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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 11 February 2008

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Mr M. Brennan, small business commissioner, Office of the Victorian Small Business Commissioner.

The CHAIR — Welcome, Mr Brennan. Thank you very much for coming this afternoon. I am required to tell you that this committee operates under the Parliamentary Committees Act and therefore anything that you say is subject to parliamentary privilege. Hansard is taking a record of our discussion and you will be sent a copy of that; you can make any changes and send it back to us. We will leave it open to you to talk to us about your work as it relates to the terms of reference.

Mr BRENNAN — Thanks for the opportunity of meeting with you. What I was going to do initially is give you a bit of a run-down on what our office is about and then I am happy to take questions. It is your inquiry; rather than me tell you what we are about, you can ask me what it is about from the point of view of the relevance of what your inquiry is about.

The Office of the Victorian Small Business Commissioner was set up on 1 May 2003. It is set up under its own legislation, the Small Business Commissioner Act, and I am very grateful to the Parliament for passing this piece of legislation. It is one of the best acts that you could find on the statute book. It is only 16 sections long, it is very easy to read, it is drafted in generous language and it has been able to give us considerable scope as to how we will operate in terms of our functions and powers. The Small Business Commissioner Act was the establishing piece of legislation. We have broad functions there.

Of relevance to your inquiry, we have a function of mediating complaints about what are called 'unfair market practices'. We interpret that function as really being us mediating any business-to-business dispute or any business-to-government dispute — a dispute that business might have with a government agency. We have looked at investigating and/or mediating those sorts of disputes.

We also have functions under two other specific pieces of legislation — the Retail Leases Act, which, in contrast to the Small Business Commissioner Act, is more complex, and we have got specific functions there, again, of relevance to your inquiry, to mediate disputes arising in relation to retail leases. In terms of retail leases, think of shopping centres and the tenants in shopping centres or strip shopping centres and the tenants there. So we have got a specific function there.

We also have a specific function, since 1 December 2006, under the Owner Drivers and Forestry Contractors Act, and again we mediate disputes between hirers and contractors. To put it into context, you could think there of the big hirers like Toll or Patrick, and the people who drive for them, the contractors who might have mortgaged their house to buy a truck and drive for the bigger hirers.

In respect of the owner drivers legislation and the Retail Leases Act, the process that happens is slightly different to that under the Small Business Commissioner Act — that is, if we hold a mediation of the dispute under those two specific pieces of legislation and the mediation fails, I am required to give a certificate to the parties, who can then take the matter further to VCAT. The parties cannot go to VCAT under the Retail Leases Act or the Owner Drivers Act without first coming for mediation at my office. If we mediate it successfully, it is all over; if we mediate and it is unsuccessful, then they can have the matter determined by VCAT according to law.

The exception is that if the relief the parties are seeking is in the nature of an injunction, they can go directly to VCAT, they do not have to come through the mediation process. If they are particularly urgent sort of matters, they are taken directly to VCAT for an injunction. Under the Small Business Commissioner Act there is no equivalent certificate procedure. Our role there is to mediate the disputes. If they are successful, fine; if they are unsuccessful, the parties have got other avenues they might consider, such as going through the traditional court or tribunal processes to seek any remedy which they might want.

Since commencing operation on 1 May 2003 up until the end of January we have had 4015 matters referred to our office. Our success rate in mediation over that period has been 74.7 per cent. More recently, over the last couple of years, the success rate has been up closer to 80 per cent. Of those matters, 27.3 per cent were settled prior to formal mediation.

The process, under the legislation, is that when a party lodges a dispute with us, the way we handle the matter is to seek to resolve it before it goes to mediation. Investigation officers within our office under the owner drivers and the retail leases legislation were required to give what is called 'preliminary assistance', but we also do it under the

Small Business Commissioner Act as an administrative thing. Our officers try to resolve the matter, and they have resolved 27 per cent of matters before they actually got to mediation.

I think a key factor for our success is the way we have gone about that, and that is that we have an approach where we are cooperative and consultative. We do not go to the respondent, when we get an application of someone alleging that the other party has done something wrong — whether it be a retail lease matter or a business-to-business dispute or a business-to-government dispute — we do not go accusing them, saying, 'We have got this thing about you'.

