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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 10 December 2007

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Justice M. Kellam, Supreme Court of Victoria.

The CHAIR — Welcome, Justice Kellam. This hearing will be recorded by Hansard, as you well know, I am sure. I do not need to explain to you that you are subject to parliamentary privilege, and all those privileges are afforded to you. The way we run this, basically, is that we will throw it open to you to make whatever comments you wish, and then we will just have some discussions. We have some prepared matters that we want to make sure we capture.

Justice KELLAM — I think this is a very timely time for this committee to be conducting this review. ADR in the court system is not new. Indeed the County Court, through Judge Lazarus and barristers Henry Jolson and George Golvan, set up what is generally believed to be the first court-annexed program in the world in 1984, and they started referring building cases out. There were no rules then. The County Court got some rules about a decade later. The Supreme Court commenced mediating in 1993 with the spring offensive. Rules came in in 1995 permitting mandatory referral to mediation. We had already had the powers, of course, of special referee and arbitration for years before that, but they were rarely used then and are rarely used now. Since about 1995 — particularly since the mandatory requirements came in, or the capacity of the court to order mediation in the absence of consent — most civil cases in the court have been mediated one way or the other, or have been the subject of an order to mediate.

I think the big change in our culture is the fact that we, in October 2005, introduced mediation by masters. The current position — I checked the figures this morning — is that in the order of 100 cases have now been mediated, so we are talking about 50 a year. We are not talking about a huge volume in the two years since we commenced mediating. Of that 100, over 60 per cent have settled, mostly at mediation, and a couple of per cent within a month or so after.

In the last year we have also engaged in mediation by masters of a number of appellate cases. I think there have been half a dozen or so directions from the Court of Appeal for the mediation of a case which has been the subject of a verdict either in the County Court or the Supreme Court, and a number of those mediations have proved to be successful. The culture has changed, and I think the culture in the profession has changed really quite dramatically — in Victoria at least; not so much in New South Wales, which seems to be a more litigious sort of society in many ways. But in Victoria we now have members of the bar who do nothing else but mediate and who have full-time mediation practices.

Over the 12 years or so that the Supreme Court has been engaged very solidly in referring most cases to mediation, the mediators in general have been barristers, occasionally solicitors, and more occasionally specialists in particular fields. Leading members of the bar or perhaps former partners of big law firms are the usual recipients of referrals from the court. The parties in general choose their mediator, although the court has from time to time, when parties cannot agree, selected one out of a group of names served up by the parties, but in general they pick them. As you know, mediators are entitled to total immunity, and there is no report back to the court other than the fact that the mediation has finished, so the court knows nothing of the details of it. That is our present state of play.

The CHAIR — Thank you for that. I will perhaps start off. You have touched on what the benefits are, and partly they are self-evident from what you have said, but can you spell some of those out?

Justice KELLAM — Yes. I think the benefits are pretty self-evident. I chair NADRAC, as you probably know, and our experience Australia-wide — and it is consistent in Victoria — is that there has hardly been any litigation coming out of mediations. So we have a pretty fair belief that most people are comfortable about the decision they have reached. I think it is pretty obvious in some ways, because when I hand down a judgment I am determining rights, and the rights will usually be, 'You win, you lose', or 'You own this land, you don't', or 'You're a beneficiary of this will', or 'You're not'. There is a winner and a loser. Litigation is rights based and mediation, very simply, is interest based.

I can give you one very brief anecdote. A few years ago I was in a regional city. I was hearing civil cases. There was one case in the list which involved a dispute between a vineyard grower and the nurseryman who supplied him. Before this case came on for trial, and it was in that month's list, it became obvious that for both parties — one was flying experts across from Adelaide and another was flying them up from Melbourne; a half a dozen experts — it did not matter who won or lost it, they were both broke. The winner might have won it, but he was not going to get his money because the other fellow was going bankrupt, and vice versa. I inquired as to whether the matter could be settled by mediation and there was resistance to it. I then got the parties in to the court and said, 'This is ruinous for everybody. This is going to take two weeks. Somebody is going to come to dreadful grief, and

probably both of you'. Everybody said, 'It cannot be mediated', and I said, 'Well, it is going to be'. I selected a local solicitor and requested him to come in; I knew he had mediation training. The case settled about three days later. For two and a half days they were out in the jury room and I could hear the loud voices, but it resolved.

