearing following the ADR process).

¹³ Inspector-General of Taxation, *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution: A report to the Assistant Treasurer*, Australian Taxation Office (Report, Inspector-General of Taxation, 2012) 95.

¹⁴ ACJI, *Evaluating Alternative Dispute Resolution in Taxation Disputes: Background Paper* (Background Paper, ACJI, 2013), available on <http://www.law.monash.edu.au/centres/acji/projects/evaluating-alternative-dispute-resolution-in-taxation-disputes/index.html> (accessed 20 March 2015).

¹⁵ Sourdin and Shanks, above n 2, 7.

¹⁶ *Ibid.*

Efforts made in relation to the use of ADR to deal with taxation disputes have expanded within Australia and internationally over the past decade. It has been noted that:

The broader application of ADR processes is partly the result of better understandings that ADR can save time and money and also reflects the result of research that links more effective ADR interventions with compliance with outcomes and a reduction in conflict. It has also been suggested in some research that ADR can impact or influence the way that disputants perceive government and that using effective forms of ADR can not only result in the resolution of disputes but can also promote trust and acceptance of government decision making.¹⁷

There are now a number of taxation authorities who encourage and support the use of ADR in taxation disputes internationally and some programs have received some evaluation attention.¹⁸

¹⁷ Tania Sourdin, 'Evaluating Alternative Dispute Resolution (ADR) in Disputes about Taxation' (2015) *The Arbitrator and Mediator* (forthcoming). The National Alternative Dispute Resolution Advisory Council (NADRAC) contributed to this extension by fostering the development of Dispute Management Plans by Government Departments. See NADRAC, *A Toolkit for Developing a Dispute Management Plan and Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan* (Toolkit, NADRAC, 2010), available on <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NadracPublicationsByDate.aspx#2013> (accessed 23 April 2015).

¹⁸ In recent years there has been an increased focus on the use of ADR in regulatory disputes. See for example, Van den Bos, Van der Velden and Lind, above n 8; In the United Kingdom, there has been extensive work conducted that relates to the use of ADR in taxation matters – see UK Government, *Tax Disputes: Alternative Dispute Resolution (ADR)*, available on <https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr> (accessed 24 June 2015).

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1.1 What Is ADR? Types of ADR Processes

The formulation of definitions of ADR processes in Australia has received considerable attention over the past two decades.¹⁹ Australia has a national system of accreditation for mediators (since 2008) and the process definitions adopted in the study are those that were used by the main body providing ADR services in relation to the dispute sample. That body, the AAT, has comprehensive definitions and descriptors of different ADR processes such as conferencing, mediation, neutral evaluation and case appraisal.²⁰ In the research, those definitions were adopted although it was noted that in some instances processes may not necessarily follow definitional or other guidelines (see below). The differences between different ADR processes can be important in shaping perceptions.²¹

The AAT definitions of the processes included on the ADR register are set out below. It is important to note that the process of conferencing, that is used extensively, was not included in the study partly because the ADR register of the ATO that was used for base data purpose did not recognise this form of ADR. The forms of ADR that were considered included:

- Conciliation which is defined by the AAT as:
 - A process in which the parties to a dispute, with the assistance of a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the

¹⁹ Sourdin, *Alternative Dispute Resolution*, above n 1.

²⁰ Administrative Appeals Tribunal, above n 4.

²¹ See the discussion in Tania Sourdin and Nikola Balvin, 'Lessons from the 'Mediation in the Supreme and County Courts of Victoria' Research Project' (2009) 20 *Australasian Dispute Resolution Journal* 142 (in Sourdin and Shanks, above n 2, 43).

content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with the requirements of the statute.²²

- Mediation which is defined by the AAT as:
 - A process in which the parties to a dispute, with the assistance of a Tribunal Member, officer of the Tribunal or another person appointed by the Tribunal (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.²³
- Neutral Evaluation which is understood by the AAT as:
 - An advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their knowledge of the subject matter, assists the parties to resolve the dispute by providing a non-binding opinion on the likely outcomes. Neutral Evaluation is used when the resolution of the conflict requires an evaluation

²² See Administrative Appeals Tribunal, *Conciliation Process Model*, available on <http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution/ConciliationProcessModel.htm> (accessed 5 November 2014).

²³ Ibid.

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of both the facts and the law. The opinion may be the subject of a written report which may be admissible at the hearing.²⁴

The processes used to deal with disputes in the sample involved ‘external’ ADR (conciliation, mediation, evaluation) that was conducted at either the Administrative Appeals Tribunal²⁵ (AAT), Federal Court or by private ADR Practitioners but did not include ‘conferencing’ (see previous and below). These processes were classified as ‘external’ as the ATO also runs an internal or ‘in house’ facilitation program to deal with disputes about taxation that is currently being expanded.²⁶

Most of the processes (72 per cent) used in the period involved external conciliation at the AAT (Table 1). Some AAT and Federal Court processes were not explored. This is because the data sample was comprised of ADR events over the period that were noted on the ATO ADR Register. For example, as noted above, where a conference took place at the AAT, this was not noted as an ADR event on the ATO Register and as a result AAT conferencing was not considered. Conferencing can focus on case management as well as facilitation and there is little information about the frequency of conferences. This means that some of the most common forms of ADR used in tax matters

²⁴ Ibid.

²⁵ ‘The Administrative Appeals Tribunal (AAT) provides independent review of a wide range of administrative decisions made by the Australian Government and some non-government bodies.’ See Administrative Appeals Tribunal, available on <http://www.aat.gov.au/> (accessed 3 July 2015).

²⁶ See Australian Taxation Office, *In-House Facilitation*, available on <https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/In-House-Facilitation/> (accessed 24 June 2015).

once proceedings commence (such as conferencing) were not considered in the Research Project.²⁷

Table 1: Types of ADR Processes Used In the Sample of Taxation Disputes

	Conciliation	Mediation	Neutral evaluation	Other
Percentage	72%	20%	8%	0%
Number of cases (n)	85	24	9	0

Other events that may not be ‘ADR’ related but can influence outcomes and perceptions about ADR include the outreach and supportive processes that may be used by the AAT or even the ATO and these were also not considered in the research (except in broad terms). In terms of the definitions of process used, it is notable that under some circumstances hybrid dispute resolution processes may be used and there may be confusion in definitions. For example, a process may be described as mediation; however, it may have a strong evaluative component and therefore could more properly be described as either conciliation or evaluation according to the more commonly accepted definitions in Australia. As far as possible, these differences were tested in the ADR practitioner survey instruments to examine what approach was taken by ADR practitioners.

²⁷ This is particularly relevant as at the AAT matters are usually only referred to conciliation, mediation or neutral evaluation if the matter has not finalised after one or more conferences. This also means that the processes considered in this study are likely to be those that are more complex or intractable. Based on AAT data, in 2013-14 1053 conferences were convened in Tax matters as compared with the next most frequent ADR process (conciliations) of which 113 were held.

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1.2 Methodology

The methodology employed to ascertain user perspectives in this Project involved a voluntary computer-assisted telephone interview (CATI) and an online survey. The survey questions employed were drawn, where possible, from a bank of common questions developed and refined over two decades of research and evaluation of dispute resolution schemes in Australia including a review of civil pre action obligations in 2012 and an evaluation of mediation in the Supreme and County Courts of Victoria in 2008.²⁸

At the commencement of this Project, each aspect of the research conducted was approved by Monash University Human Research Ethics Committee (MUHREC). Ethics approval included recruitment methods, survey instruments and data-handling protocols.²⁹ Potential survey respondents were contacted by ATO by post or email, inviting them to participate either in a telephone interview or via online survey and provided with a unique code for each party to the dispute. Potential participants were given the option to opt out of the survey in their invitation, and again prior to commencing the survey.

The target population was all of parties present at ADR processes regarding taxation and superannuation disputes that took place between 1 July 2013 and 30 June 2014. A total of 833 invitation letters were sent out to potential survey participants and this yielded 340 responses from parties to 118 disputes (Table 2).³⁰

²⁸ See Tania Sourdin, *Resolving Disputes without Courts: Measuring the Impact of Civil Pre-Action Obligations, Final Report* (Report, AIIA, 2013), available on <http://www.law.monash.edu.au/centres/acji/projects/pre-action-protocols.html> (accessed 3 July 2015); Sourdin, above n 6.

²⁹ Sourdin and Shanks, above n 2, 9.

³⁰ *Ibid* 10.

Invited participants were made up of the following groups:

- A: ATO internal people (including case officer, debt officer and others);
- B: Taxpayers;
- C: ADR practitioners (including private practitioners engaged by the taxpayer and/or ATO, AAT and Federal Court representatives);
- D: Taxpayer representative (including taxpayer's lawyer, taxpayer's accountant, taxpayer's tax agent, etc.); and
- E: ATO representative (including Review and Dispute Resolution (RDR) officer and/or an externally engaged barrister or solicitor).

