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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 29 November 2007

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Professor T. Sourdin, Professor of law, The University of Queensland (Mlbourne Campus)

The CHAIR — Professor Sourdin, thank you very much for coming along to talk to us and for your support.

Prof. SOURDIN — It is a pleasure.

The CHAIR — You have probably attended inquiries like this before. Hansard will be taking down what we say, and a transcript will be sent to you afterwards so you can make minor corrections before we put it onto our website. The final point I need to remind you of formally is that the proceedings here operate under the Parliamentary Committees Act, which means that any remarks you make are afforded parliamentary privilege. Obviously that will not be extended to any of the remarks that you make outside the confines of this hearing.

We operate pretty informally. I understand that you have got an appointment after 11, so we will finish on the dot. The way we run it is that we throw it open to you to tell us about your work in the context of the terms of reference, and then we will jump in with some questions to clarify some of things that you have said.

Prof. SOURDIN — I do not need to finish bang on 11 o'clock. If it goes a little longer, that is quite all right with me. I have not done a PowerPoint presentation; I often do.

The CHAIR — That is fine. We can survive without those.

Prof. SOURDIN — I thought you perhaps could. When I had actually looked at the background material that I had been sent, it really covers such an extensive range of areas that it probably is equivalent to a six-month university course if I was going to pick through it in detail, and if I tried to recycle some of my other PowerPoints, I do not think that they would assist or do it much justice.

I gather, though, that a couple of topics are of particular interest, and perhaps I might start there. One of those topics relates to, I think, consistency in terms of mediation practice and in terms of ADR use. Some of the questions that we had discussed when I came up and met Kerryn and Kate were around accreditation standards in the mediation area and indeed in other areas, so I thought perhaps it is appropriate for me to go there first.

You would think that setting up a national system of accreditation in the mediation area would be a fairly simple thing, but you have probably already heard evidence that it is not at all simple. That probably speaks to the great breadth of areas where mediation, and in fact all forms of ADR, are now practised in that you have ADR now operating in financial, community, criminal, commercial, family, health — all sectors that you can imagine. In fact everywhere you have conflict you will have mediation now. It is actually quite difficult, because of the different disciplinary backgrounds of mediators, to create something which looks like an accreditation system.

Also there are huge differences in terms of the diversity of mediators. We have mediators who are Indigenous. Mediators can start at 10 or 11 years of age now at schools. We look forward to quite different ages. We have overseas mediators. Clearly in the international commercial context we have a raft of mediators who have very different backgrounds. We have mediators who have legal backgrounds, health backgrounds and different sorts of backgrounds, and they practise differently as well. Some of them are full-time, some of them are part-time and some of them are no time. Some of them facilitate water disputes or something else, so they are not truly in the sense of the word mediating, but using the skills of mediation in a different sort of a way.

Designing and creating an accreditation system has been a fairly vexed issue, as is trying to create a lot of consistency in this field amongst others. Because of the different context of the disputes and the conflict that you are dealing with, it is actually quite hard to say, 'This is the process and it will take X hours', because clearly it will not, depending partly on the content and partly on the personalities of those who are involved.

After about a decade's work, though, I think there is now a national accreditation standard and also a practice standard which operates. It is a fairly minimalist standard, and I think there were questions about whether or not it could be more aspirational or even perhaps more minimalist, but at the end of the day there seems to be a fairly broad consensus that the standards that will be introduced on 1 January can operate across the board.

A number of different courts and tribunals federally have already indicated that they will seek to now become nationally recognised mediation accreditation bodies. Those bodies include the Federal Court, the National Native Title Tribunal and the Australian Industrial Relations Commission. I think the Department of Justice up in Queensland has also indicated, and there are others. The standards have only been circulated since September, and

it is anticipated that a number of people and organisations will slowly track through. LEADR, of course, has already said it wanted to become a recognised mediation accreditation body even before the standards came through.

I saw that you were talking with IAMA this morning. IAMA is of course one of the peak bodies that operates in the mediation area. It also operates in the arbitration area. I think LEADR is probably regarded as the peak mediation body, but they are similar and they are probably similar in terms of the types of membership that they have. I do not know whether it is going to be a merger or a partnership or what it might be into the future, but I think these are in part prompted by the accreditation that has been going on in the background.

NADRAC, as you are probably aware, will host a meeting of recognised mediation accreditation bodies two times a year for the next two years, and it is anticipated that there will be a number of Victorian representatives who would attend those national meetings.

