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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 11 February 2008

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Ms M. Lothian, principal mediator, Victorian Civil and Administrative Tribunal.

The CHAIR — The committee welcomes Margaret Lothian, principal mediator with the Victorian Civil and Administrative Tribunal. Thank you very much for coming to talk to us this afternoon. As you know, these hearings are covered by parliamentary privilege, which means that whatever you say is protected under that act.

Hansard staff will be taking down our discussion and you will be sent a copy of that subsequently for you to make any slight alterations as you see fit. Thank you for your submission — the material we have seen and have gone through. We have some pre-prepared issues that we want to raise with you, but I leave it open to you to start up and talk about your work at VCAT in relation to the terms of reference.

Ms LOTHIAN — At VCAT we are proud of the way we run ADRs. We hope to get it right. We welcome complaints as well as the occasional bouquet. We do mediate and also undertake compulsory conferences, which are at the evaluative end of the mediation scale in quite a number of the lists. We do not do it in all the lists. For example, in residential tenancies it would not be unusual for a member to hear 20 or 30 cases in a day and a lot of those where only the landlord, for example, comes and says, 'I will have the bond please because the property has been trashed by the tenant'. It is all over and done with in 5 minutes or perhaps a bit longer depending on how many items are being claimed. In some of the lists, in my own home list, domestic building, we have a process where we send matters between $10 000 and $100 000 first to a mediation. Matters below $10 000 usually go first to a hearing if they are only going to take a day or less. Matters over $100 000 or which are complex usually go first to a directions hearing. There are a substantial number of matters that go to mediation in any one week and it would appear that around 70 per cent are settling at the moment. It means that there are a lot of people who are saved a substantial amount in the costs that they would otherwise incur.

It has been quite an interesting process to go through the discussion paper. There are a few things I want to mention to you. By the way, if you think at any stage that I am rabbiting on please feel free to stop me and I would be very happy to answer questions instead. The matters that are of most interest to me are, firstly, question 10(c) of the discussion paper: 'Should there be a central gateway, (for example, phone line or website) for accessing information about dispute resolution and ADR services? If a central gateway for ADR disputes is desirable, who should operate this service and what services should it provide?'. My view is anything that makes ADR more accessible and more known by the public is a good idea. It gives them the power of certainty that they are engaging in a process that is worthwhile and which is generally known. On the other hand I would not want a central gateway which is the only way into ADR. One of the mottos that I live by in mediation, the first one is, 'Above all do no harm'. When I am doing a mediation and when the VCAT mediators are doing a mediation, what we do not want to do is to reveal anything that might damage the parties if the matter does not settle and they later have to go on to a hearing. We do not want cats to be let out of bags. The other one is never give up. 'Never give up' can mean never give up for a particular mediator, but it can also mean that if one mediator has not succeeded in getting to a settlement perhaps another one will. Sometimes it is because if you hear the same story over and over from different sources sooner or later you give it a bit more credence. Yes, I am in favour of a central gateway; no, I am not in favour of the central gateway being the only way in.

The CHAIR — How do people find their way in if that is not the only way?

Ms LOTHIAN — At VCAT it is a bit different because they come to us because they have commenced proceedings. To go back to the domestic building list, my home list, they have come to us because they cannot resolve the dispute. Let us say we are looking at the position of an owner who might have a claim for $50 000 against a builder. The wheels have fallen off to the point where the builder has failed to complete the job and the bathroom leaks. Let us be realistic about this — the balcony leaks. Something like half of all the matters that go to the warranty insurers either involve leaking in balconies or leaking in terraces. The builder is upset because he — it is usually a man — has not been paid the last progress payment or the last couple of progress payments and possibly also there is a dispute about some variations. There is a potential there for a very expensive dispute. It might go, depending on how many variations there are and whether anyone else gets involved, for five days or even 10 days. The capacity for toxic costs to take over is always there — costs that will outstrip the value of the dispute. If we can settle that on the first occasion they are before the tribunal that is fantastic, and sometimes we do that.

