C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 29 November 2007

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Witnesses

Mr L. Reddaway, Victorian Chapter Chair,

Professor A. O'Brien, Senior Vice-president, National Council,

Mr A. Monichino, Victorian Chapter Committee Member;

Mr G. Tippett, Chief Executive Officer, and

Ms G. Totaro, Executive Assistant, Institute of Arbitrators and Mediators.

The CHAIR — This is the first hearing of the inquiry into alternative dispute resolution by the Parliament's Law Reform Committee, and I welcome everyone here this morning. First of all I would like to thank you for coming from IAMA. Thank you very much for both the material that you sent previously and also for coming to have a discussion with us this morning. Hansard is recording what we say and a transcript of that will been sent to you in a few days.

Before we proceed there are a couple of formal things that I need to point out to you. The most important of those is that what you say in this hearing is subject to the Parliamentary Committees Act, which means it attracts parliamentary privilege. Basically it means that nobody can take legal action against you for what you say if it has caused them any offence. You are protected here, but if you say the same things outside the confines of this hearing, obviously you will not have that privilege accorded to you.

We will be as informal as possible in this hearing. We have 45 minutes. We give you as much time as you need — 10 or 15 minutes, or whatever — to tell us about yourselves and the work that you do in relation to the terms of reference, and then we have got some issues that we would like to open up with you, and we will jump in when you have completed that initial presentation. So over to you.

Mr REDDAWAY — Thank you very much for having us here. We are here to genuinely help you come up with the best report that you can. If you do want us to put in anything further in writing, we will try to do that. IAMA is Australia's leading body which is committed to ADR. ADR is our core business. IAMA trains and accredits arbitrators, mediators and adjudicators, and we have done this for 30-plus years. We reckon that the people who are on our books are pretty well trained, and they keep up to date with CPD — continuing professional development — and all of that.

IAMA has a well-established process by which we respond to requests from people who want the services of an appropriate dispute resolver. We try to send the appropriate dispute resolver to the client to help them in whatever way is appropriate. A key point is we have a huge reservoir of practitioners ready to work. There is no shortage. We train people; they all want to do work. There is a huge reservoir of practitioners.

Generally I do not know of any reason to doubt the proficiency of the practitioners. I say that, of course, for IAMA, but there are other bodies as well. Generally speaking, I do not know that there is any proper evidence that there is insufficient proficiency. However, there is just coming in currently a new set of national standards for the training of mediators and for how those mediators conduct their practice. These draft standards are of a high level, and at IAMA we certainly support high standards. We think it is fair to say that our standards are probably as high or higher than anyone else or any other comparable organisation, so we will certainly be embracing those new national standards when they come into effect.

Here is a second key message: we strongly suggest that it would be most unhelpful if any instrumentality or any state brought in a different set of standards. It was hard enough to get a consensus around Australia, which has pretty well been achieved; please do not try to reinvent that wheel.

It seems that everyone believes in ADR. It is easy to believe in ADR; it has got all the good vibes. But an issue is how to make mediation part of the mainstream of legal practice and of resolving disputes in the community. We have to do that — making it the mainstream — without compromising the very subtle features which do make mediation potentially an extremely powerful and useful tool; for example, mediation should be seen by the parties as being confidential, private. People who are undergoing this are often highly wrought and very fragile. It is very easy for that process, which is trying to bring them out of the fears that they are in towards some sort of a conclusion, to be stymied if the mediator is seen as anything other than truly, truly, truly independent; for example, I believe if a judicial officer is doing mediation which may later go on to become a court case, if I was a party to the mediation I would be scared that something I might say, supposedly in confidence, actually might be spilled over to the judge who could be sitting on the case in a few months time or whatever it is. This is an issue which applies generally as to how is mediation done. It is so easy for a bureaucratic system to say, 'Right, we will appoint a panel and we will all come to work. We will work in the same office block and these are the procedures and this is the way we do it'. This tends to lose, or potentially lose, that subtle issue of true independence and true impartiality and confidentiality.

