

CONFIDENTIALITY IN MEDIATIONS – A WORK IN PROGRESS

Introduction

1. Mediators often tell the parties at mediation that the mediation process is private and confidential. This may be reinforced by a mediation agreement, usually prepared by a mediator and executed by the parties that describe the mediation as “confidential”. What does confidentiality really mean? Is the confidentiality clause in the mediation agreement enforceable? In what circumstances will the Court treat the communications at (or documents created by a party for) a mediation as admissible? There are no easy answers to these critical questions.
2. Indeed the admissibility of statements made at mediations has been considered by three Australian Law Reform Commission reports and one reference by the Attorney-General to the National Alternative Dispute Resolution Advisory Council (“NADRAC”).
3. There is an increasing amount of academic literature about these issues¹. But they are not new. In 1999 Shirley and Harris² wrote:

¹ See Dewdney: *The Partial Loss of Voluntariness and Confidentiality in Mediation* (2009) 20 ADRJ 17. Bernauer: *Confidentiality* 16 ADRJ 135. Wood and Field: *Confidentiality: An Ethical Dilemma for Marketing Mediation?* 17 ADRJ 79. Hurley: *Mediation Where a Party Represents the Australian Government: Are There Limits to Confidentiality?* 17 ADRJ 29.

² *Confidentiality in Court-Annexed Mediation - Fact or Fallacy?* The Queensland Lawyer 1999 Volume 13 page 220 at 223

“.....if a mediator were to testify in a subsequent formal proceeding as to what transpired during the negotiations, then no matter how true or objective the report, one party may be likely to feel the mediator was biased against it. The potential damage such public scrutiny could cause to the integrity and ultimate acceptance of the process is considerable.”

4. These issues were once again highlighted by the NADRAC Report “The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction”.³ In December 2009 NADRAC was asked by the Attorney-General to further advise him on :

“The legislative changes required to protect the integrity of different ADR processes including issues of confidentiality, non-admissibility, conduct obligations for participants and ADR practitioners and the need, if any, for ADR practitioners to have the benefit of a statutory immunity”.⁴

5. The Victorian Bar Dispute Resolution Committee prepared detailed submissions to NADRAC which highlights the need for clarification of the confidentiality and admissibility issues in ADR processes and consistency across all ADR processes.⁵ The submissions urge the Federal Government to amend section 131 of the *Evidence Act* 1995.

³ A copy of the Report is available at:
http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_ADRandCivilProceedingsReference

⁴ A copy of the reference is available at:
http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_ADRandCivilProceedingsReference

⁵ A copy of the Submissions will shortly be available on the Victorian Bar website for members. The authors wish to thank the members of the subcommittee formed by the Dispute Resolution Committee for their input in drafting this paper. Special thanks are given to Carey Nichol and Carmel Morfuni of the Victorian Bar.

6. As the use of mediation and other ADR processes becomes the norm it is likely there will be more debate about the extent of privacy and confidentiality of communications at mediation. Inevitably there will be more litigation on these issues.⁶
7. The authors of this paper believe there is a need for clarity and reform of the law on the issues of confidentiality and admissibility. These issues should be consistent for all ADR processes (including mediation), whether Court ordered or otherwise.
8. The issues of mediation confidentiality, privilege and admissibility are intertwined. Usually the issue of confidentiality arises when a party seeks to lead evidence of what transpired at an ADR process.⁷ This paper is primarily directed to this issue. This paper will consider confidentiality in ADR processes, including mediation and in particular:
 1. the common law provisions relating to confidentiality, privilege and admissibility; and
 2. the statutory amendments to the principles of confidentiality, privilege and admissibility;
 3. the authors' recommendations for reform; and
 4. some suggestions to assist mediators.

⁶ See for example the detailed discussions on the issues in Boule, *Mediation Principles Process and Practice* (2nd Ed) 2005 page 539 at seq.

⁷ Or as Boule describes it (at page 542) "Subsequent access to or exposure of what transpired in mediation"

Confidentiality at common law and equity

9. The source of confidentiality in ADR processes is usually based in contract.

The confidential obligations may be:

- (i) an express term of a written agreement;
- (ii) an implied duty; or
- (iii) a term of a “quasi contract”.

