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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 10 December 2007

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Mr I. Lulham, chair, alternative dispute resolution committee, and

Ms E. Campbell, solicitor, litigation section, Law Institute of Victoria.

The CHAIR — Ian Lulham and Elissa Campbell, thank you very much for coming. I am sorry for the slight delay this morning. Thanks very much for the written material, the submission, which you have provided; that has been very useful. I think you are familiar with the way that these committees work. I need to remind you — even though I know you know — that these hearings are subject to parliamentary privilege, so you can be fairly expansive in what you may wish to say, but you cannot say that outside the confines of this hearing. The way we run is that we have a bit less than 45 minutes, but we will leave it open to you to address the terms of reference however you wish, and then we will ask questions for clarification or ask you to explore additional areas.

Mr LULHAM — What we thought might actually be more helpful — having made the written submission, which we know you have seen — is probably not just spend time going through the submission. We might just throw over to you for questions now. We thought there might be issues that you particularly want to focus on rather than wasting your time talking about other things.

The CHAIR — Okay. We have had a look at the material that you provided, as I said, but could you outline to us how the mediators accreditation program operates on the ground?

Mr LULHAM — I will certainly get some assistance from Elissa with this, because she is the Law Institute employee who is on top of this. The Law Institute runs basically two types of schemes in relation to mediation. There is the general mediation panel, and then there are accredited specialists as well. With specialisation, that is part of a scheme that covers all sorts of areas of law — like family law, commercial litigation and things like that; mediation is one of the things that fits into there — and, as I understand it, the specialisation scheme is something that is being adopted by law societies nationally as well. In fact the Victorian mediators in the specialisation scheme just assisted the Queensland Law Society by running the exams for people seeking accredited specialisation. Both of them require certain levels of qualifications and experience. Elissa can correct me if I am incorrect here. With the mediation panel, you have to do a mediation course. It is quite a long course. It is not like a short workshop; it is more like at least a weekend in length, or I think there was one run at Melbourne Uni that was about 40 hours, and that complied with the requirement.

Ms CAMPBELL — It is a minimum of three days duration.

Mr LULHAM — Yes. Those courses have to have an emphasis on practical role-playing-type things. It is not just an academic treatise; it is actually workshops and practice mediations, where you are videotaped and then you have feedback sessions. You have to be of five years standing as a solicitor. Is there anything else?

Ms CAMPBELL — Completion of a satisfactory level of professional litigation experience, providing two referees, and completion of the training course, as Ian mentioned.

The CHAIR — Okay. In your submission you talked about the increased provision of mediation in the courts and the widening of options that are available to litigants in there. What sort of changes need to occur to enable that widening to take place?

Mr LULHAM — Two things, I think. The County Court was really the driver of court-annexed mediation, and that goes way back to the early 90s, specifically in relation to the building list and then it sort of took off from there. The Supreme Court does it in a different way, but largely does the same thing of referring cases to external mediators. The Magistrates' Court does too, but, again, because statistically so many of their cases are over relatively small amounts of money, they have been conscious of making sure mediations are used most productively, so they rule a line and say, 'Cases involving less than this amount of money should not go to mediation; these ones should'.

There are already court rules that allow the courts to refer matters to arbitration or appoint special referees. Special referees are rarely used — and that is not a very popular process, I would have to say — in matters such as building cases, where the judge will determine the legal liability, but when it comes to the bean-counting exercise of working out how much variations are worth or whatever, they can refer that particular issue to the referee. In that situation the court does not delegate its decision-making power. The referee does a report, which is then brought back to the court, and then there is an argument as to whether the court should accept the report or not.

Mr FOLEY — Why are they not so popular? Why are not referees' reports so popular, do you think?

Mr LULHAM — I think, again, it is a question of being cost efficient. If you are there in court anyway and you have got all the witnesses and the judge is able really to deal with matters of quantum, then I think you can get through a lot of these things quite quickly. Inevitably if the court says, 'Right, I will stop now and appoint a special referee', you are effectively running another court case. It takes a month to get the thing up and running, and then you can run into problems. Ideally the referee should only hear matters purely to do with quantum, but I suppose inevitably the referee has to think of the credibility of witnesses, and then you start overlapping with what the court has already done. On top of which, the very fact that the referee's report is not the court's decision — that there is then a next layer where you argue about whether the court should accept the referee's opinion — just adds more expense.