ACJI contacted all participants who have been involved in the sample of dispute resolution processes, including taxpayers and their advisors, ATO staff and dispute resolution practitioners. Matters that progressed to the dispute resolution process may or may not have been settled or finalised at the process (see further discussion below). A total of 118 disputes progressed through the more narrowly defined forms of ADR over a 12-month period commencing on 1 July 2013 and concluding on 30 June 2014.³¹ Additional 'base data' regarding each dispute was obtained from the ATO's files, in order to gather standardised information about the dispute and reduce the number of questions required of each participant.³² The base data collection also ensured that the perceptions data was representative of the entire sample. For example, the researchers were able to consider if only a few participants commented about large value disputes or if perceptions about procedural fairness or cost were influenced by negative outcomes.³³

³¹ Sourdin and Shanks, above n 2, 8.

³² Ibid 9-10.

³³ Ibid 9.

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Surveys were conducted within one to three months after the ADR process had taken place following an ‘opt out’ period. Survey completion rates varied with around half of all invitees in groups A (59 percent response rate) and E (49 percent response rate) participating in the survey, but lower response rates in the remaining groups (Table 2). The lowest participating group was taxpayers themselves (18 percent response rate). There were some issues with this group, as contact details were often lawyer contact details and the research team had to rely on lawyers or other representatives to pass on survey information to the taxpayers.³⁴ In addition, where a disputant was a larger corporation, lawyers may represent a group of ‘taxpayers’ where decisions are made by a Board and it is therefore unlikely that there will be a response by an ‘individual’ taxpayer).

Table 2: Survey Response Rates From Parties to Australian Taxation Office Taxation Disputes Between 1 July 2013 And 30 June 2014³⁵

<i>Survey group</i>	<i>Number of invitations</i>	<i>Number of responses</i>	<i>Achieved sample (%)</i>
A: ATO internal people	165	97	59
B: Taxpayers	105	19	18
C: ADR practitioners	118	41	35
D: Taxpayer representative	191	58	30
E: ATO representative	254	125	49
Total		340	

The surveys were tailored to each of the five groups, with a differing question banks used for ATO internal people, taxpayers, ADR practitioners, taxpayer representatives, ATO officers and external representatives. Most but not all

³⁴ Ibid 10.

³⁵ Ibid.

representatives were lawyers. In some circumstances for example a taxpayer might be represented by an accountant or financial expert. Some questions were common to each group, while other questions were asked of individual groups only.³⁶ Surveys are all available and can be accessed in the Final Report.³⁷

The online survey was built using a platform called Qualtrics (<http://qualtrics.com/>). Qualtrics was selected because it was critical that the survey could be readily and quickly accessed (with fast download and switch-over periods) and it was essential that confidential material could be retained, stored and destroyed without records being kept by an independent web server.³⁸ In this regard, strict web access protocols have been developed by the Australia Government.³⁹ The various participant experience surveys were employed to obtain quantitative and qualitative data using a combination of Yes/No, Agree to Disagree variables, Satisfaction to Dissatisfaction variables as well as freeform comment options. A four-point Likert scale was mostly used in relation to the Likert items that were used. A Likert scale measures preferences, attitudes and subjective responses.⁴⁰

Qualitative data was collected as part of the evaluation, both through the telephone interview and the online survey, and recorded as narrative. In this area, the qualitative data obtained through the telephone interview process tended to be more complex, and additional commentary was recorded.⁴¹

³⁶ Ibid 13.

³⁷ Ibid.

³⁸ Ibid.

³⁹ See Attorney-General's Department, *Protective Security Policy Framework*, available on

<http://www.protectivesecurity.gov.au/Pages/default.aspx> (accessed 24 June 2015).

⁴⁰ Sourdin and Shanks, above n 2, 12.

⁴¹ Ibid.

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1.3 Data Analysis

Most data in this article is reported using descriptive statistics, such as percentages, means or medians. Where the sample size and data characteristics are suited to more sophisticated statistical inference, the analysis was conducted using IBM SPSS Statistics (version 20) software (SPSS) and Qualtrics software. Statistical techniques such as the Pearson Product-Moment Correlation Coefficient (r) or Spearman Rank Order Correlation (Spearman Rho) were used to explore the relationship between variables. Pearson Product-Moment Correlation is used to describe the strength and direction of linear relationship between two variables. Spearman Rho is a non-parametric test designed for use with data collected using intervals with attributes that can be ordered (for example, very satisfied – fairly satisfied – fairly dissatisfied – very dissatisfied), known as ordinal data in SPSS.

At times, statistical significance testing was been carried out to determine whether or not the relationship between variables or the difference between groups is real or likely to be observed by chance. If the probability that a relationship or a difference is observed by chance is small, the results are deemed ‘statistically significant’

2. PERCEPTIONS OF FAIRNESS IN TAXATION DISPUTES

2.1 What is Fairness?

Fairness in the context of dispute resolution can be a complex concept and ideas about fairness can be contradictory. As noted previously, often a distinction is made between substantive and procedural fairness in the context of research in the civil justice sector however there are many factors that need to be considered in exploring either concept. In the context of substantive fairness for example, a comprehensive process may be fair in terms of its pursuit of truth and the accuracy or correctness of the outcome achieved, however it may produce

unfairness if the expense of the process and time taken has an unequal effect on the parties. For example, although the substantive outcome may be fair, in compliance with the rule of law, and vindicate a disputant; if by the time it has been achieved, a disputant has been placed in an unrecoverable position in the context of a loss of business or opportunity or other costs, it may be regarded as substantively unfair. In addition, if it takes too long to resolve a dispute (regardless of the outcome), people may consider that the process was also unfair particularly if there have been negative economic, social and health impacts.⁴²

There has been significant research conducted which relates to the difference between procedural fairness, outcome fairness and perceptions about fairness. Some research has examined the way in which bargaining takes place and the potential impact on outcomes whilst other research has more clearly explored procedural justice ‘indicators’ (discussed below). For instance, Trötschel, Loschelder, Hohne and Majer have conducted experiments using negotiation processes which highlight that senders and recipients of proposals in negotiation processes, experience different levels of concession aversion depending on the salient reference resource.⁴³ Arguably, these findings can be applied to negotiations within facilitated processes such as mediation. These researchers suggest that procedural frames in interactive negotiations, will result in a frame shift (defined as ‘the emergence of antagonistic effects for the sender and the recipient’⁴⁴) and that where a proposal is framed to focus the sender’s resource, the sender will perceive the transaction as a loss and the recipient as a respective gain of the reference

⁴² Ibid 41.

⁴³ Roman Trötschel, David D Loschelder, Benjamin P Höhne and Johann M Majer, ‘Procedural Frames in Negotiations: How Offering My Resources Versus Requesting Yours Impacts Perception, Behavior, and Outcomes’ (2015) 108 *Journal of Personality and Social Psychology* 3, 418.

⁴⁴ Ibid.

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resource. Conversely, these researchers state that when a proposal accentuates the recipient's resource, the sender perceives a gain and the recipient anticipates a respective loss of the reference resource.⁴⁵ By way of illustration, this theory states that a proposal accentuating the sender's resource (e.g., 'I offer you \$25,000 for your Toyota') frames the transaction as the sender's loss and the recipient's gain. Conversely, a proposal accentuating the recipient's resource (e.g., 'I request your Toyota for my \$25,000') frames the transaction as the recipient's loss and the sender's gain.⁴⁶ These types of frames were not studied in this research however the author notes that procedural frames as well as procedural justice indicators may impact on whether an outcome is reached and how that outcome is perceived. In terms of future research, ideally observational and reporting data could be used to explore these relationships.

Fairness can also be described in terms of meeting general community standards or expectations about the observance of procedures and ensuring inequalities between the parties do not influence outcomes. Both expectations and perceptions about what is a fair outcome and a fair process can also be shaped by previous experience in dispute resolution and whether or not disputants had past experience with the ATO and in dispute resolution.⁴⁷

Fairness can also be defined by reference to broader concepts that overlap in the procedural justice literature. For example, supporting the direct participation of parties may make a process fairer for some disputants. Changing the objectives or focus of a process may make it fairer. There is extensive research to suggest that, where a disputant is able to have their voice 'heard' and where there is respect and impartiality shown, it is much more likely that the disputant will perceive the process to be 'fair' or

⁴⁵ Ibid 419.

⁴⁶ Ibid.

⁴⁷ Sourdin and Shanks, above n 2, 42.

‘just’.⁴⁸ Perceptions may also vary amongst those who attend the ADR event. For example lawyers may consider that a process is fair where much of the discussion is directed by lawyers however disputants and decision makers may not.⁴⁹ In this regard, it is quite likely that different participants in a process may have different views about whether a process was ‘procedurally fair’ and even about how much disputants and others participated.

For example, in Bingham, Raines, Hedeem and Napoli’s employment dispute study, for those participating in the informal mediation processes, between ninety-five percent and ninety-eight percent of all complainants and between ninety-six percent and ninety-eight percent of all supervisors were either somewhat satisfied or very satisfied with the mediators.⁵⁰ However, the most significant gap between complainants and supervisors perceptions related to reporting on the fairness of the outcome; 59.7% of complainants and 69.8% of supervisors reported satisfaction with outcome fairness. In light of this, the researchers noted that ‘this difference is consistent with the great body of procedural justice research; moving parties expect more.’⁵¹

Other procedural justice research also supports these findings. It has been noted that:

A large body of research supports the argument of the procedural justice model, that is, the argument that people’s reactions to their experiences with legal authorities are strongly shaped by their subjective evaluations of the justice of the procedures used to resolve their case.⁵²

⁴⁸ See, for example, Van den Bos, Van der Velden and Lind, above n 8; the base work of Thibaut, above n 8; and Thibaut and Waler, above n 8.

