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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 10 December 2007

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Mr M. Heaton QC, chair, dispute resolution committee, advanced mediator (Victorian Bar)

Mr A. Nolan SC, advanced mediator (Victorian Bar)

Ms D. Huntersmith, vice chair, dispute resolution committee, accredited mediator (Victorian Bar), and

Mr R. Nankivell, legal policy officer, Victorian Bar.

The CHAIR — Welcome to today's hearing and inquiry into alternative dispute resolution. We have members of the Victorian Bar present, who are very welcome. Thank you very much for coming. We have received the material that you have sent; thank you for that. The only thing I need to remind you of is that as we go into the hearing proper, that the discussions we have this morning are subject to parliamentary privilege. I do not have to explain to you what all that means, but if you perhaps say some of the same things outside the hearing, that privilege will not be afforded to you. We have 45 minutes for this session, and we hope to run it as informally as appropriate. We will give you, obviously, some time to speak to the terms of reference as you have decided to deal with them, and then we will go to our schedule of questions. Is that okay?

Mr NOLAN — We are content with whichever way suits you.

The CHAIR — We will hand over to you.

Mr NOLAN — We apologise for how lengthy our submissions became, but the Victorian Bar believed it had some important things to say in relation to the regulation of alternative dispute resolution. We see ourselves as coming from a separate and discrete area — that is, most of the mediators at the Victorian Bar are, firstly, part-time practitioners in alternative dispute resolution, and, secondly, conduct the mediations under the auspices of the court, whether it be the Supreme Court, County Court, Magistrates' Court or for that matter VCAT, because there are numerous mediators who are members of the Victorian Bar who sit as VCAT mediators.

We think your terms of reference are particularly wide. They cover all areas of alternative dispute resolution, and there seems to be an issue associated with matters associated with what I will call industry-based or work-related mediation structures which are not really applicable to the practices of the Victorian Bar. Historically the mediations came out of the spring offensive, which happened in the early 1990s to try to clean out the Supreme Court waiting lists. They were very short mediations, or really evaluations, by senior practitioners at the bar. That system probably did not work so well, and it did not work so well simply because it had barristers telling the parties what they thought the result was likely to be after 1½ or 2 hours of reading the material. But the bar became very interested with the process, as did the court, and we developed an expertise which is separate and discrete from those matters, for example, in a neighbourhood dispute, because the parties are sent to the mediation by order and thereafter they are there voluntarily, and we want that to be maintained.

Thirdly, when they get there, we have found that they require a longer period of time than 2 hours. For commercial disputes, for example, it is not unusual — as will happen to me today — to be tied up for all day and perhaps a second day in a commercial dispute, but in relation to a personal injuries dispute one might find that that is a 2-hour mediation, or really a conference, which you would hardly call a mediation. So they are the two ranges we have — a full-on corporate mediation and a WorkCover-TAC-type discussion, say, where they put their best offer on the table and basically it is take it or leave it.

Our predominant issue is that from our perspective in our area of the market sector we do not see a great need for regulation. We do not see a great need for government involvement. We think that the system has evolved without regulation — that is, statutory involvement — and we are concerned about lots of aspects associated with that. We are concerned about the costs associated with regulation. Both state and federal governments keep on telling us that costs associated with regulation are on a user-pays principle. Funnily enough that is what we have got in private mediations conducted at the Victorian Bar at the moment.

We have concerns associated with the costs of regulation. We have been involved as a bar in relation to NADRAC matters. Our submissions to NADRAC oppose the regulation, even though it is going to be a voluntary regulation. We attended the meeting — or the road show, as Tania Sourdin called it — on 25 July, which we got no notice of but we attended at the last moment, under the threat that if NADRAC did not sort its matters out, there would be commonwealth legislation next year. We said, 'We don't understand why there's a need to regulate', and in response to that I was often told the story that, 'Mick Gatto gave evidence in a Victorian criminal trial that he was a mediator, and we can't have that'. That was confirmed to me by several people on the NADRAC committee, including the chairman, Justice Kellam, but my issue is, what is in a name? If Mick Gatto called himself a conciliator or an agreement reacher, is there going to be legislation to control that behaviour?

Our main issue is associated with mediation. We see that there is scope within the court structures for further alternative dispute resolution mechanisms. We think that that is a good idea, but we think that the controls which

are currently in place — that is, court control — are appropriate. All lawyers, of course, are subject at the moment to legislation which controls the conduct of lawyers.