(i) Express term of a written agreement

10. In the context of mediations the confidentiality is usually set out in a mediation agreement prepared by the mediator and executed by the parties to the mediation at, or prior to the mediation. It is not unusual for a mediation agreement to contain the following terms:

“The mediator must not disclose to any person information obtained during the mediation without the prior written consent of the parties, unless compelled by law to do so.”

“A party must not disclose to any person other than that party's professional advisers for the purposes of the mediation, information obtained during the mediation without the prior written consent of the disclosing party, unless compelled by law to do so.”

“The parties agree that they will not at any time before, during or after the mediation call the mediator as a witness in any legal or administrative proceedings concerning the disputes.”

“For the purpose of any subsequent proceeding the mediation shall be regarded as a without prejudice conference and nothing said or done during the course of the mediation may be given in evidence in any proceedings and no documents created for the purpose of the mediation may be tendered in evidence or required to be produced in any proceedings. The mediation shall be conducted as if an order was made by a Supreme Court Judge referring the proceedings to

mediation pursuant to Order 50.07 of Chapter 1 General Rules of Procedure in Civil Proceedings 1996.”

The contractual promise of non-disclosure is readily enforceable by any party to the agreement.⁸ The mediator, as a party to the mediation agreement is bound by the contractual term.

11. Confidentiality clauses are not limited to ADR agreements. They are regularly associated with contracts of employment. However these clauses are generally directed to restraint on staff as well as use of the confidential information. This is another complex area.⁹ Employment agreements will not be canvassed in this paper.

(ii) Confidentiality may be implied

12. In *Farm Assist Limited v The Secretary for Environment Food and Rural Affairs (No 2)*¹⁰ Ramsey J held:

“28. I consider that the position is similar in arbitration. As the authors of Mustill & Boyd on Commercial Arbitration (2nd Edition 2001 Companion) state at 113, the courts have held that the existence of an implied confidentiality in arbitration does not preclude the use of certain documents outside the arbitration in limited circumstances. Although the scope of the exceptions to the implied confidentiality is not fully defined, in my judgment the exceptions identified in Mustill & Boyd at 113 all relate to cases where there is either consent or where the use of the documents is necessary in the interests of justice.

⁸ See Toulson and Phipps, *Confidentiality* (2nd Ed) 2006 page 36. *AFL v The Age* (2006) 15 VR 119 is a recent example of the Supreme of Victoria enforcing non-disclosure of confidential information by a stranger to a contract and at equity.

⁹ See for example *Drake Personnel Limited v Beddison* (1979) VR 13; *Pinnacle Hospitality People Pty Ltd v Ramasamy* (2007) VSC 433 and *Blyth Chemicals Limited v Bushnell* (1933) 49 CLR 82.

¹⁰ [2009] EWHC 1102 (TCC).

29. I consider that, in the context of mediation and in the absence of an express provision, a similar implied confidentiality would arise but that evidence may be given of those matters if the court considers that it is in the interests of justice to do so. In this case DEFRA and FAL have agreed with the Mediator to treat the mediation as confidential. That, in my judgment, is an obligation which is binding as between the parties and the Mediator but that the court can permit the use of or order disclosure of the otherwise confidential material if it is in the interests of justice to do so. Whilst it is possible for the confidentiality to be waived, that has to be with the consent of all parties. This means that, in my judgment, FAL and DEFRA cannot waive confidentiality in the mediation so as to deprive the Mediator of her right to have the confidentiality of the mediation preserved.”

13. Toulson and Phipps suggest that the relationship of mediator and party gives rise to the duties of confidentiality.¹¹

“The same logic [*an implied obligation not to disclose matters in arbitration*], whether in support of an implied contractual term or an equitable obligation must apply as much, if not more strongly to the case of mediation. For it would destroy the basis of mediation if, in the case of the mediation failing, either party could publicise matters which had passed between themselves or between either of them and the mediator for the purposes of mediation. An obligation of confidence would also be owed to both parties by the mediator.”

14. Any confidentiality may be protected in equity.¹² It is immaterial as to whether the duty is considered an implied term of the contract or a duty which will be protected in equity.

¹¹

At page 293.

¹²

See *Corrs Paveys v Customs (Vic)* (1987 FCR 442 per Gummow J at 442, 443, *AFL v The Age* 15 VR 419 (Kellam J) and *Control Australia v Emtech & Associates* (1980) FLR 184.

