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CHIEF JUDGE'S CHAMBERS
COUNTY COURT
250 WILLIAM ST, MELBOURNE

November 2, 2009

Mr John Scheffer MLC
Chair
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
MELBOURNE VIC 3002

Dear Mr Scheffer,

Inquiry into Alternative Dispute Resolution – Call for Submissions

I refer to your letter of September 13, 2007 to the Chief Judge inviting submissions on this topic. The Chief Judge has asked me to respond to your invitation on his behalf.

Following consultation the Court has addressed the questions in the report which are relevant to the County Court's civil jurisdiction. Generally, the County Court refers most of its civil cases to external mediation. The other mechanism which is employed to assist in pre-trial resolution of disputes is the case conference before a Judge.

Question 12: Court Referral to ADR

Currently, the Court refers nearly all of its cases in the Damages List and Business List to mediation as part of the standard timetabling orders made when matters are set down for hearing.

Serious injury applications under section 134AB of the *Accident Compensation Act* 1985 are not referred to mediation because they are on a shortened timetable for hearing which occurs against the background of two rounds of compulsory conciliation. Serious injury applications under section 93 of the *Transport Accident Act* 1986 are subject to pre-hearing protocols (not involving the Court) concerning exchange of medical reports and information and a common law conference or mediation.

The Court regularly consults its stakeholders in the various Lists in relation to the introduction of further ADR measures designed to assist in the timely and cost-efficient resolution of cases. Recently, for example, Her Honour Judge Davis discussed with stakeholders involved in transport accident serious

injury cases the possibility of piloting case conferences in these cases. Those matters are still under discussion.

Where the Court orders mediation of a case, the selection of the mediator is left to the parties, unless the Court's intervention is required to settle any dispute concerning the choice of mediator.

The Court is aware of the developments in the Family Court, Federal and Supreme Courts where judicial registrars or masters have conducted mediations referred to them by the Court. There are no judicial registrars or Masters at the County Court, and the Court has not considered referral of matters to mediation by Judges of the Court. This is because true mediation involves private discussions between the mediator and one party in the absence of the other party and involvement by a Judge in such private discussions may be inconsistent with the basic principle of fairness and absence of hidden influence, that the community expects and demands of the Court.

It should be noted however, that Judges who intensively case manage their Lists often engage in case conferencing in open court, in an effort to assist the parties to resolve the issues between them. The case conference mechanism is used regularly in commercial cases, with excellent results. This mechanism is offered regularly to parties in damages cases in addition to mediation. It will also be offered in future in all de-facto property disputes and testator family maintenance claims.

There are currently no barriers to referral of matters from this Court to ADR.

Questions 29-30: Measuring the outcomes of ADR in the civil jurisdiction

Collection of reliable data concerning, for example, the success rate of mediation in the civil jurisdiction, is a challenge currently being addressed by a research project funded by the Department of Justice on Mediation in the Supreme and County Court of Victoria and managed by Louis Schetzer, the Department Project Manager. The Advisory Group overseeing the conduct of the research includes a representative from each of the Courts, the Victorian Bar Council and the Law Institute of Victoria. The County Court's representative on the Advisory Group is Her Honour Judge Davis.

The Final Project Report is to be submitted in mid-2008. The research project will assess the usefulness of information currently collected by the Courts; develop and pilot an information collection system to be used by the Courts for mediation assessing the efficacy of court-ordered mediation and assessing the parties' satisfaction with the mediation process.

As mediation ordered by the County Court is conducted outside the Court, there are no direct implications of an increased use of mediation on the Court. The overwhelming majority of civil cases settle prior to trial. It will be important to set up data collection systems which can record and track the numbers which settle at mediation, or at other times prior to trial.

Question 33 The benefits for society of the use of ADR processes

It is impossible for the Court to fully assess the benefits to society from the use of ADR. Clearly, to the extent that the parties are able to resolve their disputes without a hearing and determination by the Court, there is a cost saving to them, and to the taxpayer. Resolution of a case at mediation, or at case conference, will allow the Court to focus its judicial resources on hearing and determining other cases. The parties may also be more accepting of a solution when they have been actively involved in the process of negotiation and compromise rather than as witnesses in a trial controlled by the Court.

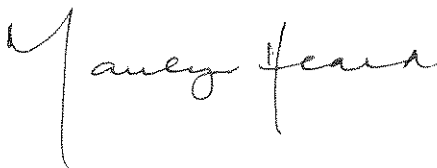
Questions 35-39: Marginalised individuals and communities

The Court has a Registrar who is designated to assist unrepresented litigants, and provide referral to community legal or other appropriate services. The Court Network provides informal assistance to litigants in person. Where self-represented litigants appear in Court they are actively assisted by the Court and referred where appropriate to the Registrar, community legal or other specific services for assistance.

Mediators have special ethical responsibilities to ensure that any imbalance between the parties does not result in the weaker party being overborne at a mediation.

Should you require further information arising from the information provided by the Chief Judge, please contact me on 8636.6698 or email marilyn.heard@countycourt.voc.gov.au

Yours sincerely,



Marilyn Heard
Executive Associate to the Chief Judge