One last point in relation to arbitration, and my colleague Albert here has prepared a submission on behalf of both IAMA and the Chartered Institute of Arbitrators. I have given you a copy of that, I believe, with our submission,

which argues that the courts in general are overworked — we hear that. They are certainly expensive and there is a great strength for arbitration and other processes in the private sector to take the load off the public sector courts. Those are the points I wanted to share with the Committee at the start. Unless my colleagues have anything they burningly want to add — —

Mr MONICHINO — I can say something about arbitration.

Prof. O'BRIEN — I just wanted to give you a little more information about our membership. While we are training people for ADR, all our members have an underlying profession. In the main they are either lawyers or from the construction industry, though, of course, we have people from a whole range. But in the main ADR training is a second form of training on top of a professional qualification. One of the key things about ADR is that it is often important to find an appropriately trained ADR professional who has a background in the profession associated with the dispute that is being resolved. That is why, of course, many of the people in the construction disputes have an engineering or architectural background.

Mr MONICHINO — Lawrence referred to a submission that I was involved in preparing. It was a joint submission between IAMA and the Chartered Institute of Arbitrators to the Victorian Law Reform Commission, which, of course, as you would know, has a reference at the moment dealing with a review of the civil justice system and how to address delay and costs in the civil justice system. I will not speak to the submission, but one of the major thrusts of the submission is that there is a private adjudication market with private adjudication professionals that works in tandem with the court system. It complements the court system, it can deal with the overflow, it can reduce the burden on the court system, but for whatever reason it is underutilised in Australia. Can I just say something sort of off the submission but which deals with the submission?

ADR includes arbitration. Arbitration and mediation are the two fundamental forms of ADR but, with respect, I found it disappointing that the discussion paper did not really address the state of arbitration in Victoria.

Not all disputes, especially commercial disputes — and I distinguish commercial disputes from neighbourhood disputes, where you might have a dispute with your neighbour about cutting down an old elm tree — such as a commercial dispute between BHP and Oil Basins concerning the meaning of a royalty agreement that translates into millions and millions of dollars, are going to be determined by consensual ADR.

Commercial parties want a binding determination which is a quality decision delivered in a timely period, and that is fundamental. It is fundamental for investment. If a multinational has a decision as to whether to invest in Melbourne or Singapore, one factor it will have regard to is, 'Well, what is the regulatory environment? What happens if we have a major dispute with our contractors? What is the likely outcome? Are we going to be sucked into the vortex of a court system and not see the end of the day for eight or nine years, or are we going to get a speedy result?'. Those factors affect investment decisions by executives and that should be borne in mind.

The civil courts in Victoria are underresourced. They cannot provide the outcomes required by commerce. If we look at one of our major competitors in the Pacific-Asia region, Singapore, I read recently a paper given by Judge Prakash of the Singaporean High Court in which she talks about how they revolutionised the courts in that country. They have benchmarks; cases will be determined within 18 months of commencement; cases will be heard within 8 weeks of them being ready to be set down. Now, I would suggest that similar outcomes are expected by commercial parties in Australia, but our courts cannot presently resource them. In Victoria, the Supreme Court has 8 or 10 civil trial judges, depending upon the demand in criminal cases, because if there are heavy criminal cases then the judges are moved into the criminal list and commercial parties are left wavering.

Government cannot simply divert commercial disputes into consensual forms of ADR. They must either, or both, properly fund the courts, or support the arbitration community to provide the outcomes expected by commercial parties. In Victoria arbitration is presently in a state of malaise, and it has been for 10 or more years. There is really no government assistance; in fact it is quite the opposite.

Provisions like section 14 of the Domestic Building Contracts Act, which declare void terms in, for example, domestic building contracts referring disputes to arbitration, have hindered arbitration. Fifteen years ago domestic building disputes were the sorts of disputes that budding arbitrators cut their teeth on. There are no such disputes any more in Victoria.