Mr CLARK — Your submission puts a big emphasis on data collection. You probably would have heard some of the submissions made by the bar witnesses, which were questioning how much data could be collected consistent with the confidentiality of the mediation process. What is your response to that? What sort of data do you think can be collected consistent with confidentiality? What are the most important items of data that you believe need to be collected?

Mr LULHAM — Probably from the court system's point of view it is statistics that go to how much time would be taken in court if the matter ran versus what has been saved by going to mediation. I do not think the statistics should look at the quality of what occurred in the mediation — that is where the confidentiality issues come up. For example, the statistic that says, 'Here's a case where there was one plaintiff, three defendants, three third parties' you can get a feel for how complex the thing was and how long it was likely to go into trial, I do not have a problem with that.

Mr CLARK — So you would be requiring the mediator to lodge a report that made estimates of those sorts of things, which would simply be reporting basic factual information that could be very recently compiled?

Mr LULHAM — Yes, that is right. The forms that were always used in the County Court certainly did not require the mediator to say anything of what had happened in the mediation. It was just, 'This case is settled or not settled'. A directions hearing would be requested or not requested by the parties, which can reflect the need perhaps to amend the case. The Supreme Court did not have a form, but it required the mediator to write a letter to the listing master, just saying, 'I have conducted the mediation'. We find, unfortunately, that the County Court was using the forms for one purpose, but it was not using them for statistical purposes.

Ms CAMPBELL — Also, like the bar, the Law Institute does not keep its own statistics. We have a total of 80 mediators on our accredited mediator list, but mediators are not required to provide us with statistics on the success or otherwise of their mediations.

Mr BROOKS — Mr Lulham, in answer to question 44 about further regulation versus the status quo, the answer you have given is:

> The more a subject matter is proscribed in regulation, the more it may become open to different interpretations and potentially the subject of court actions.

I am just wondering if you could expand on that?

Mr LULHAM — The nub of mediation is that it is a meeting which is held on a confidential basis, where you have got the parties and you have got a neutral party assisting the parties to reach their own resolution of a dispute. It is different from an arbitration process where the neutral third party is deciding the matter. That, effectively, is it: confidentiality, managing the communications in mediation, not deciding it, and assisting the parties to reach their own solution.

You do that in all sorts of ways like playing a devil's advocate role or questioning people. If they are assuming something, you can look underneath the assumptions to see how valid they may be; asking people to realistically compare what they are asking for in settlement compared with what they might get in the court. What you do not want to do, though, is to get so hung up on the definition that, at the end of the process, a party can say, 'I do not think that was really a mediation because you did not comply with part C' or, 'You actually spoke a bit too much' or, 'You did not speak enough' or, 'You seemed to be with the other party longer than with me'. It just gets too messy.

NADRAC, which is the federal government thing, publishes definitions on all sorts of alternative dispute resolution mechanisms. They talk about conciliation, which is mediation with a bit more of an arm-twisting role, expert appraisal and all those things in the range. You just do not want to get to a situation where people, at the end of the process, can say, 'I did not get what I asked for'. In particular, I should point out that the very fact that the mediator cannot impose a decision and the fact that the parties can just say, 'I've had enough of this, thank you; I am leaving', they are well protected anyway.

Mr FOLEY — The terms of reference go to restorative justice and ADR in its broadest sense, to assisting marginalised communities' access to justice. Whilst I think your submission supports that concept, it does not address how you think that might be done. Do you have any views — through government, through service agreements?

Ms CAMPBELL — The submission does not actually address restorative justice questions, but certainly we are happy to take those away and consult with our members to find out more about that point.

Mr FOLEY — And in terms of alternative dispute resolution for marginalised communities?

Ms CAMPBELL — Yes.

Mr FOLEY — Is there any pro bono work? If there is, you probably would not be aware of it?

Ms CAMPBELL — Again that is something I would need to get further information on.

Mr LULHAM — It is coincidental that I can answer this question a bit. It is probably an anecdote in a way, but I know the New South Wales Department of Juvenile Justice funds a restorative process. I do not think they call it mediation, but they encourage discussions between victims and offenders through a process. I have just come across that on behalf of a client in the last few weeks. My experience of that was not very positive. Unfortunately, because they seem to be so keen to be informal and alternative, they did not really explain, I did not think, to the victim of the crime what on earth was going on. It tended to make the person very uncomfortable and vulnerable.