Deputy President Aird is in charge of the domestic building list and she is a very hands-on administrator as well as being the person who is the chief judicial person for want of a better description in the domestic building list. An example is that recently there was a directions hearing before her for a matter that was over $100 000 and it had aspects of complexity about it. She picked up that there was at least one person there who was very sick. She sent it out to me that morning and it happened that I was available. I found out that both parties were very ill and we

managed to settle it on the day. Flexibility is a useful thing in alternative dispute resolution — and I think I have managed to completely forget what your question was.

The CHAIR — We were talking about the central gateway and you were saying that is a good thing but not the only way, and I was asking about what were some of those other ways.

Ms LOTHIAN — At VCAT we have got other ways and then we decide whether they need to go to alternative dispute resolution.

The other things that I would like to talk to you about — we will stick to the pink tagged items and avoid the purple ones. There is a question that is part of question 45 concerning the disadvantages of the current Victorian system of civil ADR regulation. I have said there is the potential for harm in the unregulated environment — intellectually there is the potential for harm — but I am unaware of actual evidence of the harm. There are instances where there is a doubling up. For example, it is not unusual for matters which go to the Equal Opportunity Commission to come along to VCAT and then for the member — at the moment Judge Harbison, who is in charge of that list to say — 'I know that you have been to mediation, but I think you would benefit from another one. 'What do you think, complainant?' and 'What do you think, respondent?'. Obviously if there is strident objection she will take that into account and might not send it back to another ADR session.

Having heard it from one source and hearing it from another source and also having thought through the dispute more, having had the time to realise what the impact of being before the tribunal might be, it is not unusual for those sorts of matters to have mediation again and to settle on the second occasion. This is not to underestimate the value of the ADR they have gone through at the Equal Opportunity Commission because I am sure that without that there would be less that would settle on the first occasion of an ADR at VCAT. Imposing rigour on the process is very important.

Question 55 in the discussion paper deals with confidentiality and admissibility of ADR processes. As a person who conducts mediations, as a person who conducts compulsory conferences, I am very aware of the advantage for the mediation practitioner in being able to say to the parties, 'What you are saying to me goes no further. No hint of what you say to me will be passed on to the other side unless you tell me I can'. The problem is that unless we can provide that sort of assurance to parties to a dispute they are likely to be circumspect in what they will tell us. They are likely to be circumspect in the sorts of approaches, the sorts of offers, they will make to the other side.

To take an example that has nothing to do with VCAT but has to do with a family member of mine, a number of years ago one of my cousins lost a baby. There was a difficult pregnancy, the baby was very large and she had very wide shoulders. She was stuck and she was in transition for something like an hour. The baby died at 10 weeks and the mother's life was saved, but only just. About six months after the babe died the obstetrician who had not delivered the baby but who had been looking after the mother asked to speak to the parents. One of the awful jobs of being the lawyer in the family is that I sometimes get invited to go along to those sorts of things. The fact that the obstetrician could say, 'I don't think I did anything wrong but I am so terribly sorry that it happened to you' made all the difference. It meant that they made the decision that they were not going to sue him, and it also meant that their lives could come back together again.

There has since been an amendment to the Wrongs Act which allows doctors to apologise — it does not say specifically doctors — but the capacity to say things which will never be repeated to anybody else is important. Sure, there will be circumstances where perhaps a mediator might find out that there is a crime about to be committed or that somebody is hiding a crime, and in those circumstances it is important to be able to prevent further harm from happening, but we should be very careful about moving away from confidentiality.

Question 59(a) was whether there should be a government-approved panel or a register of ADR providers? I am not sure about that one. We have panels at VCAT, so we advertise every few years and we are due to do that again very soon. We will spill the mediators and advertise because we are looking for the best ones that are available to us. Given that accreditation is a new topic, the accreditation which has been offered by NADRAC is an issue that is at the front of everybody's minds at the moment. It is something that we are considering. We are considering whether VCAT should be an accrediting authority so that we can accredit those of our people who we want to engage as mediators.

I would be loath to say that only government-approved mediators can mediate, because there will be occasions where a wise person within a community, a minister of religion, or an experienced family member will be the

person who will allow the parties to have a rush of common sense and get to a solution that suits them. On the other hand it is useful for the public to be able to say, 'I know this person is okay because they are accredited', and perhaps the accreditation should be voluntary accreditation using something like the NADRAC scheme, or using the NADRAC scheme. They are the things that are of main interest to me. Are there other things that you want to ask me about?