The CHAIR — Can you step us through an example, a case study?

Mr BRENNAN — Yes, I can. I will give one under the Small Business Commissioner Act. The particular applicant was a 62-year-old builder — a career builder, a husband and wife team, really a sole tradesperson himself. He was having difficulty with one of the major insurance companies over a builders' warranty insurance arrangement. The local representative of the insurance company said to him, 'Listen, mate, if you have got a problem with us, why don't you just sue us?'. Here is your 62-year-old one-man show being told, 'If you want to resolve your problem with us, take us to court and we will resolve it there'.

He complained to us about that. He complained about the matters in terms of it being an unfair business practice. I wrote to the CEO of the insurance company, which was headquartered in Sydney. I wrote to the CEO saying, 'Look, we have been told this about your company; that you have said to this fellow that he ought to sue you if he has got problems about his insurance. I am just making preliminary inquiries about it at the moment. This is what he said. I would like to have you cooperate with me, consult with me, about seeing if we can resolve what this matter is all about'. In other words, 'I want to hear your side of the story before I form any sorts of views about what ought to happen'. I say at that point, 'I suggest that perhaps coming to mediation might be the best way of resolving matters of this nature'.

The response I got from the CEO of the insurance company was to say that it was the company policy to go through traditional court and tribunal processes when they had a dispute. This is quite a major insurance company and that was its policy, that it resolve matters according to law in the courts or the tribunals. It was not its policy to go to, what he called, third-party mediations. That is at page 1 of his response. You turn over to page 2 and he said, 'However, in this case I am prepared to make an exception. We will come to mediation'.

I think he may have had a look at our legislation in the meantime and found that we can actually investigate as well as mediate. We can prepare a report, which might be tabled in the Parliament, and a report might be adverse if someone has not been very cooperative with our investigation. I think that was picked up by the CEO without us having to spell that out. They came to mediation and they resolved the thing successfully in relation to some instalment premium arrangements, which was basically the crux of it.

That was the type of matter where we found a couple of things: one is that the CEOs of organisations are not necessarily aware of what is happening further down the line. Major companies are like bureaucracies; they are pyramid in shape. You have the CEO and the board at the top and you have got all these other people down the middle. Their reporting systems are usually reporting according to cost centres. In this case the cost centre in Melbourne was probably doing well. The guy running the Melbourne offices was doing a good job and they were making profits, and the CEO and the board never inquired any further as to how that was coming about. They just got favourable reports about the bottom line and everything being all right there. But when these matters are drawn to their attention, and in this case, the CEO apprehended the statement by his Melbourne representative as not properly reflecting the values of the organisation — in other words, the guy did say, 'If you do not like it, sue us' — I think the CEO interpreted that as being unreflective of their values. He did something about it. We have found that to be almost a common eventuality. The CEOs do not know, but when they do find out that there is behaviour in an unacceptable way, they will do something about it.

This adds to why we settle so many matters before they even get to mediation, because it is the first that the key decision-maker has actually heard of the matter. If they had heard of some sort of dispute it has been coloured, and here they are hearing it as to how it is actually reflecting on their business.

The CHAIR — If I can just ask you, the 62-year-old builder, how did he know about you?

Mr BRENNAN — That is a good question. I think he had a family member in government— I think that was it. It was certainly not through any industry or professional association or a chamber of commerce.

The CHAIR — There would be the odd person out there who would not know someone in government.

Mr BRENNAN — I guess so.

The CHAIR — I suppose what is behind that question is, how widely are you known?

Mr BRENNAN — That is a good question. In our first couple of months of operation we did do some proactive advertising. When we first set up we had some adverts in the paper and we had done radio advertisements and the like. My own personal view of that is that I think we got a zero return. We spent about $270 000 on advertising and marketing, and I think for the dollars we spent specifically, directly on advertising, we got virtually nothing back out of it. The reason for that was that we were still skeleton; we were not there immediately. If I had it over, it is probably the only thing I would do differently in terms of establishing myself — I would not have thrown money at advertising.