The CHAIR — Can I just come back to something you were saying? When you were answering Mr Brooks's question you said it was important to keep it simple because there is a whole range of complexities. I think what you were saying was that if you set those out too much in black and white, it can create the preconditions where people can feel that they have not been serviced properly, because they are comparing flexible reality with a series of protocols. The converse of that is that we have a large population that is increasingly in need of ADR processes, who need to have some understanding of what they are in for and how their expectations might be met. That is what is driving the development of a regulatory framework around this. Where do you think the balance lies?

Mr LULHAM — I think the current system is about right even there. One thing that you come across all the time with clients in court is that they are not in control of the process at all. It is often a hard thing for people to get their head around — 'Here is my story, and as a result I am owed x dollars from this person'. Then you have to explain, 'That is great, but here is this great big court rule book, and we have to do the following 10 steps before you really get to say anything'. You do not want that sort of thing happening. ADR — the initials have been altered a bit now — is alternative dispute resolution. If you regulate it, it just becomes another little parallel court system.

People do know what they are in for. If they go through the private legal system, then their lawyers explain to them what is happening and what will happen in the mediation. In fact, as a matter of good practice most lawyers have a bit of a standard summary that they give people before they write a specific letter saying, 'This is what is going to happen'. If, for example, you are a self-represented litigant in VCAT going to a mediation, the VCAT website has information on it. Also when VCAT writes you a letter, saying '10 o'clock on Monday morning' it has an explanatory thing. In my experience I have not come across people who walk into a mediation and are met with some process they are not able to understand or they are shocked by.

The CHAIR — What about the thing that we have heard about from previous witnesses, that I characterise as '100 flowers'; this is an emerging, growing area and there are lots of interesting developments occurring, and people are being serviced in open marketing ways that suit them, which is a very positive way to

look at it — but are there things in the system that you are becoming aware of and which might indicate some problems, that government might need to be aware of?

Mr FOLEY — Where are the weeds in the garden?

Mr LULHAM — It is hard to sit back and say that the status quo is fine, but I suspect, at the moment, it is. I have a very broad experience of all these things because I sit as a mediator — as a lawyer mediator — but I am a part-time, sessional member of VCAT as well and in using that hat, I run mediations. Also I am on various panels, for example with the Legal Services Commissioner, so I do mediations for her; and on some industry bodies, and, yes, at the moment there is no one-stop shop. The idea is that a person can say, 'I want to go to mediation' and they can go to one source of information, but that is certainly missing. There are a range of ways you can go, but that said, I think people are reasonably well serviced.

Mr CLARK — I am hearing quite a bit lately about what others refer to as 'collaborative law'. Your former president, Cathy Gale, I gather was strong on that in terms of the different attitude or approach by practitioners to try to work with other practitioners and their clients to solve problems. It seems to me that in a sense that is at least an alternative dispute resolution approach, if not a mechanism, and also that it integrates, as it were, into mediation and that you can progress from having the lawyers working collaboratively with the clients, through to getting in a third party to mediate. Does the institute have any views about collaborative law as an approach to resolution, and how it might phase into more formal ADR mechanisms?

Ms CAMPBELL — The institute certainly supports collaborative law. As you know, our previous president, Cathy Gale, was and is a big advocate for that. In our submission to the civil justice review we pointed out that collaborative law is something that can be extended into other circumstances such as property law, wills and probate and other areas of dispute. Collaborative law, as you probably know, is still a fairly new thing in Australia so it has found its home at the moment in the Family Court, and involves not just lawyers, but psychologists and social workers. The idea is to involve as many parties as possible to bring a collaborative approach and end result for the parties in dispute. It is still, I suppose, something under formulation, something in evolution, and how it might apply in other contexts is something that we support, but it is still something that is being worked out by the market and the courts in combination.

Mr CLARK — Are there any tendencies, habits or practices developing as to the extent to which it might bring in external mediators at particular points in the collaborative process, or is it still too early to say?

Ms CAMPBELL — I think it is too early to say. Certainly we have a very active collaborative law group at the Law Institute but it has really only commenced this year and it is too early really to say how these practices might work in effect.

The CHAIR — I come back to your submission and in that you say that you do not support mandatory pre-litigation ADR, but you do support pre-litigation, conferences, meetings or process. Could you talk about the circumstances in which you believe that the pre-litigation ADR would help?

