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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 4 March 2008

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Ms F. Hollier, Chief Executive Officer, and

Ms M. Halsmith, Chair, LEADR Association of Dispute Resolvers.

The CHAIR — Fiona and Margaret, thank you very much for coming to the hearing today. I need to tell you that this hearing operates under the powers of the Parliamentary Committees Act, and that extends to whatever is said here by you and us is protected by parliamentary privilege, which means that anything you say will not become the subject of any kind of legal action against you. But that protection will not be extended outside the confines of this hearing. Hansard will be recording our discussion, and you will be sent a copy of that afterwards. You can make any slight changes to it just to tidy up odds and ends but not to make substantive changes to it, and that will appear on the internet afterwards. They are the preliminaries out of the way.

We have got about 45 minutes. I would like to thank you on behalf of the committee for the submission you provided. That has taken a lot of work, and we do appreciate it. We also appreciate your coming today. The way we have operated these hearings, and it seems to work, is we will give you 15 minutes or however long you need to tell us about the work that you do in relation to the terms of reference, and then we have got some questions and issues that we would like to raise with you as well. We will have a discussion after that and see how we travel.

Overheads shown

Ms HOLLIER — Thank you very much for making time to see us and for including us in your invitation to present information before you. Margaret and I will both be contributing to the discussion today and answering your questions, but we thought just as part of a streamlined process that I might speak to the PowerPoint presentation that we will do at the beginning. Obviously if you have got any questions as we go through this, then please interrupt us, and we will be happy to answer them. Margaret may at some point during that add something to what I say. I do not know how familiar you are with LEADR, but LEADR has been an advocate for ADR since 1989. I understand in fact it was first mooted by a group of colleagues at a meeting in Melbourne, so although these were Sydney-based people, they were at a meeting in Melbourne.

The CHAIR — Melbourne does that to people, doesn't it.

Ms HOLLIER — I understand that yes, that is right. It was over breakfast apparently. It is now a very professionally diverse organisation, although it was originally founded by lawyers, and its original name had 'lawyers' in the title, but that now is not the case; it is LEADR Association of Dispute Resolvers. One of the things that we have been discovering about ourselves through some recent work we have been doing while reflecting on who we are, is we have come to realise that we have got a very strong culture of respect, cooperation and altruism, so the way we work internally as an organisation reflects those values as well as what we do in the services we offer to the community.

We have very much a national focus, so we will not know all the details relating to Victoria. We have an overview and Asia-Pacific reach with a large group of members in New Zealand, and increasingly we are doing work, conducting training in the Asia-Pacific region. We have been working with the Federal Court of Australia just recently to run training in Kosrae and Samoa and with the World Bank in Tonga. We have got a well-recognised brand with about 1600 members throughout Australasia. We think probably one of our key strengths is that we have got a very strong member focus with a good understanding of members' aspirations. We have been running very highly regarded mediation training since the early 1990s and similarly accrediting mediators since the early 1990s, and we have been a significant contributor to and champion of national accreditation. You would be aware that there are new standards in relation to mediation accreditation.

Again, as part of that reflective process that we have been doing through surveying our members, one of the things that we have discovered is that some underlying drivers for many LEADR members is that they see ADR as a way of promoting peace and facilitating justice. So our objects might reflect those sorts of statements about promoting ADR or expanding ADR services, but these we feel are kind of emotional drivers for people.

Today's themes — you will have seen that we have spread our comments across quite a wide number of the topics that you raised. We particularly thought that the diversity of providers, complaints management, accreditation, emerging processes and community awareness were key areas that we would want to mention today. In thinking about a diversity of providers, I know that this is one of the issues that you are concerned with. We favour a diversity of providers because we think it enables specialised services to develop, and that is particularly important for marginalised groups. We think it encourages tailored processes, increases access and reduces risk especially associated with complacency. We fear that if it became too decentralised it could also become complacent. Linked

very closely with that is that it supports a robust system where you have got a healthy debate and a dissent that is highly appropriate.

The CHAIR — You talked before about the 1600 members. Are they individual and organisational?

Ms HOLLIER — Primarily individual — in fact they are all individual.

The CHAIR — They are all individual?