From a personal perspective I think there are great benefits in having one system rather than many systems. We have seen the emergence of quite a complex system in the family sector. What has emerged in the United States is that it is said that up to 500 separate accreditation systems are operating. That growth in different accreditation systems stems, I think, from the very different demographic factors that operate in America, and also a very different mediation set-up in the states.

You tend to have a lot of lawyers who become mediators. In Australia we have also had a growth well outside of the court system and you have a large community and family sector and financial sector that operates in the ADR system. But in America they talk about the credentialing wars, which were really wars between disciplines about who was going to control this thing called mediation and indeed ADR. That has led to some significant schisms, which I think are, in the longer term, not all that healthy for the ADR area. That is, I suppose, a bit of an industry perspective in terms of how things develop. I am optimistic that we will not go down the track of the credentialing wars that have plagued the United States.

I think in terms of that national mediation accreditation system there will be uptake. It is clear that there is already uptake and people are monitoring and changing courses and doing other things to make sure that they comply with the new standards. People are already seeking to be accredited under the new standard, even though it does not operate until next year. It is a voluntary, opt-in standard so I think some people may choose not to opt in; I think that is ultimately a matter for them. Whether it becomes something else over time I think is probably dependent on the industry and government and the mediators themselves about how they wish to move that forward.

There are probably opportunities there for a committee like this, if you want, to say that we would like mediators, for example, who operate in different areas to comply with this minimum accreditation. I think that is probably something that is open to this Committee in terms of recommendations that you make. It is not an unduly onerous standard. It really does not require much more now than attendance at what is a five-day mediation course and then either a video or a coached simulated mediation session where they can demonstrate that they have got certain competencies. It is not a university sort of course, it is not anything which in my view is too onerous.

There were submissions made that it ought to be a university course. That is currently what it is in large parts of Europe. For most people who operate in this area in Europe there are additional requirements, but it seems to me that you can craft something which is aspirational which few people will meet or you can craft something which is perhaps a little bit more practical and then look at how it develops along the way and to what extent that might need to be enhanced in the future.

In our sector here we have quite a lot of diversity. We have a large number of lawyer mediators; we have a large number of other mediators. It is quite a diverse group and they each have very different ideas about what this thing called mediation is and how it should be practised and what it involves. So there are definitional issues as well as everything else.

I have talked only about mediation. I am very happy to talk about early neutral evaluation or case appraisal or arbitration as well. In terms of those processes, I think there has not been much take-up in terms of early neutral evaluation and case appraisal. That probably speaks to the lack of clear protocols and guidelines and no national approach in relation to these very important ADR areas. I would anticipate that these may be matters that NADRAC would look at into the future, but again it just depends on how much resource NADRAC has as a body to look at this and whether or not there is a real need to look at that. One of the tribunals that I sit on, which is the

federal Administrative Appeals Tribunal, is currently doing a fair bit of work in that area. I would anticipate that that will continue and something like case appraisal and also early neutral evaluation may have more application in particular areas than others.

Arbitration is practised quite differently across Australia. You have got the commercial arbitration setting as well as different forms of arbitration that can be a bit more informal. There was a Philadelphia-style of arbitration that operated widely in New South Wales from about 1984 onwards. It was, I think, often perceived to be a fairly unsatisfactory process from — —

The CHAIR — Could you explain that process a bit more?

Prof. SOURDIN — Okay. In Philadelphia arbitration what you had was an arbitrator who was appointed, who would then arbitrate in a fairly informal sense, not in a courtroom sense. It was fairly informal compared to a commercial arbitration setting — no transcript taken, a fairly open discussion of evidence, really no formal rules about who gives evidence and how they give evidence, so quite a different process — with limited rights of appeal, but of course rights of appeal that were far greater than they are in an ordinary court context. That Philadelphia system of arbitration was responsible for the disposal of probably thousands of cases in the Supreme and District Courts in New South Wales through the 1980s and 1990s. I think what happened was that in Victoria there was a movement towards a mandatory mediation process in about 1992, so instead of having widespread referral to arbitration you actually got widespread referral to mediation. The arbitration system at certain times appeared to finalise matters and appeared to assist, yet the rehearing rate became so high that it was questionable whether or not there really was a sufficient cost benefit in terms of that process.

There is a widely used arbitration system that is in place at the moment in the Workers Compensation Commission up in New South Wales, which is a blended system where they have a conciliation process — telephone conciliation — and if that does not finalise the matter, then the matter goes on to an arbitration hearing. That is seen to be reasonably useful, I think, and they get reasonably high rates of settlement, though I think it very much depends on the qualities and skills of the particular arbitrator/conciliator as well, and their background and training.