This happened in June 2003. We have scarcely spent any money on direct advertising since. What we do, rather, is we engage the media, we engage professional and industry associations and local councils to write articles about us. We brief them, we tell them about things we are doing. We have found that there has been a general media and association professional bodies interest in what our organisation is all about. I would continue to do that.

When you look at it, our first full year in 2003–04 — because we started in May 2003, but leaving out May and June; so from July 2003 to June 2004 — we had 543 matters referred to us. Last financial year we had 1003 referred to us. As we have been operating, our reputation has spread. That is about an 84 per cent increase in matters from the first year to last year.

The primary users of services — the Law Institute of Victoria, the Real Estate Institute of Victoria, the Shopping Centre Council, the Property Council — have all been very good advocates for us in terms of spreading the word that there is this service available, and it is a good alternative to the traditional court and tribunal processes.

The CHAIR — Just coming back to your example, if the pre-mediation process had not happened there in that instance and it had gone further, with your success rate of over 75 per cent, roughly, what is it that you do that is good?

Mr BRENNAN — I will run through a few things. Can I take the question a bit more broadly?

The CHAIR — Yes.

Mr BRENNAN — I guess we are talking about here what I would see as the positive factors of the impact that our office has had. Firstly, I would say the legislative framework has been good. A really important thing about that is that we are not supervised by any court or tribunal. I was appointed by the Governor in Council under the Small Business Commissioner Act. I have functions where I give a certificate where people might then go on to VCAT, but I am not supervised by VCAT or by any court. I think that has been perceived by the business community as a degree of independence — that I am out there and I am different. I think that has been important.

An example I give in that regard is that I think people have seen us as a place where you can go and get a dispute looked at without declaring World War III on the other party. When you go to VCAT or to a court, you are suing someone — that is how people see it. They are litigating, so an antagonism can develop in a relationship. They probably come to our office with more of an attitude of, 'Let us resolve this. We are not in court yet. We are not at each other's throats'.

A second factor is our administrative processes of being cooperative and consultative and trying to settle it beforehand. I think that has been an important thing. These things have led to the credibility of our office. That has been absolutely crucial to the success. In fact, in the very early days I spent more time speaking and addressing big business groups than small business groups.

Firstly, to understand what big business is all about, and secondly, I wanted to assure big business that we were going to be cooperative and that we would not ambush anybody. We are not in the business of, 'I caught you out'; we are in the business of trying to make sure that people can resolve differences they have got and get on with

doing business with each other. The nature of our mediations in the business of commercial mediation is very much maintaining a relationship where the parties can continue to get on and do business with each other. People need each other — the owner-drivers, for example. The big hirers actually need people driving trucks, and of course the contractors need to have the work from the hirers.

Another important success factor is the quality of our mediators, and the fact that we have been able to deliver low-cost mediation. When the office was set up, the government committed to low-cost and speedy resolution of disputes. That was a bit of a challenge in itself — to think about what is 'low cost'. My view was that perhaps the people from the Department of Treasury and Finance — and I hope no-one from there is here — would say, '$800 a day is low cost' - not for small business. So I thought, 'I am not going to be charging people something like that if we are going to have a low-cost commitment to meet'. So we hit upon a fee initially, where the parties paid $61 each. Where do they get that from? At the time VCAT were paying their mediators $622 a session, so I thought if the parties paid $61 each, that totals $122, then I would subsidise the mediators $400. Sorry; they were paying $522, not $622. So we subsidised mediations by $400, and the parties paid $61 each, and that was definitely low cost. It also gave me some ammunition with the Department of Treasury officials, where I think they believed that I had arrived at $61 by some economic analysis, because the $1 was significant, I think!

Mr FOLEY — Your secret is out now.

Mr BRENNAN — Don't tell anyone. Over a period of time they have moved the cost up, and more recently — from 1 January — the parties are now contributing $195. That is a movement from $95 each to $195. That was in the wake of a report done for the government by KPMG. They did an evaluation and they felt that we should be charging more, and we accepted that. Nevertheless, it is still low cost and there is still a subsidising. What our office does, is we subsidise it by $310 now. So, low cost; the quality of mediators — that was important. Most of our mediators in private practice would charge $2000 to $6000 a day, but a condition of doing mediations for us is that from now — from 1 January — the mediators receive $700 for a mediation; $195 is paid by the parties, $310 by us.