(iii) A term of “quasi contract”

15. There has been an increasing use of compulsory ADR processes, including mediation, prescribed by legislation or regulation. The *Associations Incorporation Act* requires the incorporated association to adopt grievance procedures which may involve mediation. The members of the association are bound by that provision. The statutory framework implies a quasi contract on the association and its members. Therefore, confidentiality flows to any dispute resolution process undertaken pursuant to the statutory framework.

Exceptions to confidentiality in mediation

16. The common law recognises that there are exceptions to confidentiality in ADR process including mediation. These include:

(i) Waiver

It is always open to the parties to an agreement to waive confidentiality. However there cannot be unilateral waiver. All of the parties must consent to the waiver.¹³ As Ramsey J pointed out in *Farm Assist* this may require the consent of the mediator to the waiver as he or she is a party to the mediation agreement. In *ACCC v Pratt (No. 3)*¹⁴ the Federal Court received in evidence an affidavit from the mediator, Mr McHugh Q.C. The affidavit was tendered by consent. The report does not relay the circumstances about the

¹³ See Boule, 558.

¹⁴ [2009] FCA 407.

preparation of the affidavit. It is highly unusual for a mediator to be approached to swear an affidavit in proceedings.

(ii) Enforcements of the Agreement reached at an ADR process

The Courts will permit a party to adduce evidence of an agreement reached at mediation.¹⁵ In order to avoid any dispute as to whether a concluded agreement has been reached most experienced mediators will commence a mediation by ensuring that the parties agree that no agreement will be reached until such time as a document is executed by all of the parties and that the document contains a concluded enforceable agreement.¹⁶ This ensures that the first limb of *Masters v Cameron*¹⁷ applies.

(iii) Public Safety

It may be that a mediator is told of an unusual circumstance where there is a real risk to the life or safety of another person. In these circumstances the mediator has a public duty to report the matters within his/her knowledge. Any confidentiality does not extend to prevent such disclosure.¹⁸ A standard mediation agreement clause is:

“A mediator may disclose such information if the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed.”

¹⁵ See for example, *Al-Hakim v Monash University* [1999] VSC 511.

¹⁶ Some mediators state more simply “There will be no deal unless the deal is in writing and signed by all the parties”.

¹⁷ (1954) 91 CLR 353 per Dixon CJ, McTiernan and Kitto JJ at 360.

¹⁸ This provision is an express exclusion to confidentiality in the Centre for Dispute Resolutions Model Mediation Procedure and Agreement (9th Ed) clause 18.

(iv) Fraud and/or Criminality

As Boule points out:¹⁹

“Where there have been allegations of fraud or serious misconduct in the process there are grounds for admitting evidence of what transpired in the mediation and the courts may suspend confidentiality for this purpose.”

It is not unusual for mediators to mediate disputes where fraud allegations have been made in the proceedings. Experienced mediators are careful to ensure that the parties to the mediation do not make disclosures which may constitute admissions of serious offences. The difficulties faced by barrister mediators are no different to those confronted by criminal barristers when acting for their clients. Clearly the risk is best managed by experience.

Admissibility at common law

17. It is one matter for the parties to agree that a communication is privileged. It is an entirely different question as to whether a Court will admit evidence as to what transpired at mediation.²⁰ A mediator is a competent and compellable witness.²¹ But is the evidence to be given by a mediator admissible?

18. Generally speaking the law protects any communication made by a party or their agents made in the course of or in an attempt to settle a dispute

¹⁹ At 561.

²⁰ See *Farm Assist Limited* at para [21], Toulson and Phipps para 17-001.

²¹ See Boule, page 564.

between them.²² This protection applies to communications made at mediations.

19. The genesis of the exclusion of evidence of what occurs in an ADR process is public policy to provide a mechanism for the parties to settle their own dispute and thereby avoid litigation.²³ The traditional vehicle for the implementation of this public policy has been the “without prejudice” privilege.

20. In *Field v Commissioner for Railways (NSW)* the High Court stated²⁴:

“As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhampered.”

