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LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 13 August 2008

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Mr R. Thomson, legal officer, and

Mr G. Dewar, legal officer, Commonwealth Bank Group.

The CHAIR — Welcome, Ross Thomson and Grant Dewar. Thank you very much for appearing before the committee this morning. Also, thank you very much for the submission that you sent in and the documents as well. They were very useful. Before I begin, just a couple of formalities. The discussion that we are having this morning takes place under the Parliamentary Committees Act, which means you are afforded parliamentary privilege. If you say things here that may be the subject of litigation, you will be protected, but if you say them outside the confines of the discussion, that protection will not be extended to you. Also, Hansard is recording our discussion this morning. You will be sent a transcript subsequent to the meeting. You can make any minor changes to that but obviously not changes to the substance of what you have said.

We have got half an hour, so we have to move pretty quickly. We will run it informally, but we will leave it open to you to talk about both your submission and any of the other terms of reference that you might want to add to. Then we have some questions, which, if you have not addressed them, we will pick up and seek clarification on. So it is over to you.

Mr THOMSON — Thanks very much, everybody. Kerryn has sent me some questions. The first one was that she wanted to know whether the estimates of numbers related to Victoria. The answer to that is yes; that is Victoria only. This is in her email of 1 August: 'The committee is interested in the impact vexatious litigants have on the bank'. It is a severe monetary impact. In McKinnon, for example, we have spent about $460 000 on pursuing Mrs McKinnon since about 2001 when Mr Justice Byrne gave his decision in the Supreme Court on that matter. Currently Mr Paul Patterson is her trustee, and she is doing everything possible to frustrate the sale of two farming properties — tearing down auction boards, threatening estate agent and the like — so the bank has been put out of its money. Since 2001 it has not got a cent and it has spent $460 000.

While we are on costs, in the Bride matter in Western Australia the costs on that are $1.3 million, and that case is now finally at an end. On 7 August the High Court refused special leave to appeal the vexatious litigant determination. There have been over 60 applications in that, and that has gone since 1984. My colleague Grant Dewar has a matter of Maher, which it looks to me is going to be the same type of matter and is costing the bank a lot of money.

The next question was: are vexatious litigants orders effective in stopping litigants? The answer to that is yes and no. Mrs McKinnon has not been declared vexatious, but Horvath eventually went to the end and up to the High Court a number of times, so I think by and large they eventually succeed. If leave to commence proceedings is part of the new legislation and that leave is not subject to appeal if refused, I think it will be very effective if that is introduced. That sort of arrangement is in the New South Wales bill and I think is also in the Western Australian legislation. I have not looked at all the others, but those two look to be pretty good legislation or proposed legislation.

The next question is about the bank's involvement in prior criminal prosecutions. I can speak with personal experience. Mr Horvath charged me, I think, on no less than three occasions — sabotage of the constitution, perjury and a few others. Fortunately the DPP took that over pretty quickly, but it was a very unpleasant experience. It is a bit like fighting the war on the western front with these people. It goes on and on and on, and if you are tough and robust like my young colleague Mr Dewar, it is a bit of a novelty and it is a learning curve, because a lot of these people are pretty smart at the rules of law and their rights and procedure, but it does not become such fun after it has gone for eight years in one case alone. There is always the prospect of personal threats. I went to the trouble of getting a silent telephone number and the like.

I would like to direct the committee's attention to Dr Paul Mullen's paper. I have a copy here in case the committee does not know it, but that covers a lot of these issues.

The CHAIR — We have spoken to him.

Mr THOMSON — I do not know if you are aware of the paper, but I have a copy here, and it is absolutely excellent. Mr Dewar fortunately got it for me yesterday, and when you read it, ex post facto, you see all these traits and a lot of the things that Dr Mullen so eloquently articulates in his paper coming through, so I do not want to bore the committee with going into something that is absolutely excellent.

The other article that I would like to draw the committee's attention to is Clare Thompson's article 'Vexatious litigants — old phenomenon, modern methodology', which is a consideration of the Western Australian legislation.

Clare was junior counsel in the Bride case, and that is another absolutely excellent article that I draw the committee's attention to.

The last question is: has the bank used ADR mechanisms to attempt to address the issues? Certainly I use McKinnon as an example. There was court-ordered mediation, and we got nowhere. It just went on and on, but there was a mediation. It was totally unsuccessful. Mr Moran appeared at that mediation. He refused to give his name, and we eventually told him that he was not allowed to be in the mediation. There was a bit of a scene about it. We now know who Mr Moran is, and at that time I was told he had been involved in Bank Watch many years ago. The Moran case is in the papers that I have given the committee. Mr Moran is behind a lot of these cases in my view. He advises people. I do not know whether it is or is not for a fee. He appeared as a witness in, I think, the Walter case. He also has been allowed to appear in person on behalf of other people. I have difficulty with that.