Ms HOLLIER — Yes, they are all individual members. We have looked at having organisational membership previously, but we have opted at this stage to stay with individual members. The members themselves vary. Some are fully accredited members; some have advanced accreditation; some are people who have done our training but perhaps have not progressed to becoming accredited. We do have some different categories of membership.

Mr CLARK — What proportion of your membership would be lawyers?

Ms HOLLIER — I am not sure. I do not think I can give you a quick answer or a definite answer in terms of percentage. We did a survey recently and found that we did not get the answer we wanted in that we were trying to work out exactly the proportion who were lawyers. We would say our experience tells us that the majority have law backgrounds. But that is certainly changing. We are increasingly getting psychologists, educators, human resources people coming into membership.

Ms HALSMITH — Neither of us, for example, has a law background.

Ms HOLLIER — No; that is a good point to add.

The CHAIR — Only one of us does too.

Ms HOLLIER — The issue around handling complaints against ADR services is a particularly hot topic because of accreditation. It is not resolved yet. In fact Margaret and I are going to a meeting in Canberra tomorrow, which is the first of the national mediation accreditation implementation committee meetings, and complaints handling will be one of the issues that will come up.

Some of the issues that are being talked about at the moment are that obviously we need different ways of dealing with different types of matters. If it is something to do with an administrative issue around the way a service is delivered, that is quite different to if it is something to do with a mediator's conduct; the outcome from the mediation. They are very different types of matters. We are concerned that however we do a handling of complaints against ADR services, it actually reflects and has a consistency with an ADR approach. We do not want it suddenly to become highly punitive, highly investigative with no sense of engaging the people who are involved. With respect to some of the issues around handling complaints, something that is an important feature of that is transparency, and people have raised issues of confidentiality that relate to mediation which might mean there is a balancing act to be done there between transparency and confidentiality. There are also issues around the fact that if people have a complaint then they are obviously seeking justice. There are also concerns about how do you not turn it into just a punitive process for practitioners but one in which they learn and develop.

LEADR has championed accreditation. The current process for accrediting mediators nationally mirrors LEADR's model in many key features. There are some variations but in a lot of the key features we are finding that people who have been accredited previously by LEADR meet many, or almost all, of the requirements of national accreditation. We think it is important to balance flexibility with standards, and we think that accreditation needs to be mandatory after a transition. That word is meant to be period — after a transition period. There is a need to establish confidence in accreditation standards — for example, regulating bodies under the new standard are called RMABs; recognised mediation accrediting bodies. They need to be both highly regarded and themselves regulated. Again, it is going to be a hot topic for discussion tomorrow.

LEADR favours the accreditation of the practitioner to practice a range of processes, not trying to define too narrowly a practitioner with a practice; yet we also recognise that there needs to be some boundaries narrower than just saying an ADR practitioner, because ADR practitioners perhaps who have come from an arbitration background will have a very different skill set to those who have come from a mediation background. We may need some broad categories there.

In terms of some of the emerging processes, LEADR is very keen to explore new processes and to support our members in doing so. We do think we need to develop a well-understood and agreed taxonomy for describing different types of processes. We note that one of the ways of doing that is to think in terms of facilitative, determinative, deliberative. We know that NADRAC has actually moved away from that particular taxonomy. We still see some value in it and we are open of course to a different type of taxonomy, but we think that at the moment it is not clearly understood what these terms mean.

The CHAIR — Could you just talk about them a bit?

Ms HALSMITH — Could I do that?

Ms HOLLIER — Yes.

Ms HALSMITH — The reason I have volunteered to do that is that I think the previous NADRAC approach was facilitative, advisory and determinative, and I think we have been creative here in what we have come up with. The facilitative processes are the ones where the role of the ADR professional is just to facilitate the discussion, almost to the extent that if an agreement arrives it kind of drops out of the discussions. It happens due to what the ADR practitioner has done but not with the ADR practitioner having anything at all invested in an outcome or an agreement, let us say. The advisory is where the ADR practitioner has some capacity to provide substantive advice along the way. The determinative is when the ADR practitioner has the position, like in adjudicative processes, to make a determination. The issues are around things like: what are the parties actually contracting for? Are they contracting for a facilitative process. Then, inevitably, parties will say to you, 'What do you think?' Do practitioners then fall into saying 'Actually I think'; it is about defining the contract, if you like, between the practitioner and the parties.