I know a little bit about that scheme, if you are interested in hearing more. It was looked at a wee bit in the Family Court context, and there is a report that has been put out in relation to arbitration in the family law area to see whether or not arbitration could be used more widely there. Again it is difficult to work out whether or not these things are going to be more effective or whether or not there are other processes that can work more effectively. Often arbitration, case appraisal and ENE are more effective once matters are in the court system and reasonably developed in the court system. Then you have got sort of expert conclaves of builders in the construction area and a raft of other things that operate in terms of ADR.

Collaborative law, which is a note I had to mention, is a relatively new phenomenon in Australia. In the United States it is used widely, as it is now in the UK and Europe, primarily in the family law setting, but it has also emerged as an option in the workplace area, as well as in commercial and family estate matters.

Collaborative law is sometimes called collaborative practice rather than collaborative law, and the notion is that you have a series of meetings, if you like, where parties are supported by their legal advisers as well as by — it could be the state's mental health professionals, financial professionals and others, and you have a very transparent conversation where the parties are engaged in that conversation from beginning to end.

All information is disclosed. In fact usually the lawyers and others who sign up to the collaborative process sign a contract indicating that they will disclose all information, and where, essentially, you are encouraging the parties to talk. You go into it as a team, so it is quite a different sort of role for lawyers, rather than just acting on behalf of a client. You actually go into a team process, which is quite different.

It is emerging as an option, I think in the family law environment, across Australia now, growing quickly in Sydney and Canberra, and relatively quickly now in Victoria. There are 80 family law lawyers who are now trained in the collaborative model in Victoria. Whether or not it extends, I think, in part depends on the climate in terms of its extension, and the take-up rates for lawyers.

Our situation is, again, quite different to that in the United States and the UK, but I think it probably is a reasonable option, in particular in the workplace area, where you have got quite complex workplace disputes which might be difficult to sort through, and might take a bit of working through.

You also see supported negotiation and facilitated negotiation used increasingly in the sort of EBA environment and other environments, where what you are really doing is taking conflict resolution management negotiation learning and applying it to different settings.

In the water disputes area, for example, you often will see a facilitated process, particularly in environmental conflicts as well, where you have got a facilitated process, which is not like an open public hearing, like this, but is in fact a more facilitated process than something like this.

But there are so many different examples of ADR. I do not feel like I have really done justice to the area in giving it a very quick overview.

The CHAIR — Perhaps a question to start off: in the previous group we had a bit of a conversation about referrals from the courts to mediation processes and how well that was going. Do you think there should be greater referrals from the courts to ADR? Is that working well?

Prof. SOURDIN — It is an interesting question. I am just starting a project at the moment, looking at mediation in the Supreme and County Courts in Victoria. It is hard to tell what is actually going on because I think there is a scarcity of data in terms of what is actually happening.

It is abundantly clear that people do not always report back when there have been referrals and sometimes matters are classified as settled, and we do not actually know whether or not they have resolved through a mediation process, or through a between-parties agreement because somebody gave up. We really do not have much information about what is going on. I think the Supreme Court is now keeping some base statistics and of course they have their own internal Masters' program which is assisting in terms of that.

But I think your question about whether there should be more referral probably begs the question of at what point should you have referral. There is a lot to be said for pre-litigation schemes as well as schemes which are bedded within the court system. I generally refer to the blend of the two systems as multi-option rather than just the multi-door.

I have found reasonably strong views that pre-litigation systems can work effectively, particularly if they are well structured and reasonably well resourced. At the same time, I am not an ardent fan of the current scheme that operates in the family law area with the family relationship centres.

Mr FOLEY — You are or you are not?

Prof. SOURDIN — I am not — partly because one of the concerns that I have is that all of these ADR processes should be about smart and informed decision-making and about really supporting people to make decisions, and I am a bit concerned about the absence of legal advice in the family law sector in particular, and the lack of opportunities for parties to obtain legal advice.

I think pre-litigation schemes work well if people can access advice if they wish it. Certainly the community-based schemes seem to work very well. Again, my comments are 'seem to' because there is not a lot of research.