To me the courts should be picking up people like Mr Moran a lot earlier. He is costing the State an absolute fortune or has cost the State an absolute fortune in my mind by encouraging people to run defences such as the ones mentioned by Justice Dodds-Streeton in McFarlane, I think it was, and which I have mentioned in my paper. Those are the specific questions that the committee asked me, and I hope I have answered them.

One point I would also like to emphasise is it is not only the cost in sitting time of the court. In Bride I think one of the points of appeal was that the judge had taken too long to hand down his decision, and that was deemed to be unfair to the litigant. A lot of these cases — as Mr Dewar will testify to in the one he has at the moment — are intertwined. There are numerous appeals going on in different courts at different times, so when a judge sits down on a particular matter, he has a real problem, a real time consideration problem, to sift through all of this, and that is to me a great deal of waste of judicial time. I have nothing more specific. I did make additional comments under the headings of my submissions, and perhaps if your questions are directed to me, I can see if my additional comments on my paper might cover the same things. I do not want to ramble on any further.

The CHAIR — You were not rambling. Perhaps just by way of opening, you mentioned some very high figures of costs to the bank: do you have those in a form that you could let the committee have? We have had some difficulty in trying to get a measure of what it costs large organisations. While we have heard some of them — they are now on the evidence — could you provide them in a more tabulated form?

Mr THOMSON — I could. I wrote to the four banks the other day — the big banks — and I got a pretty sparse reply from most of them, but certainly I can show you the replies I got. They are general endorsements that there are problems. I can certainly give you at least four cost estimates — they are not estimates, but they are pretty accurate. There is Bride and a few others I can give you.

The CHAIR — Thank you. That would be good.

Mr THOMSON — And I can set it out in a table. I would just like to make one point on that. I think the committee should perhaps focus on the fact that it is not just the big organisations that could be affected. Let us assume you had a vexatious litigant, and you had put all your money into a residential property in your superannuation fund and you bumped up against one of them. You would not have the resources to fight these people. It could be an absolutely unmitigated disaster for a family's superannuation; it is not just the big banks.

The CHAIR — Okay. The other question is inside that. You say in your submission that you have something like four to seven cases at any one time. That is a small number, but from what you have said obviously what is implied in that is very far from small. Is this kind of activity becoming more prevalent in your experience or in the bank's experience? If you think it is, why might that be so?

Mr THOMSON — I think it is becoming more prevalent. Dr Mullen deals with that. He says that one of the reasons for that is the level of communication — the ease with which people communicate. I have a suspicion that internet sites may be being used. I have not found any, but I am very technologically backward at my age. But Dr Mullen mentions the fact of internet sites. All you would need is a person like Moran to set up a website, and people who have a grudge against the bank, for example, could access that. I think that is one reason. There is the fact that these litigants hang around the courts. They have nothing else to do other than to further their angst, and they talk to other people around the courts. I think the answer is that it is increasing, and the more robust these people become, then they see other people in courts who are self-represented. I am all in favour of people representing themselves in court, but I think it rubs off. I have no scientific evidence for that, but that is my general feeling.

The CHAIR — You said Grant was dealing with a particular case; you referred to that a number of times. Could I ask you, Grant, to tell us a bit about that particular case?

Mr DEWAR — Yes. In fact, in Ross's submission at tab 7 is a chronology, or detail, of some of the procedures in that case. This is a gentleman who has been litigating against the bank since 2000 or perhaps even 1999. The genesis of this litigation is action taken against the bank for allegations of trespass. An associate of his was evicted from a property. He claimed to have goods in that property, and he sued for damages in the Federal Court. From that proceeding a number of proceedings have spun out in both the state and federal courts involving him primarily and also his associate. They have worked together throughout the last eight years. Since 2005 the majority of those proceedings have related to attempts to bankrupt this gentleman. He has frustrated the bank's efforts to do that and has also sued solicitors of the bank, bank staff and agents of the bank emanating from the bankruptcy proceedings. That is the general nature of it. The bank has not attempted to have him declared vexatious.

The CHAIR — From the bank's point of view, how do your organise yourselves to respond to that? The bank has you doing it!