The nice thing about that story is that a year later when I went back there — I knew one of the terms of settlement involved something about some free provision of vines over a period of time, I heard that around the traps — sometime later they were still both in commercial arrangements, still years down the track. That is the difference from litigation. It can preserve relationships, it can ensure that parties are looking at their own interests and are generally happier. I do not think there is any doubt about the value of mediation. Unfortunately, I have to say, as I have had to tell you an anecdotal story, there has not been much research into this and so I cannot say, 'You can look at this study or that study'. It is all anecdotal. But I have been involved with mediation in one way or the other now for 15 years, and I think the anecdotal evidence is fairly well based, that people are generally happier about the result of a mediation. When I was the president of VCAT I think we were doing about 1400 or 1500 mediations a year and I never got a letter of complaint, and yet I got many complaints about tribunal decisions — constant complaints.

The CHAIR — We have been — I think the right word might be — 'assailed' with good stories about ADR and general mediation. The view has been put to us that it is a growing area and that it is beneficial. But I guess our job at the moment is to be a bit suspicious of that.

Justice KELLAM — Yes.

The CHAIR — As Martin Foley put earlier, where are the weeds in all this? Where are the weaknesses in this that you think we, as a parliamentary committee, whose chief concern is to make sure that the marginalised and not-so-empowered people in the community are getting a good go, need to look at?

Justice KELLAM — I think the first weakness — and it is not so much one that involves the Supreme Court because we basically know who is doing the mediation, and NADRAC, as you know, is analysing this — is that there are no standards, so anyone can hang up his or her sign and say, 'I am a mediator'. And as distinct from a court process, it is not transparent, and I think that is an issue of some significance, if you do not have appropriate standards. Whereas you can sit in court and see what happens and you can analyse the written reasons, if a mediator misbehaves and applies too much pressure to people it is not something you know about because it happens in a room, often in a caucus. I think they are some of the issues which can really only be addressed, I think, through appropriate standards. One of the things that NADRAC has been endeavouring to achieve in terms of appropriate standards is the inclusion in that of a complaint process, which would be managed by an appropriate body or bodies. I think that is one weed, if you like, to use your term.

To a great degree you are dependent upon the approach of the mediator — and this is one of the issues which arises in relation to judicial mediation, and indeed mediation by the masters, for that matter. We have taken the view that the form of mediation in which masters should be involved is the pure Harvard model, if you like — that is, of facilitation and not giving quotes and not engaging in any evaluative form of process. I think that is pretty important. On the other hand, of course, much of the enthusiasm for judicial mediation in other jurisdictions, and I think amongst individual members of the legal profession in Victoria with our masters, is that they carry the weight of authority of the court with them. So there is a bit of a conflict there.

The CHAIR — Yes, and that has been raised with us, too, that the practice in the Supreme Court leaks and there are conversations around the water coolers, which is the way it has been put to us — —

Justice KELLAM — Yes.

The CHAIR — And that that then undermines the confidence that people might have in the subsequent procedure.

Justice KELLAM — It is interesting. When we started the masters process, as I think you probably know, and no doubt submissions have been made to you, the Victorian Bar ADR Committee was opposed it. It basically opposed it on those perception issues — leaks within the court, discussions about it and so forth. Yet individual barristers in particular are still seeking it — quite a number of the referrals to the masters are coming out of individual practitioners. But yes, they are the perception issues. They are the debates that there have been in Australia. Tania Sourdin's *Alternative Dispute Resolution* book at pages 112 to 116 deals with those issues. There

are serious commentators. Sir Laurence Street has been totally opposed to any involvement in judicial mediation for those perception reasons.

On the other hand South Australia — and you will see Justice Debelle has said something in a number of cases referred to in this book — there are clear boundaries and care to be taken. On the other hand, of course, nobody raises that perception issue of 'around the water cooler' in terms of litigation. There are many litigants who are repeat, companies in particular, that appear before courts and there is the same risk, but it is produced as an argument here.