IAMA is one of the major nominating bodies, and it can count on a few hands the number of arbitrations it gets to refer to people. What IAMA is concerned about is provisions, like section 14 of the Domestic Building Contracts Act, become boilerplate provisions which are unthinkingly replicated in other pieces of legislation because of some ignorance of arbitration or prejudice against arbitration.

What we need to do is to promote arbitration in Victoria. One way of doing it is for government to be involved. IAMA recently promulgated some fast-track arbitration rules which provide a new sort of dispute resolution system where the parties agree in their dispute to refer the dispute to fast-track arbitration so that they get a decision within 150 days.

I was dismayed when I had a senior person who heads a big building company, which deals with government, who asked a question at a seminar that we presented on fast-track rules, and he said he had proposed this to the government instrumentality that his company contracted with. It was a multimillion-dollar project. When they were drafting the contract, he said, 'Why don't we have fast-track arbitration?' The reply was, 'Oh no, we can't do that'. So if government wants to promote arbitration it has got to set the example; it has got to lead.

Contrast what happens at the federal level. In April 2007 the ex Attorney-General, Philip Ruddock, launched the Australian Maritime and Transport Arbitration Commission, which established a specialist panel of arbitrators to resolve maritime and transport disputes. It is a properly funded body and the Commonwealth government supports it, provides a venue, provides funding, and it is intended to attract domestic and international disputes in that arena. Now that is something that state governments may wish to consider.

That is all I want to say.

The CHAIR — Great, that is terrific. Would anybody else like to speak?

Mr TIPPETT — Yes, I would just like to comment on things from a different tack in that with Professor O'Brien here this morning, we have the second most senior official of the national organisation of IAMA. Angela is senior national vice-president.

Victoria has the other added attraction of being the site of our national office, so I come in as the administrator of the organisation, taking a different view from some of the state chapter activities because I have got national focus as well in trying to keep the organisation within a consistent policy, and this is why some of the things that Albert has said ring true in that I am a little bit concerned with some of the things in the report in that I do not want to see Victoria heading off on a tangent.

One of the concerns we have is that one of the pieces of legislation that is in our submission, that was omitted from the discussion report, the Building and Construction Industry Security of Payment Act 2002, is a prime example of where we have gone a little bit wrong with the federal approach to this issue. We have different legislation in each of the states, and each of the states has given this common process a different tweaking. From a national perspective as far as our training is concerned, we have to produce four different models, and we are doing exactly the same thing, except it means that practitioners have to be registered in each state. We have had one case in particular where there has been a cross-border issue and we have had to appoint a different practitioner to hear the case in each state. They came up with two different answers to the same problem. That is just a legal issue that I would like to add in.

Mr REDDAWAY — I think we have to keep this to 30 seconds.

Mr TIPPETT — Okay. The other thing that comes out of all this — and you are going to talk to Professor Sourdin later this morning about the national mediator accreditation program, and this is an initiative in the right direction — is that mediator and arbitrator training in Australia is largely conducted by two not-for-profit organisations or associations, IAMA and another organisation. We receive no subsidies from government whatsoever.

There have been a large number of federal areas that have introduced ADR as the forefront approach in dispute resolution. The family law changes that came in mid-year are probably the major example of this. The governments of Australia are still relying on these voluntary organisations to provide this training. Part of the issue that emphasises this is the report put out by the Department of Justice during the past year. If we go to pages 34 and 35 of the *Alternative Dispute Resolution Supplier Survey 2006 Report*, point 14 addresses staff qualifications and

training. We have two pages here of different government organisations within the Victorian system. If you look through the requirements for mandatory training and accreditation, you see there are no common themes. I would just like this Committee to look at some of those types of issues. I have been speaking with the people in the Department of Justice, who are well aware of our attitude on this, but it is something that I think the Committee should be keeping an eager eye on.

Mr REDDAWAY — We are keen to answer your questions.