Ms CAMPBELL — One example that we give in the submission is, for example, when there are existing relationships, and it is important to maintain those relationships. We see mandatory mediation as a compulsory precondition to Victorian proceedings, as something that goes against the essence of mediation.

The CHAIR — Could you explain to us so that we have got it on the record, what are the steps in mandatory pre-litigation? What does the court require?

Mr LULHAM — It is almost in reverse actually. For example, with the Small Business Commissioner dealing with lease disputes, effectively the legislation says you cannot issue proceedings in court unless you have gone through the preliminary process. If someone ignores that requirement and issues a proceeding, there can be an application to the court to stay the proceeding or even strike it out. It works that way.

Ms CAMPBELL — We see, I suppose, a bit of a balance. While the Law Institute is supportive of courts directing matters to mediation once it is in the context of the court sphere, we see that mandatory mediation as not appropriate because mediation is about consensual matters and effectively mandating parties to attend mediation, in our view, is not appropriate because it goes against the voluntary nature of mediation and might encourage the parties to be left to bargain in good faith, for example.

Mr LULHAM — The other thing is, I think, in the court system you do not want to mediate so late that you have already spent all the money, almost, because it is a waste of resources.

Mr FOLEY — It takes away the incentive.

Mr LULHAM — Yes, but it is just as bad, if you like, to make people mediate too soon. You do need to do it when the issues are properly defined and then people have a fair exchange of information beforehand so that they can see their strengths and weaknesses. A small matter in VCAT — a small trader dispute over a used car or something — you might be talking about something different there, but with a commercial dispute the law is pretty complicated. You do not want to be rail-roading people into mediation too soon because you run the risk of people reaching settlement agreements and then finding out later very good reasons why the agreement should not have been negotiated, and then you run into a problem with people trying to undo the agreement. It is just a matter of putting the process at the right stage.

Ms CAMPBELL — It also potentially has an effect on costs, and if parties do not attend the mediation, it probably leads to increased costs at trial. It also has the potential to decrease access to the courts if the potential plaintiff is having to lay all their cards on the table and perhaps go through a pre-trial discovery stage without actually having gone to trial, all that adds up to increased costs for both sides; and if the defendant has a pecuniary advantage over the plaintiff, then that could lead to an unfair result.

Mr FOLEY — In regards to alternative dispute resolutions and particularly mediation in criminal matters, does the institute have a view on how those might operate? I understand there is a system in Western Australia that requires some level of mediation in criminal matters. I wondered if you had a view on extending that ADR into criminal matters.

Ms CAMPBELL — That is not something that is addressed in our submission, but we are very happy to take it away and bring back a response to the committee.

Mr LULHAM — It would have to be parallel to the actual criminal part of the criminal proceedings. I do not think it could impact on the court's decision on sentencing.

Mr FOLEY — I think it is more to do with the timing, on my limited understanding, and the processes around certain elements as you get to trial.

Mr CLARK — It has been put to me that compulsory mediation processes that do not necessarily result in a binding outcome tend to operate against the interests of the less financially well off litigant — not just the small individual consumer, but perhaps a small business person in dispute with a wealthy landlord — and it does that because time is on the side of the one with the deeper pockets. If you interpose another costly step along the way, a person who is desperate for money is put under pressure to settle. The argument was put to me that it would be better in those instances to move quickly to the litigation where the claimant can get justice, if they are entitled to justice, rather than be put under pressure due to delay to accept an unfair settlement. Do you have any view on that, and, if that is a problem, how do you overcome it?

Mr LULHAM — That is essentially similar to the point we make about mandatory prelitigation mediation. In the sort of scenario you are painting, it can require someone to spend a lot of resources before they are allowed to start getting to court, so that is why we do not like that. I have certainly come across situations of the small business versus the big business during a court proceeding and of the big business saying, 'Yes, we'll go to mediation, thank you, but we want Mr Bloggs, QC, to be the mediator, and he is going to charge $6000 a day and blah, blah'. But again, the market sorts itself out. The small person can say, 'Well, I'm not going to use a silk, thanks very much. This other person will be fine'. So it does sort itself out.

Mr CLARK — So you are saying that the vice is, if it is mandatory, then there is not that flexibility for the market to sort it out?

Mr LULHAM — At the moment the court will say, 'Go to mediation and tell me what happened. Come back on 1 February and tell me what happened'. Only if the parties cannot agree on a mediator will the court come in and say, 'Appoint Ms Bloggs as the mediator'. So you are not really finding a situation where a QC mediator is being imposed on someone.