21. In *Rodgers v Rodgers*²⁵ the High Court again reinforced the exclusion of evidence on the without prejudice principle to protect confidentiality in the following way:

“The evidence shows that for a lengthy period the parties were negotiating by themselves and their solicitors for the purpose of

²² A useful summary of the common law as it applied in 1995 can be found in the *Australian Law Reform Commission Report on Evidence* No.26 Volume 2 Chapter 12 paragraphs 250-258. As discussed later in this paper the ALRC’s summary relates to negotiations generally and not specifically to mediations.

²³ See for example *Cross on Evidence* Heydon 6th Australian Ed (para 25,350), Boule, page 540 and the cases referred to therein.

²⁴ (1955) 99 CLR 285 per majority Dixon CJ, Webb, Kitto and Taylor JJ at 291

²⁵ 1964 (114) CLR 608 at 614.

determining what financial provision should be made for the appellant and there can be no doubt that there was under discussion the appellant's claim to maintenance and also possible agreement concerning the wife's claim to an interest in the assets of her husband. In spite of the arguments of counsel for the appellant we are satisfied, as was the learned trial judge, that agreement was never reached between the parties and that their negotiations in an effort to reach agreement must be taken to have been without prejudice. That they were not expressed to be without prejudice is of no consequence; it is sufficient that the wife's first petition was then pending, that claims had been made upon the husband, and that the negotiations took place bona fide with a view to compromise. We do not understand the observation that whilst the "document" would not have been admissible in other jurisdictions there was something to be said for the view that it and the negotiations which preceded it were admissible in the Matrimonial Causes jurisdiction as showing the conduct of the parties. That husband and wife who are parties to a subsisting cause in the Matrimonial Causes jurisdiction, or, who contemplate such proceedings, should be able to negotiate with a view to reconciliation or as to what financial provision should be made for one party freely and without fear that, failing agreement, what is said or done by them may later be used in evidence is, in our view, not open to question. It is, we think, unnecessary to refer to authorities on this point but we mention the comparatively recent cases of *McTaggart v. McTaggart* (1949) P 94; *Mole v. Mole* (1951) P 21; *Pool v. Pool* (1951) P 470; and *Henley v. Henley* (1955) P 202 in which the purpose and application of the rule in the Matrimonial Causes jurisdiction are discussed."

22. The use of ADR processes including facilitation, early neutral evaluation and non-binding appraisal has increased over the last 20 years. It is hardly surprising that "without prejudice privilege" applies to almost all ADR processes including mediation.²⁶

²⁶

Subject to statutory modifications which are discussed later in this paper.

Summary of the common law position

23. In *Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs*²⁷ Ramsey J. highlighted the unprecedented importance of ADR processes in the Court system since the Woolf Reforms. Ramsey J summarised the law of confidentiality, privilege and without prejudice principles at mediations as follows:²⁸

“Therefore, in my judgment, the position as to confidentiality, privilege and the without prejudice principles in relation to mediation is generally as follows:

- (a) Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.
- (b) Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.
- (c) Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege.”²⁹

24. As noted earlier in this paper most ADR practitioners are more concerned with the issue of admissibility rather than the strict issue of confidentiality. As Boulle points out it is a difficult matter for a party to effectively enforce

²⁷ [2009] EWHC 1102.

²⁸ At paragraph [44].

²⁹ Ramsey J also cited with approval the various passages in Toulson and Phipps and in particular paragraph 17-016.

confidentiality of mediation as against another party.³⁰ It is more likely that a party will seek to adduce evidence based upon what transpired at the mediation. The Court will be required to determine whether that evidence is admissible.

Exceptions to the without prejudice principle

25. Boulle suggests that there are five main exclusions to the non-admissibility principles:³¹

(a) Disclosure with the consent of the parties;

This disclosure has already been referred in this paper.

(b) Admissibility of mediated agreements;

Where the ADR process has culminated in a mediated agreement the Courts have been reluctant to go behind that agreement.³²

Usually a mediated agreement is recorded in writing. The provisions of the document entitle the parties to produce that document to the Court for the purposes of enforcement. In this context the exception may be considered one of waiver by the parties.

(c) Allegations of fraud and/or criminality;

(d) Mediators reporting obligations;

(e) Costs orders and procedural hearings.³³

³⁰ See pages 443, 448.

³¹ See Boulle, 558-571

³² See for example *Al-Hakim v Monash University Beach J* (1999) BC990826; *Thompson v Macedon Ranges Shire Council* [1999] VSC 338; *Brodham v Edsoncome* (2000) QDC 313; see also Boulle, page 558-599.