There is a slight issue which I want to talk about for a moment — and I promise it will be over in 2 minutes. No-one has actually addressed the issue of retired judges. Retired judges do not have practising certificates and therefore are not subject to any of the procedures associated with the Victorian Bar, although they are still on the retired judiciary list of the Victorian Bar and therefore loosely affiliated. We have several retired Supreme Court judges who currently mediate, and nobody seems to have been directing any controls to them or considering whether it is appropriate that they be controlled in anyway whatsoever. It is an interesting issue, because I think everyone assumes the Victorian Bar accepts responsibility because they came from the bar — Justice Gillard, Justice McDonald and Justice Hedigan, to name three of them. There is a growing number of retired judges — who are not subject to any regulation and are not subject to our voluntary code of accreditation — who are flourishing in the mediation area. It is an interesting issue and conundrum, because I wonder whether it was the intention of any of the parties to legislate for or regulate them in any way whatsoever.

It is an interesting issue. If you have read our material, we had hoped we were going to deal with these five questions. The one point I want to talk about is the mandatory referral to mediation by courts, and in particular, judicial mediation. The bar accepts, in our submission, that the genie is out of the bottle. We support the concept of referring matters to mediation, but once we get to mediation that is where the court order should cease. The dispute resolution committee of the bar has been in constant contact for the last five years with the Supreme Court as to the form of order. We have negotiated in some depth with the Supreme Court as to the form of order— and for that matter, it has been adopted by the County Court — in relation to the form of the order which requires the parties to attend but not to negotiate in good faith. Because it is a fundamental issue, were the order to require negotiation in good faith, that would remove the mediator from being an independent person assisting the parties facilitating a mediation to being an objective person providing some report to the court as to party 'A' not mediating in good faith. We as a group do not believe we should be put in that position. We think it is a fundamental argument against the success of the mediation if the parties believe that something which is said or done in the mediation will be reported back to the court.

The CHAIR — Could you just explain that? Not being a person who comes from that kind of background, does that mean a court gives an order?

Mr NOLAN — Yes.

The CHAIR — That a mediation should be set up?

Mr NOLAN — Yes.

The CHAIR — And then?

Mr NOLAN — It works on these orders. There are pro forma orders in relation to mediation. The first is that the matter is referred to mediation, to a mediator appointed by the parties and in default of agreement appointed by the court. Generally the parties or their lawyers agree upon a mediator, and that person then conducts the mediation.

The CHAIR — They are required to do that much?

Mr NOLAN — They are required to do that. The parties are required to attend, and there is an order requiring the party ultimately responsible for entering into a settlement and the solicitor ultimately responsible for advising that party both to attend the mediation; that is a second requirement, the requirement of attendance at mediation of those parties. The final part of the order is that the mediator should report back — apart from matters about sharing costs and all of those matters initially and reserving. The final part is that the mediator report back to the court that the mediation is finished. That is all the court gets.

The CHAIR — What are the kinds of discretions inside the mediation itself?

Mr NOLAN — The mediation is open to the parties to agree upon what they do. It is a voluntary process.

The CHAIR — Or not agree?

Mr NOLAN — Or not agree, as they choose. The report, the discussion paper, says that should there be further reporting back of what transpires at the mediation, of the conduct of the parties or in some way whatsoever, we are fundamentally opposed to that. We believe we should not be reporting anything back to the court other than that the matter has settled. We have been making this point quite a lot to whoever will listen to us in relation to judicial mediation. The committee and the Victorian Bar are not supporters of judicial mediation, whether by masters or members, whatsoever — for lots of reasons. The first reason is the position it puts the mediator in — as someone who is then a decision-maker as to whether someone is acting appropriately or inappropriately. The second reason is if the mediator is a judicial officer, we run straight into the issues of confidentiality and confidence in the court system, which I think we addressed. We have had conferences associated with that in a continuing legal education program. At one of those — in the federal jurisdiction, not within your area — Justice North of the Federal Court has said this, and I will give you an extract. There are five copies there, which hopefully will canvass the field. This was chaired by Michael Heaton, who is from the dispute resolution committee — —

Mr HEATON — I think it was someone else that day.