The CHAIR — I come back to the submission that you made to the Victorian Law Reform Commission, where you said that the institute opposed court officials being involved in ADR processes. Could you just expand on what the basis of your objections to that are?

Mr LULHAM — They are twofold. First, I think it is a waste of court resources. Judges and masters are very expensive people. There are already enormous delays in getting to trial, and in the Supreme Court, for example, under various practice directions you cannot get to the stage of asking the court to give a trial date until you can certify that all of the pretrial paperwork et cetera has been done. Then when the court says, 'Yes, I'm satisfied that that has been done. You can have a trial', often you will be told the date is 6 months, 9 months or 12 months away. We do not want judges doing anything other than running trials, because that impacts on the delay. Similarly with the masters, they are very, very busy people. They are doing the occasional mediation, but a mediation in a Supreme Court matter is really at least a day's work, plus the reading and preparation. It is not just a matter of saying, 'Come in and let's have a chat'. In a day, they could be dealing with probably — I do not want to put crazy numbers on it — half a dozen contested interlocutory things and get those six cases moving along, so there is certainly the resources aspect of it.

The second thing is a philosophical point. If we are talking about alternative dispute resolution, that is something that the court should enjoy the benefit of, but I think if you start having court officers actually running the process, it ceases to be alternative. Frequently what encourages people to settle cases, of course, is the uncertainty of going to trial. You often say to people, 'Look, both sides have got a very firm view of what the facts are, but ultimately a judge, who has not heard anybody, will hear the conflicting evidence and make a ruling, and that's what will stick'. When you explain that to people, you need to do it sensitively. You do not want to create the impression that it is flip-a-coin sort of stuff, but I have had the experience of court officers explaining the uncertainties of litigation where it just seems to be a poor reflection on the court itself. I think an independent person can say, 'Look, you are better off choosing your own decision rather than having one imposed on you', but if the court itself is saying that to people, I think it is a very bad message.

The CHAIR — So there is the resources argument, which is good. What I was going to say about that before I come to the other point is: why do the courts do it, then?

Mr LULHAM — It is very interesting. They did not want to touch ADR 15-odd years ago. As I said, the County Court was the first one that did it, for good reason, and I think it proved to be successful. It may be that the court sees success in ADR and wants to effectively say, 'Well, look, we do this, too'. There is nothing wrong with the courts saying to the litigants, 'We want to help et cetera', but it is just not necessary.

The CHAIR — Okay. The other point that has been mentioned to us just in relation to that is the potential for breaches of confidentiality and conversations around the water cooler, as I think was said. Could you reflect on that? Do you think that is a problem, because it is not one of the two things that you mentioned?

Mr LULHAM — I personally do think it is a problem. I remember trotting out this case to Elissa some time ago. Case names go in one ear and out the other with me.

The CHAIR — That is a good thing, isn't it?

Mr LULHAM — Yes, it needs to, otherwise you can't sleep. But there was actually a case in South Australia where a judge — and it is a reported case, not just an Austlii one — talked about a mediation he had conducted earlier, and he gave a lot of information about what happened in the mediation, and then he said something like, 'But I don't regard that as a breach of confidentiality because', and then he gave some reason or other. But he has completely breached confidentiality. In my view it was a failure to understand what mediation really was.

Mr FOLEY — South Australia!

Mr LULHAM — It was South Australia; absolutely.

The CHAIR — Is that an extreme case?

Mr LULHAM — Yes, that is someone dropping the ball. That is not a common scenario.

The CHAIR — But you think that that kind of thing is a serious difficulty in our courts taking up a mediation role?

Mr LULHAM — Judges in trials, of course, hear evidence and evidence is, 'I saw this happen; I was there'; it is not, 'My brother-in-law told me what happened'. What you are told in mediation is very different. I think judges are very good at using quarantine thinking to hear things and decide. But in a mediation they would hear all sorts of things that they would not be hearing in court.

Mr BROOKS — Do those concerns apply to VCAT as well, where you have members mediating as well as hearing cases?

Mr LULHAM — Yes, the thing about VCAT is that the people who do most of the mediations are just mediators; they do not go on to decide cases as well. There is a separate category of thing called the compulsory conference where with some cases, after there has been a mediation that has not resulted in settlement, you then do the next best thing called a compulsory conference, which is perceived as more forceful.