³³ Boulle at 563 refers to *Tracy v Bifield* (SCWA) BC9801948; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576; *Reed Executive v Reed Business Formation Ltd* [2004] EWCA (Civ) 887 and *Rajski v Tectran Corp Pty Ltd* [2003] NSWSC 476.

26. It is the last two issues which are of concern to the authors.

Mediator Reporting Obligations

27. The Bar has always supported Court ordered mediations. The Court is entitled to know about the result of those mediations. The rules of the Supreme Court require the mediator to advise the Court that the mediation is finished.³⁴ The County Court requires mediators to advise about non-controversial procedural matters.
28. Of greatest concern to the authors is the mooted obligation of the ADR practitioner to report to the Court on the “good faith” of the parties or their practitioners. Ordinarily mediation is a voluntary process. If a Court Order has been made it seems inappropriate that the mediator is required to report to the Court as to whether a party co-operated at mediation or negotiated in “good faith”. It requires the mediator to move from the facilitator of negotiations to an arbitrator of behaviour.
29. In 2009 Professor Sourdin recommended that mediators report to the Court on various matters including the “good faith” of the parties and the legal practitioners³⁵.

³⁴ See Order 50.07.

³⁵ See “Mediation in the Supreme and County Courts of Victoria” at <http://www.justice.vic.gov.au/wps/wcm/connect/de41f300404a66d18925fbf5f2791d4a/Mediationin.pdf?MOD=AJPERES>

“Where the session did not result in a partial or total agreement, the mediator should be required to check a box as to whether, *in the mediator’s view* one or other of the parties or the representatives did not negotiate in good faith and indicate which party or practitioner did not negotiate in good faith. In terms of this assessment the practitioner may be required to consider matters such as the following:

1. whether the party or a representative acted in a hostile rude or unhelpful manner in the context of negotiations (bearing in mind it was likely that the parties may have strong emotions about the dispute);
2. whether a party or their representative or some other person undermines the process, for example, by adopting adversarial cross-examination or bullying techniques or by preventing a party from expressing their views;
3. whether one or other party or their representatives did not show a willingness to consider options for the resolution of the dispute that were put forward by the opposing party;
4. whether there was a willingness to give consideration to putting forward options for the resolution of the dispute.” (Our emphasis).³⁶

30. The issue of good faith in mediation has been discussed at previous CPD seminars.³⁷

31. The State Government is also considering the introduction of a Civil Procedure Bill. It is rumoured that the Bill currently requires parties to act and in good faith towards one another. If the good faith provisions are

³⁶ See paragraph 6.56 page 178.

³⁷ On 17 March 2010 Professor Tania Sourdin and George Golvan QC presented a paper at which these issues were discussed in depth. The presentation made by Professor Sourdin is available to members of the Bar at http://www.vicbar.com.au/GetFile.ashx?file=CLEFiles%2f650_170310_MediationSupremeCountyCourts.pdf

subsequently included in the Bill tabled in Parliament, it is likely to be opposed by most accredited mediators and other ADR practitioners.

Costs and Procedural Orders

32. The imposition of costs orders seems to be intertwined with the reporting obligations. It is difficult to imagine circumstances where a mediator could provide a report to the Court to enable the Court to make a costs order without breaching confidentiality. The parties are able to disclose to the Judge whether mediation was held. It is an entirely different matter to disclose what happened at that mediation, especially if there is a factual dispute.
33. The risks to the mediator advising the Court on procedural matters is contentious and not to be encouraged. Conduct reporting requirements confuses the role of the mediator who will then adopt the role of the eyes and ears of the Court. The last thing ADR needs is the public to lose confidence in the processes.³⁸
34. A mediator ought to be able to advise the Court whether the order made by that Court has been complied with. This is a hot topic in mediation circles as the standard Court orders made in the Supreme Court and County Court require the attendance of the party ultimately responsible for settling a dispute and the solicitor ultimately responsible for advising that party in

³⁸ Ibid paragraph 3.

relation to that settlement. The non-attendance of the ultimate decision maker is a breach of the order of the Court. It may constitute contempt. Experienced mediators regularly tell us that if the ultimate decision maker is not present at the mediation the prospects of achieving a negotiated settlement are low.