Mr NOLAN — The CLE programs are taped so the members can download them and play them. There was some debate going on on the issue associated with judicial mediation and Justice North said this:

> I hope you take it the right way. The availability of the judge to registrars whilst acknowledging and respecting confidentiality is actually a very valuable proximity for mediation purposes. And I mean by that a docket judge who works with the registrar who is mediating a case can often get guidance in a very on the ground way about process, about the generality of parties lets say amenability to settlement.

Can I stop there: we are totally opposed to a judge finding out what happened at a mediation whatsoever. Can I also say that Justice North is the judge who is effectively responsible for mediation implementation in the Federal Court — a very senior judge. His Honour later gave an example, which is in the second paragraph:

> I say there is a line between confidentiality and not and that has to be rigorously observed. But it is not a particularly bright line and to give you a practical example —

Can I stop there: our view is that it is a very bright line — that there is confidentiality, and that is it —

> what I mean is that if a case has been mediated and has come close —

How does a judge know it has come close unless the registrar has told him it has come close, which is itself a breach of the confidentiality? He also said:

> It is not wrong for a registrar to say, 'Well, Judge, at the next directions hearing may be —

that is the way it was transcribed exactly —

> you would want to make orders about discovery. That might help and I am prepared to approach the parties afterwards and bring them back'.
>
> No identification of who stands where — just an assistance —

Can I stop there: I disagree entirely with His Honour, that His Honour is using the processes of the courts — on discovery or court orders or witness statements or opines — to impose upon the parties the question of great cost in circumstances where a nod is as good as a wink from the registrar as to what might try to settle the case. We as outside independent mediators do not have that access to the judge, we do not have the water cooler conversations. I must say from my experience as a mediator for all of these years, the parties are anxious to find out what goes back to the courts. They are very anxious to find out. They are very comforted by the fact that nothing goes back and they set their sails accordingly. I find that is a critical issue in building up confidence with the parties, and that confidence is something which develops into a possible resolution. After you build up their confidence you are able to put suggestions to the parties — whether they take them or not is another matter. But at the moment we have this on the public record.

The second issue associated with judicial mediations is illustrated by a VCAT example which I would like to give you very briefly. I promise this will be over in 2 minutes. A recent mediation was conducted by a senior member of VCAT who told the parties at a previous compulsory conference, 'This issue is terribly weak. I have spoken to the experts on the other side and they think you will lose'. The unit-holders — it was a body corporate-type dispute — were perplexed by that because their lawyers had been giving them 180 degree different advice that they were

likely to win on that. I became involved in the case, did a bit of research and found that the owners were on very sound ground.

We then went back down to another compulsory conference — and you will be aware of the processes of VCAT where a registrar conducts it, so it has the imprimatur of the court. She apologised for the advice that was given at the first conference. She had looked into the matter again and she was wrong. Who sues her if the parties entered into a settlement on the court stamp-approved advice that they were hopeless on the first part of the claim? That was fundamentally wrong.

The registrar and I had a bit of debate about that issue. Eventually she left the room. I am not a big supporter of judicial mediation but I am not a supporter in circumstances where there is no redress for advice given by a mediator, if that is to be given and that happens to have the stamp of the court on it because it is a registrar of the court giving that advice. There are fundamental issues of the independence of the judiciary which have to be maintained. I think they are important issues. That is all I really want to say in an opening statement.

Ms HUNTERSMITH — I would not mind saying a bit, if I can, about our position in relation to regulation overall as the bar has members who provide ADR services as an adjunct to their profession as lawyers, in particular as barristers. We say that they are therefore in a special category of people who already are highly trained and highly qualified, and have obligations to their professional bodies, obligations, for example, of good character, honesty, educational requirements including things which overlap hugely with ADR such as ethics, professional practice, dealing with conflicts, and dealing with people in dispute all the time.

Again, they have to qualify to be at the bar. They do a bar readers' course where they go over subjects which involve ADR again. They are also required to comply with ongoing educational requirements. As well as that, if they want to practice mediation as part of their work as a barrister, they have to qualify under our scheme and we will talk about the details of that when we come to it. It does include such things as undertaking a course and ongoing educational requirements in addition to the specific categories they need to address as barristers generally.

