MEDIATIONS IN COMMERCIAL LITIGATION: THE LEGISLATIVE AND COMMON LAW FRAMEWORK FOR LEGAL PRACTITIONERS AND MEDIATORS

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Introduction

1. Alternative dispute resolution forms an integral part of nearly all forms of commercial litigation in Australia. Mediation is one of the cornerstones of alternative dispute resolution. In this decade, both the State and Federal legislatures have introduced legislation which impose obligations on legal practitioners and their clients as to the conduct of commercial litigation, including the use of mediation. Legislation and court rules also impact on the obligations and rights of mediators that conduct court ordered mediations. In the main, mediators that conduct court ordered mediations are afforded legislative immunity from suit as to their conduct of mediations. However mediators engaged to conduct voluntarily mediations (i.e. mediations without a court order) remain exposed to potential claims as to their conduct of mediations. Confidentiality as to what takes place in a mediation is fundamental to that process. Legal practitioners representing clients in mediations and who act as mediators also need to be aware of the legislative requirements relating to confidentiality as to mediations and the without prejudice privilege.
2. This paper addresses:
   A. The impact of the ***Civil Procedure Act 2010*** (Vic) (**the CPA**) on the obligations of legal practitioners in connection with mediations for civil proceedings in the courts in Victoria;
   B. The requirements imposed by the ***Civil Dispute Resolution Act 2011*** (Cth) (**the CDRA**) for persons to seek to settle civil disputes before proceedings are commenced;
   C. The impact of Part VB of the ***Federal Court of Australia Act 1976*** (Cth) on the obligations of legal practitioners in connection with civil proceedings in the Federal Court and the Federal Circuit Court;
   D. The obligations imposed on mediators of court ordered mediations;

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E. The legislative immunity from suit afforded to mediators conducting court ordered mediations;

F. The potential liability to suit of mediators that conduct voluntary (i.e. non-court ordered) mediations; and

G. The legislative provisions governing confidentiality of what takes place during mediations and the operation of the without prejudice privilege.

SECTION A: THE IMPACT OF THE *CIVIL PROCEDURE ACT 2010* (VIC) (CPA)

3. The CPA has a broad impact on civil proceedings in Victoria. That impact extends to the way in which legal practitioners conduct themselves in connection with civil proceedings generally including mediations. To appreciate the impact of the CPA in these respects, it is necessary to consider the purpose of that Act, the paramount duty it provides for and the overarching obligations it imposes. It is also necessary to have regard to the way in which the courts are dealing with contraventions of the overarching obligations and the power the courts have to impose sanctions for such contraventions.

The purpose of the CPA, the paramount duty and the overarching obligations

4. Section 1(1) of the CPA states that the main purposes of that Act are, among other things:

> "(a) to reform and modernise the laws, practice, procedure and processes relating to civil proceedings in the Supreme Court, the County Court and the Magistrate's Court and provide for uniformity;...
>
> (c) to provide for an overarching purpose in relation to the conduct of civil proceedings to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute;".

5. Section 1(2) of the CPA provides that, without limiting ss 1(1), the Act provides for:

> "(a) overarching obligations for participants in civil proceedings to improve standards of conduct in litigation;...
>
> (d) further enhancement of appropriate dispute resolution processes.".

6. Section 7(1) of the CPA states that the overarching purpose of that Act and the rules of court in relation to civil proceedings is to facilitate the "just, efficient,

timely and cost-effective resolution of the real issues in dispute". The expression "**civil proceeding**" is defined in s 3 of the CPA to mean any proceeding in a court other than a criminal proceeding or quasi criminal proceeding. The expression "**court**" means the Supreme Court, the County Court and the Magistrates' Court.[1]

7. The overarching purpose may be achieved by, among other things, any appropriate dispute resolution process agreed to by the parties or ordered by the court.[2] Section 3 of the CPA defines the expression "**appropriate dispute resolution**" to mean, without limitation:

> "(a) mediation, whether or not referred to a mediator in accordance with rules of court;...".

The word "mediation" is not defined in the CPA.

8. Section 10 of the CPA provides that the overarching obligations apply to a party to a civil proceeding, any legal practitioner or other representative acting for or on behalf of a party, any law practice acting for or on behalf of a party and any person who provides financial assistance or other assistance to any party, to the extent that that person exercises any direct control, indirect control or any other influence over the conduct of a civil proceeding.[3]

9. The CPA provides that the overarching obligations apply in respect of the conduct of any aspect of a civil proceeding in a court including, but not limited to:

> "(c) any appropriate dispute resolution undertaken in relation to a civil proceeding.".[4]

This means that the overarching obligations apply to all mediations undertaken in relation to a civil proceeding whether court ordered or not.

10. Part 2.3 of the CPA contains ss 16 to 27. These sections specify the paramount duty under the Act and the overarching obligations that apply to legal practitioners and their clients.

11. Section 16 of the CPA is headed "Paramount duty". That section provides that each person to whom the overarching obligations apply has a paramount duty

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[1] The CPA does not apply to proceedings in the Victorian Civil and Administrative Tribunal.
[2] CPA, s 7(2)(c).
[3] See CPA, ss 10(1)(a)-(d).
[4] CPA, s 11(c).

to the court to further the administration of justice in relation to any civil proceeding in which that person is involved.

