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Chair  
Law Reform Committee  
Parliament House  
Spring Street  
East Melbourne VIC 3002

Dear Mr Scheffer

**Ombudsman Victoria submission to the Law Reform Committee of Parliament**

Thank you for your invitation to make a submission to the Law Reform Committee of Parliament's Inquiry into Alternative Dispute Resolution (ADR).

I consider the Committee's Inquiry to be a timely review of the ADR sector. The following will describe the increase in complaints experienced by my office in recent years. I believe the trends in demands upon my office is indicative of growing community expectations that independent and effective dispute resolution schemes will be in place to deal with their concerns. The proliferation of private industry schemes which the Committee is considering is also reflective of these growing expectations.

My office is one of the oldest formal ADR bodies in Australia. It provides the Committee with a case study of more than 30 years continuous experience in independently and efficiently resolving citizens' concerns regarding government services. I have therefore described the work of my office in detail to provide the Committee with an understanding of the elements that have underpinned the sustained success of my office.

I have also identified the structural elements that I believe have supported the growth of my office since 1973 into a body that is known and trusted by the Victorian community. I believe this information may inform the Committee regarding the elements required for a robust and credible ADR system.

Finally I have included some case studies that provide practical examples of the work undertaken by my office.

### Complaints to Ombudsman Victoria

A large portion of my office's work involves mediation and dispute resolution. Over the reporting year 2006-07, I received a total of 3,628 complaints and approximately 11,000 enquiries from the public. While a number required in-depth investigation, most were resolved through enquiries with the agencies concerned. Seventy five per cent of all cases were open for less than 30 days, with many dealt with on the day of receipt. The average time taken to finalise all complaints was 25 days, with 50 per cent within 12 days. This demonstrates the effectiveness of my office, where the majority of complaints are resolved through enquiry and mediated outcomes.

Most complaints received by my office involve allegations of unreasonable, unfair or wrong decisions, actions or enforcements of rules by government departments, local councils or statutory authorities. I have jurisdiction over approximately 600 Victorian government agencies, 79 local councils, 12 professional boards, universities and government schools, public and private prisons and authorised officers under the *Transport Act 1983*.

In the 2006-07 period, local government accounted for 24 per cent of all complaints, making it the largest single source of such matters; agencies and authorities under the jurisdiction of the Department of Justice accounted for 19 per cent; 41 per cent of complaints were associated with five other departments: the Department of Human Services, the Department of Treasury and Finance, the Department of Infrastructure, the Department of Education and Early Childhood Development and the Department of

Office of Housing (OOH) made an application to the Victorian Civil and Administrative Tribunal (VCAT) for compensation for damages to a tenant's former residence. VCAT ordered the former tenant to pay compensation and set a deadline for payment.

However, due to an administrative error OOH referred the debt to a debt collector before it was due. The former tenant was very distressed at being approached by the debt collector and was confused about their obligations. My office contacted OOH which promptly apologised to the former tenant for the error.

The matter was resolved and the former tenant paid the compensation due to OOH.

Sustainability and Environment; and the remaining 16 per cent of complaints were spread across the other public sector agencies and statutory authorities under my jurisdiction.

### **Alternative Dispute Resolution and role of Ombudsman Victoria**

Although there is no agreed definition of ADR, the National Alternative Dispute Resolution Advisory Council (NADRAC) views ADR as “processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them”.<sup>1</sup>

The main role of my office is to investigate and resolve complaints about administrative actions taken by or on behalf of government agencies, public statutory bodies and officers and employees of municipal councils, independently and impartially. The way in which I may conduct my office is set out in the *Ombudsman Act 1973* (the Act).

Section 13 of the Act states that “the principal function of the Ombudsman shall be to enquire into or investigate” administrative actions. As such I have the ability to determine the best method for the resolution of a dispute, whether it be through referral, enquiry, facilitated mediation or investigation.

A young woman in custody at a youth residential centre complained to my officers that she was not permitted to have physical contact with visitors, including her family. The contact was denied due to security procedures.

Given her age and the importance of connection with her family, my officers raised the matter with the manager. Following my officers' enquiries, the manager decided to support contact visits between family members for detainees assessed as not posing a security risk.

The Act also requires that I am impartial and that I act confidentially. In particular, subsection section 17(2) states that:

Every investigation under this Act shall be conducted in private.

Section 13A also provides that I may resolve matters informally:

- (1) The Ombudsman may conduct an enquiry for the purpose of determining whether—
  - (a) an investigation under this Act should be conducted; or
  - (b) the matter may be resolved informally.