We have huge obligations not only of initial training but also ongoing training as well, plus requirements of honesty and practice requirements under our code of ethics. We say barristers need to be recognised as a separate category of people providing ADR services if there is to be any national scheme, which we say is not necessary because at the moment, without cost to the consumer, they are having very highly qualified people undertaking mediation. They are not paying for their initial training, and they are not paying for their ongoing obligations of continuing legal education under their professional body.

They are not paying for the disciplinary processes under the *Legal Profession Act*. All this is free to the consumer, whereas if you implement a national scheme, you then have the costs associated with that, which are huge. They will have to be passed on and I will talk about some of the additional costs that are going to happen in relation to lawyers because we say a lot of them will not comply, at least initially, if such a scheme were to be implemented. There would be huge initial set-up costs as well as ongoing increases in costs. In any event, we say they should be recognised as a separate category. If there is to be a national scheme, which we say is entirely unnecessary and not beneficial to consumers, then they should be recognised as accredited under that scheme simply because they are accredited by the Victorian Bar.

We also say that there are fundamental problems with a nationally regulated scheme of the type that has been proposed by Tania Sourdin, because it flies in the face of the common practice. If you have problems with a particular area, if you want to make this a separate profession, you should do it in the way that is done with all other professions which is there may be training requirements prescribed. This is the type of thing that Laurie Boulle was talking about in his report. You have topics perhaps that need to be covered under training courses but you do not go further and regulate how it is that each mediation should be conducted on a micro-managed basis.

The CHAIR — I am a little bit lost on this. From the point of view of government, or from the point of view of the public, how do we protect consumers if we do not have an overarching regulatory framework?

Ms HUNTERSMITH — First of all — —

The CHAIR — How are you bracketing it off?

Ms HUNTERSMITH — Separate it, first of all, with lawyers. They have abundance of protection because we are covered by the *Legal Profession Act*. We are also covered by our professional body. We are required to comply with a huge list of requirements in our practices every day. Then you have the general public, and there are lots and lots of areas where ADR is provided and a lot of people are professionally qualified. Anybody who is accredited has to go through an accrediting system within each of the bodies that are in existence, be it LEADR, be it IAMA or whatever, and that system seems to be working.

This is what you have to look at as a regulator unless you have specific complaints about a particular area and then perhaps you deal with that particular area. But if there are sufficient complaints or sufficient concerns that the industry needs some sort of minimal training requirement that is one thing. But the scheme that is proposed is not just a minimal training requirement. It is to do with regulation at a micro-managed level of the processes themselves. That is where I have the fundamental objection to it, and the bar, apart from saying that lawyers ought to be treated separately because we are abundantly qualified and regulated — and it is impossible to serve two masters — you would have compliance with all their obligations as a lawyer plus compliance with all their obligations as a mediator or ADR provider and, bearing in mind it is an adjunct to their profession, it becomes impossible to comply with.

Mr NOLAN — I think the difficulty for the committee may be the generality of the expression 'dispute resolution' and then the regulation of it. When you are talking about consumer complaints, it must be remembered that most of the court-ordered mediations or indeed mediations pre-court order, because we deal with that where litigation has been issued but the party's solicitors choose to go to mediation earlier, the consumer is protected by their own lawyers at most of those mediations.

The lawyers choose the mediator and effectively the mediation is conducted in the presence of their lawyers, so we do not really have the issues associated with mediator conduct, which requires regulation. It might be a different matter using someone who wants to mediate a neighbourhood dispute without representation, and there might then be the imbalance that you are talking about. That is why we expressly did not make submissions about marginalised communities in our submissions because we did not feel competent to do so. The issue is that if you draft regulations — and this is the dilemma I think the committee must face — how do you incorporate regulations which apply to the unrepresented person with a dispute over a tree to the highly regulated and complex commercial matters where the parties are already in conflict and in litigation conflict where there is no ongoing relationship?

We highlight the ongoing relationship issue, which is probably the middle ground of the three I am speaking about, as the small business commissioner does, where there is a requirement that the parties enter into a mediation process or a dispute resolution process before they can issue in VCAT. Predominantly that is a special category and we highlight that because there is an ongoing relationship between the landlord and tenant in most of those — that is, that they have to get on. Both have invested a lot of money and time in the commercial enterprise — the landlord to get the rent and the tenant to make the business successful. They both want it to work, so that if those relationships are still going on at that time, it is important to try and achieve a continuation. So in that sense we support what has happened in that limited area, but they are the three ranges. Mark Brennan, the small business commissioner, has been very successful in what he has done by getting a panel of mediators — some with legal training, some with accounting training, some with business training. Not all of them are accredited. There are some members of the bar who are accredited through our system, and effectively that is working brilliantly. He has the major area.