The CHAIR — Yes, perhaps starting more broadly, you indicate in your submission that some of the VCAT lists have high success rates with mediation, and I think you list antidiscrimination as an example. What are the kinds of disputes that are not that amenable to success?

Ms LOTHIAN — Perhaps I should say that some disputes do not justify the time and the trouble that is spent in mediation. We were talking about residential tenancies before. There are some residential tenancy matters that do need mediation — for example, if you have got a residential tenancy dispute where perhaps a family member has let a property to another family member, and it is almost more of a family law dispute than a residential tenancy dispute. That might not be amenable to mediation.

Another one is if you have got vast numbers of people in planning disputes — lots and lots of people in planning disputes, which never, of course, happens — —

If the time it will take to mediate the matter is going to outweigh the benefit to the players of having it mediated, then I do not think that we should nail our colours to the mast and say everything has to be mediated. On the other hand there are opportunities for many disputes to get an outcome, which is not necessarily one that you would achieve if it went to a hearing and which enables the parties to get something which is much better than the outcome that they would get before the tribunal. An example of that was mentioned in our annual report last year, and that was the *Islamic Council of Victoria v. Catch the Fire Ministries Inc*., which was an antidiscrimination matter under the Racial and Religious Tolerance Act. We really provided the venue and lots of cups of coffee and allowed the parties to do it themselves. It did not need an obstetrician, it did not need a vet. All it needed was a good environment, and they sorted it out themselves. The result, which I can tell you about, because it was public, was the statement that they made at the end of the mediation, which added, even if just to a tiny degree, to the store of wisdom and kindness in the community.

So it is probably a matter of looking at the individual dispute and saying, 'Is this going to benefit the parties? Will it be too expensive for them to come to mediation?'. We assume that every time parties walk in the door with a lawyer it is going to cost them $1000, and if it is going to be for the whole day it will cost significantly more than that.

Mr CLARK — You may or may not have it front of mind, but one of our two terms of reference is:

> whether a form of government regulation of alternative dispute resolution providers is appropriate or feasible …

You have made a number of observations that are highly relevant to that question, but rather than put words in your mouth, could I ask what your personal response would be to that question that we have been asked to report on?

Ms LOTHIAN — How long is a piece of string? Before I worked for the Domestic Building Tribunal, as it then was, which became one of the tribunals under the VCAT umbrella, I spent a lot of time working for the Royal Australian Institute of Architects, and there are a couple of ways of looking at that sort of legislation. One is to say, like the doctors, you cannot practise medicine unless you are registered. The other one is to say, like the architects, you can do everything that an architect does, but you cannot call yourself an architect unless you are registered. My view is that if the term 'accredited mediator' could be supported by legislation, that would be a very good thing indeed. I think it might be too costly and too difficult to prevent people from practising the skills of mediation by legislation, and we certainly do not want the wise person in the community to suddenly find themselves tripped up. Is that what you were looking for?

Mr CLARK — That was a good answer to the question.

Mr BROOKS — I am just seeking some clarification on a point. On some lists at VCAT is mediation mandatory or always the starting point?

Ms LOTHIAN — I suppose when there is an order that somebody go to mediation, yes, it is mandatory. Is it automatic? To some degree, but let us take the example of, again, my home — that is, domestic building. If we

have a matter that is between $10 000 and $100 000, the first thing that the parties will get is a notice saying to come to mediation on such and such a date, and the date is usually within about six weeks of the application being lodged at VCAT. A lot of those are all over and done with within six weeks, so that keeps our figures looking wonderful, and it also provides a good service to the people who come there.

If we get a letter from somebody who says, 'We don't believe this will work because of the following reasons', then occasionally there will be a response from the member who looks at the letter, saying, 'We still think it would be worth while to take the matter to mediation, but if you really think that there is no chance, you are welcome to seek a directions hearing'. So do we force people to go to mediation? Yes, but they can seek a way out of it.

Mr BROOKS — The reason I asked is that we had evidence earlier from a consumer law group, and they raised a concern that — I think it was the consumer credit list, whichever list deals with consumer credit — —

Ms LOTHIAN — Sure.