I might also say that the New Zealand High Court has just done some work on judicial settlement conferences and they are grappling with these issues, and I think you will find that judges in New Zealand will be mediating — in fact already are. They call them judicial settlement conferences, but they are certainly grabbing the bull by the horns.

In terms of the Court's position on judicial mediation, Justice Byrne went to Montreal a while ago and had a look at what was going on there. We are closely looking at what is going on elsewhere. To a degree it has to be other states and places like Canada and New Zealand that we look at because the Commonwealth has this Chapter 3 constitutional issue as to whether judges should mediate or not; the argument being it is not a judicial function. We are looking at it closely. There needs to be a lot of care about it because there are some judges whose personalities are more suited to mediation than others.

There are issues and I think it is something that needs to be looked at pretty carefully. I think it has a future save for one thing. Our court is pretty stressed for resources at the moment and it is an expensive proposition to take a judge out of hearing cases and have them mediating because mediations can take a long time. The experience with the masters has been that there are many mediations that have taken a day. That is a pretty expensive process in some ways, particularly if you are taking a judge out of hearing cases to mediate.

The CHAIR — Okay.

Mr CLARK — I might add to what the Chair has said that it was alleged to us earlier in evidence that the water cooler problem was occurring at the Federal Court and a specific instance was alleged to us earlier on. I do not know how much of the County Court evidence you heard earlier, but you may have gathered that the County Court judges were quite enthusiastic about the case management approach, and implicitly because that was in open court that offered some advantages in overcoming the water cooler-type concerns. You may have gathered they were very enthusiastic about it and they also believed it abridged some of the huge problems that we know are suffered in relation to discovery whereas I gather that the Supreme Court's mediation process kicks in after discovery is complete. Have you considered the approach the County Court has taken with the case management conference?

Justice KELLAM — Yes.

Mr CLARK — How do you see its strengths and weaknesses, and how does the Supreme Court decide on its approach vis-a-vis what the County Court is doing?

Justice KELLAM — Basically we run our litigation in lists — commercial list, building cases list — and then there is the general common law division, which is not so much run in lists. We have a litigation support program there.

In terms of the specialised lists it is up to the judge, I think, to identify when mediation is appropriate. There is no fixed time before it is appropriate. There can be cases — and I have seen cases — where you could make an order at the first directions hearing and before the pleadings are in if you can identify relatively isolated issues. On the other hand a lot of commercial cases are pretty complex and you really need the pleadings in and, to some degree, discovery, although I am not convinced that you always need discovery. I think discovery is a bit of an industry of its own in litigation. There is a lot that could be said about discovery and we would very much like to limit discovery if we could, and we endeavour to in a variety of ways.

There is no fixed time. I do not think you can say, 'We will have a judicial settlement conference six weeks after' and then say it is time for mediation. I think there is an advantage with less sophisticated mediation, and at one stage I ran the building list in the County Court and I used to have a directions hearing within six weeks of the issue

of proceedings. I would fix a date. I think it is very important that mediation does not cause delays in the process. You would fix a date for hearing and then I would look at whether there was sufficient information in to mediate. Going back, I think probably 50 per cent of those cases I ordered to mediation at that six-week period, perhaps after a process had been completed, perhaps not. I might have ordered discovery and then mediation.

I just do not think there is a one-size-fits-all. Frankly that is the great advantage of the Federal Court docket system — that the judge can look at it on a case-by-case basis and identify when it is appropriate. We have got problems with the docket system because of the volume of cases we have. We have a much bigger volume than the Federal Court and there are real difficulties in judge management of every case. The Federal Court system, I think, works very well with the number of cases they have. Yes, we can have judicial settlement conferences, but where most of our litigation is managed anyway it is another step in the process and in effect we do have them by the directions hearings we have or by the litigation support program.

Mr BROOKS — This is a broader question, if you like, given the number of hats that you wear. We heard from the bar, for example, this morning that they did not necessarily see the need for the national standards and I suppose the regulatory framework to be imposed, and their argument was around reducing flexibility that the current system has. I was wondering if you have any thoughts on that?