Ms HOLLIER — We think the issues around taxonomy do present some difficulties when you start getting hybrid or blended processes — for instance med-arb, collaborative law or collaborative practice, as many of the — —

Ms HALSMITH — There is arb-med as well.

Ms HOLLIER — Yes, there is arb-med.

The CHAIR — Could you just talk about those two hybrid or blended processes and what you understand by them?

Ms HOLLIER — Med-arb is a situation in which someone is contracted to start as a mediator. It might reach a point in the mediation where for whatever reason — either the parties are not able to reach an agreement; an agreement does not drop out of the mediated discussion — —

Ms HALSMITH — Or a certain amount of time passes.

Ms HOLLIER — Yes, time passes and the same person who has been mediating then moves into the role of arbitrator. They are moving from a facilitative process to an advisory or to a determinative process.

Ms HALSMITH — There are lots of controversial aspects to that, but one of course is that as a mediator I would have conducted separate sessions with each of the parties and have all of the confidential information. Then if I come to arbitrate, to what extent do I use that confidential information?

The CHAIR — What do you do?

Ms HALSMITH — I do not conduct med-arb.

The CHAIR — Does anybody, or is this just a theory?

Ms HOLLIER — Certainly people are conducting it.

The CHAIR — How do they negotiate that problem that you identified?

Ms HALSMITH — It is in your original agreement with the parties. You either agree that all information will be available to be used or only the information from the joint sessions — open sessions — will be available.

The CHAIR — So they can trust that when the mediator moves into the arbitration stage that they can themselves set some information they already know aside, or are you saying that that is out on the table and at the beginning some of it is not.

Ms HOLLIER — That would be subject to agreement at the beginning, and I think that is one of the issues that needs to be discussed and talked through, and because it is the emerging at the moment, I do not think there will be clear answers on all of that. More often people would be making agreements that would enable them to use the information that has come up. What is your experience like?

Ms HALSMITH — It is about individual practitioners, and it is also different in different countries. In the US you know more of what you are getting, when you are getting a med-arb; in the UK you are getting something different; and in Australia it is practitioner by practitioner.

The CHAIR — And what about collaborative law?

Ms HOLLIER — As I said, probably that should be called collaborative practice. It is one that there is some debate about, particularly if you think in terms of the suite of ADR services, because in this situation legal representatives make an agreement with their clients that they will now enter into a joint conferencing session with the other parties and their representatives to see if we can thrash out an agreement together, and they are actually putting aside some of the more adversarial approaches to communicating with each other. Now there are some interesting tensions there because at the same time as lawyers are doing that, they are also saying, 'But we still have to represent the interests of our clients in the very best way'. So this one is contentious, I think.

Ms HALSMITH — Yes it is.

Ms HOLLIER — It is debated and the reason for thinking in terms of collaborative practice rather than law is that it is premised on the idea of drawing in a range of other professionals as well as lawyers.

Ms HALSMITH — Yes, it is not strictly a form of ADR, because there is no ADR professional there running the show, as it were. It is a group of people sitting around, all working collaboratively towards the parties reaching an agreement, and the notion is that if the parties do not reach an agreement, part of the original contract is that then the lawyers are no longer representing the parties and they go off to get fresh legal representation to take the matter to court.

Ms HOLLIER — And so the incentive there, obviously, is for the lawyers to work together because otherwise they will lose their clients to someone else if they proceed on to court proceedings. It would seem that very often collaborative practitioners are using many of the sorts of skills that you would encourage in good dispute resolution, but as Margaret said, there is not the outside third party who is actually playing a part.

Ms HALSMITH — Some of that is happening without a leader, and whether that is a plus or not I suppose depends on a case-by-case basis.

Ms HOLLIER — Going back to the things that we thought were key messages — and we know that this one was of interest particularly to this inquiry — to community awareness. LEADR is, I guess, primarily concerned with raising awareness of ADR and also making the community broadly aware of the assurance of the quality of LEADR members. Our main services are through member services, so we are keen to support members through a variety of services but particularly so through CPD and helping to create the circumstances in which their services are sought. We are not particularly seeing ourselves as going out and seeking consumers to buy our services, but rather to work out the policy level and the education level around the professionals themselves. Out of interest, we still do provide a referral service, although increasingly we are finding that our members attract work themselves, and referrals to LEADR for mediation mainly come through legal advisers, and referrals for our adjudication service through legal advisers and our website.