Mr BROOKS — They raised an example where there were a number of cases of a particular payday lender causing problems for their customers and complaints were being lodged. Satisfactory mediation is being held in each of those cases, so the actual complainant was satisfied, but the consumer law group was raising the concern that the systemic or original problem with the practices of that organisation had not been dealt with, because they had not been able to take it further. I was wondering if you had a response to that and how you would deal with those systemic issues where you might see a number of cases, maybe from the same individuals or the same companies.

Ms LOTHIAN — Sure. Deputy President Cate McKenzie is, I am fairly sure, the person in charge of that list. I cannot speak for her, but if it were a domestic building matter that came to me, my first concern would be for the parties, rather than wanting to make a decision in that area. So although it might be in the public interest that the applicant go to a hearing instead of settling the matter at mediation, my interest is with that particular applicant rather than with the public interest.

I do not think that any particular applicant should be forced on to a hearing if they are not willing to do it. Reading between the lines, what is happening there is that those who complain are getting the justice that everybody should be getting. I do not know how you get around that.

Mr BROOKS — Just to follow up, we heard from the external dispute resolution people, the industry based ombudsman, if you like, and part of their brief is that they have to report on systemic issues.

Ms LOTHIAN — There are some lists where that happens. For example in the domestic building list, when there is outrageous behaviour by a building practitioner it can be reported to the building practitioners board. There have been a number of occasions where I have done that, but only in matters where it has gone to a hearing.

I understand that the building practitioners board also keep their eye out for what happens in the list, and so if they see that the She'll be Right building company is appearing time after time, they take an interest in She'll be Right and perhaps go and have a chat with them.

Mr O'DONOHUE — Just as a general comment, we have heard from lots of groups this afternoon, including yourself, about the success rates of mediation and the benefits of it, and we all agree with that, but do you think there is a risk that there is a push to settle before a complainant — or a respondent, for that matter — feels they are ready, and that they are pushed to settle, which they then do and perhaps regret that decision later on? With any litigation I suppose there is often regret, but do you think there is ever a risk that the system pushes settlement at the expense of the respondent?

Ms LOTHIAN — Either party? Absolutely. It is something that I hope does not occur among the mediators at VCAT. It is in breach of our ethical conditions for the mediators at VCAT — and they are available on our website — and I spend a lot of time encouraging the VCAT mediators to emphasise to the parties that the decision is theirs.

So the emphasis is: 'I am controlling the process; you are controlling the outcome. Think about how you will feel three months down the track. Will you feel pleased that the thing is over and done with or will it rankle? If it is going to rankle, then don't settle'. And further down the line — this is part of my opening spiel — further into the

mediation it is not unusual for people to say, 'Now, how are you going to feel about that? Is it going to work for you? Is it something that you can live with later on?'.

Mr O'DONOHUE — And from my own personal experience as a former practitioner, that was my experience of VCAT too. But I have a sense that some other groups or organisations are driven by the statistics to settle, perhaps at the expense of letting the matter take its course as the parties would want.

Ms LOTHIAN — It is a fine line. As mediators we are pretty proud of getting the settlements. On those occasions when it is a hard case and it is not going to settle without you, and it does settle, you feel pretty good. The fine line is between making sure that it is the party's own decision but still pressing them hard enough to get them to the point where they will make a decision. I am not interested in mediators who sit on the fence and let parties off too early. Our job starts when the parties say they cannot settle.

The CHAIR — Which brings me to the issue I wanted to ask you about; it neatly segues into this: the issue of people handling disputes themselves. Are we doing enough as a system to encourage people, support them, educate them in resolving disputes prior to their coming under some sort of official or professional arena?

Ms LOTHIAN — The self-represented litigants? Is that what we are talking about?

The CHAIR — No.

Ms LOTHIAN — Are we talking about the dispute that settles before they even — —

The CHAIR — The community empowerment, so that people are capable of sorting out things before they even come to the attention of third parties.

Ms LOTHIAN — I think the more people know about how to negotiate, the better. It is one of those situations where there cannot be too much education about how to sort out your own problem.

The CHAIR — Are there organised ways of trying to strengthen communities to do this, that you know of?

Ms LOTHIAN — There probably are ways. There are probably people who are doing that, but I am not aware of it. There are some initiatives. For example, are you familiar with the mediation competition that the Law Institute has been running in schools over the years?