2. Statutory Reforms of the Common Law

Australian Law Reform Commission Reports

35. In 1979 the Commonwealth Attorney-General requested the ALRC to prepare a comprehensive review of the laws of evidence with the view of producing a code of evidence and to draft a *Uniform Evidence Act*. In 1985 the ALRC prepared a two volume report (No. 26).³⁹ The detailed report included a comprehensive review of the law as at June 1994 and recommended the codification of the common law in all matters of evidence, including without prejudice settlement negotiations.⁴⁰ Draft legislation was prepared.⁴¹ In 1994 the ALRC prepared its second report.⁴² The second report did not make substantial changes to the proposed legislation insofar as it related to without prejudice settlement negotiations. The recommendations of the ALRC were substantially adopted and incorporated into section 131 of the *Evidence Act* (Commonwealth).

³⁹ A copy of the Report may be downloaded from the ALRC website at www.alrc.austlii.edu.au/au/other/alrc/publications.

⁴⁰ At Volume 2 Chapter 12 paras 250 et seq. However this Chapter dealt with negotiations generally, not structured ADR processes.

⁴¹ Volume 2 Appendix A.

⁴² ALCR Report No.38.

36. In July 2004 the Commonwealth Attorney-General referred questions of privilege including client legal privilege to the ALRC. In 2005 another report was prepared.⁴³ The ALRC considered recent case law relating to the application of section 131⁴⁴ and in particular its interaction with section 53B of the *Federal Court of Australia Act*.

37. The ALRC recommended that:⁴⁵

“From the Commission’s survey of the case law it appears reasonably well settled that evidence of matters discussed at mediations falls within section 131. Whilst the section could be amended to adopt the terms of a mediation privilege as expressed in the Acts such as the *Federal Court of Australia Act 1976* (Commonwealth). In the absence of strong submissions suggesting such action is necessary, it is the view of the Commissions that amendment to section 131 is unwarranted.”

Section 131 Evidence Act (Commonwealth)

38. A copy of the section of the Act will be distributed. Section 131(1) replicates the common law position that evidence of settlement negotiations will not be admissible. The exceptions set out in s 131(2) are, in our view, broader than the common law exceptions. Of particular concern to the authors is section 131(2) (i) “*making the communication or preparing the document affects a right of a person.*” It seems to the authors that every mediation affects the right of a person. Legal and equitable rights are always

⁴³ ALRC Commission Report No.102.

⁴⁴ *GPI Leisure Corporation v Yuill* 42 NSWLR 225; *Silver Fox Company v Lenards Pty Ltd* (2004) 214 ALR 621 and *Lewis and Nortex* [2002] NSWSC 1245.

⁴⁵ Chapter 15.179

compromised. In theory this section could open the door to the admissibility of all acts and negotiations at mediation. Fortunately the provisions have been interpreted narrowly.⁴⁶

39. Section 135 of the *Evidence Act* grants to the Court a general discretion to exclude evidence:

“The Court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.”

40. It is difficult to understand how the discretion vested in the Court by section 135 would enable a Judge sitting without a jury to refuse to receive evidence which would be admissible by reason of section 131(2).⁴⁷

Specific Federal and State legislation concerning mediation

41. Despite the opinion of the ALRC, the *Federal Court Act of Australia Act* was amended to provide a wider exception to admissibility of evidence at mediations. Section 53B of the *Federal Court Act of Australia* 1976 states:

“53B Admissions made to mediators

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A ***is not admissible:***

⁴⁶ See for example, *Glass v Demarco* (1999) FCA 482 [10] *ASCIAC v Australian Secured and Managed Mortgages Pty Ltd* (2008) FCA 753 at [33], *Uniform Evidence Law*, Odgers, 8th Ed (2009) page 673.

⁴⁷ See Odgers page 686.