The problem we see the committee faces is that if you are going to regulate, how are you going to draft regulation on a one-size-fits-all, when we have had an unstructured system which has developed for each area? We canvassed that issue. There was some debate on the dispute resolution committee on the gateway issue which seems to be very simple — have a webpage for all of those. You might be surprised that we did not support that because eventually we think that if you have a gateway, someone is going to have to establish the gateway; there will be a cost associated with it; there will be an application to join the gateway and then what are we going to do?

Are we going to have bodies accredited by someone? Who is going to accredit those bodies? Then we have the costs associated with the accreditation of those bodies, and then we have, using my example again, what do we do with the retired judges who provide a valuable resource who are not members of any professional association? There are only six or seven of them, but they perform an important commercial task to find that there is not a gateway for them open. So it is a cost issue; it is a regulation issue. We think once you start the regulations, you will find that they fall into the exceptional areas rather than the general areas.

Ms HUNTERSMITH — Can I expand on that as well? Tony raised there about the marginalised groups. You have got, for example, mediations with people who have been subject to sexual abuse or matters like that. There may be special requirements for people performing mediations in that area, and if there are particular areas that need addressing to protect community members, those particular areas should be addressed, but that does not require and should not require a huge cost to the community of a global national scheme which covers all areas where there is not any need for regulation and in fact there are very high services provided at no cost to the community in terms of training at the moment and ongoing supervision at the moment.

The CHAIR — We have about 17 minutes to go. Mr Nankivell and Mr Heaton, do you want to speak as well?

Mr NANKIVELL — I am just here in attendance. They are the three committee members.

The CHAIR — Fine.

Mr HEATON — I really wanted to just address a couple of the questions that we understood the committee was interested in.

The CHAIR — That is fine.

Mr HEATON — I think this regulation aspect is quite important.

The CHAIR — I am not in any way minimising it. I just wanted to plan. People have some questions, so maybe just keep to that time frame.

Ms HUNTERSMITH — I will keep it short then. I am really addressing the question of the national accreditation scheme in particular and the whole concept of regulation, so having said that, we feel there is no need for regulation at a national level or any one-size-fits-all regulation; secondly, having said if there is to be any, then lawyers, and in particular barristers, should be recognised as a category of already accepted at a national level because of the criteria they have to fulfil. I then wanted to talk about the actual conceptual issues with the type of national regulation that is at the moment proposed, and I started to talk about that insofar as it is highly prescriptive and, although there have been changes in a most recent draft, they are still highly prescriptive. For example, the code of practice goes for 15 pages.

There are lots of different codes of ethics around most of them, including government ones: For example, the VCAT one; for example, the Queensland Land and Resources Tribunal — each of them go somewhere between one and a half to four or five pages. It is not much. That is because any code of practice is meant to be an overall generalised code covering matters such as ethics and how do we know when to terminate, that sort of thing. It is not meant to be: this is how you conduct each session. Imagine if it was dictated by government to doctors and accountants: every time you meet a client you must first of all introduce yourself, then explain how the process of this meeting is going to work, then explain, for example, 'I am going to tell you now at what point and every possible time that it may arise that I might give you time out by yourself'. These types of things are micromanaging and not appropriate to regulation. They are appropriate for professional bodies to have their own codes of conduct which are generalised and consistent with what Professor Boulle said: simple, easy to implement, basic entry level — the types of things that can apply generically if you are to have national regulation. They are really the points that I wanted to get across in relation to regulation.

You then have the issue that in the current form the bar may not qualify as an RMAB, a mediator-accrediting body — for example, we do not have a formal review-type, debriefing process in place. We really do not have the power to refer complaints to a legislative body. I know that exemption has now been put in. We tell people they can go to the Legal Services Commissioner, which is where complaints against barristers are lodged. We do not actually have a formal referring power, so we would not qualify as an RMAB. There are various other provisions which make it almost impossible.