The CHAIR — Tell us.

Ms LOTHIAN — It is called SCRAM. I am not absolutely sure what that acronym is.

Mr FOLEY — Schools — —

Ms LOTHIAN — Yes, 'schools' is obviously the first word. I have had the joy of being one of the adjudicators for SCRAM over the years. I have not heard from them for the last couple of years, so it maybe that SCRAM has gone and disappeared — —

The CHAIR — It has scrammed.

Ms LOTHIAN — Yes, it has scrammed. The advantage of that is teaching kids about how to mediate when they are in around about the year 9–year 10 level. Any information which enables people to separate the dispute from the personality is worth while. Although it is nominally about teaching them how to mediate, really it is about saying, 'Sure you are cross with Josephine about this, but let us see it from Josephine's point of view'. So enabling kids to learn how to see things from the other point of view, about being able to put their needs and desires forward without it being a big fight, is useful. I understand that there are mediators who as part of their marketing go out and talk to service groups and interest groups within the community, and that is useful. I can imagine that if the Department of Justice has education officers, this could be a wonderful initiative for them as well.

The CHAIR — You also talk in your submission — this is on marginalised communities; that area — or your submission suggests, that ADR practitioners should be drawn from the diversity of communities in being reflective of the broader Victorian community. What happens at VCAT?

Ms LOTHIAN — I suppose the problem is that we have mediators who are drawn from the professions where they are going to mediate. We have a number of builders, engineers and architects who mediate in domestic building. We have at least one doctor and a couple of psychologists.

The CHAIR — They are professions. What about ethnic backgrounds, for example, or linguistic backgrounds?

Ms LOTHIAN — We have people from ethnic and linguistic backgrounds within those groups, so when mediators are appointed at VCAT they always have mediation training, they usually have substantial experience in mediation generally, they usually have substantial experience in the list or lists that they are going to mediate in, and then hopefully they will be from diverse backgrounds, but there is going to be a limit to how diverse those backgrounds are, given the other requirements. It is certainly something that we will take into account next time.

The CHAIR — Okay.

Mr FOLEY — Does that have a particular emphasis in the antidiscrimination list? That diversity, it seems to me, is the obvious point of reference.

Mr O'DONOHUE — If I may add, the deputy president you mentioned before has a unique perspective on that issue perhaps.

Ms LOTHIAN — Because she is blind?

Mr O'DONOHUE — Yes.

Ms LOTHIAN — Yes, Deputy President Cate McKenzie. I could not say that we have a great cultural diversity at the moment.

A lot of the VCAT mediators heard Maria Dimopoulos speak last year. Have you come across her? A wonderful woman. Maria is an expert in issues of cultural diversity and she has taught for the Judicial College of Victoria. She also came along to VCAT to teach the mediators and the members, at my request, last year. She is a very interesting person, and a fact that she came up with, that made me sit up and take notice, was that Australia is the second most culturally diverse country on a per head basis in the world. The most culturally diverse is Israel. It is an issue that we had to be aware of.

We do not yet have any Vietnamese mediators at VCAT. We certainly do not have any Horn of Africa mediators, although they are probably less well represented amongst the ADR and domestic building list disputes.

The CHAIR — But is there a strategy in place, or a sense of policy around this, or is the feeling that this will happen of itself through history and osmosis? I must say, when you arrive at an advanced old age I do not see it happening as quickly as it ought to be happening.

Ms LOTHIAN — Sure, it is something that we will be taking into account.

Mr CLARK — Could I put to you a comment on a couple of propositions that have been put to us previously about mediation services run by courts or tribunals. The first is that judges and tribunal members are specialists in adjudication through judicial process, and those skills are not necessarily the skills of mediators, leaving aside people who have got specialist mediation training such as yourself or registrars. But the argument goes that it does not make a lot of sense to divert judges or tribunal members from that adjudication role to a mediation role because they do not have the skill set to do it necessarily and there is a loss of adjudication time.

The second proposition that has been put is what I think has been referred to as a water cooler problem with judicial and tribunal mediation, where regardless of the rules about confidentiality, there tends to be a bit of an informal chitchat amongst judges, registrars, tribunal members and/or mediators, and that that may undermine the confidence of some parties in the process, or at the very least there need to be precautions put in place to make sure it does not happen. Would you care to respond to those two points?