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<sup>1</sup> National Alternative Dispute Resolution Advisory Council (2007) *What is ADR?* ACT: Attorney-General's Department, Commonwealth of Australia

Where I investigate a complaint I may regulate my own procedures in such a manner as I see fit (subsection 17(7)).

In its publication 'Legislating for alternative dispute resolution', NADRAC cites the need for confidentiality as one of the key issues to consider when providing for ADR. Specifically, NADRAC advises that:

The duty of practitioners and participants to keep such matters confidential is seen as a key underpinning of ADR services. On the other hand, disclosure may be necessary in limited circumstances in order to protect a person from harm or to prevent a serious breach of the law.<sup>2</sup>

This requirement of impartiality and confidentiality places my office in a good position to be able to effectively mediate complaints and resolve disputes independently.

In December 2006 a complainant wrote to me alleging that the Sheriff's Office had lost a cheque, which had been seized after the execution of a warrant. An investigation established that there had been breaches of policy and procedures by the Sheriff's officers and their supervisors.

The Department of Justice accepted my proposal that the matter be resolved through an ex-gratia payment to the complainant of over \$2,000.

### Facilitating outcomes

The cornerstone of the effectiveness of my office has been its ability to recommend and facilitate sensible solutions to problems that have sometimes appeared intractable to the parties. My officers take great care to explain to the parties that I am not an advocate for either party to the dispute. However my role is not a passive one and I pursue issues assertively when required. In turn my office is successful in obtaining agreement to my recommendations due to the widespread acceptance of the Ombudsman's impartiality when determining which issues have merit.

A recent example of the use of mediation within my office occurred when I received a complaint regarding a local council matter.<sup>3</sup> The complainant advised that he had made multiple notifications to his local council regarding a neighbour conducting a spray painting and panel beating business from his home, within a residential area. It was the complainant's belief that a business of this nature was not permitted under the local planning scheme. The matter

<sup>2</sup> National Alternative Dispute Resolution Advisory Council (2006) Legislating for alternative dispute resolution. ACT: Attorney-General's Department, Commonwealth of Australia, p.11

<sup>3</sup> Ombudsman Victoria Annual Report 2006-2007 p 23-24

continued for many years, with the complainant becoming more and more frustrated with the council's apparent inaction.

When the complainant contacted my office, the matter had been with the council for more than 10 years and the list of complaints had grown from one to three businesses operating outside the planning scheme. My enquiries revealed that the council had not adequately investigated the matter and had refused to treat the complainant reasonably when he made complaints.

Following the issue of a draft report to the mayor of the council, my office sought to resolve the matter by mediation, particularly bearing in mind the age of the dispute. A mediation session was arranged between the CEO of the council, the complainant and the complainant's neighbour. The meeting was co-mediated by two of my officers, who had been trained in ADR. The meeting provided the parties with an opportunity to negotiate a fair and reasonable outcome to their dispute, a situation that had not previously occurred during the 10 years that the complaints had continued.

The outcome of the process was that all parties, including the council, agreed to an independent assessment in relation to two specific issues:

- the alleged construction of buildings without a building permit
- the alleged operation of an earthmoving business from the site.

During the mediation session the council agreed to fund the assessment. The assessment found that the buildings in place had the necessary building permits, but that a 'store' in connection with an earthmoving business required a planning permit.

I believe that this case illustrates the usefulness of encouraging parties in protracted disputes to attempt to resolve their problems through direct negotiation and mediation, assisted by an independent third party.

### **Profile of Ombudsman Victoria**

My office has a long history of conducting outreach and education sessions to raise the awareness of the organisation, increase its accessibility and to build relationships within the community. In 2006-07 my office participated in a collaborative project designed to improve access to government services for

Indigenous Australians. My office was also involved in community education forums for Indigenous communities in Footscray, Shepparton, Swan Hill, Thornbury, Bendigo and Mildura.

In 2006-07 my office made more than 120 general presentations to government agencies, community groups and forums as well as formal presentations in metropolitan and regional areas such as Warrnambool, Horsham, Mildura and Benalla.<sup>4</sup>

My office also conducted training sessions, participated in forums and undertook site visits to ensure the effectiveness of our complaint handling mechanisms.

In June 2007, the Department of Justice published 'Dispute Resolution in Victoria: Community Survey 2007', which reported on, amongst other matters, the community's recognition of ADR services.