That has worked very successfully, because 95 people have expressed interest in being on our mediation panel. Twelve mediators do about 90 per cent of the work, and they are the ones responsible for this high mediation success rate. Why do they do it for $700 when their private practice would allow them to charge much more? In most cases it is people wanting to give something back to the business community. Others feel as though there is some marketing value in being appointed to a government panel. Whatever their reasons, I am very grateful that they are there.

Another key thing for our success has been — and this is a little uncanny, because I do not know how; it is in a way intuitive — the ability of our people to pick the right mediator for the right matter. I have got no doubt that that is an important aspect of mediation, I suspect not just in commercial mediation but in the broader concept of mediation. Some mediators have a style where they are warm and fuzzy and, 'Let's get the parties together and be lovely to each other and we will work out a resolution of the matter'. At the other end of the scale I am sure the mediator takes the parties into the involuntary confessions room and extracts some sort of agreement. I do not want to know how they do it, but they are getting a good success rate — we are happy enough.

I am not prescriptive about the way people mediate, but obviously we do have rules where the mediation agreement has to be abided by, and there are some prescriptions in the legislation as to what a mediator can do. We believe that our process has been successful — its success rate shows that. Our estimate is that we have dealt with something like about $180 million-worth of disputes in the time that we have been going. We have successfully mediated about 75 per cent of those. We have done that within an average time frame of around about 10 weeks from date of application to the date and time they get on for mediation. I think we have made a significant contribution to the economy, because what was in dispute is now resolved and the money that might have been stalled is now flowing, and, even more importantly, the emotional stress of being in dispute with somebody is relieved. When I was in private practice and involved with litigation, the stress that people experience when they are waiting 18 months to two years to get onto court, you notice it and it is very, very bad for them. I think there is an emotional or social benefit that comes out of this as well.

We have also found — and we did this last year — that a lot of disputes could have been avoided if people behaved better, like the example of a case study I gave you where CEOs do not know what is happening down the line. So we did a bit of a study into whether we could improve the way businesses conducted themselves. We felt that if

they conducted business between themselves better there would be less disputes. I wrote to 400 Australian business leaders saying that I was interested in looking at this sort of thing and what did they think about it. I got very, very positive responses from people saying, 'Yes; we think something should be looked at there'. It resonated with them, this notion that as CEOs they were not quite sure how people were behaving at particular workplaces. So we did a study. We got Deloitte involved to do independent research for us, and we formed a reference group of business representatives. They produced a report called *Forming and Maintaining Winning Business Relationships*.

In that report we identified seven major characteristics of good business behaviour, and this is what I say: we have picked the brains of the top business leaders in Australia, and they have said to us, 'This is what we think are the main business behaviours that lead to successful business relationships and avoid getting into disputes'. If you look at our report, those seven business behaviours are not earth-shattering in the idea that you think, 'Gee! I've never thought of that one! Never heard of that!'. They are more confirmation: 'Yes; that is the way people ought to behave'. Within our role we see that we have got an educational function there, and we use the mediation processes to draw on that to try to improve the way things are done.

In that regard I noticed in some of the submissions to your discussion paper, there was some comment about almost the sanctity of the mediation process — that you should not reveal anything that was said or done in mediation; that a high level of confidentiality was seen as being the norm. I do not agree entirely with that. We do have a confidentiality provision in our mediation agreement. Our mediators are all professionals, and as part of their professional practice they obviously observe confidentiality. But I think that, particularly within government, there is a sort of miscued understanding of what confidence or confidentiality is all about. People see something stamped 'Confidential', and they say 'Oh, it must be confidential because it is stamped that'.

Let us say, for example, that a person dobs in a social welfare cheat, and they say they are doing it confidentially — you know, 'I am confidentially telling you that so-and-so's ripping off the social welfare system'. You are not going to say, 'We cannot do anything with that, because you have given it to us confidentially'. What the person wants you to do is actually investigate — do something — but not reveal who told them, who was the dobber.