Justice KELLAM — I am not speaking as a Supreme Court judge, I am speaking as chair of NADRAC. We have a firm view that there needs to be an appropriate system of accreditation. I know the bar's argument and I might say frankly I do not think that an accreditation system would concern the bar at all. NADRAC is not really talking about the bars. Most of them have introduced their own systems. The Victorian Bar has — and I would anticipate that their internal accreditation system would meet exactly all the requirements that NADRAC is talking about. The Queensland Bar likewise and a variety of other bars and institutions have appropriate standards. I do not think the fact that they have their own standard means that they should not have that subject to a national approach. In the end result I accept what they say, that their own standards are adequate. I accept that. That is not to say that there should not be a national approach.

Whilst it is true that most of the referrals from the Supreme Court are to mediators who are either members of the institute or the bar and they do have standards, it is a pretty good question to be asked: why should a court grant immunity to somebody, as we do, under our legislation? Why should you have total immunity when there is no basis upon which the court can be satisfied that you are conducting mediations to an appropriate standard? It is a pretty big gift to give total immunity, and why should we not require the accountability of an appropriate standard? That is my answer to the bar on that matter.

Mr FOLEY — Justice Kellam, what is your view on the way in which alternative dispute resolution as practised by your courts provides access to marginalised communities at the moment? Does it have to go any particular way in which to engage communities or groups of communities? I am just wondering how you saw it operating more generally.

Justice KELLAM — The principal guideline for our master's program, which is a fairly limited one in all the circumstances, is preference to people who are impecunious. Frankly, if the ANZ Bank and BHP want to have a blue with each other, why can they not pay for a mediator, and why should they use up the court's resources? That is the first thing. However, it creates a difficulty assuming, as we do, almost the pure Harvard model of facilitation. It is difficult for non-represented parties. There are some non-represented parties who might fall into the Professor Mullen 'querulous litigant category', and there is a real question as to whether the court should be exhausting its resources on those people, but on the other hand there are non-represented people who do not fall into that category and really ought to have the benefits available. Right now we have identified five cases where there are non-represented people who really should be given the benefit of a master's mediation because of the impecuniosity issue, but we are reluctant to have masters mediate where there is an imbalance of power because of our view that we should not be involved in expressing opinions, or because it is facilitative. In fact we are trying to deal with that at the moment. We have an arrangement half entered into with the Victorian Bar where they will provide pro bono assistance to those people, but that is one issue. The power imbalance is one and, to a degree, the power imbalance in terms of court mediation can exclude people who do not have the capacity to be represented. The second one, of course, is that marginalised people do not have the funds to pay for mediation the way big commercial users do and, to a degree, they get excluded on that basis. That is difficult.

Some years ago after the 'Wakim' case was decided by the High Court, I think 37 de facto property cases came out of the Family Court back to the Supreme Court, and I ran a list dealing with all of those 37 cases, mostly relatively impecunious people, often fighting about a house. The nonsense, of course, was that it came to the Supreme Court because the value of the property was over the County Court jurisdiction at the time, but then you might have a house worth $350 000 or $400 000 with a $300 000 mortgage on it. Really the de facto property in dispute is not the value of the house, it is the $100 000 left over. And if you think that the de facto husband was always going to get 30 per cent and the de facto wife was always going to get 30 per cent and the battleground was the intermediate 40 per cent, you have got a Supreme Court case over $40 000.

I ordered all those cases to go to mediation. Some of the parties were very reluctant, but in the end I really justified that by the fact that if they ran two days in court it was going to cost a lot more than a mediation. If they settled at court door even, it was still going to probably cost more than the mediation, so I got to them as early as I could. Of the 37 or 38 cases, all but 2 did settle, but, as I say, the parties were not happy, and I had no choice. I think now I would try and get the most impecunious of those cases dealt with by a master, but that facility was not available eight years ago.

I think you are right. I think there needs to be some way of curing the power imbalance for more marginalised people. Most pro bono schemes, of course, have really been involved in litigation. ADR has not really been the subject of much pro bono. I think there would be a pretty good argument for pro bono to include mediation as a source of free legal assistance. As I said, we are dealing with the Victoria Bar at the moment with a view to having them expand a pro bono scheme to our master cases, but that would be the limit of it. We are not talking about a lot of cases, but I think there is an issue there, and it would best be resolved by at least some pro bono assistance for people to go to mediation.