- (a) ***in any court*** (whether exercising federal jurisdiction or not); or
- (b) ***in any proceedings*** before a person authorised by a law of the Commonwealth or of a State or Territory or by the consent of the parties to hear evidence.” (*Our emphasis*)

42. In the Supreme and County Courts⁴⁸ a slightly different statutory regime applies. The relevant provisions of the Supreme Court Act are:

“24A Mediation

Where the Court refers a proceeding or any part of a proceeding to mediation, other than judicial resolution conference, unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the ***hearing of the proceeding*** of anything said or done by any person at the mediation.” (*Our emphasis*)

“24B Judicial resolution conference

- (1) If, in any proceeding, the Court orders or directs that a judicial resolution conference be conducted, no evidence shall be admitted at the ***hearing of any proceeding*** of anything said or done by any person in the course of the conduct of the judicial resolution conference unless the Court otherwise orders, having regard to the interests of justice and fairness. (*Our emphasis*).
- (2) Without limiting section 16 of the **Evidence Act 2008**, a Judge of the Court or an Associate Judge is not compellable to give evidence ***in any proceeding***, whether civil or criminal, of anything said or done or arising from the conduct of the judicial resolution conference.” (*Our emphasis*)

⁴⁸ See Sections 41 and 47B *County Court Act 1958*. Section 41 is directed to civil judicial resolution conferences.

43. Most practitioners will be aware that slightly different words are used in the Supreme Court Rules.

“50.07(6) Except as all the parties who attended the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation.”⁴⁹

44. Order 50.07 is substantially replicated by the County Court Rules.
45. It remains to be determined whether there is any substantial difference in the application of these sections despite the use of different words highlighted above. Is hearing of the proceeding intended to be different from hearing of any proceeding? If so what is the rationale?
46. VCAT has a slightly different regime as it may order compulsory conferences as well as mediation.⁵⁰ However sections 85 and 92 of the *VCAT Act* strictly limit the admissibility of any evidence of things said or done at mediation or a case conference.
47. Further the special provisions associated with family dispute resolution (which includes mediation) in the Family Court are the subject of legislation. Section 10H of the *Family Law Act* states:

⁴⁹ The Supreme Court Rules make it clear that the only matter which may be reported to the Court is that the mediation is “finished” – see Order 51.07(5).

⁵⁰ See sections 85 and 92 of the *Victorian Civil and Administrative Tribunal Act* 1998.

“10H Confidentiality of communications in family dispute resolution

- (1) A family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution, unless the disclosure is required or authorised by this section.
- (2) A family dispute resolution practitioner must disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.
- (3) A family dispute resolution practitioner may disclose a communication if consent to the disclosure is given by:
 - (a) if the person who made the communication is 18 or over—that person; or
 - (b) if the person who made the communication is a child under 18:
 - (i) each person who has parental responsibility (within the meaning of Part VII) for the child; or
 - (ii) a court.
- (4) A family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:
 - (a) protecting a child from the risk of harm (whether physical or psychological); or
 - (b) preventing or lessening a serious and imminent threat to the life or health of a person; or
 - (c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or
 - (d) preventing or lessening a serious and imminent threat to the property of a person; or
 - (e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

- (f) if a lawyer independently represents a child's interests under an order under section 68L—assisting the lawyer to do so properly.
- (5) A family dispute resolution practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families.
- (6) A family dispute resolution practitioner may disclose information necessary for the practitioner to give a certificate under subsection 60I(8).
- (7) Evidence that would be inadmissible because of section 10J is not admissible merely because this section requires or authorises its disclosure.
- Note: This means that the practitioner's evidence is inadmissible in court, even if subsection (2), (3), (4), (5) or (6) allows the practitioner to disclose it in other circumstances.
- (8) In this section:
communication includes admission.

48. There is authority to indicate that Court ordered mediations are not bound by the *Evidence Act*⁵¹.

49. In *Pinot Nominees* the Federal Court held that section 131 had no application if the mediation was Court ordered.⁵² It remains to be seen whether the rationale in *Pinot* will be applied by Victorian Courts. If parliament intended that all Court ordered mediations would be excluded from the operation of section 131, then it should have explicitly done so.

Section 131 and the Supreme Court Rules (and for that matter the *VCAT*

⁵¹ *Pinot Nominees Pty Ltd v Deputy Commissioner of Taxation* (2009) FCA 1508; *Rajski v Tecteram Pty Ltd* (2003) NSWSC; *Steven Odgers Uniform Evidence Law* 8th Edition Law Book Company at para 1.3.13890.

⁵² *Pinot Nominees Pty Ltd v Deputy Commissioner of Taxation* (2009) FCA 1508; *Rajski v Tecteram Pty Ltd* (2003) NSWSC; *Steven Odgers Uniform Evidence Law* 8th Edition Law Book Company at para 1.3.13890.