⁴⁹ Sourdin and Shanks, above n 2, 41-42.

⁵⁰ Bingham, Raines, Hedeem and Napoli, above n 9, 142.

⁵¹ *Ibid.*

⁵² Tom Tyler and David Markell, ‘The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures’ (September

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The procedural justice literature has generally focused on people with personal experiences with legal authorities and has been concerned with their post experience evaluations of the legal system and willingness to accept its decisions. This literature, which might therefore be broadly characterized as a literature on post use “consumer satisfaction,” demonstrates that people are strongly influenced by the justice of the procedures they experience when they go to court or deal with the police.⁵³

The argument that people’s willingness to defer to a procedure’s decisions is linked to their views concerning the procedures by which those decisions are made and implemented is widely supported by research on legal, political, managerial, and environmental decision-making procedures.⁵⁴

It has been suggested that a shift towards facilitative processes may assist to enhance perceptions of fairness partly where procedural justice concerns are attended to. This is because those involved in the process may have an opportunity to put their viewpoint forward and in the context of procedural justice theory, this factor may enhance fair process perceptions. The importance of fairness in dispute resolution processes is also recognised throughout literature relating to court and ADR processes.⁵⁵ In this context the definition of fairness can be linked to perceptions of a ‘fair’ process (that is, procedures, participation and timeliness of arrangements are viewed as ‘fair’: NADRAC has suggested that ‘fairness’ could involve an ADR practitioner conducting a ‘process in a fair and even-handed way’) as well as the quality of the outcome whether or

2010) 7 *Journal of Empirical Legal Studies* 538, 541 (citations omitted).

⁵³ Ibid.

⁵⁴ Ibid 544 (citations omitted).

⁵⁵ For example, NADRAC, *Report to the Commonwealth Attorney-General: A Framework for ADR Standards* (Report, Commonwealth of Australia, 2001) 13–14; Supreme Court of Victoria, *Courts Strategic Directions Report* (Report, Supreme Court of Victoria, 2004) 2.

not the outcomes reached as a result of the process are fair by reference to objective or other standards.

Determining whether a result in an ADR process is substantively fair has been the subject of discussion in a number of reports,⁵⁶ in the context of pre-action requirements,⁵⁷ and in many recent access to justice arrangement inquiries.⁵⁸ The issues in researching this topic are numerous and can include restrictions on reporting outcomes (as a result of the confidential nature of agreements that may be reached in an ADR process). Perhaps more importantly, however it is arguably impossible to objectively test for outcome fairness unless an expert reviews all the material relating to a dispute and makes a determination

⁵⁶ Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand and Lixia Qu, *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 60.

⁵⁷ NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes* (Report, NADRAC, 2011) p 34, available on <http://www.ag.gov.au/> (accessed 3 July 2015). One salient feature of this recommendation is that it is proposed in relation to ‘mandatory’ ADR, which is an increasing feature of the Australian dispute resolution landscape (both within courts and tribunals and as a precondition to commencing litigation). It is possible that disputants who are required to attend an ADR process (rather than choosing to attend) may be less likely to attend and participate in good faith.

⁵⁸ See ALRC, *Discovery in Federal Courts* (Consultation Paper No 2, ALRC, 2010) (the Discovery Report) 286. The ALRC referred to the Victorian Law Reform Commission (VLRC), *Civil Justice Review* (Report No. 14, VLRC, 2008) pp 109–110, and noted that: ‘The VLRC Report identified that the implementation of pre-action protocols may be challenged on the basis that such protocols are a barrier to accessing the courts, and therefore incompatible with the right to “have the charge heard or proceeding decided ... after a fair trial” pursuant to s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, this concern was dismissed by the VLRC on the grounds that pre-action protocols: would not bar the commencement of proceedings; are triggered before the commencement of proceedings; and support the facilitation of a fair hearing.’

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about substantive outcomes. This is particularly difficult where matters progress to ADR as often all information that would be necessary to make a comprehensive assessment is not available and even if it was, arguably the views of substantive experts may differ.⁵⁹ In addition, it may be that disputants in some forms of ADR are prepared to consider areas of doubt and develop options that are more future focussed in some disputes that are therefore considered to result in ‘substantively fair’ outcomes. In the area of taxation disputes for example, a more future focussed outcome could include ensuring that a definition of future business activity is agreed upon and it may be that a taxpayer is prepared to forgo a focus on substantive fairness where there is doubt about possible legal or policy interpretations.

In view of the different understandings about fairness, in the context of this study a series of survey questions were directed at a range of fairness variables. For example apart from asking whether or not people considered outcomes were fair and asking questions directed at procedural justice indicators (include participatory features), survey respondents were also asked about cost, time, experience in previous disputes, demographic questions and other variables. In the context of outcome fairness, past research has suggested that perceptions of whether or not a process is ‘fair’ can be influenced by the outcome reached. However, often people consider that, even if the outcome (from their perspective) was ‘unfair’, the process that was used was ‘fair’.⁶⁰ The findings of past research was specifically considered for comparative purposes in the taxation research (discussed below).

⁵⁹ See Tania Sourdin, ‘Facilitative judging: science sense and sensibility’ in Tania Sourdin and Archie Zariski (eds), *The Multi-tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters, Pyrmont, 2013) 231-247.

⁶⁰ Sourdin and Shanks, above n 2, 41.

2.2 Fairness Perceptions

The research provides some useful data about the perceptions of those who used ADR processes in relation to ATO disputes. The findings suggest that there are very positive perceptions about the fairness of the ADR processes used in relation to ATO matters; however, the extent to which people considered they were ‘heard’ varied.⁶¹

The survey responses showed a high level of agreement that the processes used to deal with most ATO disputes were fair. In general, it seems that those who attended more ‘formal’ processes with limited discussion and engagement were less likely to be procedurally satisfied than those who attended processes where more open dialogue took place.⁶²

Overall, 95 per cent of those surveyed agreed or strongly agreed that the process was fair. This finding is regarded as very high in the context of past studies. For example, in past studies relating to fairness, the percentage of those considering mediation processes conducted by mediators in the Supreme Court and County Court of Victoria, 74 percent of survey respondents considered that the process was ‘fair’. In other studies, the fairness rates have also been lower.⁶³

Internationally, past studies have found that what is important in shaping perceptions of fairness includes:

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

⁶¹ Ibid 42.

⁶² Ibid 43.

⁶³ See the discussion in Sourdin and Balvin, above n 23 (in Sourdin and Shanks, above n 2, 43).

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dignitary process features are at least as important as control issues in determining whether a procedure is seen as fair.⁶⁴

In line with past studies of ADR processes, a fair proportion of those who thought that the outcome was 'unfair' still thought that the process used was fair (Table 4). That is even when the agreed outcome was not what was expected or was 'not just', people still considered that the ADR process was fair. Perceptions about outcome can be linked to broader perceptions about systems. For example, if a taxpayer considers that the tax system is 'unfair', they may also consider that the outcome reached was 'unfair', although it complied with legislative and other requirements.⁶⁵

⁶⁴ Robert J MacCoun, Allan Lind and Tom R Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts* (Report, RAND Corporation, 1992) 100, referring to studies reported in Allan Lind, Robert J MacCoun, Patricia A Ebener, William L F Felstiner, Deborah R Hensler, Judith Resnik and Tom R Tyler, 'In the eye of the beholder: Tort litigants' evaluations of their experiences in the civil justice system' (1990) 24 *Law and Society Review* 953; Allan Lind and R Tyler, above n 7 and Tom R Tyler, *Why citizens obey the law: Procedural Justice, legitimacy and compliance* (Yale University Press, New Haven, 1990).

⁶⁵ Sourdin and Shanks, above n 2, 43-44.

Table 3: Perceptions of Fairness Variables In Previously-Evaluated Schemes

<i>Perception of fairness variables</i>	<i>Mediation connected to Supreme and Courts of Victoria (Agree %)</i>	<i>NSW Settlement Scheme Mediation (Agree %)</i>	<i>CAV (Agree %)</i>	<i>FICS (Agree %)</i>	<i>VSBC Pre Action Retail Lease (Agree %)</i>
I felt pressured to settle	66.7	23.7	19.6	36.4	52.0
I had control over the outcome	45.9	90.0	-	20.9	-
I was able to participate during the process	85.6	96.7	64.0	38.5	72.0
I had control during the process	48.6	90.2	53.9	21.5	76.0
The process was fair					

Note: The ‘agree’ percentages presented in Table 3 are the sum of ‘agree’ and ‘strongly agree’ responses on a four-point scale, where 1=strongly disagree and 4=strongly agree. The table shows the percentage of clients that agreed with the question.