In the financial sector, I have reviewed the Financial Industry Complaints Service and certainly had a look at a number of the other schemes. Again, it is difficult to actually work out what goes on until you go in and start researching these systems because people will say, as they do at Consumer Affairs Victoria, 'we are mediating' whereas when you actually go in they are doing a shuttle negotiation on the telephone, or a reconciliation, and it is really something which is quite different. And there are really substantive differences about whether you use an interest-based negotiation model, or a rights-based negotiation model, so there really are quite big differences.

Coming back to your question, though, which is where we started: 'Should there be more referral?'. I think a lot more could probably be done in the restorative area. It seems to me that if you are looking at sentencing and criminal matters, recidivism is always a cause for concern, and the statistics that we get out of France are very exciting in terms of the impact that good victim-offender mediation programs can have. There is certainly a lot of scope in that area.

There were some very good examples set up around Australia of different victim-offender programs, but they always seemed to collapse at some point. I think that is because people move on and then nobody is left to champion it, even though the stats and the feedback that you get on these programs is usually excellent.

In the commercial sector, I think that there is a pretty active referral program that is operating already. I would probably have concerns about some of the court-connected mediation work that happens and about the quality of some of the referral work, less than that which is done in-house because I certainly do not want to prejudge anything that the Masters are doing, but it is more about the quality of the mediation work that occurs when it is referred out to, predominantly, lawyers in the legal sector.

I would be hesitant about recommending a blanket increase in terms of referral of mediation for everything unless you have actually got some quality systems in place.

The CHAIR — What are your views on mandatory referral? Under what conditions should that apply?

Prof. SOURDIN — They have certainly changed over time. I sat on committees in the 1990s where of course it was seen to be really essential that mediation was voluntary, and then looked at Tom Altobelli's work where he contrasted the outcomes that people have between mandatory and non-mandatory. I work as a mediator in both mandatory and non-mandatory schemes, and I have got to say that in terms of outcomes, you often have a pretty much equivalent resolution made with the mandatory compared to the non-mandatory, which I think is surprising.

Most times in the mandatory setting parties are more likely to come in and say something like, 'There is no way that this matter will resolve' and surprisingly after a number of hours it generally does. I think that it is probably again a cost-benefit equation. There is no sense in having mandatory mediation referral in a very small matter unless there is some other reason why you are referring matters to mediation. There could be. In the community sector, for example, having mandatory referral might be appropriate if you are trying to actually build relationships in a community or if you are looking at capacity building or look at doing something else. I think I am now a strong supporter of mandatory mediation, but that certainly was not the case a decade ago.

The CHAIR — The stage in the process where that occurs, does that make a difference?

Prof. SOURDIN — I know that many of the courts think that really you have to refer once the pleadings have crystallised and you have got a pretty good idea about what is the subject of the dispute. There are issues about ripeness. I think sometimes people are more ready to resolve a matter once they have expended some money on legal costs and have an understanding of how much it is going to cost into the future and how traumatic it might be. It is only at that point that they might be ready to resolve their dispute. Yet on the other hand, once they have expended a lot of costs it is actually quite difficult; it is harder for them to look at some of the options because they have already expended costs.

I work in different schemes where referral points happen at different times. It seems to me that it is about sensible and, I suppose, clever referral systems. What do I mean by clever referral systems? One of the schemes I work in is a retail lease scheme in New South Wales — not in Victoria, but I have worked in Victoria in retail lease as well — and generally I get a huge wad of documents which includes a lease and a whole lot of correspondence that has gone between the parties, it has been quite heated, and it has not yet got up to the tribunal hearing stage; it is a mandatory prelitigation scheme. I have got to say that it is very, very rare that we ever refer to any of the documents that have been sent in. Usually it is more about looking at a range of other things, including relationships and other matters. It might depend a wee bit on context in terms of the point at which you refer. There have been multiple systems that have been attempted in America, but often they are — I should not say perverted by the lawyers — used by the lawyers to really put matters into processes that they think are appropriate.

Again I think that if somebody has got an injury, for example, it makes sense to have a sense about what the injury is and to take some medical reports on that. It stands to reason; it seems ultimately sensible. If it is a complex construction dispute, yes, you are probably going to need to get experts in to have some site inspections and look at what has actually gone wrong and look at what the contract perhaps involves. The question of whether or not you need to get very complex statements put on by everybody is, I think, a very moot question, and oftentimes it is not that helpful. It just polarises things rather than providing an opportunity for discussion, and it probably creates a lot of misunderstanding. I would think early referral, but not too early, and I am a fan of the mandatory prelitigation schemes that exist in some environments.