The next issue is in relation to our members. At the moment we have around 400 accredited mediators. Our requirements are different, bearing in mind that these people already have high skills training in related areas. The course requirement is a little shorter than under the national standards and there is no provision for people already accredited to be recognised as accredited. It would mean of the 400 there would be a huge number who would need to go and do another course — at what cost: to be away from their practices for a week and pay out the substantial

sum that it costs to do that — in a situation where it is not necessary to do that. Then there are the ongoing requirements of CLE that I have already talked about — that it is duplication of their obligations already, not just under their accreditation scheme but in relation to the bar generally, as a separate area. So we have major issues with it. The answer to the question as to whether the bar would be involved in the program in its current state is that it would be highly unlikely.

Mr HEATON — The committee did address some questions to us and I think was interested in the accreditation scheme of the Victorian Bar. I have downloaded what the requirements are and have copies of them. I do not propose to read those at the moment. What I might do, though, is perhaps endeavour to summarise in a very brief form what is required for accreditation for not an advanced mediator but to become just an accredited mediator with the bar, emphasising that this is a voluntary scheme. Essentially the barrister has to hold a practising certificate — that is no issue — and be a member of the Victorian Bar, and that is no issue. At the moment the training completed requires a minimum three-day approved course. We understand now that Professor Sourdin is proposing a minimum 38-hour course. Courses are now going up and up and up. If that means that the Victorian Bar, despite having conducted a number of mediations and had a lot of experience, would not qualify for the national scheme and that a barrister has to effectively take a week off work and redo over a number of days a course that they are already familiar with, we see that as significant impediment and cost and unnecessary. Then there is ongoing training.

Ms HUNTERSMITH — We require 10 points, which can be split up between performance of mediations and some CLE component. The new scheme provides for 25 hours.

Mr HEATON — Yes, whereas at the moment we are really referring to varying between 3 and 10 hours of CLE. Of course before the barrister can become an accredited mediator the barrister has to have been practising five years full time, so that they have to have gained experience of at least five years in advocacy before they can become an accredited mediator. Then the experience criteria for a barrister is to have obtained seven points in mediation as a mediator or a co-mediator. That is a minimum of seven points and that is effectively, in re-accreditation terms, two mediations over a two-year period. We have re-accreditation coming in in April next year, so this is our first experience with accreditation and re-accreditation. The other three points can be made up of representing a party at a mediation, observing at a mediation, presenting on mediation topics at CLE seminars and the like. It is getting the seven points which is the critical issue.

At the moment we have an issue where we have a number of people who are doing the basic course and then saying, 'But how do I get the experience to have conducted at least two and a bit mediations, to become accredited?'. In other words, the demand for mediation is less than the number of people who are wanting to be accredited to conduct mediations. That is an issue in respect of our accreditation standards that we are presently looking at. It may well be that, in terms that I think Tony and Danielle mentioned, if a national or state scheme is introduced on the basis of what Professor Sourdin is saying, then the bar is that much higher — that you have to go and do this. We see that as an inordinate cost and unnecessary so far as the bar in particular is concerned.

Ms HUNTERSMITH — Can I just add to that at this point? Michael has talked about the initial accreditation, but in order to maintain accreditation as well there is a requirement to perform mediations. There is a requirement in Tania Sourdin's drafts as well at a much higher level. That is a problem in concept as well. We are now coming up to our re-accreditation point for the first time with these new standards that we have at the bar, and whether this is a reasonable requirement or not has been raised.

When you think about other professions, it flies in the face of the usual practice. A requirement to practice, to continually practice, is a different concept from initial training. Once you have the skills, just because you are undertaking a certain number of mediations a year does not mean you are performing them well. Conversely, if you are not performing them in any given period because you may be busy with other stuff, particularly where it is an adjunct to your profession, that does not mean you cannot do them, assuming you are doing the ongoing education, you are still meeting with other mediators, you are participating in the discussion groups and that sort of thing, and going to seminars. It does not mean you cannot perform them, so why should you be struck off your accreditation just because you have not had the opportunity to get the work or you have been caught up in a case for a year or two? That pervades through Tania Sourdin's things as well. In any profession just because you have not performed that profession does not mean that you should therefore not be accredited any more. That, in concept, we have a problem with as well. We are actually in the process of reviewing this and looking at whether that requirement should even be in the bar things or be at a lower level than the Tania Sourdin draft.