On the whole, the perceptions of ‘participation’ were very positive in the taxation dispute sample, with more than 90 per cent of survey participants agreeing that they could participate in the ADR process although there was variation between groups (discussed below). In addition, some survey respondents made comments about the perceived willingness of the other side to genuinely and fully participate in the process and this may have influenced their own capacity and willingness to

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participate.⁶⁶ For example, a small number of negative comments were made by both the ATO and taxpayers about participation and these were mainly linked to behaviours within the ADR process. That is, on a few occasions, the ATO was critical of the taxpayer (or their representatives) or the taxpayer or their representative was concerned about ATO or representative behaviour.

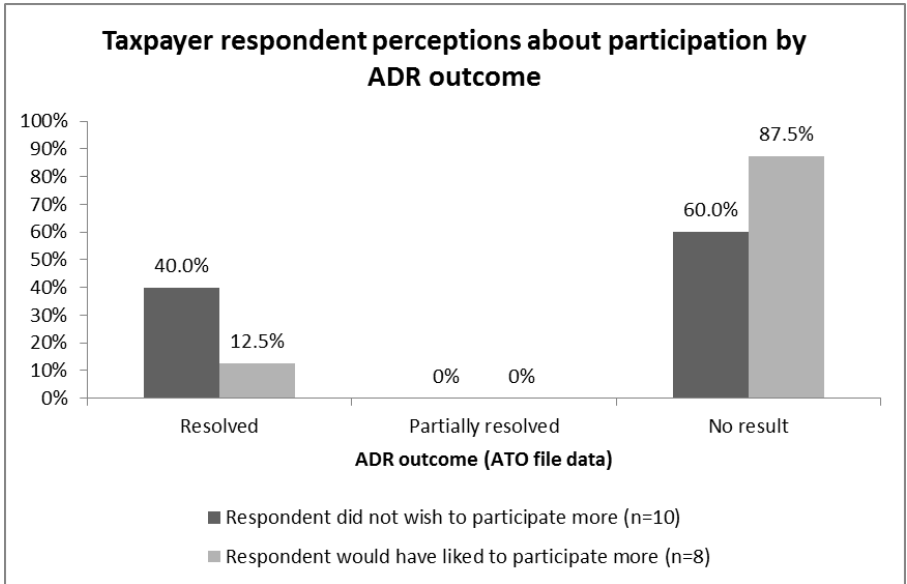
Some comments about participation may be relevant, although they can be taken out of context and need to be considered against the background of the very positive responses overall. A few survey respondents, for example, commented on the attitude of representatives in the ADR session (rather than the ADR practitioner) and this may be an issue in some ADR processes. A reasonable proportion of survey respondents indicated that they wanted to participate more (around 18 % of tax officers, 18% of taxpayer representatives and 44% of the taxpayer group). This finding (although not statistically significant in some groups because of cohort size) suggests that more attention may need to be paid to how people participate in these processes and that this factor can be linked to both procedural justice perceptions and outcomes.

The sample of disputants was too small to draw any clear conclusions about the role that participatory involvement may play in shaping perceptions and are presented for descriptive reasons only. However, the diagrams below do highlight the differing perceptions of taxpayers and their representatives as well as suggesting that there is a relationship between whether an outcome was reached and perceptions of participation. This relationship has been discussed in the context of past studies which also suggest that levels of participation play an important

⁶⁶ Participation, voice and engagement have been shown to be relevant in the context of a range of ADR processes in employment and other disputes. See for example, Bingham, Raines, Hedeon and Napoli, above n 9, 129.

role in determining perceptions and possibly whether an outcome is reached.⁶⁷

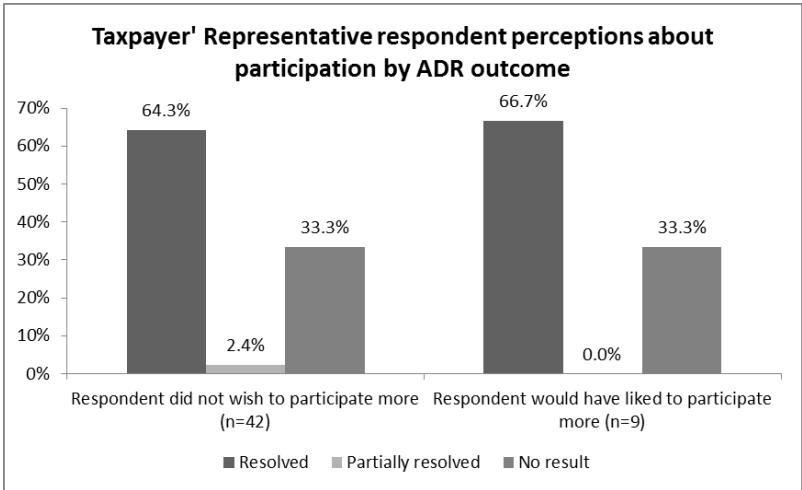
Figure 1.



⁶⁷ See the extensive work by Tyler and Lind that was set out in Lind and Tyler, above n 7.

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Figure 2.



The differing perspectives of those involved in the process are also noted below in Table 4 with high numbers considering they could participate although this must be contrasted with material that suggested a significant proportion wanted to participate ‘more.’ In addition, the difference between outcome and process perceptions indicates that survey respondents distinguished between the two variables (although this varied between groups).

Table 4: Percentage of Respondents Involved In ATO Taxation Disputes (1 July 2013 To 30 June 2014) Who Agree With Statements Relating To Perceptions Of Fairness.

<i>Perception of fairness variables</i>	<i>ATO Internal</i>	<i>Taxpayer</i>	<i>ADR Practitioner</i>	<i>Taxpayer Representative</i>	<i>ATO Representative</i>
I felt pressured to settle	-	29.4	-	-	-
I was able to participate during the process	92.7	83.3	-	94.2	95.8
I had control during the process	75.0	72.2	-	69.2	81.8
I had control over the outcome	58.3	35.3	-	32.1	59.5
The process was fair	96.8	88.9	97.6	90.7	95.9
The outcomes of the ADR process were fair	93.7	58.8	94.9	75.5	95.9

Note: The ‘agree’ percentages presented in Table 4 are the sum of ‘agree’ and ‘strongly agree’ responses on a four-point scale, where 1=strongly disagree and 4=strongly agree. The table shows the percentage of clients that agreed with the question.

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2.3 Timeliness and fairness

The *International Framework for Court Excellence* recognises that ‘time’ is a relative and subjective concept and that the principal issue in dispute resolution is not the extent of delay, but its reasonableness. This approach is consistent with considering the disputant perspective and was used to inform the approach taken in the research project. There is limited research which provides insight into the disputant perspective in relation to the time taken for the resolution of their disputes. There are however many reports that have commented on the impact of delay on disputants. For example, the Australian Victorian Law Reform Commission has suggested that many litigants in the higher Courts are dissatisfied as a result of delay, inefficiency and disproportionate legal costs.⁶⁸

Other larger scale studies have shown a positive correlation between delay and dissatisfaction. The *Financial Industry Complaints Scheme Review*⁶⁹ suggests that while outcomes can be an important factor in determining levels of satisfaction, other factors such as levels of participation, perceptions of fairness, costs, delay and control are important in determining levels of

⁶⁸ VLRC, *Civil Justice Review Report* (Report, VLRC, 2008) p 10, in ACJI, *Innovation Paper: Improving Timeliness in the Justice System* (Innovation Paper, ACJI, 2015) pp 9–10 (In press).

⁶⁹ Banking and Financial Services Ombudsman Limited, *Review of the Banking and Financial Services Ombudsman Scheme, Background Paper* (Background Paper, Banking and Financial Service Ombudsman Limited, 2004), available on http://www.fos.org.au/custom/files/docs/background_paper_bfso_independent_review.pdf (accessed 3 July 2015); Tania Sourdin and Alan Shanks, *Evaluating Alternative Dispute Resolution in Taxation Disputes: User Experience Survey in ADR, Final Report* (Report, ACJI, Monash University, 2014), available on <http://www.civiljustice.info/> (accessed 3 July 2015), (in ACJI, above n 70).

satisfaction and positive perceptions about processes.⁷⁰ Importantly, past studies have suggested that time taken can be critical in determining whether people found processes to be fair.⁷¹ However some studies have not considered time taken nor the nature of the ADR process.⁷²

It may be that the different stakeholders (such as lawyers, disputants, judges and others) have different views about the reasonableness of delay or what constitutes a reasonable time to deal with a dispute.⁷³ For instance, the lawyer in a dispute might consider that there has been timely resolution of a dispute if the matter has been finalised six months after court proceedings have commenced. A disputant who has been involved in the same dispute for two years (including an 18-month period prior to filing with a court) may take a different view.⁷⁴

Judges may have differing views again. Within Australia, McClellan J (NSW) has also voiced concerns about timeliness and cited Sir Anthony Mason, stating ‘the rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice’⁷⁵ although it is probable that many

⁷⁰ Jane Elix and Tania Sourdin, *Review of the Financial Industry Complaints Scheme – What are the Issues* (Issues Paper, La Trobe University, 2002) in ACJI, above n 70, 9.

⁷¹ ACJI, above n 70, 9.

⁷² Michael Heise, ‘Why ADR Programs Aren’t More Appealing: An Empirical Perspective’ (2010) 7 *Journal of Empirical Legal Studies* 64.

⁷³ Tania Sourdin, ‘Using Alternative Dispute Resolution (ADR) To Save Time’ (2014) 33 *The Arbitrator and Mediator* 1, 71.