Mr BROOKS — An important part of our terms of reference is about looking at how the use of ADR might provide better outcomes for marginalised communities. I suppose I am just looking for your advice around

just a general overview of how ADR might be able to benefit or provide fairer or better outcomes for marginalised communities. That is probably the first question.

Prof. SOURDIN — Okay. I think, again, there has been a lot of demographic work done on who within communities accesses court systems or accesses ADR services. I have done a little bit of work in that area, more recently looking at credit consumers in VCAT and Consumer Affairs Victoria. It was startlingly clear from that research that there are very large parts of Victoria that do not have dispute resolution and complaints services. I think that really is an area of concern, because in the communities where you would expect the credit consumers to emerge and have issues, they did not emerge, which means, I think, that those people are giving up or are negotiating directly.

Mr FOLEY — Are they even aware that there are alternatives?

Prof. SOURDIN — I think there are major issues about awareness, and that is probably something that I would recommend in terms of how you target ADR services. I think, too, there may be a lack of ADR service providers in some areas. It is interesting that on Monday and Tuesday of this week I sat out at Broken Hill — which I do not often do — with another tribunal that I sit on, which of course is not in Victoria, but I think the learnings are similar. Whenever you have courts or somebody else who goes to these areas to run sittings or to do something, generally you do not provide ADR services at the same time. You just have a court that comes to town, but there is no ADR service provision, because it is too expensive to send people from a city out to somewhere else to run an ADR service provision process. You can try and train people within communities, and there are some reasonably large numbers of regional Victorians now training, particularly in the family setting, but I think there are real issues about whether or not people can access these and even about whether it is presented as an alternative.

There are issues about what regional lawyers understand by ADR, because they simply do not get the same amount of continuing legal education as their counterparts do elsewhere. And whilst you have mandatory systems that seem to operate well in the cities and in the large regional centres, they do not necessarily operate in these much smaller centres, and they would need to. So I think there is actually scope to have a circuit which is put on, not just when courts go to visit with the magistrate or with a judge, in terms of ADR service provision.

That only deals with the question of regional Victoria, in a sense, and it does not deal with it fully, because there is the awareness issue that is out there as well about how government relates, about what it recommends and about what local councils do, and all these sorts of things are relevant too. But the marginalised communities, of course, extend into the cities as well, and there are issues about what people do there and about whether or not they think that they can access a dispute resolution centre or something else if they come from the community.

I have not spoken to Teresa Zarella about what her demographics look like and to what extent they are reflective of the population as a whole, but I think it is actually quite hard for people to understand that they can ring the service and they can have a conversation with somebody. Particularly with the literacy rates, the brochures and the other material I do not think really hit the mark in terms of access, so you need to have a strategy — as you do in the health system about health system complaints; or as you ought to have in the health system about health system complaints — where the service is accessible and where people are actually encouraged to approach the service, have conversations and do things. I certainly do not think that is happening.

Mr BROOKS — I have just a very quick follow-up question. When people do access the ADR services, would you say the outcomes are up to scratch, or do you think — —

Prof. SOURDIN — Sorry, I rolled my eyes because it is such a tricky question, and it is one I have been asked before, about fairness of outcomes. I think that is the question you are asking.

Mr BROOKS — Yes, particularly for marginalised communities.

Prof. SOURDIN — There was an article written years and years ago by a fellow called Owen Fiss against settlement. I think he was very concerned about the prospect of, if you like, people agreeing to something in a mediation process that they would not otherwise agree to and the difficulties in not having precedents being set. Those are interesting arguments, but they have probably moved on.

It is so hard to judge whether or not an outcome is fair. At the point in which a matter might be mediated is not a point where everything is finalised, and who is to judge what is fair and what is not? Even if you sit down and try to

empirically test whether or not this is fair, it is really up to the parties. Usually there is a range of outcomes that people can agree on, and it is somewhere within that range. It is very, very hard to measure fairness.

Mr BROOKS — Are the people from marginalised communities getting the advice to give them that balance of a relationship with people they are mediating with?

Prof. SOURDIN — Again I think it comes back to what the actual process is. A mediation process ought not to be about applying pressure on people to settle or resolve. The objective should not be settlement or resolution; the objective is actually smart decision-making. It needs to be made very clear that it is a facilitative process, that they are not being given advice by someone who is not qualified to give advice, or where they are getting advice after only hearing a few things and not having it tested through an evidentiary or other process.

Advice giving is really problematic in the mediation sector, in particular with marginalised communities. What you need to have is a well-supported decision-making process, and if somebody does not have the information where they think they can make a smart decision, you have to have the flexibility to say, 'How can you get that information, and can we come back?' — this the mediator speaking, and I am speaking from that perspective.