Degrees of information can come into a process that ought to be declared confidential and others not. With things like the issues that come before mediation, I do not see any reason why I should not be able to be saying, 'As the small business commissioner I have a function of advising the Minister for Small Business on emerging market trends'. I do not see why I should not be able to say, and this is not a real example, 'In the last year in terms of retail leases disputes, 50 per cent of them were about landlords not keeping their repair obligations; there seems to be a trend of landlords bucking the system with that'. If I cannot use that — I am not disclosing who the landlords are or anything else; I am identifying an issue — maybe the legislation needs tightening, maybe some education programs might need to be put in place. That type of thing is what I am talking about there in terms of saying that maybe, with the information we get in through mediations, there is a higher public interest in having that information made available for a wider good without destroying the confidentiality of the parties.

Mr CLARK — Thank you very much for that. I was wondering if either now or on notice you could give us a bit of a breakdown of the numbers of the disputes and the success rates in the three categories you have. I would also be interested in the unfair business practices category. What is the proportion that is business-to-business and what proportion is business-to-government?

Mr BRENNAN — I would be happy to do that. I have got some general figures, but I will give you all of it in one package. What I can say is that business-to-business disputes are increasing in number as there is greater awareness of our role. In fact many of the law firms might file a particular matter in the Federal Court or Supreme Court and then they are in the queue for months or years or whatever. They might suggest to their client, 'While we are waiting let us see if we can get it mediated by the small business commissioner' and they have a go at it with us. If it is unsuccessful they have not lost their place in the queue, but if they have success their client thinks they are the best lawyer they have ever come across because they have looked at the matter differently.

Mr CLARK — So you do not have difficulty in mediating cases that are pending in the courts?

Mr BRENNAN — No. I do not see any problem with that at all. I have not been told that I should not be. I guess I have been prepared to push on until someone tells me otherwise.

Mr FOLEY — So you are available to any business operator in Victoria?

Mr BRENNAN — Yes, as long as there is a connection with Victoria. If the incident happens in Victoria — like that insurance one; the headquarters is actually in Sydney.

Mr FOLEY — So if I am an owner-driver and I just happen to be driving through Victoria but the company I am engaged with and myself are based interstate, it is a bit tenuous there?

Mr BRENNAN — That is a good test. If both parties said that they would be willing to have it mediated by us we would probably do it out of the greater good, but if someone raised a jurisdictional issue I would probably say in that case no, unless you could actually point to some sort of contractual thing that was — whether the law in Victoria applied.

Mr FOLEY — Pretty much any business that operates in some circumstance in Victoria?

Mr BRENNAN — Yes, if it touched in some way here. Our approach has been not to dwell on technicalities. We look to the substance of things. In any of our jurisdictions, if people want to raise a jurisdictional issue, we will say, 'Why don't we see if we can resolve it by mediation anyway and then if you want to fight a jurisdictional issue in the courts we will do that at some later stage', but we might solve the problem in the meantime.

Mr FOLEY — With the trend of the increasing number of self-employed tradespeople, self-employed home-based workers, all of those kind of growth sectors, you would pick all of those up?

Mr BRENNAN — Yes, we would be delighted to have those. We do not want them getting into dispute, but we would be very happy to deal with any of those matters. There is another variation here, and I do not know whether it will come up in other submissions or not — and you have sort of pointed me in this regard and it is more at the other end of the scale — I will give you an example. One of the biggest multinational companies in Australia has got a worldwide rule. I have got to be careful that I do not disclose who they are, but their headquarters are in Europe and they have got a rule that worldwide, if any legal proceedings are started against them in any of their regional areas or a significant government inquiry or investigation is started, the local manager has got 24 hours to send a brief to the CEO and the board in Europe and within 48 hours has to be available to present personally in Europe.

With that company, and I know with a lot of other big companies and also with local councils which I will perhaps get to a little bit more in a minute, mediation is regarded as being within the umbrella of a litigation. So they are jumpy if you go to them and say, 'We have got a dispute, we want a mediator', because they have agreed that if there is going to be a mediation, they have got to tell their headquarters in Europe, and no-one likes reporting to the boss, it seems.

Mr FOLEY — But if you are just investigating?