⁷⁴ *Ibid.*

⁷⁵ Peter McClellan, *The Australian Justice System in 2020* (2009) 9(2) *Journal of the Judicial Commission of New South Wales*, 179 and Peter McClellan, *ADR – an introduction* (Speech delivered to the Chinese National Judges’ Conference, April 2008, Kunming, China, April 2008), citing Anthony Mason, *The Future of Adversarial Justice*

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judges consider that justice takes time and that the careful consideration of a dispute may necessitate slow moving processes in certain circumstances.

The International Framework for Court Excellence describes timeliness as a balance between the time required to properly obtain, present and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources.⁷⁶ In addition, the literature which was considered in the *Timeliness Background Report* notes that timeliness is and must be related to other factors such as the cost, quality of and access to the justice system.⁷⁷

Based on previous work, in the sample many matters progressing to ADR could be categorised as ‘old’ matters where the disputes were ‘longstanding’. The median length of time from objection to the ADR process taking place was 607 days (see Table 5 below). The date of objection was taken as a referable date (as the date the dispute ‘arose’) from the ATO, and it is probable that many disputes had arisen before objection and were therefore even ‘older’ when the ADR event took place.⁷⁸

(Paper presented at the 17th Australasian Institute of Judicial Administration Annual Conference, Adelaide, 6–8 August 1999).

⁷⁶ International Consortium for Court Excellence, *International Framework for Court Excellence* (Framework, National Center for State Courts, 2008).

⁷⁷ Tania Sourdin, *The Timeliness Project: Background Report* (Background Report, ACJI, Monash University, 2013); Tania Sourdin and Naomi Burstyner, ‘Justice Delayed is Justice Denied’ (2014) 4 *Victoria University Law and Justice Journal* 1.

⁷⁸ Sourdin and Shanks, above n 2, 57.

Table 5: ADR Timing of Intervention (ATO File Data)

	<i>Date objection lodged to date ADR conducted (days)</i>	<i>Date where any AAT or Federal Court proceedings commenced to date ADR conducted (days)</i>
Median	607	267
Average	539	209
Range:	Range: 54 to 1,951 days	Range: -234 to 1,326 days
N	113	108

In the context of time, the date from objection to ADR event and the date at which court proceedings were commenced were each considered as separate variables. The ‘newer’ matters in the context of court or tribunal days elapsed appeared to be more likely to resolve at ADR.

The approach taken to measuring dispute age was based on past research which suggested that measuring ‘case age’ rather than dispute age could result in an inaccurate measuring of a key variable. The Victorian Supreme and County Court mediation programs were evaluated in 2007, and the evaluation report in 2008⁷⁹ indicated that a large proportion of matters that were mediated (mostly by external mediators) were ‘old disputes’. In that report, a distinction was made between ‘case age’ and ‘dispute age’. It was noted:⁸⁰

Age of dispute

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

⁷⁹ See Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Report, Department of Justice, Victoria, 2009), available on http://www.endispute.com.au/wpdl/Mediation%20in%20SC%20and%20CC%20of%20Victoria%20Research%20Report_251108.pdf (accessed 3 July 2015).

⁸⁰ Sourdin, *The Timeliness Project*, above n 77, 85-86.

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2.66 The first approach is to measure the age of the actual dispute, from the date the ‘cause of action arose’ to the date of mediation. This approach provides information on whether resolution was affected by the time that has passed since the event that caused the dispute occurred.⁸¹

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

Dispute age at mediation

2.68 In the Supreme Court, the median dispute age at mediation (time from when cause of action arose to first mediation) was 971 days (2.7 years).⁸² In the County Court, the median dispute age at the time of the first mediation was 1,437 days⁸³ (4 years). County Court disputes tended to be older⁸⁴ than Supreme Court disputes at the time of mediation (this difference was statistically significant).

Case age at mediation

2.69 In the Supreme Court, the median case age (time from when the matter was filed in court to the first mediation) at the first mediation was 324 days.⁸⁵ In the County Court, the median case age at first mediation was 260 days.⁸⁶ In summary, it took a

⁸¹ Research suggests that the length of dispute affects the likelihood of resolution. For example, Patrick Regan and Allan Stam, ‘*In the Nick of Time: Conflict Management, mediation Timing, and the Duration of Interstate Disputes*’ (2000) 44 *International Studies Quarterly* 239; the ‘cause of action’ date was usually derived from the originating writ or motion in which the plaintiff described the history of the conflict.

⁸² ($n=73$; $M=1256.36$; $SD=881.09$; Median=971.00).

⁸³ ($n=97$; $M=1615.02$; $SD=1184.03$; Median=1437.00).

⁸⁴ ($t(170)=2.37$, $p=.019$).

⁸⁵ ($n=74$; $M=417.05$; $SD=387.11$; Median=324).

⁸⁶ ($n=99$; $M=345.40$; $SD=278.00$; Median=260.00).

similar length of time for cases to get to mediation in the two jurisdictions,⁸⁷ but County Court disputes were older when they were commenced in the Court.⁸⁸

In that report, it was noted that ‘younger disputes’ were more likely to be finalised at mediation, and recommendations were made that ‘younger disputes’ could be identified when proceedings were commenced and referred to mediation.⁸⁹

Does age influence mediation outcomes?

2.71 Table 6 outlines the results for younger and older Supreme and County Court disputes by mediation outcome (finalised at mediation; not finalised at mediation). The median (1,323.5 days) was used to split the groups. As can be seen from Table 6, younger disputes were more likely to be finalised at mediation and older disputed were less likely to be finalised at mediation. This difference approached statistical significance⁹⁰ and the pattern of findings is similar to those of Sourdin and Matruglio,⁹¹ who found that disputes in the NSW Supreme and District Courts that had a duration of 3 years or less at the time of mediation were more likely to resolve at mediation than disputes that were older than three years.⁹²

⁸⁷ The difference in time from originating motion to mediation in the Supreme and County Court was not statistically significant ($t(171) = -1.42, p > .05$).

⁸⁸ See *Mediation in the Supreme and County Courts of Victoria*, above n 81.

⁸⁹ Sourdin, *The Timeliness Project*, above n 77, 86-87.

⁹⁰ ($\text{Chi}^2(1) = 3.22, p = .07$); Continuity correction used for 2x2 table.

⁹¹ Tania Sourdin and Tania Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (Report, La Trobe University, Law Society of New South Wales, 2004).

⁹² See Sourdin, *Mediation in the Supreme and County Courts of Victoria*, above n 81, 64.

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Table 6: Age Of Dispute At Mediation By Outcome – Previous Study Comparison⁹³

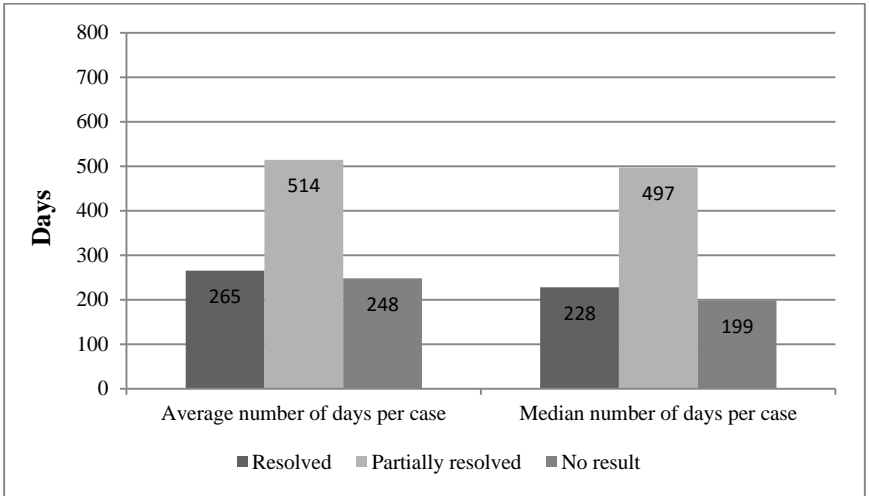
<i>Age of dispute at mediation</i>	<i>Finalised at mediation</i>		<i>Not finalised at mediation</i>		<i>Total</i>	
	<i>n</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
< 1324 days (3.6 years) – younger disputes	46	58.2	37	43.0	83	50.3
> 1324 days (3.6 years) – older disputes	33	41.8	49	57.0	82	49.7

In this research, age also appeared to play a critical role in determining whether or not the dispute resolved and also in determining whether it was regarded as a ‘fair’ process. In keeping with previous studies there was a strong correlation between the time taken and perceptions of fairness. Often, the older the dispute, the less likely that disputants would be satisfied with the outcome or process. These perceptions can partly be explained by the fact that in older disputes it is more likely that higher amounts of costs will be expended. However, unresolved disputes can also have significant other impacts that include increased personal and business stress and a loss in productivity.⁹⁴ The research suggested that earlier dispute resolution, where possible, could result in enhanced perceptions of a fair process and outcome.

⁹³ See Ibid 81.

⁹⁴ See Sourdin and Burstyn, above n 77, 46; Tania Sourdin, ‘Using Alternative Dispute Resolution to Save Time’ (2014) 33 *The Arbitrator and Mediator* 1, 61–72.