It is very difficult to measure fairness. I certainly had one matter that I had dealt with on a personal level where I had seen that the outcome was manifestly unfair to me, understanding the range of outcomes. But again, I did not know what secret information was not revealed to me and I only understood that a few months later; when I understood that additional information; then of course it completely changed my perspective of what was fair and what was not. It is very hard to know.

Mr FOLEY — Similar to beauty, is fairness in the eye of the beholder and all about how you are engaged as a participant, and does that come down to process and standards?

Prof. SOURDIN — I will always ask people whether or not they think the outcome was fair, but I ask them a lot of questions about procedural fairness. It is about opportunity to participate, whether they thought they were being pressured, and about what was going on in terms of the actual conference setting. Beauty, justice and fairness all defy definition, and I think that is absolutely spot on.

Mr FOLEY — So if your subject is being leant on by a Master, or someone, just to make sure they are not back in court, versus them feeling they are generally being engaged and genuinely being heard, even if the mediation is an outlet for outrage perhaps, how does all of that come together under ADR?

Prof. SOURDIN — People should never feel constrained from litigating, and we need a strong rights-based system around any interest-based system, and I say that at the outset. I think what mediators do is really follow a type of Harvard-principle negotiation model. They will talk with participants about what their interests are, which are much broader than their positions, and then they will have a conversation about what their understanding of the alternatives is.

Logically if you have court proceedings in the background it will be a conversation about what those court proceedings might involve and whether they have an understanding of how long it is going to take and what that will be like.

But it is also a much broader conversation, in that you go through different elements, like there are the seven elements in the Harvard model: you look at the relationships, how they communicate with one another, the standards of legitimacy, what is fair and what is not and under what circumstances. I hear about very clumsy mediations. I also hear about mediations that are slightly more informed. This is not a process about bullying if you are looking at mediation, and no ADR process should ever be about bullying. At the same time it should be a process where people are reality tested about what they understand their alternatives are.

Mr DONNELLAN — You talked about the Relationships Australia family relationship centres, I know they came in about two years ago. There is one down the road, and I have never actually known what they do. What do they do?

Prof. SOURDIN — In Australia we are still, I suppose, in transition in terms of the family relationship centres. A lot of federal government funding has been put towards family relationship centres, of which there will be 52 in Australia overall. They are intended to act as, if you like, a first-contact point for couples who are

separating and who are going through conflict. They may not actually be separated but may be separating, and may be seeking advice about what they can and cannot do.

The idea behind the centres was to set up something that was a pre-litigation system, where the parties could go to a family dispute resolution practitioner and, if you like, have a form of mediation they could access so they could attempt to try to work out their problems before they got into a litigation cycle — because once they get into a litigation cycle you get the polarity that is produced by people filing documents and then doing certain things that then trigger responses from the other side.

The centres are gradually being set up. There are issues in terms of the amount of time that is actually funded for families, and also there are issues about training and other matters, which are important. There is no clear research yet on how effective those family relationship centres will be, but based on the large groups that have operated prior to the introduction, that would suggest a large number of matters will be resolved and hopefully people will be able to maintain some form of relationship, in particular in situations where they have children.

They are partly directed at trying to ensure relationships are maintained, or if not maintained, at least terminated on a basis that is perhaps more acceptable than might otherwise be the case.

The CHAIR — Can I just step back out of the formal system and just ask you what you think could be done to empower Victorians generally to resolve disputes prior to them being drawn into a system?

Prof. SOURDIN — That is a very good question. There is a lot to be said for government taking a lead and doing certain things. I mean, government can act as a litigant in certain ways, where other people follow. So I suppose I would suggest a whole range of different strategies. One is that government actually also pursues mediation, has instructions, is there and is able to participate in good faith. I do not think that is always the case at either state or federal level.

Mr FOLEY — Perhaps we should halve our preferred lawyer list and replace it with a mediator list.

Prof. SOURDIN — It is actually very important that government does not say, 'This is what everybody else should do, but, sorry, it is not for us, because we're a bit a different. When we are dealing with external contractors or somebody else we don't necessarily have to comply with this'. I think it actually does involve a whole-of-government approach. There was an executive order in the United States which required government departments to actually mediate before they litigated, which I think is a good idea from the government's perspective.