Mr HEATON — One other issue that has cropped up with us in the document I have given you is the continual CLE training for a full day, which we have found to be not really compatible with the way we have been conducting seminars. We have had good turn-ups at seminars. They have gone for an hour. We have had a panel. We have had speakers on current topics for mediation, which has generated a lot of questions from the audience and comments from people from the audience who are dealing with these practical problems on a day-in, day-out basis — how to handle this, how to handle that, what do you do in this circumstance, what do you do in that circumstance — and they have been very successful. I think that has been very helpful in continuing legal education so far as mediation is concerned.

The regulation was the second question we were asked. It appears in the submission to the Victorian Law Reform Commission's civil justice review, as well as in our submissions to this committee, about, if I can use the term, 'one-size-fits-all', which has come here. Mediation is evolving at the moment. It is evolving in different ways with different tentacles. Once you start to say this is it, you tend to restrict the way it is moving. At the moment, with different organisations with their own accrediting processes, we are allowing for diversity, we are allowing for flexibility and we are in an expanding area which has not been contracted — in fact the very opposite. It is expanding and it is evolving in different ways with different approaches to mediation in the sense of it is not one mediation concept or one way of doing mediation. There are a number of different ways of doing mediations according to the circumstances. You may have an entirely different way of conducting family disputes and neighbourhood disputes compared to a commercial dispute or a personal injuries dispute.

The CHAIR — I am conscious that others might want to ask questions, but just on that, the 100 flowers is fine, but I presume you are saying they are not all necessarily good, that there are issues in there. Perhaps we could stop at that point. We have got another 5 minutes grace I think.

Mr NOLAN — I think I was limiting the time. I have got a mediation starting at 10.30. If I can leave by 10.15, I will be fine.

The CHAIR — Five past 10 I thought we might take it up to, if that is all right with the next witnesses.

Mr CLARK — If I could, Chair, I am sympathetic to a lot of the arguments that you are putting. I am keen to get more sort of factual details about what is going on at the moment. I know it is hard but, for example, can you give the committee your views as to what level of success mediation involving members of the bar is having at the moment, or what percentage of mediations which your members are involved in are successfully settling, and some indication about the costs involved, either an average cost figure or a range of cost figures for what it costs to have a mediation done by one of your members?

Mr NOLAN — The bar deliberately does not keep statistics, because they have the difficulty of what is success at mediation. Sometimes the success at mediation is the realisation that the matter has to be litigated, that the parties cannot agree, and therefore setting some timetable and limiting the issues eventually for trial. That said, we point to the statistics of the Supreme Court — about 4500 commercial matters are issued each year and only 120 or 130 of those end up in a judgement. It means that over 4000 matters settle through some form of dispute resolution, even if it be an entry of judgement and then negotiating the terms of payment. As a practising mediator, as well as the other part of my practice, I would estimate somewhere between two-thirds and three-quarters.

We had a meeting with Supreme Court judges about 10 years ago who said, 'The success rate has dropped from 75 per cent to 66 per cent; what is going wrong?'. The experienced mediators said, 'We do not think anything is going wrong; you have overestimated the likely success at mediation'. That has been compounded by the fact the Supreme Court does not give us any statistics as to success, if you use that word — that is, settlement — without trial after mediation or at mediation. There are just no statistics being kept about that. We addressed that in some detail. The cost — it depends on who you get. If you want a QC mediator, the costs for the mediator may well be $5000 or $6000 a day, but that goes down to the Magistrates' Court where there is a Magistrates' scheme and I think the barrister or the mediator bills the scheme for, I think, $500 or $600.

Ms HUNTERSMITH — It is certainly under $1000. I am not sure — —

Mr NOLAN — There are a whole range of schemes. Also, the bar runs voluntary mediation schemes. I am the chair of a committee in relation to sporting disputes between athletes and their sporting organisations, and the bar has 52 volunteer mediators who volunteer for the scheme — —

Ms HUNTERSMITH — And that is pro bono.