Figure 3: Impact on ADR outcome of time (in days) between commencement of AAT or Federal Court proceeding and the date ADR was conducted

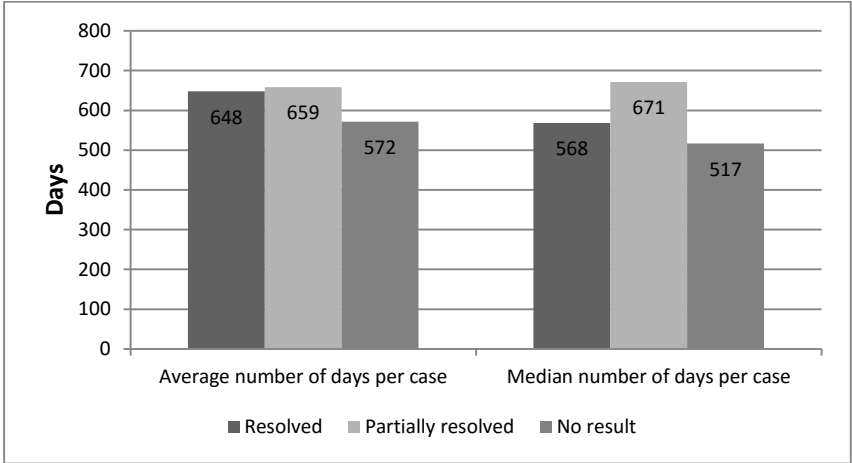


The research also suggested that, the earlier that the AAT or Federal Court held an ADR event, the more likely it was that a matter would settle. However, this finding must be considered in the context of other material (including case complexity) that may mitigate against finalisation of some matters. Interestingly, the findings in respect of the other measure of time taken (using the objection date) also suggests that later referral is less likely to result in settlement although the relationship between the variables is not as strong. In addition, it must be noted that most matters at the AAT will pass through a conference process before being referred to mediation, conciliation or evaluation. The conference process results in the finalisation of a significant proportion of matters commenced at the AAT. Further work which also considers this significant cohort of matters could assist to determine whether earlier referral is more successful in respect of some case types.⁹⁵

⁹⁵ Sourdin and Shanks, above n 2, 57-58.

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Figure 4: Impact on ADR Outcome on Time (In Days) Between the Date the Objection Lodged and the Date ADR was Conducted



In most cases where the ADR process (as defined by the ATO Register) took place at the Federal Court or the AAT, about nine months had elapsed before the ADR intervention occurred. The case file activity undertaken in the AAT and Federal Court can vary extensively. For example, in the Federal Court, individual case management events (in court) were likely to have taken place. At the AAT, case conferencing (usually involving representatives only) is used to manage disputes. A proportion of all disputes will resolve at the Federal Court and AAT at case management events (and before more intensive and focussed ADR is used).⁹⁶

Some comments made by survey respondents included that an ADR process may be more beneficial at an earlier stage. In particular, it was noted that:⁹⁷

⁹⁶ Ibid 59.

⁹⁷ Ibid 61.

(ATO staff) ADR needs to be incorporated in case management earlier on. End of audit or stage of objection. This would get a better understanding earlier.

These comments and views about earlier ADR referral were also supported by statements made by legal representatives in response to whether there was anything that the ATO could have done to make their contact easier, including:⁹⁸

Yes, personal meeting during the objection process.

Face to face contact through the objection process.

Figures 5 and 6 compare case complexity data with timeliness factors such as the date of commencement of AAT or Federal Court proceeding to date ADR conducted (Figure 5) and the date objection lodged to date ADR conducted (Figure 6). For each of these timeliness factors, the average and median number of days increase as the level of case complexity increases.

⁹⁸ Ibid.

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Figure 5: Timeliness (Date Of Commencement Of AAT Or Federal Court Proceeding To Date ADR Conducted) By Case Complexity (ATO File Data)

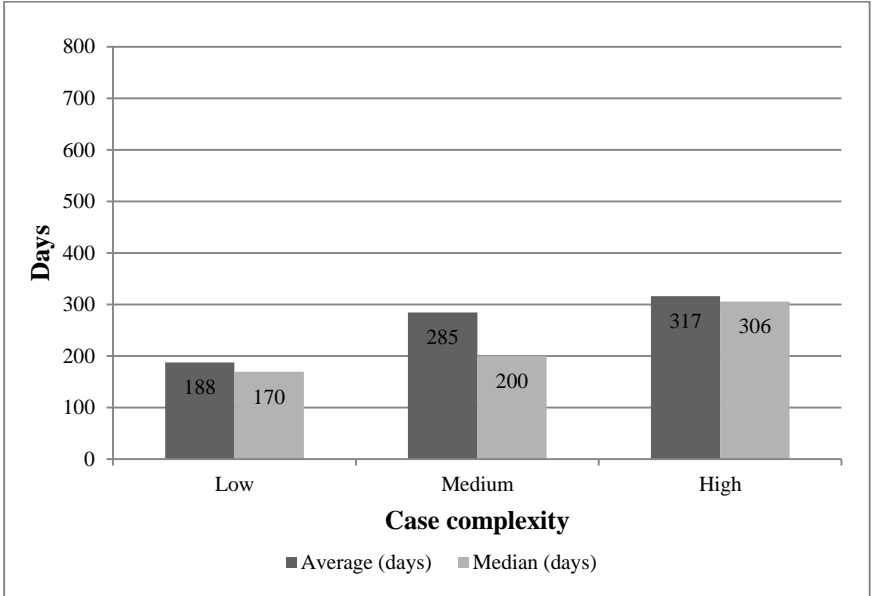
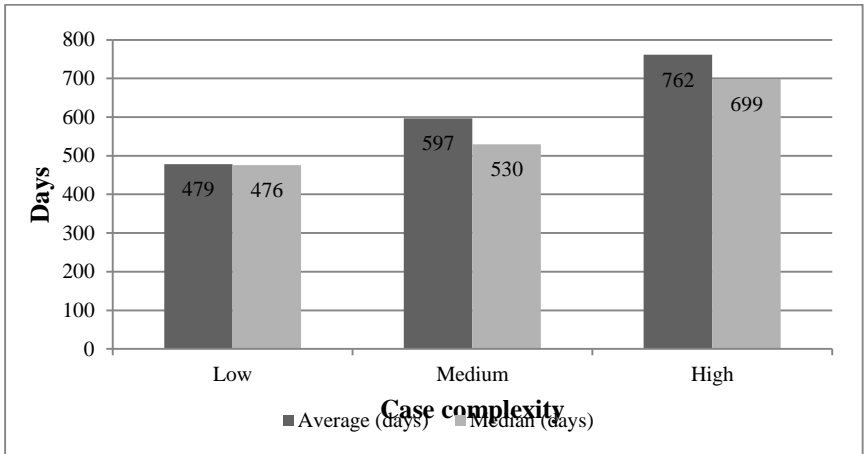


Figure 6: Timeliness (Date Objection Lodged To Date ADR Conducted) By Case Complexity (ATO File Data)



2.4 Costs and Fairness

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

The need to ensure appropriate public funding of courts and dispute resolution processes that avoid waste.

The need to reduce litigation costs and avoid repetitive or unnecessary activities in case preparation and presentation.

The need to consider the interests of other parties waiting to make use of the court or other dispute resolution process.⁹⁹

⁹⁹ ALRC, *Issues Paper 25: Review of the Adversarial System of Litigation. ADR – Its Role in Federal Dispute Resolution* (Issue Paper No. 25, ALRC, 1998) 27.

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In addition, effectiveness can also refer to long-term gains, rates of compliance, behavioural impacts and the broader costs of unresolved conflict.¹⁰⁰

The cost of a dispute can be considered by reference to:¹⁰¹

- any direct monetary costs incurred by disputants as a result of the requirement (whether or not the requirement led to or supported finalisation and including any litigation costs where litigation, or ‘satellite litigation’, was related to the requirement);
- whether or not costs were saved (public and private);
- the direct and indirect costs that may be experienced if a dispute is not resolved or finalised in a timely manner. Clearly, where disputes are not resolved within a reasonable timeframe, there can be significant impacts on disputants relating to cost, loss of opportunity, loss of profit and associated health and family impacts.¹⁰²

Cost can also be assessed or considered by reference to notions of proportionality. Proportionality can require that:

... legal and other costs incurred in connection with the proceedings are minimised and proportionate to the complexity or importance of the issues and the amount in dispute.

Cost minimisation and “proportionality” are key elements of recent civil justice procedural reforms.¹⁰³

¹⁰⁰ Sourdin and Shanks, above n 2, 29.

¹⁰¹ Ibid 53.

¹⁰² Tania Sourdin, *Dispute Resolution Processes for Credit Consumers* (La Trobe University, Melbourne, March 2007) 93, in Sourdin and Shanks, above n 2, 53.

¹⁰³ VLRC, ‘Civil Justice Review Report’ (Report, VLRC, 2008) 188, in Sourdin and Shanks, above n 2, 53.