The CHAIR — We are also very keen to hear what you have to say, which is why we are here. Thank you very much for those remarks. Can I perhaps come to an issue to open it up, and then we will go more broadly to the remarks that you made, Mr Reddaway. In your submission you state that the private civil justice system is being underutilised, and you just spoke to that; you also said, I think, in the document that it was for some reason, and then you mentioned about underresourcing just before as you were going through. I think, Albert, you also referred to that in relation to arbitration. Could you talk to us a bit about what that means, that underresourcing? Is it a question of money, is it a question of priorities, or is it a question of a framework that could better guide the way that this works?

Mr FOLEY — Or even culture.

The CHAIR — Or culture, yes.

Mr REDDAWAY — To put it bluntly, the judges like being judges, and they do not like other people doing their work.

Mr MONICHINO — I think it is a bit more than that. If you are a consumer and you say, 'I've got a dispute. How am I going do resolve the dispute?', you go to the court system — it is tried and true. On the other hand, for example, in the UK arbitration is so big that I think it gets a mention in the balance of payments. It is a huge industry, and there are quality results, and people flock to arbitration usually in preference to the courts, so there is a culture of people using it. We used to have a culture of arbitration, but, as I indicated, that culture of domestic arbitration has died away. If you talk to practitioners now when they are drafting their dispute resolution clauses, or if you talk to government departments and ask, 'How are we going to resolve future disputes with this building contract with a multinational; are we going to go to arbitration?', the answer is, 'Well, it's a bit risky', because the field has sort of evaporated. What we need to do is reinvigorate — —

The CHAIR — What does that mean, 'it's a bit risky'?

Mr MONICHINO — It is a bit risky because you do not have a track record and you do not have quality arbitrators who day-in, day-out arbitrate.

Mr REDDAWAY — This is a perception. It is not the reality. There are quality arbitrators out there, but they are twiddling their thumbs, if you like.

Mr MONICHINO — The perception is that you do not have a pool of specialist arbitrators who day-in, day-out resolve disputes in a quality manner. Once people try arbitration and they have a good experience, then they will do it again. But with the Domestic Building Contracts Act and the like, the opportunities for arbitration have fallen away. That is why we are excited by the federal initiative of establishing a maritime and transport arbitration panel. It is going to attract work, people will experience arbitration and then they will use it if the alternative is to go to court and have to wait three or four years for a result.

Mr DONNELLAN — The building industry used to have a fair bit of arbitration, though, did it not, for some years? The institute of valuers used to make assessments of market value if the parties could not agree for many years, and that was arbitrated, was it not?

Mr MONICHINO — That was expert determination.

Mr DONNELLAN — Is that different again, is it? Okay.

Mr MONICHINO — The difference between expert determination and arbitration is that with an expert determination you appoint an independent person. That person will determine the dispute but without conducting

any forming of a quasi-judicial hearing. An arbitrator hears evidence, hears submissions and acts like a private judge. Expert determination is a bit more rough and ready.

The CHAIR — Just before we move on, I come back to you, Mr Reddaway. We have heard a bit about arbitration. What is the story in terms of mediation?

Mr REDDAWAY — Coming from the courts?

The CHAIR — Yes.

Mr REDDAWAY — As I understand it, almost all the courts have the facility to send this case out to a mediator, but the judges and the staff do not always do that, and it is not yet the commonly accepted, genuinely enthused about process.

Mr MONICHINO — I have to disagree with that. I suppose I am a bit more directly involved in the court system than Lawrence, being a practising barrister. In the Court's State of the Judicature address, the Chief Justice of Victoria said that but for mediation the Supreme Court would just collapse. She said that in August this year. The courts have embraced mediation with a fervour, to the extent — and this is what we say in our submission — we are a bit concerned about bringing mediation in-house and having judges actually mediate, when there is a huge private profession that can mediate, and you do not have the same problems.