Mr NOLAN — On a pro bono basis. There are quite a few. I dare say if a solicitor rang up and said, ' We haven't got much money here, can you help us out?' that barrister-mediators would do what they always do and make sure that the matter got mediated. It depends on the type of mediation. Some of them are strictly 2 hours. The TAC and WorkCover matters are very short. On the other hand commercial litigation — I do not expect to get home to tea tonight; it is more likely to finish at 8 o'clock or 9 o'clock tonight depending on the commerciality of the parties. There is a whole range of costs. The Federal Court is regulating its matters. If it is a VCAT mediator, they have a fee which is set, and I am sorry that I have not got it with me, but there are a range of fees starting from a daily fee of $500 up to a range of fees for barristers in any event. I dare say if you wanted to get Jeff Sher you would have to pay substantially more than $5000.

Ms HUNTERSMITH — Can I add one statistic to that which is actually quite interesting. I do not have the exact figures but I recall reading that there is a huge difference between the compliance rate with the settlement that comes out of a mediation and court orders. If you add to that the saving to the community from matters that actually settle at mediation, I think the compliance rate is about 80 per cent, whereas if you go down to court orders they are often not complied with and there is a huge cost associated with trying — and trying — to enforce those.

Mr BROOKS — I have a very similar question to the one that was just asked. I suppose what I am looking for is whether there is a performance measurement tool that you have for the mediation scheme, given it is such a large concern, and whether or not that is the job of the bar or the courts? I am after your advice on that.

Mr NOLAN — I think it is neither. That is, the courts are dealing with people who are already in dispute. The courts are directing their attention and their reports to matters which tie up judges' time, and they are trying to get some type of mechanism to minimise judges' time, yet that is generally settlement rates. I have some debate as to whether the settlement rate is the correct measure, and we could debate that all day. There are a lot of people who enter into a settlement very unhappy about the process and remain unhappy about it for the whole of their lives. The issue of success at mediation is just so hard to measure, and I am not sure it is really appropriate to work out a success rate as to whether what actually sticks. What I can say, which Danielle was saying, is that all of the commercial disputes I have, if they result in a court order, have a default mechanism where the parties can enter an order if they do not comply. But the commitment of the time and energy generally shows that the parties do stick to their agreements rather than one being imposed upon them. Getting back to my other issue of judicial mediation, that is my other concern.

Ms HUNTERSMITH — Are you talking about performance within a mediation by a mediator?

Mr BROOKS — We have advice from other witnesses about them conducting research post-mediation, for example, showing people's satisfaction in the outcomes and comparing that to the courts.

Mr NOLAN — I have some issues as to how that can be done without breaching the confidentiality. The parties can probably breach the confidentiality, but if one goes to a mediation to say, 'What is said at the mediation is strictly confidential and will not be repeated anyway', it seems to me to be totally opposite to then have someone following up and saying, 'What do you think of the mediator, and what happened?' because inevitably they are going to tell the recipient of the information on what happened at the mediation; it has to happen. It could be, 'I got there and I wasn't happy because I had to tell Aunt Joan that the will was unfair, and Aunt Joan wasn't very happy about it'. How does that fit into a schedule associated with customer satisfaction?

Mr HEATON — The Office of the Mediation Adviser in relation to franchise disputes has a feedback form which the mediator is meant to give to the parties to complete and send back. It asks, 'Was it conducted this, that and the other thing?'. That may intrude depending on what they say on the confidentiality, but it is in general sorts of forms. But I think in answer to your question generally, I agree with Tony. It is two-thirds to three-quarters, and when you think of what that saves by virtue of avoiding a lengthy trial or litigation so far as the parties are concerned, it means that whether it is 50 per cent, 60 per cent or 70 per cent it is performing a very significant function so far as saving costs to the community, and in fact to government.

Mr NOLAN — If I may, the final point on that is that most of the mediation is conducted by Victorian barrister-mediators. There is legal representation. As it turns out market forces come into play. If a solicitor thinks you have done a bad job with the mediation, that is the last mediation you get from that firm.

Ms HUNTERSMITH — But also there are complaint mechanisms.

The CHAIR — Thank you very much for the huge amount of work you have put into the submission.

Mr NOLAN — Could we just apologise for being so late.

The CHAIR — That is okay. We have got it and that is the main thing. Thank you very much. Thank you also for your very generous contribution this morning. It has been very informative and really interesting. You will contacted by Kerryn or by Kate. No doubt there is a lot to discuss further to this, and I hope you will be open to that contact.

Mr NOLAN — If we can assist, we are only too pleased to do so.

Mr HEATON — We are open to further liaison.

The CHAIR — Thank you very much.

Witnesses withdrew.