Mr FOLEY — We have heard a lot from different levels of court support, but not a lot of data. You have made a similar comment. I understand the Supreme Court has participated in a Department of Justice data collection process that is currently under way. That is a pilot, as I understand it?

Justice KELLAM — Yes.

Mr FOLEY — How do you think it is going?

Justice KELLAM — I do not know. I was approached at the start and I was asked to sit on the committee, but I had too many other things to do and I could not. But I was very much involved at the start; in fact I was approached about the design of it. I was of the firm view — and I believe it is going down this track — that we really need some hard facts. On the court's collection facilities for data, our resources were such that we just could not manage and had not over the years. Part of the reason, of course, was that mediation grew like topsy, but we do not have the numbers of how many cases we have referred out; we do not have the numbers of how many were settled. We do not have those sorts of numbers that would articulate a proper empirical basis for consideration of the matter, and that is what has to be done. The raw data is there, but nobody has collated it, and that is a fairly resource intensive thing. I am hoping that out of this research project, first of all, old raw data will be capable of being analysed to give us some understanding of what has happened in the past. In particular I think there ought to be an evaluative — and I understand they are doing this. I would want the opportunity for those who have been involved in the project to say what they thought of it. You would get some feeling of the litigants who have had a case settle or not settle through mediation. I think we really do need some hard numbers, but Australia-wide there is not much by way of hard numbers, probably because the courts do not have the resources to put into this extra thing.

The CHAIR — When you say you think the raw data is there — —

Justice KELLAM — To a degree.

The CHAIR — What might that be? What do you think is out there?

Justice KELLAM — For instance, the orders that have been made for referral to mediation, they are all there. All the court files will tell us which cases and that will be most of them. We will certainly know the ones that did not settle — that raw data is there, because they would have come on for hearing — but we will not know about a variety of others that just never came back. That is probably the black hole. There is a fair bit of data there as to what was actually sent out, what came back on for hearing and perhaps timetables. There might well be the reports

from the mediator that the matter has been completed, on file. Then we could look at times. That is the sort of raw material that is there.

The CHAIR — Just coming back to Martin's question earlier about marginalised groups, this is hard. I presume the answer is going to be no, but might there be anything there that could tell us about who is not getting access?

Justice KELLAM — To mediation, to ADR processes?

The CHAIR — Yes.

Justice KELLAM — My guess is that there probably is not. My guess would be that probably most people, with the exception of the self-represented parties, even if they are from marginalised backgrounds or are marginalised in terms of resources, have had an order for mediation made.

The CHAIR — Could the types of cases throw light on, for example, the socioeconomic profile of the parties to the dispute?

Justice KELLAM — Probably not. Commercial cases are not all ANZ against BHP sort of thing. A lot of them are, but many of them are about small consumers with a real beef. I do not think you could quite identify out of the commercial list. I think there are probably more of the sorts of cases you are talking about in the County Court and the Magistrates' Court than there are in the Supreme Court. It would be fairly hard to identify them.

The CHAIR — Going back, you mentioned in passing — I think you might have referred to judges, but if we just broaden that out a bit — that some might be temperamentally, I think you said, more suited to doing mediation or other sorts of ADR work. Just coming off the back of that, could I ask you about training that the masters, for example, receive?

Justice KELLAM — All the masters have done the LEADR course at the moment. I am very keen, and I have discussed this with them, to get some funding for them to do an advanced mediation course, probably at Bond University or La Trobe, one of those. They have all done at least the LEADR course, which is relatively limited; it is a five or six-day course. A number of the masters have had really quite extensive experience. Master Efthim, who came from the Federal Court, and Master Wood both had extensive experience in that regard. The other three masters who are mediating have had less experience. That is the training.

The CHAIR — Is that adequate?

Justice KELLAM — I think it would be a lot better if they did more. Advanced training courses are available. So it is adequate, but it would be better if more opportunities were available.