Act) appear to be in conflict and clearly set up a different evidentiary regime for ADR processes, including mediation. However the trigger for the difference is whether the ADR process is Court ordered.

50. The conflict between section 131 of the *State and Commonwealth Evidence Acts* and the protection afforded by section 53B of the *Federal Court of Australia Act*, the *Supreme and County Court Rules* and sections 85 and 92 of the *VCAT Act* is obvious.

Summary of current position

51.

- (i) If the parties to a dispute conduct an ADR process before litigation then section 131 of the *Evidence Act* applies.
- (ii) If the parties issue proceedings but then engage in an ADR process such as mediation or early neutral evaluation, then section 131 of the *Evidence Act* applies.
- (iii) If the parties issue proceedings in the Federal Court and the Court orders mediation then section 131 does not apply to that mediation. Section 53B of the *Federal Court of Australia Act* applies.
- (iv) If the parties issue proceedings in the Supreme or County Courts and are ordered to mediation or a case conference then section 131 of the

Evidence Act probably does not apply and the Rules of Court will limit the evidence which may be adduced.⁵³

- (v) If the parties are in litigation in the Family Court of Australia then section 10H of the *Family Law Act* applies and section 131 of the *Evidence Act* does not apply.

3. Recommendations for Reforms

52. Governments and Courts are encouraging parties to resolve their disputes without recourse to litigation. Surely all disputants are entitled to be placed in the same position as those who await Court proceedings to be issued and a Court order for an ADR process. The current system may, in fact, provide a disincentive to early resolution of disputes. It is time for the State and Commonwealth Governments to treat all persons who engage in ADR equally and to ensure that confidentiality and admissibility of what occurs at all ADR processes is consistent. The statutory conflict highlights the defects in the current regime. There is no justification for the multiple schemes associated with admissibility of matters which occur at an ADR process.
53. In our view the current regime is unacceptable. Ideally there should be one regime which codifies the admissibility of things said or done at all structured ADR processes. It is unacceptable that ADR practitioners face a greater risk of being required to give evidence as to what happened at an

⁵³ Query: what happens if the mediation takes place after the time specified in the Court Order?

ADR process if the ADR process (especially mediation) was conducted before a Court made an order. Consistency is desirable.

54. Insofar as section 131 attempted to provide a codification and admissibility of what is said or done at ADR processes; it has failed. The exceptions in section 131(2) are far too broad.
55. Perhaps the mediator should give a better explanation to the parties as to the nature of confidentiality. But what could be said? Perhaps the following:

“This ADR process is not Court ordered therefore section 131(1) of the *Evidence Act* provides that what is said or done in negotiations is inadmissible – unless section 131(2) applies if the Court determines that a right has been affected. Even then the Court might not admit that evidence because of section 135 of the *Evidence Act!*”

or

“This ADR process is Court ordered...”

One wonders what the parties would think!

56. Boule⁵⁴ highlights the dilemma:

“While parties may make their own rules on confidentiality, these will also be susceptible to being overridden by public policy and the needs of justice administration. Ultimately, there are issues of credibility and legitimacy at stake in terms of how the mediation movement deals with these issues. As there are undoubted limitations on confidentiality in practice, these should be dealt with as clearly as possible before the commencement of the mediation. Unfortunately this can never be definite – as this chapter reveals a statement that mediation is confidential unless disclosure is ‘required by law’ is accurate, but ultimately not instructive or helpful.”

⁵⁴

At page 571

57. There is a lot of work to be done on the issue of confidentiality and admissibility. Hopefully NADRAC will produce a report which will provide the impetus for amendment of section 131 of the *Evidence Act*.

4. Recommendations to Mediators

58. In the meantime:
- (i) redraft your opening statements to accord with the current legal framework;
 - (ii) ensure your ADR agreement is well drafted;
 - (iii) if it is said that there is a Court order always call for the order before the mediation to ensure that it is still current;
 - (iv) lobby the State and Federal Attorneys-General to achieve consistency in all ADR processes irrespective of whether a Court order has been made;
 - (v) continue to rely upon the reluctance of Judges to hear any evidence of things said or done at mediation; and (perhaps most importantly)
 - (vi) pay your professional indemnity insurance which is due next month.

DATED: 12 May 2010

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