Ms LOTHIAN — Taking the water cooler one first, I certainly hope that that does not happen, and it would be an extraordinarily serious breach of our code of ethics. As far as judges and tribunal members mediating is concerned, from my experience I am thinking of a particular tribunal member who is a wonderful member. He is

a considered, scholarly and rigorous member who is very good at hearing and determining cases, and we would not let that person near a compulsory conference or a mediation if he was the last one available. There are some mediators who would not be interested in hearing matters.

If there is a capacity and an interest in both determining matters and mediating, both of those skills inform the other one — for example, a member who is good at mediation tends to be even better than a normal member with unrepresented parties, particularly if you have got an unrepresented party on one side and a represented party on the other one. The capacity to know when to call the appropriate adjournment is something else that members who mediate pick up. 'Ah, so you think you would like to talk. Would you like to talk now? I am out of here.' Sometimes in those circumstances they settle.

My belief is that while there are people who are specialists in one area or another, it does not necessarily follow that it is a waste of time to use people in both roles, particularly when it is a compulsory conference, the compulsory conferences being the evaluative end of the scale. A person who is a member can say authoritatively to a party in a private session, 'I think you are going to have a problem with this because of X, Y and Z. If it was before me, given the facts that I have heard today, I think you may be going down on that point, that point and that one'. My view is: not such a problem.

The CHAIR — We are out of time. There are, nonetheless, other questions which we will not pursue.

Ms LOTHIAN — If it is convenient for you I am happy to go on.

The CHAIR — Is it all right if we ask just one more on the training because I think that is probably important? It is just about the training performance and competency standards for mediators at VCAT. What kinds of training do people get?

Ms LOTHIAN — When they come to us we expect that they have at least done a Bond or a LEADR course, the four-day course. After that they will need to have had substantial experience. Most of the people who were appointed would have done a minimum of 200 to 300 mediations — that was about four years ago. We knocked back some embarrassingly good mediators on the last occasion. We had something like 90 applications. We provide two after-work seminars each year for mediators, and we also have four lunchtime sessions which mediators are not obliged to attend, although there is a tendency for quite a few of them to come. The purpose of the lunchtime sessions is to enable one of the mediators to lead a discussion in a particular area — for example, the basics of the mediator's introduction or crunching the deal, those sorts of things; or the party who becomes obstreperous during the course of the mediation — those kinds of topics. The purpose is not just to train them but also to make sure they know each other, because sometimes the most important resource that mediators have is each other — to be able to talk to each other when they have got a problem and to be able to debrief to each other. Debriefing is important.

The CHAIR — You have a code of conduct, do you not?

Ms LOTHIAN — Yes.

The CHAIR — How do you ensure compliance?

Ms LOTHIAN — We ask the mediators to undertake to comply with the code of conduct. They are required to comply with the code of conduct, and we take any complaints that we get very seriously.

Mr CLARK — Can I just clarify, you recall previously I asked about the water cooler issue and you said no, that would be a breach of ethics. So presumably, just to get this on the record, your debriefing sessions would have to be sessions that were anonymous or non-disclosing of the details of any particular mediation.

Ms LOTHIAN — Yes.

Mr CLARK — How could you do a debrief and say, 'I was driven mad by this party in this particular mediation that I have done', without others working out which party and which mediation it was that you were talking about in the debrief session?

Ms LOTHIAN — A debrief that I did recently with one of our mediators was where a party had abused her and she told me in general terms what had happened. She used some specific words about what had happened,

but I did not ask what the mediation was and would not dream of looking it up and would not repeat it to anybody else.

Mr CLARK — The context would be you could have that conversation without there being a risk that you would know which mediation she was talking about?

Ms LOTHIAN — If there was any possibility that it might be one that I would hear myself, she could not debrief to me.

The CHAIR — All right, thank you very much for coming along and being so generous with your time.

Ms LOTHIAN — Thank you for the opportunity.

The CHAIR — As I indicated earlier, you will get a copy of the Hansard transcript, and I hope you do not mind if Kerryn or Kate gives you a call maybe to follow up any matters.

Ms LOTHIAN — That would be fine.

Committee adjourned.