Mr BROOKS — Or arm twisting?

Mr LULHAM — Yes, that is right. But statistically they do not happen a lot — actually they do happen a lot, but they do not happen a lot in the context of how many mediations are taking place.

Mr CLARK — Do you think there would still be the same risk of water cooler conversations as in other jurisdictions unless there were very clear protocols within VCAT to avoid that sort of thing?

Mr LULHAM — Yes, I think that is right.

The CHAIR — Further questions? I will press on then. A more general question that we are interested in is that in your submission you say it is not realistic to expect every dispute to be resolved through an ADR process.

Mr LULHAM — Yes.

The CHAIR — What sorts of disputes might be unsuitable?

Mr LULHAM — Almost anything. Things settle or they do not. I think our point was that you cannot say that something that goes to mediation and does not settle is somehow a failure. I think that was our point.

The CHAIR — Not that with some difficulties that people have it just would not work, it is better to just go straight to the traditional court?

Mr LULHAM — No, I do not think we are putting it that way.

Ms CAMPBELL — I think the point was that not all matters are suitable for ADR. I mean, every matter is individual to the persons who are part of that matter and they may have particular choices about which way they want to go. It is also dependent on the quantum of the amount in dispute, the nature of the case — a myriad of factors. It is very difficult, I suppose, to generalise and say a particular kind of matter or type of matter is not appropriate for ADR. It is very much individual and peculiar to the parties.

The CHAIR — What about a particular type of party, then, if not the matter?

Ms CAMPBELL — Again, parties are as individual as cases.

Mr FOLEY — But regulators have said that some things are appropriate for ADR, such as tenancy disputes and that kind of thing. Perhaps not that long ago that might not have been the case, but now, as you say, we say, 'You must do that'. Someone has made a judgement that that category is — —

Ms CAMPBELL — That is true. Over time, as the mediation market has evolved and developed, with certain categories of cases it has become more common for people to utilise certain ADR procedures into them. But even so, within that context it is difficult to generalise.

Mr LULHAM — I think also with the commercial tenancies it is almost a matter of the government treating the tenant as a consumer of — —

Mr FOLEY — Yes, services from a landlord.

Mr LULHAM — Services, and the landlord is normally the big organisation and the tenant is normally the small organisation, and their relationship is always the lease, which will largely be similar to the next lease of the next guy and the next landlord. When you come to normal commercial transactions —

The CHAIR — So some issues and parties are coming into the fold, but what about domestic violence, for example? Where does that sit in ADR?

Mr LULHAM — I am not a great domestic violence practitioner, but I have had some experience in getting intervention orders, and again mediators are not appointed there. But if you need an intervention order, it is a very streamlined procedure now. You go to the Magistrates' Court and ask for the order over the desk. You do not go to court as such; you go to a registrar. You are given an order that immediately stops the person coming within 100 metres of the other, or what the order needs to say, and that order lasts only for three weeks or so and is served by the police on the other party; then everyone comes back to court. I do not purport to give use statistics, but I am sure that 9 out of 10 contested intervention order matters end up resolving. You commonly see people who say, 'Well, I don't admit I did anything wrong but I'll agree to not approach'. In a way, there is some sort of alternative dispute resolution going on there, but that is after the court's — —

Mr FOLEY — And now with the new code the police have it is actually forwarding down the chain directly to the so-called 'incidents'.

Ms CAMPBELL — One of the points we make in the submission is that one of the ways to determine that disputes might be so-called 'inappropriate' for ADR is just by the pure action of the marketplace. That is why we support the idea of parties having the idea to opt into mediation or ADR processes appropriate prior to the issue of proceedings, but once they are in the court context they may be referred off to ADR as appropriate. But it is a reaction and a function of the marketplace that ultimately determines what is and is not appropriate for ADR.

Mr CLARK — How do you deal with the issue of the defendant who is acting in bad faith, who is using time delay court processes to avoid honouring what they really know is their obligation to pay half a million dollars to the other party to the dispute? Presumably for them time is on their side and the longer they can fob it off with mediation, the better for them. How do you cut through that and give a decision — 'Look, this is not a good faith thing' or, 'It is not likely to settle at mediation, therefore it is not going to go to mediation and we are going to get straight through to the tintacks and get judgement if judgement is due.'?