There was a case in Western Australia where a judge referred a mediation to a junior judge, a district registrar, who then told one of the parties, the plaintiff, in a private session, 'I have spoken to the judge. He has taken an adverse view of your credibility'. The matter did not settle, and when it went back to the court the party sought to disqualify the judge, who refused to disqualify himself. That went to up to the Court of Appeal, which removed the judge. The point is that judges talk, or there is a perception that they talk, and it is much better for mediation to be external to the court system.

But the courts have embraced mediation with a fervour. The question is whether we can make the next transition and to embrace a broader ADR menu — for example, early neutral evaluation, arbitration, court annexed arbitration and special references. But as far as mediation is concerned, that game is won.

Mr FOLEY — Is it, though? Knowing I was on this Committee and having this reference and having read some of the stuff, I dealt with a family in my electorate who had dealt with building warranty insurance dramas. The story has been all over the media. It is a dreadful story. It involved a Greek working-class family trying to build a property in Port Melbourne. The state of the joint is such that you would not put a dog in it, let alone three families. That family had access, through VCAT and through CAV too, to an alternative dispute resolution procedure, but they were never advised anywhere along the line that that was an alternative for them.

Now, $1 million and six years later, the builder has gone into liquidation, now at the death knock they have been offered the $13 000 by the insurance company. It has destroyed that family. And yet I am hearing mediation is part of the process, but it totally by-passed people who do not have a high education background and should have been clearly pointed in that kind of direction.

Mr MONICHINO — Is VCAT part of your reference?

Mr FOLEY — I think so, yes. That is what made me think about it. I listened to this family's story and I was thinking, 'This is a model for why ADR should be there'.

Mr MONICHINO — VCAT has its own version of mediation.

Mr FOLEY — But it was never offered to them.

Mr MONICHINO — It is a compulsory conference that is conducted by one of the actual members, and it is conducted in the courtroom like a quasi-court case; it is not mediation. But you have raised a very important point. It really depends upon the judicial officer. I have a case where elderly parents have guaranteed their son's debt and are about to lose their home. When they have gone to court, the first thing the judge has said is, 'Before you do anything and spend 1 cent more we are going to mediate this', because the judge was alive to the sort of problem you have just referred to. So it really depends on the parties and the court.

Mr FOLEY — But it should not.

Mr REDDAWAY — But I think your court case is an example of why the court system is not geared up to actually taking your constituent aside and explaining what the process is. This is not only about ADR but the courts generally. The average typical person that goes into court does not have a clue what is happening, nobody explains anything to them, and they end up asking, 'Well, what has happened?'.

Mr MONICHINO — That is why mediation is powerful, because it is informal and it empowers the parties to take control of their dispute as opposed to the court system, like in the movie *The Castle* where at the end of the case Darryl says 'Fantastic!' But he actually lost.

Prof. O'BRIEN — We have been talking about civil cases, but there is also potential in the criminal jurisdiction to look at the potential for victim-offender mediation/discussion, and I think particularly in the Children's Court. There is a lot of this happening in Europe at the moment where there are large numbers of cases that are going through the children's courts in northern Europe that are settling using the victim-offender program.

The CHAIR — Are there particularly good models you can point us to?

Prof. O'BRIEN — Probably we might be able to go back and have a look at some of them. Certainly there was an excellent talk at one of our conferences.

Ms TOTARO — In Germany.

Prof. O'BRIEN — Yes, and we could certainly find that information for you. And you have probably read what is happening in New Zealand, where quite a lot of work was done with the Maori communities, and I think there is enormous potential to do some good work with the Horn of Africa and a lot of other new communities. I certainly know many of the magistrates, including Brian Barrow who was the Deputy Chief Magistrate for a number of years, are very committed to working with young offenders in different kinds of ways, because there is absolutely no doubt that the processes in the courts are not the best ways of dealing with the social issues associated with the criminality of young offenders.

Mr DONNELLAN — I think he is using soccer as an introduction, is he not, which works pretty well, with the police and so forth?

Prof. O'BRIEN — Yes, it does. There has been a lot of work with sport. I have been involved quite a bit with the arts with young offenders. There is a whole range of possibilities. Of course what is important is generally a holistic approach. You can do something much more if you are working with different kinds of mediator processes when you are dealing with young people.