In addition, the cost of ADR cannot be considered in isolation from other impacts. In assessing the utility of ADR, blunt measures that emphasise only short-term quantitative impacts or benefits (such as time and cost) may not accommodate other qualitative factors that assist to determine effectiveness (client satisfaction and impact on behaviour and compliance). As a result, effectiveness was considered in the research by using a broader range of measures – not just by reference to time and cost savings.¹⁰⁴

In the context of cost, there was some data that suggested that the ADR processes resulted in significant cost savings, even though many had already incurred substantial costs prior to the registered ADR event. One relevant factor may relate to the types of costs incurred and the significance of external professional costs. It is possible that these could be reduced by earlier narrowing of issues.¹⁰⁵

Again, in complex matters, it could be expected that significant legal and expert costs could be incurred. However, the late use of ADR may mean that some costs for both the ATO and the taxpayers could have been reduced had ADR been undertaken at an earlier time.

The relationship between case complexity, resolution (ADR outcome) and time factors (date objection lodged to date ADR conducted and date where any AAT or Federal Court proceedings commenced to date ADR conducted (in days)) was investigated using more sophisticated data measurement tools such as the Spearman's Rho Correlation Coefficient (Table 7).¹⁰⁶

¹⁰⁴ Sourdin and Shanks, above n 2, 53.

¹⁰⁵ Ibid 61.

¹⁰⁶ Ibid 21.

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Table 7: Spearman’s Rho Correlations Between Case Complexity, ADR Outcome And Time Factors

<i>Scale</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>
1. Case complexity	-	.036	.193	.151
2. ADR outcome		-	.004	-.074
3. Date when any AAT or Federal Court proceedings commenced to date ADR conducted (days)			-	-
4. Date objection lodged to date ADR conducted (days)				-

Note: Correlations significant at the 0.01 level (2-tailed) are marked **

The analysis of the ATO base data indicates a small positive correlation between case complexity and both time factors: the number of days elapsing between the commencement of AAT or Federal Court proceedings and the date ADR was conducted ($\rho = .193, n = 65, p < 0.01$); and the number of days elapsing between when the objection was lodged and the date the ADR was conducted ($\rho = .151, n = 67, p < 0.01$). This means that the more complex a dispute, the more likely it is that the ADR process will take place at a later time. It may be that there are benefits in referring these more complex disputes to ADR at an earlier time (particularly if the ADR process results in issue identification and narrowing).¹⁰⁷

The relationship between two time factors (date objection lodged to date ADR conducted and date when any AAT or Federal Court proceedings commenced to date ADR conducted (in days) was investigated using the Pearson Product-Moment Correlation Coefficient (Table 8). This test indicated a medium, positive correlation between the two time factors ($r = .412, n =$

¹⁰⁷ Ibid 22.

108, $p < 0.01$). This data also suggests that more complex matters are likely to result in later commencement of court or tribunal proceedings. Again, it was noted that earlier pre-filing ADR may assist to manage disputes and to avoid delay and increased cost.¹⁰⁸

Table 8: Pearson Product-Moment correlations between two time factors: date when any AAT or Federal Court proceedings commenced to date ADR conducted (days); and date objection lodged to date ADR conducted (days)

<i>Scale</i>	<i>1</i>	<i>2</i>
1. Date when any AAT or Federal Court proceedings commenced to date ADR conducted	–	.412**
2. Date objection lodged to date ADR conducted (days)	.412**	–

Note: Correlations significant at the 0.01 level (2-tailed) are marked **

The research suggested that the timing of ADR process interventions can be linked to whether people regard it as procedurally fair as well as the overall effectiveness of the ADR process and may have an impact on costs incurred as well as cost savings. Sometimes, the earlier the ADR intervention takes place, the more likely that a matter will be resolved and with a greater cost saving. This is not always the case, however, as in some instances, further documentation may be required and cost savings will not be reduced. It is also the case that there may be incentives to delay ADR, as in some instances, delay can benefit a disputant (if, for example, it means that payment does not need to be made).¹⁰⁹

However, later referral to ADR can lead to higher costs and the adoption of more positional and entrenched views. A lengthy

¹⁰⁸ Ibid.

¹⁰⁹ Ibid 56-57.

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period of communication that responds to court and tribunal case management requirements and one that is conducted mostly by lawyers may not foster a collaborative problem-solving approach that supports ADR. As a result, later ADR may in some circumstances be less effective than earlier ADR.¹¹⁰

It also seems that, in the sample, in many cases costs were increased as a result of external valuer and other fees (rather than only via professional legal fees) and it may be that some of these fees can be reduced in some way or so that questions that are referred to external professionals can be limited through the use of earlier ADR (thus resulting in cost and time savings).¹¹¹

2.5 Outcomes, settlement and fairness

The ATO base data indicates that ADR processes resulted in an agreed outcome within the ADR process in 42 per cent of cases (Figure 2.1). However, this figure appears to be incomplete as many matters settled shortly after the ADR process had taken place. Survey respondent perceptions vary about what additional percentage settled the dispute as a result of the ADR event with between 19 per cent to 37 per cent of respondents in survey groups A, D and E indicating that ADR prompted settlement in the period following the ADR/dispute resolution conference (see Table 9).¹¹²

It is clear that in some instances the settlement of disputes occurred following the ADR process and occurred prior to surveying (surveying took place up to three months following the ADR intervention). This later settlement may have occurred because an option was being considered. In other circumstances the ATO event may have led to another meeting. For instance,

¹¹⁰ Ibid 57.

¹¹¹ Ibid.

¹¹² Ibid 30.

when asked to elaborate on how the dispute was settled, an ATO Internal (Group A) survey respondent said:¹¹³

More advice or information was exchanged between ATO and taxpayer and we then attended a further ADR process.

Tables 9 and 10 below suggest that about a quarter of disputes resolved following the ADR process and that, in these types of disputes, it was often important for more information to be exchanged that could assist the parties to negotiate or better understand the situation. Using this combined resolution data (from the ATO data base and from the survey), it seems that the ADR event was significant in producing agreed outcomes in 60 – 70 percent of matters. The findings may also suggest that, in tax disputes, it is more likely that settlement will take place following the ADR event than in other types of disputes (this may also be linked to the need to obtain expert advice or to consult to consider options).¹¹⁴

¹¹³ Ibid.

¹¹⁴ Ibid.

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Table 9: Survey respondent perceptions about how the dispute was finalised (survey groups A, B, D and E)

	<i>A: ATO Internal</i>	<i>B: Taxpayers</i>	<i>D: Taxpayer reps.</i>	<i>E: ATO reps.</i>
At the ADR/dispute resolution conference	44%	25%	59%	44%
Following the ADR/dispute resolution conference	22%	0%	19%	37%
After more advice or information was exchanged between ATO and taxpayer	11%	0%	8%	8%
After expert advice	6%	0%	3%	0%
In a court or tribunal	0%	13%	3%	2%
Through negotiation with the other side	9%	13%	0%	6%
Lawyer negotiated on behalf of client	2%	13%	5%	0%
Other	6%	38%	3%	3%
N	54	8	37	63

Table 10 Survey respondent perceptions about how the dispute was finalised (survey group C, n=23)

<i>Stage at which the dispute was finalised</i>	<i>C: ADR Practitioners</i>
At the ADR/dispute resolution conference	57%
Following the ADR/dispute resolution conference	22%
After more advice or information was exchanged between ATO and taxpayer	13%
After expert advice was received	0%
Following negotiations	4%
Don't know	0%
Other	4%

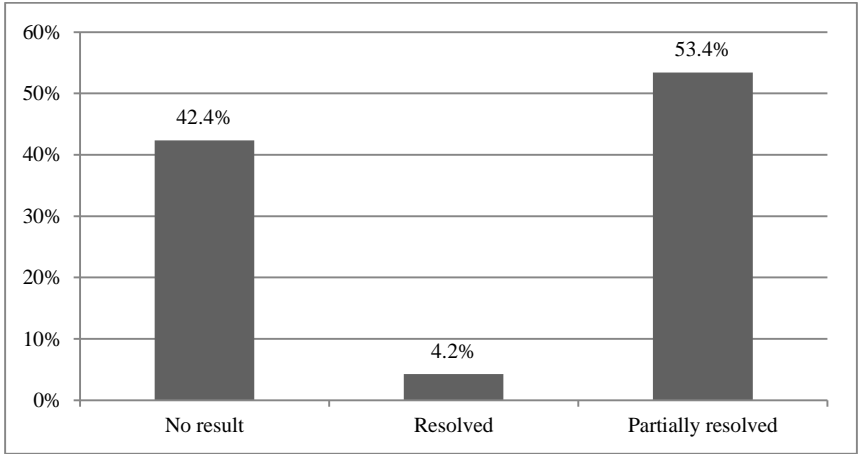
Further action as a result of the ADR process varied. In some instances, the further action required consideration and submission of other material that could then be dealt with in a different manner. For example, one ATO survey respondent in a comment noted that:¹¹⁵

...many elements of the dispute were settled, there are remaining issues that should now be resolved under our normal administrative processes.

¹¹⁵ Ibid 32.