Mr LULHAM — Yes. That is why I think issuing the proceedings and then having a mediation conducted during the proceeding is the better way to go. When I said before that people who go to court are not in control of the process, the good side of that is that it stops defendants who just want to play games. If the plaintiff is a bit energetic and persistent, then even if it is a David and Goliath case, you can go to court and say, 'Look, this defendant was obliged to do' such-and-such 'by this date; he hasn't done it — make him do it'. Whereas if you are purely talking mediation with no proceeding, there is no umpire who can make you do anything.

The CHAIR — When you were talking just before about the market determining, that is a good kind of segue into those who may not have equal access to the market, marginal groups. In your submission you say that we need to work out better ways of promoting ADR for marginal groups and individuals and communities. Do you have views on how that might be done and what this committee could look at in relation to improving the situation?

Ms CAMPBELL — One of the things we endorse in our submission is of a central collection point of information about ADR. We suggest that could be on the Department of Justice's website where people would be able to have the so-called one-stop shop as much as what one can of the myriad of ADR providers and processes available to them. Clearly one way of empowering people is to give them information. People need to be properly informed before they can make appropriate decisions about what kind of process they might like to take, whether that be alternative dispute resolution or litigation. That would be one way of doing that.

The CHAIR — I agree. So this general point about education you are saying that the internet, one-stop shop site would be right. How do people in marginalised communities, for want of a better term, access law and what are the steps for them?

Mr LULHAM — I was in another meeting actually last week and people were asking this question even in the context of criminal law. People had done a lot of research on poverty and poor people as they interact with the legal system, and the statistics were pretty depressing. I was floored. I would think as a lawyer that if someone has a legal problem, they would think, 'I had better find a lawyer', not necessarily the top lawyer at the top end of Collins Street but a lawyer.

The CHAIR — Not, 'I will sort it out myself'?

Mr LULHAM — Yes, for a lot of people that thought does not even come into their mind. They might end up going to a citizens' advice bureau or asking someone at the library but taking that step of talking to a lawyer does not happen.

The CHAIR — I kind of suggest that to go to the internet to see if there is a one-stop shop means you are already pretty well on the way to knowing that there is something that you need to know further to where you are already placed. Whereas when we are talking about genuinely marginalised groups, new arrivals for example, people with poor education, people who are in unskilled work or unemployed, the homeless — groups like that — itinerant fruit pickers, all those kinds of groups would have enormous problems in accessing the legal system I guess.

Mr FOLEY — Indeed, in accessing any service.

The CHAIR — Any service, that is true.

Mr LULHAM — Certainly the Law Institute has its referral service where anyone can phone — you do not even have to use the internet — and get a list of three lawyers who will see you for half an hour for free. There are a lot of lawyers who do that. Someone would have a statistic on that but there is an enormous number of contacts made each year into that service.

The CHAIR — Okay. We are over time. Are there any further points we need to cover? Have we covered regulation?

Ms RISELEY — No.

The CHAIR — Do we have another hour! Would you like to talk to us about how you see the regulatory frameworks that are being developed and what the institute's view is on that?

Mr LULHAM — I think our position at the moment is that in terms of lawyer mediators there is already sufficient regulation. It is clear that running a mediation is part of legal work in terms of our compulsory insurance scheme, for example. If the mediator does anything wrong and someone needs to actually seek compensation from the mediator there will be insurance money there. There is always of course the *Legal Profession Act* that has the whole complaint mechanism going into the Legal Services Commissioner. So regulation in that sense is there for us.

In terms of non-lawyer mediators, people who are affiliated with various industry schemes, those industry schemes would have a form of regulation attached to them anyway, whether it is government regulation or a contractual form of regulation. Ultimately now with the *Fair Trading Act* because of that definition of a consumer-trader dispute, meaning that any time a person provides services for a fee VCAT has jurisdiction. If you look at regulation in terms of the way for someone to claim recompense for something that has gone wrong, that already covers everybody anyway. I think what the Law Institute says is that we do not want to see too much regulation at the moment. Mediation is still in its infancy and is still developing. If you have regulations that imposed a rigid structure on everybody it would be too much, too soon.

The CHAIR — What do you think about the ACT act that covers this area?

Ms CAMPBELL — I have heard of it but I have not looked at it in detail. That is something I cannot comment on.

The CHAIR — Is that the only jurisdiction?

Ms BUCHANAN — ACT and Tasmania.

Ms CAMPBELL — Our approach is to favour the current system which is about self-regulation and voluntary control. We see that gives a lot of flexibility to the system and enables the system to deal with individual people and things as they evolve over time. We are in favour of how things are.