There are other things that you can require as well. You can actually require government departments to have a dispute resolution plan in place, about how they individually are going to deal with disputes and how they are going to support complaints handling, which means that you do not look at your minimal number of complaints but actually want to increase it, in a sense, because you want to know that people are accessing the system and what outcomes they get. So there are things that government can do.

In terms of things that a government can do on a broader level, you can require other systems that you relate to to have dispute resolution systems in place. ASIC requires that in terms of licences that operate in respect of financial planners and others. Essentially they have got to be a member of an industry-based scheme which is supposed to comply with a number of defined criteria and be reviewed on a regular basis. I think these are matters that the government should make more inquiry about and also how it can impact on those areas where it can have control. You could do that in relation to a raft of different areas from the retail area onwards. You can effectively require that different industries have their own dispute resolution services that comply with certain things. This creates accessibility.

The bigger issue about how you actually empower and encourage people to use ADR services is another issue. One of the schemes that I think is interesting as an example is the redress system which was brought in in the US postal system. They have 750 000 postal employees, and that is where that expression 'going postal' is derived from: posties who went berserk after travelling through sleet and rain and snow and whatever. They introduced a very broad-scale, mandatory transformative mediation process, and they found that it had a huge impact on their workforce and the way in which the workforce engaged. I would think that looking at workplaces is a good place to start. I think that that actually creates and enhances access to many Victorians. For those that do not work, I think you do have to look at local councils and how dispute resolution operates there. You have to look across the board.

I think that bringing in mediation education in schools is a really important part of whatever approach — if you want people to try to sit down and communicate and learn how to resolve disputes and negotiate in a constructive way, then you actually have to bring it in in an education setting. At the moment it is pretty haphazard. I think there are some good peer mediation programs that operate in Victoria but there are others — —

Mr FOLEY — Around bullying and that sort of stuff?

Prof. SOURDIN — Yes. It is useful to bring that in not just at the student level but also at the teacher level. That is what I mean by the workplace situation and what you have available and accessible for those in workplaces. You only have to look at the new health systems and the education system to say, 'Well, it's not enough just to say "This is for the kids". What do we do for the employees who are involved in these systems and what do we provide, and how coherent is it?', because it is not coherent. There are very different avenues to take different sorts of disputes through in a workplace dispute situation, which I think is confusing for both the government as an employer and also for the employees. I would probably suggest that having a good workplace strategy is going to be useful. I think having a link in and requiring industry to do more is also useful, and that way government also does not have to pay. You do not want it to become too much of a cost burden on government.

I think you probably can do more in terms of court understanding of these processes. The levels of understanding are not high, and I think the level of engagement varies from court to court, so there is probably more that can be done at the basic court level. I think my comments in relation to regional Victorians apply in terms of that as well.

The CHAIR — Something that was raised in the previous session has been playing on my mind. A number of people have said that in Europe there is a greater acceptability of ADR processes. I want to ask you to reflect on our English-speaking system, which seems to have a much more adversarial structure. It is adversarial in terms of Parliament, it is adversarial in terms of our court system, particularly as depicted in the media. The media often depicts its stories in terms of adversarial conflict, where there is a winner and a loser. Is there a cultural dimension to the acceptability of ADR, and in the end can we be successful in building a good ADR system on a public perception of courts and major institutions being adversarial?

Prof. SOURDIN — I actually think the environment in Australia is probably even better than the environment in Europe, in terms of the growth in the ADR system. It is far better than the environment in the States, and that is for a whole range of reasons. If you can talk about it as cultural values and how we operate, I think Australians actually are quite empowered and tend to be more empowered, in terms of complaints, and this translates well into an ADR environment. The notion of sitting down and having a chat or having somebody else to assist you to have a conversation is something I think Australians feel more comfortable about than, for example, the English, where there probably is a preference for having somebody provide advice rather than simply facilitate. So I think in terms of our cultural background Australia is actually very well placed, as is New Zealand, to have a process where you support decision making and the notion is around empowerment and recognition of different individuals.

In Europe — it is a bit hard to talk about Europe as a big lump — and the UK you have different hierarchies and class systems that operate, which are present in Australia but I think are present to a lesser extent. I think culturally ADR is something which fits our culture extremely well. That is why it is popular and why people like the notion of mediation and the notion of making their own decisions and do not necessarily want advice from somebody else.

The CHAIR — You talked about England. What about continental Europe? Germany was mentioned earlier.

Prof. SOURDIN — I have a German PhD student at the moment, and the forms of mediation that you often get are forms which are a little different to what we practise in Australia. The facilitative form of mediation is not as popular, and I think it tends to be more evaluative. You still have somebody who is kind of like a decision-maker and adviser.