12. Each of the overarching obligations specified in ss 17 to 26 of the CPA are of critical importance to all legal practitioners and law practices engaged in civil proceedings in the Victorian courts.

13. Using the heading to ss 17 to 26, the overarching obligations may be summarised as follows:

    (a) overarching obligation to act honestly (s 17);

    (b) overarching obligation – requirement of proper basis (s 18);

    (c) overarching obligation to only take steps to resolve or determine dispute (s 19);

    (d) overarching obligation to cooperate in the conduct of civil proceeding (s 20);

    (e) overarching obligation not to mislead or deceive (s 21);

    (f) overarching obligation to use reasonable endeavours to resolve dispute (s 22);

    (g) overarching obligation to narrow the issues in dispute (s 23);

    (h) overarching obligation to ensure costs are reasonable and proportionate (s 24);

    (i) overarching obligation to minimise delay (s 25); and

    (j) overarching obligation to disclose existence of documents (s 26).

The impact of the overarching obligations on the role of legal practitioners in mediation

14. Many (if not all) of the overarching obligations impact on the role of the legal practitioner in mediations for civil proceedings to which the CPA applies. It is convenient to consider the operation of ss 17, 20, 21, 22, 24 and 26 of the CPA in that context.

15. Before turning to consider those sections specifically, it should be noted that only s 22 specifically refers to alternative dispute resolution (i.e. mediation). Sections 17, 20, 21, 24 and 26 do not. That is, none of those sections specifically state that the overarching obligations for which they provide apply to alternate dispute resolution and therefore to mediations. However sections 17, 20, 21, 24 and 26 all use the expression “civil proceeding”. Section 11 of the

CPA provides that the overarching obligations apply in respect of the conduct of any aspect of a civil proceeding in a court including, but not limited to (relevantly) any appropriate dispute resolution (i.e. a mediation) undertaken in relation to a civil proceeding. Therefore, it is most likely that ss 17, 20, 21, 22, 24 and 26 of the CPA will be interpreted so as to apply to any mediation that may be conducted in connection with a civil proceeding. The expression "civil proceeding" is defined to mean any proceeding in a court (other than a criminal or quasi-criminal proceeding).[5] This means that the overarching obligations in the CPA do not apply to disputes before they are the subject of proceedings in the Courts. Therefore, any mediation of a civil dispute before the commencement of proceedings in a court would not be subject to the CPA or the overarching obligations.[6]

Section 17 of the CPA

16. Section 17 of the CPA requires each person, to whom the overarching obligations apply, to act honestly at all times in relation to a civil proceeding. The expression "honestly" is not defined in the CPA. In *Brown v Guss (No 2),*[7] McMillan J held that to establish a contravention of s 17 of the CPA, the court must find that the person "possessed a particular state of mind to not act honestly".[8]

17. In *Giles v Jeffrey,*[9] the Court of Appeal of the Supreme Court of Victoria stated that the principles in *Briginshaw v Briginshaw*[10] apply in determining whether a person has acted dishonestly for the purposes of s 17 of the CPA.[11] The Court of Appeal in *Giles v Jeffrey* also upheld the finding of the trial judge in that case that the respondents had not deliberately lied and therefore did not act dishonestly contrary to s 17 of the CPA.[12]

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[5] CPA, s 3.
[6] Plainly, an arbitration conducted in accordance with an arbitration agreement would also not be the subject of the operation of the CPA.
[7] [2015] VSC 57 (8 April 2015).
[8] At [172].
[9] [2016] VSCA 314 (14 December 2016).
[10] (1938) 60 CLR 336.
[11] At [122].
[12] At [188].

18. As a result of s 17 of the CPA, legal practitioners have an obligation to ensure that they, and their clients, do not act dishonestly in connection with the conduct of civil proceedings (once issued) including mediations that take place after proceedings are issued.

Section 20 of the CPA

19. Section 20 of the CPA requires a person, to whom the overarching obligations apply, to cooperate with the parties to a civil proceeding and the court as to the conduct of that proceeding. It is likely that, if a party to a civil proceeding wishes to have a mediation, the requirements of s 20 of the CPA are such that the other parties to the proceeding, in order to discharge their obligation to cooperate, may be required to agree to and attend a mediation.

Section 21 of the CPA

20. Section 21 of the CPA provides that a person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is:

> " (a) misleading or deceptive; or
> (b) likely to mislead or deceive.".

20. The concept of conduct which is misleading of deceptive or likely to mislead or deceive is very similiar to that which has formed the cornerstone of the key consumer protection provisions in s 52 of the *Trade Practices 1974* (Cth) (**TPA**) and now s 18 of the *Australian Consumer Law* (**ACL**).

Hudspeth v Scholastic Cleaning and Consulting Services Pty Ltd & Ors (No 8)

21. In *Hudspeth v Scholastic Cleaning and Consulting Services Pty Ltd & Ors (No 8)*[13] (***Hudspeth (No 8)***), Dixon J considered, among other sections, the operation of s 21 of the CPA in the context of the conduct of practitioners and an expert in the trial of the proceeding.
22. In *Hudspeth*, the plaintiff made a claim against the company that employed her and the school at which she worked as a cleaner for personal injuries arising as a result of slipping on soap from an allegedly vandalised soap dispenser in the toilets.

[13] [2014] VSC 567 (20 November 2014).