The survey indicated that my office rated the third mostly highly recognised dispute resolution organisation in Victoria, with a 73 per cent recognition rate, behind Consumer Affairs Victoria (92 per cent) and The Victorian Equal Opportunity & Human Rights Commission (89 per cent). It also showed that my office had a high level of recognition in people aged 30-60 years of age (72 to 87 per cent) and by those living in regional Victoria (80 per cent).<sup>5</sup>

I received a complaint that a council had not thoroughly investigated a series of complaints over several years regarding floodwater arising because of a neighbour's inadequate drainage. My enquiries found that the Council had previously conducted a dye test and confirmed that the flooding came from the neighbouring property. However despite the installation of drainage, the problem of flooding continued.

My office found that the extent of further action taken to address the problem was unclear. The council subsequently accepted my recommendation to engage an independent contractor to conduct dye tests to determine whether a nuisance continued to exist and inform the corrective action that should be taken. The complainant and her neighbour subsequently agreed to remedial works to resolve the problem.

Other ADR schemes, such as the Financial Industry and Complaints Scheme (25 per cent) and Dispute Settlement Centre Victoria (16 per cent), recorded far lower rates of recognition. I believe that this indicates that the work that my office has done to raise awareness and build relationships within the

<sup>4</sup> Ombudsman Victoria 2006-2007 Annual Report p 69

<sup>5</sup> Department of Justice (2007) *Dispute Resolution in Victoria: Community Survey 2007*. Melbourne: Ipsos Australia

community has produced measurable results. I have recently expanded the communications area in my office to include a Communications Manager, an Outreach Officer and a Learning and Development Officer to extend my outreach work and increase internal and external training. I anticipate that this will assist in raising the awareness and accessibility of my office as well as developing stronger relationships within the community.

### **Governance and management**

As an independent officer of the Victorian Parliament, I perform an important role in supporting the Parliament in its scrutiny of the executive government. I report direct to Parliament and I am accountable through my annual and other reports. I have formalised a governance framework for my office based on four key pillars:

- Strategy and direction
- Structure and relationships
- Compliance and accountability
- Performance monitoring.

In late 2006, I established an Audit and Risk Management Committee, which consists of two independent members, one of whom operates as Chairperson, as well as two ex-officio representatives. The committee's role is to review and advise OV's executive about matters of financial accountability and internal financial control.

### **The ADR Industry**

The above comments outline the role of my office and explain how it is constituted in order to meet an increasing demand for Alternate Dispute Resolution services. In my 2007 Annual Report I reported a 15% increase in complaints over the previous years, continuing a steady increase since 2003-04.

After ordering and receiving his personalised number plates, the complainant believed that they implied a sexual innuendo and so sought to exchange them for ones that were 'neutral'. VicRoads refused, saying that the complainant would need to purchase new plates. The complainant contacted my office and enquiries were made with VicRoads. VicRoads acknowledged that an error had been made and that the number plates should not have been issued. VicRoads exchanged the number plates at no cost to the complainant.

In my view, the demand for ADR services is driven by the ability to provide a service that is accepted as independent, fair, provided in a timely manner and is accessible. The benefits of this approach are also recognised by respondent

bodies. Aside from reducing the costs of litigation, the availability of an independent, external review body is that there is a forum in which otherwise intractable disputes can be resolved which is accepted by all parties as acting impartially.

The experience of my office has identified that several key elements are crucial to establishing and maintaining an effective ADR scheme. These include:

- The independence of the scheme's Chief Executive, both real and perceived
- A clear mandate to investigate
- Accessibility
- Community awareness of the service
- Transparency of processes
- A reputation for skill and rigour
- The respect of the sector subject to jurisdiction
- Sufficient resources.

I investigated a complaint that CityLink fines had been imposed incorrectly on a business vehicle due to an administrative error.

Whilst the complainant believed the error had subsequently been rectified, the Sheriff's Office visited the complainant seeking payment of more than \$5000 for the unpaid fines as a warrant had been issued. The complainant felt that she had no option except to pay, as the alternative was for the officers to take possession of her car.

DO accepted my recommendation that the matter be resolved by refunding the monies paid by the complainant.

A statutory Ombudsman has the advantage of a legislative base to support these elements- clearly defined functions and powers, a no-cost service to individuals, and the ability to report publicly on findings. These are all factors that define the community's confidence in the office.

I trust that my observations are of assistance to the Committee in its consideration of this matter. I would be pleased to appear before your Committee should you wish.

If your staff have any queries they may contact Stephen Mumford, Director of Investigations, on (03) 9613 6205

Yours sincerely



G E Brouwer  
OMBUDSMAN