Ms HOLLIER — We try to think about the practices that are critical to moving forward, and we think legislative reform, including pre-filing and mediation, and defining ADR similarly in all jurisdictions. That relates back to what we were saying about the taxonomy previously. There are increasing numbers of professional referers. At the moment, there are certainly a lot of legal referrals, there are workplace referrals, but we think that there are a range of other professionals in fields such as education and health who could be also referring through appropriate education. We think ADR participants in the main will show most interest in ADR when they actually

have a dispute, so it is at that point when you are in contact with them that they are going to be most ready to hear about ADR. It is through that skilled intake process.

The CHAIR — Sorry, I am not clear on that. What do you mean when you say through skilled intake? Are you talking about ADR practitioners, or when you say participants, people who are purchasing the services?

Ms HOLLIER — People who are purchasing services, so ADR practitioners or their organisations. Sometimes it is managed by an organisational representative who actually decides whether or not, or who helps the participants decide whether or not, ADR is an appropriate dispute resolution mechanism for them and can be educating them in the processes.

Ms HALSMITH — It is a distinguishing factor between different styles of mediation and dispute resolution whether a dispute resolution practitioner spends a whole lot of time with each of the parties before getting them together in a joint session or whether in fact the parties are just booked into a mediation and are straight into a joint session. It is that skilled intake that assesses for suitability and so on.

Ms HOLLIER — Then finally, we think that we would benefit greatly from much more data collection and research, both quantitative and qualitative.

The CHAIR — Maybe I will just start off going back to the beginning, when you talked about 1600 members and some of those have gone through the LEADR accreditation process and some have not. Can you just step us through, on the ground in very basic terms, what kinds of people we are talking about and how do they get involved with LEADR and get the accreditation? You have talked about general principles and objectives and so forth, but what is that currency, the experience of a member, as they go through your organisation?

Ms HOLLIER — Okay. We advertise mediation training. We are finding that increasingly that is attractive to people from a wide range of professional backgrounds or sometimes non-professional backgrounds. Maybe there is a particular community member who has an interest in mediation. They would, up until the end of 2007, have attended our four-day mediation training course with us; from 2008 onwards it is five days. At the end of that training course when they would have been exposed to a range of theoretical models and lots of simulations and practical experiences, we would then encourage them to go and seek out some opportunities to perhaps observe some mediators in practice, to perhaps work with someone who is already practising in the field. Some do that, others move directly to seeking accreditation. The accreditation is a written assessment which asks various questions about how they would actually approach various aspects of mediation and deal with particular issues, and there is also a video simulation where they have to demonstrate competency in a simulated 2-hour mediation.

The CHAIR — All that is in the four-day package?

Ms HOLLIER — No, there is the four days and then there is a period of time, and we strongly advise people in that period of time to try to expand their experience by getting some practice, and then the accreditation. It is possible to go from the four days to the accreditation, and there are some people who manage that transition very well, particularly if they have perhaps had some previous professional experience in a related area where they may have actually developed some of the skills that are going to be useful for mediation. For others, actually going through some additional practice is important. We have got about an 80 per cent pass rate on that accreditation video.

The CHAIR — Is success determined on a personality type or a level of previous education, or is it more related to the kind of work they are already doing.

Ms HOLLIER — I think it is a mixture. What do you think, Margaret? I think it is a mixture. We could probably say some personalities are born to certain professions, so there is that relationship. Would you like to add to it?

Ms HALSMITH — I do not think I can say.

Mr CLARK — Could I ask about ADR by judicial officers, which is one of the hot topics with this inquiry. We have heard a range of views. Some say judges and masters have got skills that can be usefully translated to mediation and conciliation et cetera. Others say leave them to be judges and there are plenty of other

people capable of doing mediation and arbitration. Do you have any view on judicial officer involvement in ADR or in respect of types of ADR and in respect of levels of courts?

Ms HOLLIER — We do have a view, and I think it does vary, to some extent depending on the type of ADR. That certainly could be considered differently. Margaret, would you like to make some comments, because I know this is a particular interest of yours?