23. In considering the operation of s 21, Dixon J had regard to the cases that have interpreted and applied s 52 of the TPA and s 18 of the ACL. His Honour held as to s 21 of the CPA (among other things) that:
    (a) intention is irrelevant to establishing misleading or deceptive conduct under s 21;[14]
    (b) the word "knowledge" is not to be read into s 21 of the CPA;[15]
    (c) conduct will be misleading or deceptive if it is capable of inducing error;[16]
    (d) a person may mislead or deceive even though he/she acts reasonably and honestly;[17] and
    (e) the test for misleading or deceptive conduct is an objective one.[18]
24. In *Hudspeth (No 8)*, the key issue revolved around the manner in which the evidence of an expert, called to give evidence for the plaintiff, had been dealt with at the trial. *Hudspeth (No 8)* is a complex case involving allegations of the contravention of several provisions of the CPA against the plaintiff's solicitors, senior and junior counsel and an expert retained by and called to give evidence for the plaintiff. In considering the operation of s 21 of the CPA, it is sufficient to focus on the allegations made against senior counsel which were made on the Court's own notion.[19]
25. The key allegations against senior counsel were that he engaged in misleading or deceptive conduct, contrary to s 21 of the CPA, in connection with the failure to disclose the existence of a third expert report prepared by the plaintiff's expert and the adducing of evidence from the expert absent that disclosure.[20]
26. The plaintiff's expert in *Hudspeth (No 8)* had initially prepared two reports. The day before the trial was due to commence, senior counsel directly requested that the expert prepare a third report. The third report was based on a key assumption which differed from that in the expert's second report. In the event, the different assumption did not change the expert's opinion. The third report

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[14] At [194].
[15] See generally [177] to [194].
[16] At [172].
[17] At [172].
[18] At [177].
[19] At [10].
[20] At [5].

was delivered to the plaintiff's solicitors and senior counsel shortly before the trial commenced.

27. The third report was not served on the defendants and not referred to in the evidence in chief adduced by senior counsel from the expert at trial. His Honour found that senior counsel had taken the view that he had an option as to whether or not to serve the third version of the report.[21] The existence of the third report only became apparent during the cross-examination of the expert.[22] During the trial, senior counsel did not reveal to the Court the role that he had played in the production of the third expert report.[23] His Honour held that the failure of senior counsel to disclose the existence of the third report constituted misleading or deceptive conduct contrary to s 21 of the CPA. His Honour also found that there had been a contravention of order 44. In particular, His Honour found that senior counsel mislead the court when leading evidence from the expert because Rule 44.03(3), having regard to the existence of the unserved third version of the expert's report, required that the plaintiff obtain leave of the court to lead any expert evidence from that expert.[24] The plaintiff's counsel did not seek that leave.

28. His Honour also held that the third version of the report was a critical document as the evidence which it contained was to be called "*viva voce*".[25] His Honour held that the solicitors and senior counsel had breached their obligations under s 26 of the CPA by failing to disclose to the defendants the third expert report as soon as practicable after it was completed. That breach was integral to the conduct that was deceptive and misleading.[26]

29. *Hudspeth (No 8)* highlights the importance of legal practitioners ensuring that they do not engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive in connection with civil proceedings. Legal practitioners must comply with the overarching obligations in connection with (among other things) the conduct of any mediation (whether court ordered or not) in so far as it relates to a civil proceeding issued in the Victorian courts. Legal practitioners

[21] At [81].
[22] See generally at [108] to [115].
[23] At [203].
[24] At [198].
[25] At [214].
[26] At [229].

must, therefore, be mindful not to mislead or deceive or engage in conduct which is likely to mislead or deceive in connection with the conduct of civil proceedings including mediations in which they are involved. Legal practitioners must advise their clients of this obligation in connection with civil proceedings in the Victorian Courts and that it applies in mediations.

Section 22 of the CPA

30. Section 22 of the CPA requires that a person, to whom the overarching obligations apply, use reasonable endeavours to resolve a dispute by agreement including, if appropriate, by appropriate dispute resolution (i.e. mediation). That obligation applies unless the use of reasonable endeavours to resolve a dispute by agreement is not in the interests of justice or the dispute is of such a nature that only judicial determination is appropriate.[27] An example of a proceeding to which these exceptions may apply is a proceeding brought for a civil penalty.

31. Plainly, s 22 of the CPA imposes an express obligation on legal practitioners to resolve a dispute by agreement and this is most likely to include seeking to use mediation to facilitate the reaching of agreement. Therefore, legal practitioners, in discharging the obligations imposed by s 22 of the CPA, must give consideration to the use of, among other things, mediation to resolve disputes. The discharge of the legal practitioner's duty to their client would most likely require him/her to advise them of the overarching obligations in s 22 of the CPA.

32. The obligations of legal practitioners as to settlement discussions and mediations was dealt with by McClelland J in *NSW Couriers Pty Ltd v Newman*[28]. His Honour stated that:[29]

> "all practitioners...should be mindful, at every stage of proceedings, of the possibility that direct negotiation including formal or informal mediation might bring resolution of their clients' problems. Proper discharge of a practitioner's obligations...requires the practitioner to inform the client of the possibility of negotiation and to raise the possibility with the opposing parties' representatives, before significant costs have been incurred in the preparation of the matter.".

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[27] CPA, s 22.
[28] [2002] NSWSC 1172 (20 November 2002).
[29] At [12].