Mr CLARK — Could I quickly follow up with a similar question to the one I asked the bar representatives? In relation to the mediations that the institute's members conduct, do you have any feel anecdotally or otherwise as to what success rates those mediations are having, and what sort of costs are involved for those mediations to the parties that are involved with them?

Mr LULHAM — We do not keep statistics as an institute so it is going to be anecdotal. The anecdotal view would be something like two-thirds to three-quarters of matters resolve. The reason is that people defend things for all sorts of reasons. Some people defend things because they genuinely have the view that they are not liable at all for some good legal or factual reason. Some people defend things because, 'I would love to pay you the money but I just do not have it. If I can just drag things on, that will help me and if I can negotiate to pay you off over a year or something, then that is fine'. There are all those differences. It would be between two-thirds and three-quarters probably.

In terms of the cost, again the Law Institute does not impose fees on people, and it just varies. Obviously people would charge more money if you are going to deal with some Supreme Court extravaganza involving five parties or something versus a Magistrates' Court debt collection.

Mr CLARK — Sure. Are we looking at charges at sort of solicitors' normal charge out rates of several hundred dollars an hour? Do they tend to charge at the same rates for mediation as they charge for other aspects of solicitors' practice?

Mr LULHAM — Probably a little less in the sense that there is a difference because you are running a process rather than coming up with a decision. It is less. And also, sorry, one more thing. Solicitors tend to charge more on a hourly rate or a half-daily rate whereas some people I think have the concept of the day. It would be very nice to have the concept of the day but we do not do that.

Ms CAMPBELL — I would also add to that a lot of matters can be such that the solicitor mediations are conducted in accordance with the scale of costs of the different courts, so that offers them some guidance. Really the costs are individual to the mediator in the matter that they are mediating.

The CHAIR — Just coming back to the regulation issue, the last thing on that is with the national mediator accreditation system, the standards that are now in place is the institute going to participate in that process?

Ms CAMPBELL — The institute supports minimum accreditation standards, but we proceed from the view, I suppose, of the organisations concerned deciding for themselves what is appropriate and, for that reason, we had, as Ian mentioned earlier, the non-specialist and specialist accreditation mediators and we have been maintaining and assessing our mediators against those standards for a number of years.

In terms of the national mediation standards, we have been involved to the extent that we have made a submission to Professor Tania Sourdin, but I think the standards, as they are, are very much a living document. They are still very much under development and review. I understand there is going to be a national mediation accreditation committee, which is coming into effect from next year, so those standards are still very much a work in progress.

The CHAIR — So you keep working with it?

Ms CAMPBELL — Yes, but it is also important that the standards, I think, from our point of view remain a voluntary standard rather than being imposed on a national basis on people because, from our perspective, it is too difficult, and it would infringe too much on the system's flexibility if it was imposed on all types of ADR processes and ADR practitioners.

Mr FOLEY — So would you take the view the bar did about carving out any role via your members if there was such a system of national accreditation?

Ms CAMPBELL — That is something we would need to see once the mediation standards have been finalised. As I said, it is very much a living document.

Mr FOLEY — Do you think there is room in there given it is such a big vast area with mediation and all of its different types of mediation, arbitration et cetera? Do you think there is room for everyone to live under the one roof?

Ms CAMPBELL — The accreditation standards that Professor Sourdin is working with deal simply with mediation, but I think our approach would be that ADR by its nature is just so diverse, it is very difficult to conceptualise and characterise them all under the one roof.

Mr LULHAM — When they introduced the administrative law statutes, I think in the late 1970s, the first one said that anyone who makes a decision has to give reasons. Very early on people were saying that that applies to arbitrators, but the first time it got to court, the court said, 'No, it doesn't, because arbitration is such an ancient system; it has its own body of law', so I do not think you would assume that NADRAC would end up — or that these standards would cover arbitration.

The CHAIR — No further questions? Thank you, Ian Lulham and Elissa Campbell, for coming and for the work that you have done in preparing your submission and also for your generous time today. Kerryn and/or Kate will probably be in touch with either or both of you to follow up some of the things you have said this morning or things that you have said in written form, and it would be much appreciated if we could continue that conversation.

Mr LULHAM — We are happy to do that.

The CHAIR — Thank you very much. You will be sent a copy of the transcript.

Witnesses withdrew.