Mr DEWAR — Yes. It is a reactionary process. Resource wise it is quite difficult to keep one's head above water. We do our best to respond to his almost weekly tactics or attacks as best we can with an overall strategy to bankrupt this gentleman ultimately, which hopefully will lessen his activities. But there is no guarantee that he will go away.

The bank has taken advice as to its prospects of having this gentleman declared vexatious. He tends to abuse the interlocutory procedures and process and also the appellate structure. For that reason the bank's prospects would be quite remote in the bankruptcy proceedings. He will take every conceivable technical point and appeal every case management or interlocutory order, no matter how insignificant. He will appeal that to the High Court if he wants to simply as a matter of course.

Mr CLARK — Could I ask about your experience dealing with the Attorney-General's office and the Department of Justice in relation to vexatious litigant applications. How have you found those dealings? Are there ways in which that system of making application to the Attorney-General can be improved? And in terms of parties other than the Attorney-General making application, your submission refers to senior court staff; do you believe that there are others who should be able to make those applications such as, for example, the bank itself or other adversely affected parties?

Mr THOMSON — In Horvath I found the response time from the Attorney-General was excellent. I prepared everything, I was deeply involved in that matter, I set it all out and as far as I can recall it was dealt with very quickly and with no problem whatsoever. It was not as though I had to carry on. So I think the answer is good preparation. I have got a newish matter — and I think people need to be educated to identify these sorts of people earlier on — and I am keeping a very careful, ongoing chronology set out in Excel spreadsheets of everything that is going on, so if I go down the track in two years, I will have it all ready and I will be able to get it up to the Attorney-General very quickly, instead of having to invest hours in putting perhaps a messy file together. That is one problem. I think identification earlier would help a lot.

In regard to the second half of your question, there is no doubt about it that it would be of great benefit if anybody other than the Attorney-General were able to make applications. I sensed — and I may be absolutely wrong on this — that certainly the application to the federal Attorney-General could have been influenced by the fact that there was an election in the offing. The Western Australian legislation and the New South Wales bills both postulate people other than the Attorney-General, and I think that is a very good thing.

The CHAIR — Could you come back to my question to Mr Dewar before, which was about how the bank is positioning itself and how it is organising itself to deal with cases like this. You are describing that you are very proactive, collecting documents and making sure you are preparing a case as things look like they might run into trouble. Are you doing that across the bank, or is that something that just you are doing?

Mr THOMSON — That is just my idea, because I have been caught with these people so many times. I think I might have said to Grant — in fact I did say it to you a month or two ago — 'Listen, get your house in order early on in the piece', because it is an awful job when you are trying to run a practice, any sort of practice, to have to go back five years, maybe eight years, and put everything together. It is a disaster.

The CHAIR — So that is the beginning of a systemic response that the bank can make?

Mr THOMSON — Yes.

Mr O'DONOHUE — I was interested in your comment, Grant, about abuse of interlocutory procedures, because that is something which other witnesses have made reference to or comments on in passing. Is that something you see with other vexatious litigants, using that term in the broad sense, that abuse of interlocutory proceedings is a way to frustrate, slow down and extend proceedings?

Mr THOMSON — From the bank's point of view, the bank is normally the plaintiff. It is the abuse of all those interlocutory processes — and appeal processes; I include that — where our biggest problem is. It is not so much that we are getting sued. We do get sued, and criminally as well, as I pointed out, but it is that ability to — without question and as a matter of course — just appeal and challenge every single decision along the way which is energy sapping and very costly.

Mr DEWAR — Without regard often to the truth, and with a willingness to often, in my personal experience, perjure themselves in order to get another adjournment. Multiple applications for adjournments are a big problem, and the courts have a very difficult job because they are obliged to take every application on face value and try to afford procedural fairness. But when we personally know as lawyers that the supporting material being put forward is really just a fabrication, it is very difficult and very demoralising. In this one particular matter the courts have got to a point where the judges in both states are now taking almost judicial notice of these kinds of tactics employed by this one gentleman, and that is helping, but it has been many, many years to get to this point.

Mr THOMSON — I was wondering — this is just a thought of mine, and this may be inappropriate from the judicial side — whether the Chief Justice would be in a position to know or to get figures of the number of people that the judges feel are vexatious and perhaps to have a conference. I do not know if that would be appropriate or inappropriate, but it seems to me that with new appointments to the bench they will deal with a matter, then the next time the matter will be with somebody else and the next time it will be somebody else. If there were some sort of communication that may assist, whether it be proper or improper, I do not know.