33. There is every prospect that a legal practitioner could be sued in negligence by his/her client for failing to properly advise on the availability and advantages of mediation as a means to achieving an early resolution of a civil dispute. In addition, the failure of a legal practitioner to provide such advice to their client may also constitute a contravention of the overarching obligation in s 22 of the CPA.

Section 24 of the CPA

34. Section 24 of the CPA provides that a person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal and other costs incurred in connection with the civil proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.

35. In *Yara Australia Pty Ltd v Oswal*,[30] the Court of Appeal stated that, as to s 24 of the CPA:[31]

> "There is plainly no costs matrix or formula that can be applied in determining whether the parties have met their obligations. Rather, the court must weigh the legal costs expended against the complexity and importance of the issues and the amount in dispute, in order to determine whether the parties used reasonable endeavours to ensure those costs were proportionate...".

36. The obligation in s 24 of the CPA suggests that legal practitioners need to bear in mind, at all times, whether a mediation (or other appropriate dispute resolution) may lead to an early resolution of civil proceedings and thereby keep the legal and other costs reasonable and proportionate.

Section 26 of the CPA

37. Section 26(1) of the CPA imposes an overarching obligation for the disclosure of the existence of all documents that are, or have been, in a person's possession, custody or control -

> "(a) of which the person is aware; and
> (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.".[32]

[30] (2013) 41 VR 302.

[31] At [13] per Redlich and Priest JJA and Macaulay AJA.

Disclosure under s 26(1) must occur at the earliest reasonable time after the person becomes aware of the existence of the document or such other time as the Court may direct. The overarching obligation in s 26 is ongoing for the duration of the civil proceeding and does not limit or affect a party's obligation in relation to discovery.[33]

38. *Hudspeth (No 8)* provides an example of how the failure of a legal practitioner to disclose a critical document can give rise to a breach of the obligations under s 26 of the CPA. Conduct of that kind may also give rise, as it did in *Hudspeth (No 8)*, to a finding that the legal practitioners have engaged in misleading or deceptive conduct, or conduct likely to mislead or deceive, contrary to s 21 of the CPA.

39. A mediation is more likely to be effective in settling proceedings, or narrowing the issues in dispute, if critical documents are disclosed. As a result, legal practitioners need to identify documents critical to the resolution of the dispute and ensure that those documents:

    (a) are disclosed by their client to the opposing parties; and/or

    (b) are obtained from the opposing parties –

    before a mediation takes place.

Sanctions for contravening the overarching obligations

40. The CPA gives the courts powers to deal with contraventions of the overarching obligations. These powers are contained in ss 28 to 31 of the CPA.

41. Section 28(1) of the CPA provides that the court, in exercising any power in relation to a civil proceeding, may take into account any contravention of the overarching obligations. Further, s 28(2) provides that any contravention of the overarching obligations may be taken into account in the exercise of the court's discretion as to costs.

42. Section 29 of the CPA gives the court extensive power to make orders against a person that has contravened any overarching obligation. Section 29(1) of the CPA specifies the following orders that the court may make, namely:

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[32] CPA, s 26(3) provides that s 26(1) does not apply to any document which is protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived or under any Act (including any Commonwealth Act) or other law.

[33] See CPA, 26(4).

> "(a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;
> (b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;
> (c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including—
> (i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or
> (ii) an order for no interest or reduced interest;
> (d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;
> (e) an order that the person not be permitted to take specified steps in the civil proceeding;
> (f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.".

43. Section 29(2) of the CPA provides that an order under that section may be made on the application of any party or any other person, who in the opinion of the Court, has a sufficient interest in the proceeding, or on the Court's own motion.[34]

44. Importantly, s 29(3) provides that s 29 does not limit any other power of a Court to make any orders, including any order as to costs.

45. Section 30(2) of the CPA provides that an application for an order under s 29 must be made prior to the finalisation of the civil proceeding to which the application relates. The operation of s 30(2) is consistent with the public policy that there should be finality to litigation. However s 31 of the CPA provides that, despite s 30(2), a person may apply to the Court for an extension of time to apply for an order under s 29 after the finalisation of the civil proceeding. An application under s 31 of the CPA may be made by any party or any other person who has a sufficient interest in the civil proceeding.[35] The Court may grant an extension of the time for the making of an application under s 29 if it is

[34] An example of the court making orders of its own notion are the orders made against senior counsel in *Hudspeth (No 8)*.
[35] CPA, s 31(3).

satisfied that the person making it was not aware of the contravention until after the finalisation of the civil proceeding.[36]

SECTION B: THE REQUIREMENTS OF THE *CIVIL DISPUTE RESOLUTION ACT 2011* (CTH) – FEDERAL COURTS

The taking of "genuine steps"

46. The object of the CDRA is:

> "to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted".[37]

Section 6 of the CDRA requires applicants instituting civil proceedings in an eligible court[38] to file a "genuine steps statement" with their application.[39]

47. Under the CDRA, the respondent to a proceeding, having been provided with a copy of the applicant's genuine steps statement, must also file a genuine steps statement.[40] The respondent's genuine steps statement must state that the respondent agrees with the genuine steps statement filed by the applicants or, if the respondent disagrees in whole or in part with the applicant's statement, must specify the respect in which, and the reasons why, the respondent disagrees.[41]

Obligations on legal practitioners and litigants under the CDRA and the Courts' powers

48. Section 4(1A) of the CDRA provides that:

> "for the purposes of this Act, a person takes ***genuine steps to resolve a dispute*** if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.".