Mr CLARK — On the issue of gathering data, it has been very pleasing to hear you mention that there are a lot of records there that hopefully can be tapped into. I am still concerned that in the public sector data collection tends to become a far more elaborate, costly process than necessary. It seems to me from what you have said that basically you could get a summer clerk or an intern or someone to work on the database for two or three months and, particularly with the computerised records, just scan them and tabulate the sort of data we are talking about. Then it would be available for the whole world. Is that a possibility or do you think it will take more work than that?

Justice KELLAM — I think that is a possibility for the past. Our court has not been resourced at all well in recent years. We do not have much by way of sophisticated electronic resources. There are an awful lot of paper files or indexes of that sort around the place. There are new programs on foot that are coming in. I would have thought that for the future it would not be difficult to design that into the system. I think that is an important thing — that for new systems there ought to be a way of analysing what is going on with ADR. That should not be costly. I agree with you. I think a summer clerk could spend three months getting at least some raw data. We have had some, but what sorts of conclusions you could draw from it I do not know. I think the anecdotes are pretty strong. We keep hearing from people that they regard it as a satisfactory process. I think we have to keep control of standards. As I say, transparency is an issue. Codes of conduct, I think, are important. VCAT has a code of conduct for mediators. I think that is something that all organisations that are dealing with mediations, either referring out or dealing with them in house, should have.

Mr BROOKS — Another broad question: what are your views on how ADR might be utilised in the criminal justice system?

Justice KELLAM — NADRAC is about to turn its mind to that. We have looked at it on and off over a period of time. The Canadians are using what they call mediation. I do not use 'mediation'; I think it is a bit more akin to plea bargaining, so we have to be a bit careful about that. It is particularly related to money-type offences — tax frauds, white collar, so-called victimless crimes. They are not victimless; the community is the victim, but they are so-called victimless crimes. They have been doing a bit of work there. I am not sure that I can see in the very near future an appropriate ADR process in terms of sentencing in Victoria.

I am not sure that our community, frankly, would accept it. However, I think there are a number of other avenues for restorative justice processes. I think one is juvenile crime. I am not talking so much in the sentencing process but as a way of having the victim and the offender understand what they have done. That has worked in New Zealand very, very well. I think there are opportunities for us to very carefully explore mediation between victims and offenders in certain circumstances. I have observed in New Zealand that the Parole Board in fact is doing some victim-offender mediation after sentence, prior to parole. That has been quite effective in a way, particularly amongst their indigenous community where the victim and the offender are Maori. It has worked quite well. There is a lot of work to be done there. I think we have to take some care, though. As I say, the Canadians say they are mediating sentences, but I am not sure. We do not have that culture of plea bargaining that North America has. I think we have to take a lot of care about that. To a fair degree I suppose there is a sort of ADR process at the moment between the accused and the prosecution because there is a fair bit of negotiation and settlement in guilty pleas. It is probably a good idea for the court to stay out of that, I must say, at the moment. But the Canadians have a different view.

Mr FOLEY — Is that what His Honour Justice Byrne was looking at when you referred to his — —

Justice KELLAM — No. They are doing a lot of work in judicial mediation of cases, and he has had a good look at how that operates over there. They have been doing it for a while. In 1993 they were doing it in Ontario in relation to motor car cases and industrial accidents. They have had judges involved for quite some time in actual mediation. We have not really done it much in Australia, although it has been done a little bit in South Australia. It has been done a couple of other places, but no-one has really grabbed the ball. South Australia is a pretty small jurisdiction and they often have spare judge capacity. Their jurisdiction is nothing like ours in terms of the volume, and if you have spare judge capacity there is a pretty good argument for saying, 'If you have got judges sitting around, why not?'. That is not our situation in Victoria, nothing like it. It would be a new step for us. I think it would have significant advantages in terms of evaluation but in terms of resources it would be very resource intensive.

Mr FOLEY — I am not wanting to catch you unawares, but has the Victorian Parole Board turned its mind to those restorative justice opportunities of the New Zealand Parole Board?