Ms HALSMITH — I have concerns around judicial officers and mediation in terms of the parties' expectations and the settings where the mediation takes place, so I am not particularly having concerns around the skills. It is the notion of — —

For example, I have mediated matters that have been in the court system for a long while. They come out of the court system to a suburban practice and they are remarkably straightforward to settle, and the parties themselves comment that you think differently when you go and park your car and go into the court and so on, so I think for the sake of the parties it needs to be clear that is a completely different style. There is that aspect, and as well as that the actual aims and the principles around which each process takes place — the judicial process and an ADR process — are often conflicting. For example, and ADR process is almost always future focused, whereas a judicial process is almost always past focused. An ADR can be very, very flexible to the extent that the other day I finished a mediation in a car yard. It started in a practice and then, as it happened, part of the agreement was around purchasing a car. The parties were not confident that they could see that through, so off I went to the car yard. Of course there are the more regimented court processes, so the parties know what they can reasonably expect and they can have the suitable mindset for each different process.

Mr BROOKS — Just to follow on from that question, we also heard evidence that the powers of the courts in some cases to refer matters out to external mediation are rarely used. I am just wondering if you have got any views as to how that might be improved or if referral of cases has increased?

Ms HOLLIER — Again, I think that might vary across different jurisdictions. What is your experience there, Margaret?

Ms HALSMITH — My experience is that, yes, there is a list of mediators or ADR practitioners attached to most courts, but in fact if a registrar is providing mediation free — and frequently free and faster, available at shorter notice and short sessions are needed — —

Private-practitioner mediation tends, I think, to last for longer and, I would add, and addresses issues well beyond the substantive legal issues, whereas the mediation attached or ADR attached to a court limits itself usually to the legal issues and is shorter, so there are pluses each way, I guess. But with the referral out, there are long lists which are really cheap, so I know of lists that include people who have not been ADR practitioners for years, so it is about keeping those lists live.

Mr DONNELLAN — With your members and so forth, how do they view the issue of professional liability and all that? How is that dealt with in that environment, or how would they like it dealt with, or how do they think it should be dealt with? Does it vary on the dispute you are dealing with? Is it in terms of immunity, or whether you are protected or not protected? Can someone come back at a later date and say, 'Hopeless mediator! We both agree we are going to sue the mediator', which probably takes you back to square 1 again, does it not?

Ms HOLLIER — I think that is a concern for people. That might be hanging there in the background as a risk that they might face, and yet there is another sense in which those sorts of cases have been so few and far between that people are heartened by the fact that it has not happened in any large sense. The new national standards are requiring that people have professional indemnity, and LEADR was able to negotiate for its members a very competitive professional indemnity package about 12 months ago which comes in at $125 a year. If you know anything — —

Mr DONNELLAN — So that is a bargain, and that includes the steak knives as well that come with it!

Ms HOLLIER — It is an absolute bargain. I only mention that because insurers are very good at estimating risk so for them to give us that sort of deal. Not only are they interested in capturing a market obviously so there is that sort of financial imperative — —

They are not interested in capturing a market which is going to end up costing them huge amounts of money, so they are certainly feeling very confident.

Ms HALSMITH — As a point of comparison, my professional indemnity insurance — until LEADR negotiated this deal — was $2500 or heading to $3000 a year. That was after I could get it. I went from insurance broker to insurance broker and explained what I did, and they would say, 'No thanks. Out the door! We don't want to have anything to do with someone who puts warring parties in a room'. Yet this company understands the risk by looking at the challenges that have existed.

The CHAIR — You talked about the new national mediator accreditation system. Could you perhaps flesh some of that out a bit in terms of what you think the benefits of it are and some of the existing potentialities?

Ms HOLLIER — Maybe we will start with some of the benefits and perhaps we could look at some of the things that we think might be still to be thrashed out and maybe even a little bit difficult. Certainly with benefits we should be feeling a concern that people have been able to say in the past, 'I am an ADR practitioner and I know how to do it', without there being any kind of regulation of that behaviour or any requirement that — —

The CHAIR — Can I just stop you at that point? Can you characterise for us that group of people?

Ms HOLLIER — Of the unregulated — —

The CHAIR — Who are the people who just do it? What do they look like? Who are they?

Ms HALSMITH — It would be tremendously varied. For example, I say to my students at uni, 'Look, you have paid your HECS fees and you have bought your textbooks and so on, but you can now just leave this room and go home and get a refund on your fees and hang a shingle and call yourself 'mediator"'. They still can, in fact, because it is voluntary. It is the whole range of humanity — various people out there. I know of various instances, but the instances that concern me the most are in the family law area, where there are issues of violence and so on, and where there could be issues of violence. I have known of mediators negotiating with the parties around the violence.