49. Section 4(1) of the CDRA provides a non-exhaustive list of examples of "genuine steps". The examples in s 4(1) include:

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[36] CPA, s 31(2).
[37] CDRA, s 3.
[38] The expression ***eligible court*** is defined in s 5 of the CDRA to mean the Federal Court of Australia and the Federal Circuit Court of Australia.
[39] CDRA, s 6(1). Rule 5.03 of the Federal Court Rules 2011 prescribes that a genuine steps statement must be in accordance with Form 11.
[40] This is to be done before the hearing date specified in the application.
[41] CDRA, s 7.

> "considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process.".[42]

The CDRA does not define the expression "alternative dispute resolution process". However mediation is contemplated by s 4(1)(d) which refers to a process facilitated by another person.

50. Section 9 of the CDRA imposes a duty on legal practitioners to advise persons (i.e. their clients) of the requirements to file a genuine steps statement and to assist in complying with that requirement.

51. The CDRA does not state that taking genuine steps to resolve a dispute requires that a party suggest mediation to the opposing party. However the purpose of the CDRA combined with the requirements of s 4(1A) would suggest that a sincere and genuine attempt to resolve the dispute requires serious contemplation to be given to the use of a mediation (or a without prejudice settlement conference) before proceedings are commenced. Legal practitioners may need to advise their clients accordingly.

52. A failure to file a genuine steps statement does not invalidate an application to commence the proceedings, a response to that application or the proceedings themselves.[43]

53. Section 11 of the CDRA provides that an eligible court may, in performing functions or exercising powers in relation to civil proceedings before it, take account of whether:
    (a) a person that was required to file a genuine steps statement in the proceeding did so; and
    (b) a person (i.e. a party) took genuine steps to resolve the dispute.

54. Section 12 of the CDRA gives the eligible court the power, in exercising a discretion to award costs in a civil proceeding, to take into account whether:
    (a) a person that was required to file a genuine steps statement in the proceeding filed did so; and
    (b) a person (i.e. a party) took genuine steps to resolve the dispute.

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[42] CDRA, s 4(1)(d).
[43] CDRA, s 10(2).

55. In addition, s 12(2) of the CDRA gives an eligible court the power, in exercising a discretion to award costs in a civil proceeding, to take into account any failure by a legal practitioner to comply with the duty imposed by s 9 of the CDRA.
56. Section 12(3) of the CDRA provides that if a legal practitioner is ordered to bear costs personally because of a failure to comply with s 9, that person must not recover the costs from his/her client.[44]
57. If a legal practitioner is put on notice by an eligible court of the potential exercise of the discretion under s 12(2) of the CDRA against him/her, the legal practitioner must immediately consider whether notice ought be given to their professional indemnity insurer.
58. Section 13 of the CDRA states that the powers in that Act are available in addition to any powers the Court has under other legislation. One example of other legislation that contains powers that may impact on the operation of the CDRA mediation is the ***Federal Court of Australia Act 1976*** (Cth) (**FC Act**), particularly Part VB thereof.

Excluded proceedings under the CDRA

59. Part 4 of the CDRA excludes certain proceedings from the operation of the Act. Section 15 of the CDRA identifies ***excluded proceedings***. The significance of a proceeding being excluded under s 15 of the CDRA is that the applicant need not file a genuine steps statement.[45] Excluded proceedings include proceedings in which (by way of example) an order imposing a pecuniary penalty for a contravention of a civil penalty provision is sought[46] and *ex parte* proceedings.[47] Section 16 of the CDRA identifies proceedings under various specified Acts of Parliament which are ***excluded proceedings***. These include proceedings under the ***Australian Citizenship Act 2007*** (Cth) and the ***Family Law Act 1975*** (Cth). Section 17 of the CDRA provides that certain proceedings may be

[44] See generally *Superior IP International Pty Ltd v Ahearn Fox Patent and Trademark* [2012] FCA 282 and *Superior IP International Pty Ltd v Ahern Fox Patent and Trade Mark Attorneys (No 2)* [2012] FCA 977 (6 September and 12 September 2012).
[45] *Garret v the Chief Executive of Australia (No 2)* (16 March 2015) [2015] FCA 242 at [10], per Jessup J.
[46] CDRA, s 15(a).
[47] CDRA, s 15(h).

excluded by regulation. An example of this is an application to wind up a company under s 459A of the ***Corporations Act 2001*** (Cth).[48]

SECTION C: THE IMPACT OF PART VB OF THE *FEDERAL COURT ACT 1976* (CTH)

60. Part VB of the FC Act comprises ss 37M, 37N and 37P. That Part provides for an overarching purpose for the civil practice and procedure provisions.[49] The expression, ***civil practice and procedure provisions*** is defined to mean the rules of the Federal Court and any other provisions under the FC Act or any other Act with respect to the practice and procedure of the Court.[50] The reference to any other Act with respect to the practice and procedure of the court is likely to include the CDRA.

61. The overarching purpose stated in s 37M(1) of the FC Act is to facilitate the just resolution of disputes according to law and "as quickly, inexpensively and efficiently as possible".