Justice KELLAM — No. I chaired the parole board until very recently and we have thought about it and we have discussed it. The New Zealand model has worked particularly well with indigenous offenders and victims, and of course they have a much larger group of both categories. I think it is a bit more difficult for us. I think it is worth looking at, but the Parole Board has not at the moment. But it is certainly worth looking at. I still think it would be a fairly small category of cases. I think it might have some value where there have been offences inside a family, because when the prisoner leaves, that prisoner is going to have good or bad or indifferent relations with a family group, many of whom were affected by the crime. That is the sort of area that I think would be of value for the parole board to look at in Victoria.

Mr CLARK — Could I explore the issue of Harvard or facilitative mediation versus more proactive mediation? I can understand that court-adjunct mediators might be a bit inhibited in what they could do least they be seen to reflect adversely on the court, or to put it the other way, non-court adjunct mediators can perhaps be franker in what they say to the parties. Talking anecdotally, re the anecdote you gave earlier about the regional case, my impression was you were doing, as it were, a degree of very interventionist pre-mediation in terms of urging the parties to mediation on the grounds of, 'Look at what will happen to you if you don't'. Is it only the masters who are sort of carrying out Harvard mediation? If the court refers people to other mediators, is it expected that they will use a Harvard-style, facilitative mediation? Or can you see a role for non-court-associated mediators to be more proactive in the way they conduct their mediations?

Justice KELLAM — I think if you asked the Victorian Bar now, who are doing a fair number of mediations, I think they would say there is a range of approaches from the pure facilitative model, which is one I believe — that is a personal opinion of mine; the court has not got a view about that at the moment, apart from that is the approach we have taken with the masters — to one where I suspect and hear anecdotally a fair bit of evaluation takes place. To some degree it is a matter of how the mediation is done. It would not be appropriate for a master to say, 'Well, you are going to lose this case'. I suspect that from time to time mediations do take place with that much intervention, but in my view that is far too much intervention. On the other hand the facilitative model, and some might say it is just of semantics, would permit, 'Have you thought about the consequences of losing this case? Have you thought about the costs?'. I think all of that is permissible. There is certainly a range of activities in outside mediation. I do not doubt that there are occasions when outside mediators who are the subject of a referral from the court have, to a degree, used a fair bit of intervention. Where the intervention turns to pressure is my concern, particularly when there is imbalance between the parties; that is the issue. That is why I think we would take the view that the facilitative model does permit a fair bit of questioning of interests — are your interests served by going on with this case; have you thought about what will happen if you lose your house sort of thing.

There is a clear distinction, however, in what I was talking about before in the regional city with case management. I think judges can be very interventionist in case management, but it is not articulating any of the issues in the litigation; it is making it pretty clear to the parties. I can recall one occasion in one of these de facto cases where I got out a jug of water and put out four glasses and said, 'That is for your legal practitioners, and that is for your legal practitioners. Here is what left in the jug, and that is what you have got to share'. That was interventionist; it was telling them, 'You had better get out there and settle this', but I was not expressing any view about anyone's rights. I think that is the issue that we have to deal with. A non-Harvard facilitative model might involve, 'You are going to lose', and I think a fair bit of care has got to be taken about that. That is one of the arguments against mediation — that it is not transparent. If that happens in the caucusing room it is not transparent. That is why my own view is that there needs to be standards, and there needs to be a code of conduct which is enforceable by way of complaint, and we do not have any of that now.

Mr CLARK — The bar argues that the lawyers in the mediation protect against that, and if the mediator is going off the rails then the lawyer can advise the client, 'Don't cop what the mediator is telling you because it is wrong'. I take it that you do not regard that as an adequate protection?

Justice KELLAM — I suppose it depends upon the question of whether or not there is a caucus — a private discussion between the parties and the mediators.

Mr CLARK — Do you mean without the lawyers?

Justice KELLAM — Without the lawyers. It depends on how the mediation is run. There is no doubt that many well-run mediations will involve a private caucus between the mediator and the parties to explore interests. If the Victorian Bar always ensures that one of its practitioners is there perhaps it does avoid that. At the same time it is a pretty good way of dealing the mediations.

The CHAIR — Justice Kellam, we are out of time.

Thank you once again both for your submission and for your generous time this morning. We will send you a copy of the transcript, and I hope you will be open to either Kate or Kerryn contacting you. Thank you very much for your time.

Witness withdrew.