The CHAIR — The reason I am asking is that clearly one of this committee's main concerns is vulnerable consumers and people from marginalised and disadvantaged groups. Do you think this body of people, who have hung the shingle out and are just doing it with no reference to anything else, constitute a real consumer problem, or do you think this is just a theory they could and therefore it might be a problem?

Ms HOLLIER — Yes. The real question is not on a basis of is it ethically right, but a practical issue. Margaret might have a different perspective on this one. We are talking about our perceptions from our position within the organisation and not a statement of what the organisation believes, I think. My perception is that we hear some level of concern and complaint about mediation, but it is not huge. I think probably most people who are saying they can practise mediation have in fact done some training. Maybe they are working in some organisational setting where they are able to deliver mediation services quite well.

I think that is an interesting question: that it is quite wrong and may not be very damaging. I think probably 'Is it reaching the full potential of what ADR can offer?' might be a more pertinent question. My suspicion is that whatever people are saying I can stand back and not advise people but look to empower them. If they stick with that, they probably do not do too much damage too often, but it may be that they just do not know really how to use the process effectively to help people to move to a better situation and to actually resolve their dispute effectively. My perception would be that there is probably a small percentage only who are really doing serious damage.

Ms HALSMITH — I would agree.

The CHAIR — I interrupted you. You were talking generally about the system.

Ms HOLLIER — Yes.

The CHAIR — And its benefits.

Ms HOLLIER — Okay. In fact that question has helped me to focus. I actually think that is what the big benefit of accreditation is: that it is going to lift the standard of practice. It is not that it actually prevents the

charlatans from operating, although it will do that, but it is more about giving us the scope and the wherewithal to ensure we lift ADR practice to a much higher level of expertise. That would be the really big value, I think. As well, in the process of accreditation we start to get much greater clarity about what people who are practising ADR are actually doing, and we will begin to define more clearly what the types of processes are.

Ms HALSMITH — It has raised the tenor of discussion about mediation and caused us to have to have language to talk with each other about it. Until then it was all a bit blurry.

The CHAIR — What changes does LEADR have to make to its own practice to comply with the new system.

Ms HOLLIER — The changes that we are in the process of making, I think, is more accurate, because it has only been in since January and there is a transition period. We needed to move to five-day training — that is, 38 hours of training. We have to change some of the details around our original assessment. The video assessment is still fine. We also need to look at how we manage complaints, or make it very clear to people how we will manage complaints. We see that as the broad-ranging complaints, and that could include dissatisfaction with the service that we as an administrative body are offering. They have been the primary changes.

Ms HALSMITH — And then we work around actually deciding who is able to be accredited due to experience already and figuring out a fair process for the grandparenting clause, if that is what you would like to call it.

Ms HOLLIER — There are many people who have been previously accredited by LEADR, so we understand about their training and background and experience. We also have many people who are coming to us saying, 'I have never been accredited before'. Some of those people we know well, and we actually are able to easily get the kind of supporting information that says, 'Yes, they operate well as an ADR practitioner'. With others, we have little background knowledge of them; they may have done a training course here or overseas; they may have done it five years ago or 10 years ago; and it is difficult to track back through all of that and we are needing to make some assessments in relation to those people.

Mr DONNELLAN — How does an accredited practitioner deal with power imbalances or education imbalances in a sense? You might have someone who is very well educated in a dispute and someone who is totally ill-equipped to really understand the process to go through. It is probably a good thing they are out of the courts, but this person still may not really understand what is going on around him. I know that sounds a bit silly, but I am sure it happens often. I am just wondering how they would move back one from that? Does the ADR practitioner become a partisan participant in the exercise? You know what I mean. What do you say in the training to deal with those situations?

Ms HOLLIER — I can hear Margaret just waiting to give an answer on this one.

Ms HALSMITH — In my practice I mediate in a number of ordinary sorts of situations like commercial mediation and so on, but also I mediate family law matters and I also mediate for Towards Healing. I do not know if you have heard of Towards Healing, but it is a program around providing a listening opportunity for the Leaving of Liverpool children, so they are now their 50s, 60s, 70s, and they have often had extremely awful things happen to them in the name of care, including sexual abuse, emotional abuse, having their names changed, being told their parents are not sending mail to them when they in fact were and so on — highly vulnerable, very marginalised people, people who had missed out on education and not had their health issues addressed and so on.