62. Section 37N(1) of the FC Act provides that the parties to a civil proceeding must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose. Section 37N(2) provides that legal practitioners must, in the conduct of civil proceedings (including negotiations for settlement), take account of the overarching purpose and assist their client to comply with the duty.

63. The references in ss 37N(1) and (2) of the FC Act to the expression "negotiations for settlement" are most likely to be interpreted as including mediation. The overarching purpose in s 37M(1) and the obligations in ss 37N(1) and (2) require legal practitioners in civil proceedings in the Federal Court[51] to advise their clients to ensure that the dispute is resolved as quickly, inexpensively and efficiently as possible. Most likely, the advice to the client (in that regard) must canvass the use of mediation to achieve that purpose.

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[48] See reg. 4(b) of the *Civil Dispute Regulations 2011.*
[49] FC Act, s 37M(1).
[50] FC Act, s 37M(4).
[51] Also in the Federal Circuit Court.

SECTION D: OBLIGATIONS IMPOSED ON MEDIATORS OF COURT ORDERED MEDIATIONS

64. Mediators that conduct court ordered mediations have specific obligations imposed on them by the rules of the court that orders the mediation. It is convenient to consider the rules of the Supreme Court of Victoria and of the Federal Court.

Mediator's obligations under the Supreme Court Rules

65. Paragraph 50.07(3) of Chapter 1 of the Supreme Court (General Civil Procedure) Rules 2015 (**the Supreme Court rules**) provides that where a reference to mediation of a proceeding is made under Rule 50.07, the mediator "shall endeavour to assist the parties to reach a settlement of the proceeding or settlement of that part of the proceeding referred to the mediator".

66. Paragraphs 50.07(4) and (5) of the Supreme Court rules deal with the obligations of a mediator in reporting to the court. Paragraph 50.07(4) contains both a facilitative and mandatory requirement as to reporting. That paragraph:
    (a) allows the mediator to report to the court that the mediation is finished, where the court has not made an order requiring such a report; and
    (b) provides for the court to order that the mediator report as to whether the mediation is finished.

67. Importantly, paragraph 50.07(5) provides that the mediator shall not make any report to the court other than a report in accordance with paragraph (4). That is, paragraph 50.07(5) mandates that a mediator only report if the mediation is finished.

68. In *Cook & Ors v Taing & Ors*,[52] Elliott J dealt with a situation where the mediator provided a report to the Court which went beyond the requirements of paragraph 50.07(5) of the Supreme Court rules. In that case, the mediator sent a letter to the court stating that the mediation had concluded and also reported "...that the parties had settled the matter, subject to the parties 'executing Deed of Settlement'.".[53] The letter also stated that the parties would be seeking orders

[52] [2014] VSC 428 (11 September 2014).
[53] [2014] VSC 428, at [9].

from the court in due course. The letter to the court was not sent to the parties. In dealing with the "over-reporting" by the mediator, his Honour stated:[54]

> "Subject to any order or direction of the court to the contrary, a mediator should not go beyond stating whether or not a mediation has finished when reporting to the court. It is critical for the integrity of the regime of confidentiality pursuant to which a mediation is conducted that, save for stating whether or not a mediation is finished, mediators refrain from disclosing any details to the court of the outcome, or details of or relating to communications conducted before, during the course of, or after the mediation.".

69. Mediators must take care not to report to the court in a manner that breaches the confidentiality of the mediation process. (Issues of confidentiality in mediations are discussed in Section F below).

Mediator's obligations under the Federal Court rules

70. Part 28 of the Federal Court Rules 2011 (**FC rules**) deals with alternative dispute resolution. Rule 28.03 provides that if the court orders that a proceeding, part of a proceeding or matter arising in a proceeding be referred to (relevantly) a mediator, the mediation must be carried out in accordance with Part 28.

71. Rule 28.23 of the FC rules provides that if part only of a proceeding is the subject of an order for mediation, the mediator may, on the conclusion of the mediation, report to the court in terms agreed between the parties.

72. Rule 28.24 of the FC rules provides that:

> "If the mediator considers that a mediation should not continue, the mediator must:
> (a) terminate the mediation; and
> (b) report to the Court on the outcome of the mediation.".

73. The FC rules do not give any guidance as to what the report to the court as to the outcome of the mediation must contain. However any report to the Federal Court by a mediator must take care not to breach the confidentiality regime in connection with mediations.

SECTION E: THE LEGISLATIVE IMMUNITY AFFORDED TO COURT APPOINTED MEDIATORS

74. At common law, judges have unqualified immunity from civil liability which may otherwise exist as a result of their words, actions, omissions or other

[54] Ibid, at [10].

behaviour.[55] Judicial immunity constitutes an absolute bar to any civil proceedings and it is not necessary for the judge to show that he/she acted in good faith or without malice.[56]

75. There is no immunity at common law for mediators.[57]

76. The legislatures have afforded immunity from suit to mediators that conduct mediations pursuant to court orders. The legislative immunity provided to those mediators is expressed as being the same as that of the judges of the court.

77. The statutory immunity for mediators of mediations ordered by the Supreme Court and those ordered by the Federal Court are identified below. However as the case of *Von Schultz v Attorney-General Queensland*[58] (**the Von Schutz decision**) shows, despite the available legislative immunity, a mediator of a court ordered mediation may nevertheless be involved in litigation at the suit of a party to the mediation.