Mr BROOKS — I wanted to say, firstly, that I was a former associate member of the Institute of Arbitrators and Mediators, so I just wanted to get that on the record.

Prof. O'BRIEN — We are just sad he is not a continuing member, that is all I can say!

Mr BROOKS — My question is about the use of mediation in the courts, picking up from Martin's example of the family in his electorate. One of the key things I remember from mediation and the course that the institute ran was about the power relationship between each of the parties. Picking up that example, where I am assuming you would have an insurance company or a large builder and, for example, a family from a non-English-speaking background, how does the court system deal with that issue of the knowledge of the legal system of the one party, compared to the knowledge of their rights of the other person, and how does that work through the court system? If you could also talk about how it might be improved, if there are going to be improvements to that system. That question is to anybody.

Mr MONICHINO — I act for multinationals, and I also act for elderly migrants living in Reservoir. I am available to anyone; the Bar creates a level playing field. Your constituents would no doubt have had legal representation.

Mr FOLEY — I do not think they were well represented.

Mr MONICHINO — That is always an issue. But you leave it to your lawyers to explain the process to you and to create a level playing field.

Mr BROOKS — Pardon my ignorance, but in the court mediation do the lawyers representing sit in on that process?

Mr MONICHINO — Yes, absolutely. It is not just the individuals by themselves. What happens is you have an independent mediator who explains the fundamentals of the process, that it is private, confidential — theoretically, anyway — and informal. Then they have a discussion around the table.

The two lawyers will speak and the clients will also speak and then the mediator will perhaps break out into private session with each of the parties and then discuss and say things that may not have been said in open session which might tend to undermine that party, and so there is a bit of reality testing. The mediator sort of sits above the process and has amazing knowledge because he knows the knowledge of both parties and sees whether there is a possibility of massaging the parties to an outcome and facilitates that.

If the parties are properly represented, then there should not be an issue of power imbalance. One of the issues mediator training addresses is: what if there is a perceived power imbalance, what does the mediator do?

Prof. O'BRIEN — Exactly — and a good mediator should be able to manage and mediate some imbalances of power.

Mr REDDAWAY — But that is not the complete answer because in this case it is a huge insurance company against a struggling family. In the end the family is likely to give up, just through exhaustion, whereas the insurance company is not going to give up. Just because the mediation process may be relatively even handed, that is not to say that the insurance company is going to give up or concede too much. If the insurance company wants to, it has the power, and I do not know any way to overcome that.

Mr FOLEY — You talked about the culture of dispute settling. Do you perceive that the whole Australian national culture — whether it is industrial, commercial or family — has swung against alternative dispute resolution, even though, to a degree, it is growing and there is the work of you guys? If you look all the way through, with the recent events we have gone through — with WorkChoices and commercial arbitrations — you see these contradictory patterns emerging. You pointed to the fact that there were the maritime issues and commission disputes. Yet in other forms of dispute resolution there is an emphasis on just the parties themselves working it all out. Are we swimming against the tide here?

Prof. O'BRIEN — I will make a few comments, and I am sure others will want to. I think that there needs to be much more good publicity and government support for publicity of ADR. It is, hopefully, well handled; it is cheaper; it is quicker; and it can be more user friendly than the courts, and I think that is fairly evident. But at the moment people of course want their day in court because people understand that the justice system is associated with an adversarial system.

People believe that the way you get justice is to have your lawyer fight tooth and nail with the other party's lawyer and whoever is the hawk can bash up the dove, and you hope you get a hawk, not a dove, for your lawyer. So notions that consensual decision-making, consensual justice is an appropriate way to go really is not the culture of Australia at the moment. I think that culture is more embedded in some of the European countries.