The CHAIR — An inquisitor?

Prof. SOURDIN — Yes, so it sort of fits with the inquisitorial system a wee bit.

Mr DONNELLAN — Does that push people towards a preference for ADR, in a sense, an inquisitorial system, the seeking of the truth? I suppose they are seeking the truth — I would not have a clue.

Prof. SOURDIN — It may do. It is interesting when you look at Canada, which of course is a blended system. They have really taken to traditional dispute resolution using ADR, where effectively you have a lot of the judges doing the work of mediators that we would expect to take place in the general community. But they have got 7000 judges in Canada with a population of 31 million or something. I think we have 600 or so judges.

Of course we have a number of tribunal members, but their make-up is quite different. Canada is probably a good country for us to look at in terms of their ADR use because in terms of cultures and demographic mix, we are probably a wee bit closer. It is a very long-winded answer.

The CHAIR — No, that is good. It is a complicated area, and it is very interesting.

Prof. SOURDIN — It is complicated. It is not easy. I think culturally ADR fits our culture well. There are issues in terms of remoteness and issues about what forms we use into the future. I saw that online dispute resolution was a query area that you had. I do think that culturally it is a better fit than some others. Despite having that adversarial background and the playout of things in the media about how things work, there is a better understanding.

The CHAIR — There are sort of two narratives, really.

Prof. SOURDIN — There are two narratives, and I think they can coexist, as a rights-based and an interest-based system can coexist.

Mr FOLEY — In regard to the English-speaking world and the continental European differences as it applies to corporate regulation, shareholder cultures, corporate structures in continental Europe versus the UK, the US and the Australian system, in commercial arbitration and ADR does that have an impact? Is the European system a better system in commercial arbitration? My limited understanding is that the expectation is that in Europe the corporate structures have regard to broader factors.

Prof. SOURDIN — I am really going outside my area of expertise, but I might as well go out on a limb on commercial arbitration. Some people regard that as an example of colonialism. You have an arbitration system that was set up because people did not want to be confronted with a domestic legal system they thought was incompetent in much of the Middle East. It was really a case of asking, 'How can we apply the laws that exist in our home countries or the rules that we have developed, rather than subjecting ourselves to a domestic legal system?'.

I think it is problematic that in the past a lot of the commercial arbitrators in particular have been drawn from Europe and not from Asia or elsewhere. That situation is slowly changing, but there are very different views there, too, about what conciliation is and what mediation is. Some of those views are similar to ours but they again have some, what is called Rambo or muscle mediation, operating. It is rhino, Rambo or muscle mediation. I would not really classify that as mediation. It is a much more advisory process. It has got a place. I do not want to suggest that it has not, but it probably should be called conciliation rather than mediation. I think that is probably derived from that model and about the systems that those arbitrators operated in.

The CHAIR — The National Mediator Accreditation System currently only applies to mediators?

Prof. SOURDIN — That is right.

The CHAIR — Do you think that could be expanded to apply to all ADR processes — we were talking about this with the last group as well — both arbitrators and mediators?

Prof. SOURDIN — The short answer is yes, it could. The standards that I have worked on here have been derived in part from work that I have done in the family area, where we looked specifically at advisory practitioners; at those who gave advice in the family sector. You have got to do a lot more work around what the competencies are, understanding that there would be very different competencies required in different content areas; but yes, I think you could actually extend it.

The question is whether you need to extend it. Generally the arbitrator pool is much smaller and is comprised of lawyers, engineers and others. There are already industry groups that operate in that area, but it is also quite clear that some people will hang up a shingle and call themselves an arbitrator when they have no background or qualifications.

The CHAIR — Thank you very much. That has been really stimulating. I am sure Kerryn and Kate will be in touch with you again.

Prof. SOURDIN — If I might just make one comment: I would not want any of my comments to be misconstrued. I did want to say that in terms of what operates in Victoria there are a large number of lawyer-mediators who practise in Victoria, and I have enormous respect for a lot of the work they do. I certainly did not want any of my comments to suggest that I did not. I just wanted to make sure that I made that point clear.

The CHAIR — I guess inevitably at hearings like this we rake over all the things that are not going that well sometimes.

Prof. SOURDIN — Yes, and I think there is such a lot that is going well, so I should make that clear too.

The CHAIR — Thank you again, you will get a copy of the Hansard transcript.

Witness withdrew.