Legislative immunity for court appointed mediators – Victorian Supreme Court

78. Section 27A of the ***Supreme Court Act 1986 (Vic)*** (**SC Act**)[59] provides for the protection of special referees, mediators and arbitrators. Section 27A(1) reads:

> "(1) A special referee, mediator or arbitrator to whom a proceeding, part of a proceeding or question arising in a proceeding is referred under the Rules or under the Civil Procedure Act 2010 has, in the performance of his or her duties in connection with the reference, the same protection and immunity as a Judge of the Court has in the performance of his or her duties as a judge.".

79. The operation of Section 27A of the SC Act is a significant development for the protection of mediators that conduct court ordered mediations. That section provides an immunity to mediators conducting court ordered mediations, which is the same as that which is enjoyed by the judges of the court in the performance of their duties.

80. Section 27A of the SC Act identifies two grounds for the ordering of mediations to which that section applies, namely the Supreme Court rules and the CPA.

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[55] *Carbassi v Bila* (1940) 64 CLR 130.
[56] See R Carroll, 'Mediator Immunity in Australia' (2001) 23 *Sydney Law Review* 185, 195.
[57] Ibid, at 197.
[58] (2000) QCA 406 (6 October 2000).
[59] See also to similar effect the ***County Court Act 1958*** (Vic), s 43C and the ***Magistrates' Court Act 1989*** (Vic), s 108A.

The immunity therefore applies provided the Supreme Court orders a mediation under either the rules or the CPA.

81. Rule 50.07(1) of the Supreme Court rules provides that the court may, at any stage of a proceeding, with or without the consent of a party, order that the proceeding or that any part of the proceeding be referred to a mediator.[60]

82. Section 66 of the CPA provides that a court may make an order referring a civil proceeding, or part of a civil proceeding, to appropriate dispute resolution. This includes mediation.[61] An order under s 66(1) of the CPA may be made at any stage in the proceeding.[62] The courts are also given the power by s 48(2)(c) of the CPA to give directions or make any orders considered appropriate with respect to the use of appropriate dispute resolution to assist in the conduct and resolution of all or part of the civil proceeding.

Legislative immunity for court appointed mediators – Federal Court

83. The Federal Court has the power, under s 53A of the FC Act, to make an order referring proceedings, or any part of them, or any matter arising out of them to a mediator for mediation in accordance with the rules of Court.[63] A referral to mediation may be made without the consent of the parties to the proceeding.[64]

84. A mediator appointed to conduct a mediation ordered pursuant to s 53A of the FC Act has "the same protection and immunity as a Judge has in performing the functions of a Judge".[65]

The Von Schultz decision

85. The existence of unqualified immunity for mediators has not completely deterred litigation against them. An example of this is the Von Schultz decision. In that case, the applicants had commenced proceedings in the Supreme Court of Queensland for damages against their landlords and other parties. The

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[60] The power to make this rule is expressly conferred by s 25(1)(ea) of the SC Act.
[61] See the definition of ***appropriate dispute resolution*** in CPA, s 3.
[62] CPA, s 66(3).
[63] FC Act, s 53A(1)(b).
[64] FC Act, s 53A(1A).
[65] FC Act, s 53C; The same is the case for mediators for mediations ordered by the Federal Circuit Court. These mediators have the same absolute protection and immunity as a Judge of that Court; ***Federal Circuit Court Act 1999*** (Cth), s 34(5).

Supreme Court ordered a mediation[66] and a barrister was appointed as the mediator. During the mediation, an agreement was reached for the settlement of the proceeding. After the settlement agreement was reached, the applicants denied that agreement had been reached and sought to repudiate it. The settlement agreement required the applicants to file a notice of discontinuance of the Supreme Court proceedings. They failed to do so. Applications were made to compel the applicants to file the notice of discontinuance. Ultimately, the Supreme Court proceedings were brought to an end. Following that, the applicants commenced proceedings in the Magistrates' Court against the mediator (who by then was a Judge of the Supreme Court), another judge and court officials. The applicants alleged conspiracy and fraud in the mediation and as to subsequent proceedings in connection with the mediation.

86. The Court of Appeal of the Supreme Court of Queensland held that, relying on s 113 of the ***Supreme Court Act 1991*** (Qld), the mediator had the same rights of immunity from suit as a Judge.[67] The Court of Appeal also held that the Magistrate was correct in striking out the applicants' action as was the District Court Judge in striking out the appeal from the Magistrate's decision. The Court of Appeal refused to grant leave to extend time for the applicants to file an appeal as it had no prospect of success.

SECTION F: THE POTENTIAL LIABILITY OF NON-COURT APPOINTED MEDIATORS

87. Mediators that conduct non-court ordered mediations do not have the benefit of legislative immunity or common law immunity. As a result, there is nothing to prevent claims being made against mediators of voluntary (i.e. non-court ordered) mediations. There are at least four causes of action that may give rise to claims against those mediators, namely:
    (a) breach of contract;
    (b) breach of duty of care;
    (c) breach of fiduciary obligations; and
    (d) pursuant to s 18 of the ACL.

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[66] *Von Schultz* (2000) QCA 406 (6 October 2000) at [5].
[67] At [19].