Firstly, there needs to be a lead, obviously, from the government in trying to provide some support for changing the culture and thinking about different kinds of ways for handling disputes. Secondly, of course, you have to ensure that ADR practitioners are well trained and accredited and that they do maintain their standards with good CPD, in the way that any other professionals do. In my opinion, a lot of the ADR training at the moment — and I think to a certain extent before us, as well — relies on sitting on the top of other kinds of professional training.

We make assumptions that people do understand the construction industry or that people who are doing mediation training already have a background in law or in social work or whatever, wherever they are working. We need to think very seriously about how we accredit, and it needs to be national. Then, of course, the courts particularly but government also need to work hand in hand with organisations like IAMA and LEADR and the other organisations that are working with ADR practitioners. There does need to be regulation and there does need to be publicity. I will let someone else speak up on that.

Mr MONICHINO — I do not think we are swimming against the tide; I think we are on the crest of a wave. But there are pockets of resistance, and the resistance is within the legal community and also within government. It is all very well for governments to parrot that they support ADR but it is a question of actually putting your money where your mouth is and actually putting in your contracts dispute resolution clauses saying, for example, 'We will go to fast-track arbitration to set the lead'. I think you also have to appreciate that ADR is not all about consensual resolution. There are some aspects of ADR which require a determination, whether it is expert determination or arbitration. That is part of the ADR menu. As I said in my earlier remarks, you are never going to resolve all commercial disputes by consensual means.

Mr REDDAWAY — What I would add if I may is that I believe this Committee has the real ability through the Parliament to influence the government to force VicRoads, or whoever it is, to put into their contracts dispute resolution processes which are carefully thought out and are not hidebound by the past prejudices of the people who are actually writing the contracts.

The CHAIR — We are just about out of time, but Professor Sourdin has not arrived yet. If it is all right, we will continue. There are a couple of questions we would like to ask.

Should the national mediation accreditation system apply to all ADR processes, including mediation and arbitration that we talked about, and are there any processes that you think fall outside of what the accreditation system should take in?

Prof. O'BRIEN — Mediation is quite different. People are trained quite differently. I do not think that the way in which that accreditation process has been written and been thought about really applies to the determinative processes of arbitration and adjudication. It operates quite differently. You certainly could have a parallel national accreditation system, but you would need to construct it in such a way that it met the needs of other kinds of ADR processes.

Mr TIPPETT — When you speak to Professor Sourdin, I am sure she can outline some of the processes that have been involved in the work she has been doing, but it certainly has not been easy to get to this stage.

The process started in 2004. It is being conducted under the umbrella of the National Mediation Conference, which is held each two years. A report went to the Hobart conference in 2006. It was prepared by Professor Laurence Boulle of the Faculty of Law at Bond University, and the work that Professor Sourdin is doing has taken on from there. She will tell you about the difficulties of pulling all of these concepts together just for mediation. To take it beyond that is a whole new scope.

The CHAIR — Mediation has been one thing; arbitration could have a parallel process that maybe has the same structures but different approaches internally. Are there areas that would not fit into that at all, areas that should be left aside?

Mr REDDAWAY — There are inevitably a whole range of processes, and you cannot ever cover them all. Albert referred to expert determination, which is where you find an expert on the topic. You cannot always find an expert on the particular topic who is also accredited and qualified and all the rest, so I do not think you should be aiming high to create standards that cover absolutely everything.

Prof. O'BRIEN — While the Commercial Arbitration Acts are uniform throughout the country, that is not the case with the security of payment acts. They are quite different throughout the different states of Australia, so there would need to be some thinking about those different legislations. I know very little about adjudication, but — —

Mr MONICHINO — IAMA does accredit adjudicators, and IAMA is a national body, so I do not think that is an impediment.

Prof. O'BRIEN — We train on a state basis to meet the needs of the different acts across the country.

Mr MONICHINO — But if it ain't broke, why fix it? Private accreditation works. If it does not work, then parties will not approach the nominating body to nominate. If private accreditation works, why does the government need to intervene?