I can quickly answer your question in the light of one of those mediations that I did recently where one of the parties was illiterate. There were two other parties, but perhaps I will talk about it as if there was one other party and where the other party is highly qualified, possibly PhD sort of level. So what did I do to manage a perceived power imbalance? One of the things about power, I think, is that it is not what it appears to be, ever. So you might think that the party who had the PhD level education has more power than the party who is illiterate, but in fact that is not necessarily the case. The party who has the PhD qualification is literally suffering emotionally for the horrors that this other person has experienced, so they are feeling like the victim, but acknowledging that they are not the victim all those years ago. Quite frequently parties will each say, 'I am feeling bullied', so in a power sense you have got a group of victims in the room. What I actually did in that situation was I visited the person who is illiterate at his home, which is about 2 hours away from Perth, so that it was not a case of him having to get to any professional rooms or anything. I listened to him and I asked a set of structured but open-ended questions, listened

for a couple of hours. He had a support person with him when I spoke with him and I talked through how best to design the mediation so that he would feel comfortable and developed a few quick cues and clues — cues, I guess — on what he should do if he was feeling pressured but unable to say he was feeling pressured.

Then, of course, I take breaks frequently throughout the mediation, and my first comment in a break is, 'How is it going for you?', and all that depends upon my having developed really strong rapport. If I have not developed strong rapport, then it is not going to get very far. So it is about individualising and personalising and being very ready to hear from someone that something is just not working for them and being able to ask questions that elicit that sort of information, and making sure that there is no duress, of course, and making sure that there are no snappy agreements at the end. So I run a number of sessions, about a week apart. I say to them, 'The first thing I will be asking you when you come back into a joint session is along the lines of "What do you want to change your mind on that you said last time?", so there is scope to move and encourage legal advice and so on. Does that address some of your questions?

Mr DONNELLAN — Yes, I was just interested in how you work through that.

Ms HOLLIER — Perhaps if I can just add to that that, again, that skilled intake process is very important, that there will be times when, for a range of reasons, a particular ADR process may not be the appropriate process, so certainly that is the end of it, and then that very strong reliance and confidence that you have the tools available to you in process terms for managing the kinds of issues that come up. I think perhaps if we hearken back to the question about what accreditation does for you, it helps shift practitioners to be able to really do that sort of skilful intake and manage the process effectively. I am sure that there would be many mediators out there perhaps who are doing a very good job within a narrow field of mediation and who would not have the kinds of skills that Margaret has just talked about to take on that. I think there is scope for that kind of overall — —

Mr DONNELLAN — They might bypass that one and go on to another one.

Ms HOLLIER — One would hope that in fact that would be their decision — that is, 'That is not one that I should undertake but I should undertake something different'. I think that accreditation process will help us to be able to identify the differences in people's particular skills as well as raise the level of skill overall.

Ms HALSMITH — Then, of course, there is working with interpreters and so on for people who are marginalised due to their language issues, but other than that are quite on the ball.

Mr CLARK — Could I ask further about the issue of accreditation and the overlapping area of training? Do you believe it should be mandatory or voluntary — voluntary in the sense that you cannot call yourself accredited unless you are accredited, but you can call yourself a mediator without accreditation? Secondly, if you do think there should be elements of compulsion, what should the coverage be? For example, we heard evidence this morning from the energy and water ombudsman that she did not think it was appropriate for her staff to be covered by mandatory training because she had very well-developed in-house training arrangements. If there is to be a mandatory element, what carve-out should there be? Conversely, what should be the coverage of that mandatory element?

Ms HOLLIER — We would argue that mandatory accreditation would be something that would be good to move towards. We think there needs to be a transition period. I think the situation that the ombudsman is talking about could be covered by a good accreditation standard that recognised ways in which the training that she is giving those people would actually meet the requirements of accreditation. If there is a transition period and if at the moment she gives a certain amount of training, then there would be a transitional time in which that could improve. We would want an accreditation process that has some flexibility and that allows for the different circumstances. There is a huge variety of circumstances in which ADR is called for — from local community, family mediations where the services that are focused in that area will not have huge resources and the practitioners will not be necessarily people who are well resourced to be able to fund an expensive accreditation process. At the other end, for big-figure commercial ones, that will not be the issue at all. We would want to see an accreditation process which is related to evidence of competency, and we would think that, carefully crafted, the issues that a person was making this morning may well be managed effectively without it becoming exclusive.

