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Testing assumptions about ADR perceptions

Researching good process — what impact does it have on fairness perceptions?

Peter Condliffe

Introduction

In 2001 NADRAC stated:

Despite their methodological shortcomings, research studies appear to support some of the claims of ADR, namely that it is responsive, quick, fair and informal, and that it is cheaper than litigation. Most parties appear to value ADR, and seem capable of making distinctions between substantive satisfaction and procedural satisfaction in that, while they may be unhappy with the outcome of the dispute, they appreciate the fairness of the procedure and the competence of practitioners.¹

Research by the author has raised some questions about how confidently one can assert, as NADRAC did in 2001, that adverse outcomes do not impact upon perceptions of the process.²

Study

The high-density housing sector was studied as a domain for the development of a mode of dispute management alternative to that contained in the relevant statutory regime.

This formed the basis for a simulation that empirically tested 252 participants on three levels:

- their preferences
- their perceptions of justice (fairness)
- some elements of efficiency.

Each of these three levels was tested in relation to three processes:

- mediation followed by arbitration conducted by the same person (med–arb same)
- mediation followed by arbitration conducted by a different person (med–arb diff)

- arbitration followed by mediation conducted by the same person (arb–med).

At the end of the arbitration, a decision was delivered to the parties which heavily favoured one side. The decision was based upon actual, real-life cases. The impact of this decision upon fairness perceptions was measured and compared with an identical measure made earlier in the process.

Observations

This research has raised some questions about the ability of parties to distinguish between procedural and substantive ‘satisfaction’. The parties who obtained an adverse outcome went on to judge with significantly less satisfaction the procedural, interpersonal and informational justice elements of the process. The pervasive view in the literature—namely, that parties who receive a fair

There may be a tendency by some policy-makers and commentators to over-rate or conflate the ability of ‘good process’—as exemplified in ADR processes—to negate the impact of adverse outcomes. The research in the justice literature indicates a high correlation between satisfaction with outcomes and process, and a lesser relationship between the former with interpersonal and informational elements. That is, as one goes up, the others go up; and vice versa. While ‘good process’ may cause parties to rate adverse outcomes less adversely than otherwise, this may only go so far. My research demonstrates that adverse outcomes have an impact on how ‘good’ overall the process is perceived as being. The disputant group who received the adverse outcome in my research appeared to be using a simple heuristic to judge the fairness of the process overall, even though only the outcome had been manipulated.³

My research demonstrates that adverse outcomes have an impact on how ‘good’ overall the process is perceived as being.

process will put up with less fair outcomes—may be right. However, if the outcomes are adverse, then the process is considered less fair! In other words, the outcomes and other elements are symbiotic and cannot be as easily separated as commentators may conclude.

The other salient aspect of the outcomes and their impact upon fairness perceptions in this research was that the fairness perceptions of the group of disputants who benefited by the manipulated outcome were not significantly changed. Rather, the fairness perceptions of the adversely



affected dropped significantly to produce the change between them and the advantaged. What this demonstrates is that the 'loser' is likely to have their fairness perceptions impacted adversely, while the winner's perceptions are not positively impacted.

This is contrasted with those cases in which the parties were able to reach a settlement in the simulated mediation. In these cases, the complainants and respondents did not differ significantly in their justice perceptions. Nor did those parties who did not reach agreement at the time of the mediation significantly differ in their responses on the four justice measures from those who did. What is interesting about this aspect is that the making of an agreement did not raise or lower the justice scores. It is often assumed that parties' subjective perceptions of fairness will rise with an agreement. What this research indicates is that at neither the post-mediation nor post-arbitration stage of the process did the making or imposition of an agreement make any significant difference to fairness perceptions, excepting for those who 'lost' in the arbitration.

Also, participants in the experiment seemed to distinguish between the preferences they had made and their fairness judgments. In fact, the most preferred procedure (med–arb same) scored slightly lower on the justice scores than the other procedures. However, this was not at significant levels. Therefore the participants did not relate their fairness perceptions to their preferences, which were highly correlated with perceptions of control. While the reasons given for the preferences indicate that a clear majority of participants justified their decision on the grounds of procedural justice, this was not related to any one particular procedure.

The other key aspect of the justice research is the finding that there was no significant difference in the justice scores between the different processes. This indicates that parties were not affected by the placement of arbitration before mediation or by

the presence of a different third party. Also, there were no differences based on role types, gender, ethnicity or housing status. For dispute system designers, this information is useful.

Conclusion

What this leads me to conclude is that we need more research! Our understanding of ADR and what underpins its continued success is still little understood. For example, what may be useful in future research is to graduate the distributive outcomes in an experimental situation in relation to their adverse perception in the eyes of one group of participants and to measure the impact this would have on their perception of the various justice elements.

It would be interesting to have a more balanced outcome, say, where one issue was decided in favour of one side and one for the other. In my research the outcomes, while based on the actual outcomes of real-life cases, heavily favoured the respondents on both the major issues of dispute. This could then be varied to have more nuanced outcomes where different elements of the disputes in issue went either way in varying degrees. The differing outcomes could be rated in terms of their adversity for either side in the dispute and this then analysed in terms of the impact on fairness judgements.

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Endnotes

1. NADRAC, *A Framework for ADR Standards*, Canberra: Commonwealth of Australia, 2001 at 37.
2. Condliffe, P, *Conflict in the Compact City: Preferences and the Search for Justice*, PhD Thesis in preparation, Victoria University, Melbourne, 2011.
3. Lind, E Allan, 'Thinking Critically About Justice Judgments' (2001) 58 *Journal of Vocational Behavior* 220–26.