The CHAIR — It is on the record now, so it is there as an idea. Earlier on you alluded to cases that you had run in other jurisdictions in New South Wales and Western Australia.

Mr THOMSON — Yes.

The CHAIR — In Queensland and the Northern Territory I understand that the bank applied for vexatious litigant orders on its own behalf. Is that right, because what I wanted to ask you to do is to — —

Mr THOMSON — I am afraid to say I cannot elaborate on the Queensland position unfortunately.

The CHAIR — But has the bank initiated action like that, and could you step us through it?

Mr THOMSON — I think in New South Wales the case of Maddigan is the classic case, I am told by John Lanser, one of my colleagues in Sydney. That case went over a number of years all the way to the High Court.

The CHAIR — Sorry to interrupt, but that was where the bank applied for the order. What I am after is, if you did go through that process, how did you do it, were there difficulties relating to costs and were there other sorts of impediments?

Mr THOMSON — I cannot answer the committee's question as to whether the bank has made application in other states other than Bride, where obviously it did, and obviously I cannot comment on who made it and whether there were difficulties or anything.

The CHAIR — Okay. Do you think that alternative dispute resolution processes at the front end of emerging issues might help to ameliorate problems?

Mr THOMSON — As I said, with McKinnon there was alternative dispute resolution. I think that if one were able to introduce a professional at an earlier stage, of the likes of Professor Mullen, one might get somewhere. But after you have been to mediation, if you have got a vexatious litigant who is on a mission — or a querulent litigant, as Professor Mullen calls them, which seems to be a wider concept — I am sceptical that it would work. I

definitely feel strongly that there is scope for the committee considering whether courts should be able to refer these people to professionals for professional help. I do not see why they cannot, because they do so in criminal proceedings; why not in civil proceedings?

Mr CLARK — At paragraph 8.5 of your submission you talk about deciding leave applications 'on the papers', which seems to me to make a lot of sense. At paragraph 8.4 you say that where there is a leave application made there should be notice only to the Attorney-General or the appropriate court official and that the bank would not want to be notified. Would that remain your view even if leave applications were determined on the papers? We have had other witnesses say that they believe their clients ought to be notified of leave applications because they might want to intervene at that stage to put relevant facts before the court which they would be better possessed of than others. Clearly it is a balancing consideration, but particularly if things were decided on the papers would you then want, as a bank, to be notified of leave applications?

Mr THOMSON — The problem with these applications is that if you are notified, you often feel obliged to go to the court. So often if you get a document that has a court seal, you have to front up or get a barrister to front; that runs up the costs. I feel that the judiciary is sufficiently sophisticated and smart enough to handle these applications and ask the questions. For a lot of those applications there will be a track record before, and I am quite happy to not be notified — for the very reason that if you are notified, you feel you have to front up, then you have to brief and so on and so forth. It becomes a cost safari.

Mr CLARK — But what if the things were decided, without an oral hearing, on paper submissions? Would you have the same view?

Mr THOMSON — I have no problem with it.

Mr CLARK — You would still not want to be notified?

Mr THOMSON — If we were served with a copy of the papers, I think that would be a good idea — a bit like if you want to remove a caveat, you send a copy of the documents to the titles office and it normally sends the standard letter. I do not have a problem with that.

The CHAIR — The last question, because we are running out of time, unless other people have anything. Courts do have other powers to deal with vexatious litigation — for example, the summary dismissal of a case; in your experience have you found that to be effective?

Mr THOMSON — I would say no. If one can show an arguable case that the courts are very loath to shut people out — and I think quite rightly so — it does not take too much to be able to cross that threshold. Even if some of it is perhaps suspect, the judge cannot determine on an affidavit who is telling the truth. That is a problem, and quite rightly I think they should not be readily shut out on that basis.

The CHAIR — There are no further questions. We are just over time, so thank you both very much for coming.

Mr THOMSON — Thank you very much.

The CHAIR — Thank you also for the material you sent. You will be sent a copy of the Hansard transcript.

Mr THOMSON — Is there any material either in the form of the article by Clare Thompson or anything else?

The CHAIR — Yes, there was the data on the figures.

Mr THOMSON — I will get you that.

Ms RISELEY — Perhaps a copy of that judgement as well.

Mr THOMSON — Sure.

The CHAIR — However, having said that, from your invitation it may well be that Susan and/or Kerryn will get in contact with you and ask for a matter to be clarified or for further information.

Mr THOMSON — No problem.

Witnesses withdrew.