Ms HALSMITH — I would agree. The risk of accreditation not being mandatory is that ADR already has a reputation for being second-class justice. If you have a choice about whether you are accredited or not, it is as if to

say, 'We do not bother to get accredited in this area, but we do in the other area'. It runs the risk of maintaining that image.

Mr CLARK — Would you make it mandatory for people who did mediation or ADR in a voluntary, non-remunerated capacity — community leaders who tried to resolve disputes or mediations in a sporting club or a sporting league — or would it only be for people who did ADR for reward?

Ms HALSMITH — For me it is mandatory all through.

Ms HOLLIER — I was going to say there has always been skilled helpers around. Within any community organisation there have been people who mediate disputes. We have them within our families. They are not given the title of 'mediator'; they are just known to be a really good president of the local sporting club this year. I do not think we would ever be wanting to regulate individuals' helping behaviours that occur that way. I think if someone is going to name themselves as a mediator who could actually be called in that capacity as a mediator, then we would be looking for mandatory mediation, but we do not want to stop schoolkids in schools who are mediating disputes between their friends. Of course in promoting ADR we are very keen for that kind of informal mediation to be occurring.

Ms HALSMITH — One of the principles of ADR is that you try first to sort it out yourselves. You try to sort it out casually and then you call in somebody — an ADR practitioner. Sorting it out yourselves and sorting it out casually — leave people alone.

Ms HOLLIER — Absolutely. Yes.

Mr BROOKS — Do you see that mandatory system underpinned by state-based legislation?

Ms HOLLIER — We think it needs to be supported by legislation, and we certainly think it needs the government's insistence within its own services on using accredited mediators. Again, not at a casual level, so a manager in a workplace can sit down with his staff and help them sort out a problem. He has never called himself a mediator even though he is using skills of mediation — that is fine. But if it escalates beyond that we would want to see that mediators are accredited.

Mr DONNELLAN — Someone asked about state — would it not be preferable to have national legislation also. You would have members all around Australia, wouldn't you, and it would be rather strange to have accreditation in Victoria, and then New South Wales might do something else and Queensland might not bother. You know what I mean.

Ms HOLLIER — There would certainly no sense in — —

Mr DONNELLAN — It would have to be national, wouldn't it, because your membership is national and in South-East Asian areas as well.

Ms HOLLIER — Yes, and increasingly people are very mobile. There is no doubt that one of the attractions of ADR is its cost-effectiveness. If it starts becoming very difficult to gain accreditation and accreditation is different in different jurisdictions then that cost-effectiveness would be eroded, and we certainly would not want to see that.

Ms HALSMITH — Most of the ADR organisations in Australia have a national outlook, it would be fair to say. What needs standardising is the language. There are a whole lot of acts that use the term 'mediation', but the practice they describe is not mediation, and there are a whole lot that do not use the word mediation at all but actually describe a practice which is mediation. There is a whole lot of work to be done there so that everyone can read them similarly.

The CHAIR — Speaking of which, do you think the mediation accreditation system should be extended to conciliation and arbitration as well.

Ms HALSMITH — In short I do.

Ms HOLLIER — Yes, I think so.

Ms HALSMITH — But not hastily because I think we have some stuff to figure out around the national mediation accreditation. Just giving that the time for a transition period and streamlining that process will provide lots of insights about how to go about it with conciliation and arbitration, and maybe others — early neutral evaluation and the rest.

The CHAIR — I am very conscious of the fact that we have kept you here for about 10 minutes more than we intended to. Are there are any last questions?

Mr DONNELLAN — No.

The CHAIR — On behalf of the committee I thank you both very much for coming. Once again, thanks for your written input as well. Kate and Kerryn might well be in touch with you after this meeting to tidy up some information or get some material from you, I hope that is okay.

Ms HOLLIER — Of course.

The CHAIR — As I said earlier, you will be sent a copy of the Hansard transcript. Thank you.

Witnesses withdrew.