Prof.O'BRIEN — We also need to leave the way open for hybrid forms of dispute resolution. We do not want to lock ourselves into these specific forms. There is a form, which we call med-arb — mediation and arbitration working together — which tries to bring those two together. With some of the things I have suggested before in terms of the criminal jurisdiction and particularly working with kids you might develop some forms which would play off mediation but which would develop their own kind of shape because obviously there might be something in them that may not be sentencing but an agreed kind of community action.

Mr REDDAWAY — I might just say that what that leads to, I believe, is the importance and usefulness of having standards. But the actual imposition of standards is a different question. If you are going to say, 'These are the mediator's standards' and, 'Those are the arbitrator's standards', and they are compulsory, then how are they actually applied and monitored?

Having standards is fine. Somebody who wants a good arbitrator will ask, 'Are you qualified under the standards?'. 'Yes, Good'. But we should not inhibit people from choosing somebody who is not.

Mr FOLEY — What is the role of the State, or more broadly Commonwealth or States, in that? Is it restricted to managing issues like immunity? Would that help or hinder? Is there an issue there when it comes as to whether it is compulsory or voluntary? What is the role of the States in facilitating the outcome?

Mr MONICHINO — It is to provide an appropriate regulatory environment which promotes ADR and also to lead by example.

Mr REDDAWAY — Yes, I think the latter is really important.

Prof. O'BRIEN — And to investigate in an open way new ways of trying to improve the justice processes.

Mr FOLEY — Restorative justice programs?

Prof. O'BRIEN — Absolutely; restorative justice programs to try to help your constituents and those people who really find it hard either because of their socioeconomic circumstances or because of their cultural and social understanding of the legal processes. Really, we are looking at trying to improve justice through introducing these other forms and restorative justice.

Ms TOTARO — I simply want to finish by introducing my role. I work in the publications and media section of the Institute, and I brought along a couple of newsletters for this Committee's attention simply because I thought you might find the contributors quite interesting, namely your Attorney-General and the Deputy Premier, who was kind enough to write an article called *Changing the culture of disputes.*

You might find the comments quite interesting. It was also publicised in the *Australian Financial Review* when it was published in our newsletter. You may also find interesting the comments of Justice Michael Kirby who was our keynote speaker 30 years ago. His comments about the law and commercial arbitration are as relevant today as they were back then. The former Commissioner of the Inquiry into Corruption in Queensland, Tony Fitzgerald, launched our mediation handbook. He has made some interesting comments also about what role the government should play in support of ADR in Australia compared to the support that ADR attains in places like Singapore.

I am simply broadcasting the fact that we have some information here that would be relevant to the scope of what this Committee is looking into. That is all I need to say.

Prof. O'BRIEN — We will send you any further information we have that might be useful to you.

The CHAIR — Any last questions?

Mr TIPPETT — Could I just make a comment?

The CHAIR — Of course.

Mr TIPPETT — The history of our organisation is that we were created in 1975 at the request of the then Standing Committee of Attorneys–General because of the impending introduction of consolidated Commercial Arbitration Acts throughout all of the jurisdictions of Australia. Victoria took the lead and introduced its Act in the

mid-1980s. It took 10 years to get to that stage, so it was not an easy process. We have had consolidated Arbitration Acts since the mid-1980s.

We have referred to the way adjudication has gone off on a different tangent. I think this Committee has an ideal opportunity to take a close look at what is happening with ADR in Victoria. The report I referred to earlier is an indication that there is a very large footprint in the Victorian Government to ADR — about 20-odd organisations. We would just like to see some consistency in this. I think you have a wonderful opportunity to come out and make the relevant strategic decisions about how you see ADR fitting into that framework.

The CHAIR — Recommendations at any rate.

Ms TOTARO — It needs to be noted that the national office is in Victoria, and a previous Labor government was quite supportive of ADR. Years ago, it contributed $250,000 to IAMA on the basis that it establish an international arbitration centre in Melbourne.

The CHAIR — Thank you very much for your time, and thank you for your documents. We will be in touch with you again. You will receive a copy of the transcript.

Witnesses withdrew.