Mr BRENNAN — But if we are suggesting the mediation, within their system, they have got to inform their European headquarters. What we say is, 'We won't do a mediation, but how about if you came to a facilitated meeting and we will put a facilitator in and see if we can get the party that is complaining about you to talk to you with a facilitator'. We appoint one of our mediators to be the facilitator, and the process is probably remarkably similar to a mediation, but there is a semantic benefit to getting the parties to come.

We have also noticed that this has been a particularly effective way. Robert, in relation to your question about categories I will provide the number of facilitated meetings we have had because we tend to be doing it a bit more; not overwhelmingly but it is just starting to be a good alternative. A lot of bureaucrats at local council level are quite nervy about coming to processes like mediation if they do not have to, and under our Small Business Commissioner Act we cannot compel people to come; we have got to get them to agree. It seems to me that, within those councils, the processes are that they have got to let the council know whenever there is anything that resembles a litigation going on, and mediation gets characterised as resembling a litigation. So we suggest there, 'Let's have a facilitated meeting', and that is something they can get on and do without alarming their superiors, as I say unnecessarily. The success rate of our facilitated meetings mirrors that of the mediations anyway because to a considerable extent it is a similar process.

Mr BROOKS — What sorts of disputes or issues arise with local government? Can you give us some examples?

Mr BRENNAN — There have been a variety. There has been things like — I was going to use the word 'tax', but I think it is a charge, extra charges, for people in strip centres for certain things. Contracts are another. People who have tried to get work from local governments are disgruntled or aggrieved because they did not get it or there is something wrong with the process. That type of thing is the most common. We have had quite a number of water authorities too.

The CHAIR — In relation to contractors legislation where there is a requirement to mediate do you have people who resist that or who are reluctant to participate?

Mr BRENNAN — Under our three pieces of legislation there is no provision in any of them that makes mediation compulsory. However, under the Retail Leases Act and the owner drivers Act there are provisions that say that if a party refuses to attend mediation or participate in mediation or withdraws from a mediation and the matter proceeds to VCAT — after I give a certificate saying that the mediation failed — VCAT can award costs against the party who would not participate in the mediation, win, lose or draw. When we first started mediations we used to just try to encourage people to come to mediation under the Retail Leases Act, and in about 80 per cent of cases people were coming to mediation. When we start drawing attention to section 92 of the Retail Leases Act which says if you do not come to mediation you might have costs awarded against you even if you win, 99.9 per cent of people come to mediation then.

The CHAIR — But that is not called mandatory.

Mr BRENNAN — That is not mandatory, no, but there is a consequence if you do not. Under the Small Business Commissioner Act we do not have a similar provision to that, but what we do have there is that if you do not come to mediation under the Act I have a responsibility to investigate the behaviour, so I will investigate you. Hopefully you will be cooperative in the investigation.

The CHAIR — So these two pieces of legislation do not make it a mandatory requirement, but you have got various strategies that you can use to persuade people that it is in their interests to come to the table.

Mr BRENNAN — Yes, that is the way we do it, and in some respects that is well received because it is not seen as being a hard stick thing; it is a soft approach, and it does work. In fact, with the Small Business Commissioner Act, where a business will not come to mediation, we have used — an often loose term — the 'shame sanction', where we say, 'We can investigate this matter. We have got one side of the story from the applicant; you are not telling us anything. We still have to prepare a report, because we have got this investigation function. At the moment the report is going to look like this because we have only got one side of the story; it does not paint you in a particularly good picture. Here is a draft of the report. This is what is going to be given to the minister, and this is what he will table in Parliament'. We have never had a report tabled in Parliament of that kind, because once we get down that path businesses see that it is in their better interests to try to resolve the matter or to explain where they are coming from. In many cases the explanation is satisfactory; the applicant has been proceeding down the wrong path, and there is an educating process for the applicant coming out of that.

The CHAIR — We are 10 minutes over. Thank you very much for coming along and sharing so fulsomely your experience. As I said, you will get a transcript. If there are any other questions, I am sure you will not mind — —

Mr BRENNAN — I will be happy, yes.

The CHAIR — Thank you very much.

Witness withdrew.