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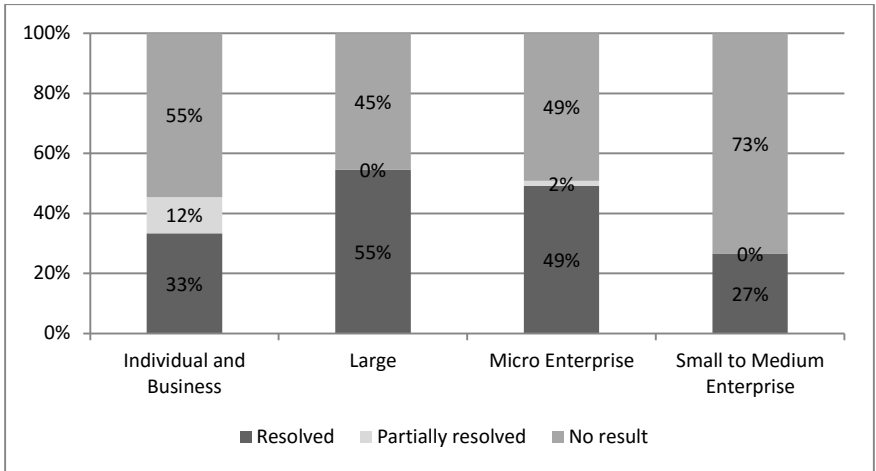
Figure 7: What Was The ADR Outcome? ATO Base Data Only.



The variation in settlement rates was also considered from the perspective of market segment and procedural justice indicators. This material suggests that large and micro-enterprise disputes were most likely to resolve at ADR, and small to medium and individual taxpayer disputes were less likely to resolve. The individual disputes were more likely to ‘partially resolve’ than all other groups. Furthermore, the types of disputes that are addressed by these processes are relevant in determining whether resolution occurs and what types of solutions result. For instance, reviews of existing literature suggest that mediation processes can provide procedural justice and also can have positive organisational outcomes in the context of employee disputes.¹¹⁶

¹¹⁶ See generally, Lisa B Bingham, *Employment Dispute Resolution: The Case for Mediation* (2004) 22 *Conflict Resolution Quarterly* 145 (concluding that DSDs using mediation has proven itself capable of producing positive organisational outcomes, while there is no evidence that non-union employment

Figure 8: Effect of Market Segment on ADR Outcome



The data suggests that micro-enterprise disputes are most likely to resolve at the ADR stage. In addition, they are more likely to be resolved more quickly (referral to ADR is more likely at an earlier time). Large complex business disputes were also more likely to resolve at the ADR event, although they will usually not be referred to the ATO ADR event until a year after proceedings have commenced in the AAT or Federal Court (see Table 11 for a summary – note it is likely that case management events would have been attended and conferences at the AAT (these may have been focussed on representatives only)).¹¹⁷

arbitration has that impact); see also David B Lipsky and Ariel C Avgar, ‘*Commentary, Research on Employment Dispute Resolution: Toward a New Paradigm*’ (2004) 22 *Conflict Resolution Quarterly* 175 (advocating multivariate models and more sophisticated statistical techniques to measure the impact of employment dispute resolution); David B Lipsky, Ronald L Seeber and Richard D Fincher, *supra* note 14 in Bingham, Raines, Hedeem and Napoli, above n 9, 135.

¹¹⁷ Sourdin and Shanks, above n 2, 24.

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Table 11: Summary of Case Complexity, Timeliness and ADR Outcome Data for Each Market Segment¹¹⁸

	<i>Case complexity (% of processes)</i>			<i>Timeliness (Date AAT or Federal Court proceedings commenced to date of ADR)</i>		<i>ADR outcome (% of processes)</i>			<i>n</i>
	<i>Low</i>	<i>Med.</i>	<i>High</i>	<i>Average</i>	<i>Median</i>	<i>Resolved</i>	<i>Partially resolved</i>	<i>No result</i>	
Individual and Non Business	30%	52%	18%	287	223	33%	12%	55%	33
Large	0%	9%	91%	397	418	55%	0%	45%	11
Micro	30%	54%	16%	251	193	49%	2%	49%	57
Enterprise									
Small to Medium Enterprise	0%	67%	33%	219	183	27%	0%	73%	15
Not for Profit	*	*	*	*	*	*	*	*	0
Gov'tment	*	*	*	*	*	*	*	*	1

Note: * denotes sample size too small for analysis

ATO base data highlights the association between case complexity and the amount in dispute in the survey period (Table 1.9). Eighty-six per cent (86%) of low complexity cases (n=27) involved amounts in dispute of \$100,000 or less. Seventy-nine per cent (79%) of medium complexity cases (n=61) involved amounts in dispute between \$20,001 and < \$10 million. Eighty per cent (80%) of high complexity cases (n=30) involved amounts in dispute between \$100,001 and > \$10 million.¹¹⁹

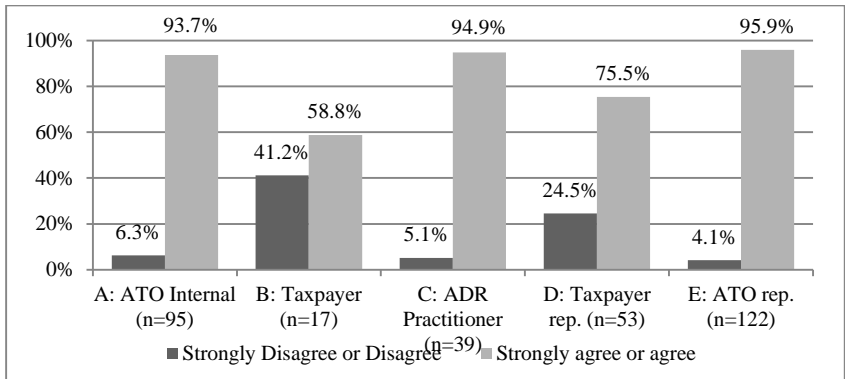
Survey respondent perceptions about whether the outcomes of the ADR process were fair suggest the view that about 50 per cent of taxpayers (B) and 65 per cent of taxpayer's representatives (D) considered the outcomes were fair. (A much higher proportion considered that the process was fair). This suggests that those surveyed were able to distinguish between outcome and process fairness. However, the relatively small sample size for these two participant groups may have skewed

¹¹⁸ Ibid 25.

¹¹⁹ Ibid.

this result, with only 17 per cent of survey respondents being either taxpayers or their representatives. In comparison, between 91 per cent and 96 per cent of participants from the remaining survey groups (A, C and E) indicated that they considered that the outcomes of the ADR process were fair.¹²⁰

Figure 9: Survey Respondent Perceptions about Whether the Outcome of The ADR Process was Fair by Survey Group¹²¹



The ADR processes assisted with ‘other matters’ in about 30 per cent of cases. This is an important outcome and indicator of ADR effectiveness. For example, where a taxpayer declares bankruptcy following an ADR event (see below), there may be considerable cost and time savings for both the taxpayer and the ATO. In relation to this cohort of disputes, it was noted in the survey responses from ATO staff members that:¹²²

While the process as a whole was not successful due to lack of engagement by the other party, some useful

¹²⁰ Ibid 44.

¹²¹ Ibid 45.

¹²² Ibid 56.

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information was obtained which will enable the matter to progress closer to resolution.

When used correctly, ADR (conciliations/mediations) is a way of articulating each party's relative strengths and weaknesses when it comes to a dispute. It can then be used to narrow which issues there are scope to move on.

All substantive issues except for one were resolved in the process.

It encouraged the Applicant to make an offer of settlement.

The taxpayer declared bankruptcy shortly afterwards.

3. CONCLUSIONS

The research findings indicated that ADR played an important role in finalising the majority of the taxation disputes that progressed to ADR. In addition, perceptions of fairness in respect of the ADR processes were very positive. In addition, the findings were consistent with past research in that they showed that people in a dispute were able to distinguish between outcome fairness and procedural fairness. The research also suggested that there was a relationship with outcomes reached and procedural fairness in that, if people considered that the process was fair, the data suggested that it appeared to be more likely that an outcome was reached and a dispute would resolve. A critical factor relates to whether people considered they wanted to participate 'more' in the ADR process. The impact of these factors remains somewhat unclear partly because the data set is small and also because it appears that disputants may have differing perceptions to those of lawyers and others involved in dispute resolution processes who may consider participation differently and may be influenced by other factors. The findings do however have important implications for both legal and ADR practitioners. They suggest that levels of client participation as well as perceptions about whether clients felt respected are important in

shaping outcomes and legal practitioners and ADR practitioners need to ensure that they are both supportive and respectful as this is more likely to promote positive client outcomes.

It also appears that the time taken to resolve a dispute (measured from two starting data points – date the dispute ‘arose’ and date that an outcome is achieved) has an impact on perceptions of procedural fairness and whether an outcome is reached at an ADR process. This relationship is however less clear as factors that can be linked to the costs expended and the complexity of the dispute may also be relevant in determining whether an outcome will be reached and also in shaping perceptions. From a practitioner perspective an earlier focus on ADR (before proceedings commence) might therefore promote a resolution that might not otherwise be achieved if clients perceive that it has taken ‘too long.’ Finally, it may also be that bargaining patterns and ‘frames’ play a role in forming perceptions and it is probable that more interest based processes foster more participatory activities (and more positive perceptions of procedural fairness) and require deeper additional analysis, including observational analysis, to determine their impact on outcomes.