This section briefly overviews each of these potential causes of action and discusses the decision in *Tapoohi v Lewenberg*[68] (***Tapoohi***). That case dealt with allegations against a mediator, retained for a voluntary mediation, based on breach of contract and breach of duty of care.

Liability for breach of contract

88. Mediators may be liable if they breach the mediation agreement. The mediation agreement (which is normally in writing) may contain express or implied terms which a mediator may breach.

89. There is a wide range of potential claims based on breach of the express terms of a mediation agreement. One example is the breach of an express term as to confidentiality. If a mediator discloses information obtained during the mediation to persons other than the parties to the mediation, that would most likely constitute a breach of the confidentiality term. Further, a breach of a confidentiality term may arise if the mediator improperly discloses to party A to the mediation information provided to him/her by party B in strict confidence and not for disclosure to any other party. Mediators need to take care not to breach their confidentiality obligations.

90. A mediator may also face a claim for the breach of implied terms of the mediation agreement. In *Tapoohi*, it was alleged that there were several implied terms of the mediation agreement that applied to the mediator. The implied terms alleged were that the mediator would:

    (a) exercise all the due care and skill of a senior barrister specialising in commercial litigation and related matters;
    (b) exercise all the due care and skill of a senior expert mediator;
    (c) reasonably protect the interests of the parties;
    (d) not act in a manner patently contrary to the interests of the parties, or any of them;
    (e) act impartially as between the parties;
    (f) carry out his instructions from the parties by all proper means; and
    (g) not coerce or induce the party into settling the proceedings when, at the relevant time or times, there is a real and substantial risk that settlement would be contrary to the interests of the parties, or any of them.

[68] [2003] VSC 410 (21 October 2003).

In *Tapoohi*, Habersberger J ruled (albeit on an interlocutory basis) that the implied terms (referred to above) could be pleaded and that the claim against the mediator could proceed to trial on the basis of the alleged breaches of those implied terms.[69]

Liability for breach of duty of care

91. To establish liability for breach of duty of care against a mediator, it will be necessary to establish that the mediator owed a duty of care to the plaintiff, that there was a breach of the duty, that the breach resulted in damage to the plaintiff and that the damage was a reasonably foreseeable consequence of the breach.[70]

92. In *Tapoohi*, the mediator argued that there was no duty of care that could be owed. Habersberger J was loath to "...strike out a pleading on the basis that a mediator owed no duty at all to the parties in the mediation".[71]

93. At least one area of conjecture, in any claim for breach of duty of care alleged to be owed by a mediator, is the nature of the duty of care. There are many different approaches to the conduct of any mediation that a mediator may adopt. It is therefore difficult to envisage how the duty is to be framed. Correspondingly, it will be difficult for a claimant to establish that the mediator failed to meet the requisite standard. The confidentiality accorded to what transpires at mediations also makes it difficult to establish the key indicia of the standard that mediators owe to the parties.

94. A person making a claim in negligence against a mediator also faces the difficulty of being able to establish that they have suffered any loss or damage from any breach of the duty of care. It would seem to be very difficult for a claimant to demonstrate that, for example, but for the mediator's breach of duty, a settlement would have been reached (where one was not reached) or that more favourable terms would have been agreed (where agreement is reached).

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[69] At [46] to [49].

[70] For a discussion of this area of the law see generally Shirley, Melinda J. & Cockburn, Tina L. (2004) 'When will a mediator operating outside the protection of statutory immunity be liable in negligence?' *The University of Western Australia Law Review*, *32*(1), pp. 83-99.

[71] Ibid 68, at [54].

The decision of the Supreme Court of Victoria in *Tapoohi*

95. Mrs Tapoohi and Mrs Lewenberg were sisters. A dispute arose between them relating to their mother's deceased estate. Mrs Tapoohi commenced proceedings in the Supreme Court (**the first proceeding**). The two sisters agreed to attend a voluntary mediation of the first proceeding i.e. a mediation without an order of the court. The fact that mediation was not court ordered was significant as it precluded the mediator from invoking the protection of the statutory immunity in s 27A of the SC Act.

96. Mrs Lewenberg attended the mediation in person along with her solicitors and barristers. As Mrs Tapoohi was overseas, she attended the mediation by telephone and was represented in the mediation by barristers and solicitors. At the mediation, a settlement agreement was reached. It was executed by Mrs Lewenberg in person at the mediation and by Mrs Tapoohi by signing a faxed copy of it and faxing it back. In summary, the settlement provided (among other things) that Mrs Tapoohi pay to Mrs Lewenberg $1.4M in exchange for various properties to be transferred to her and for Mrs Tapoohi to resign from various family companies.

97. Following the mediation, Mrs Tapoohi realised that the settlement was worth considerably less for her than anticipated because of a large capital gains tax liability. Mrs Tapoohi commenced new proceedings (**the second proceeding**) against several parties which included her sister and the companies holding the bequeathed properties. As part of the second proceedings, Mrs Tapoohi sought to have the settlement agreement set aside on two principal grounds, namely:

    (a) that it was subject to an express oral term that the parties would seek taxation advice about the settlement after which final terms would be negotiated; and

    (b) alternatively, that the parties had not reached a concluded agreement on all the matters subject to the settlement.

    In the second proceeding, Mrs Tapoohi also included a claim against the solicitors that acted for her in the first proceeding on the grounds that they had been instructed to obtain taxation advice about the settlement and had not done so. Mrs Tapoohi's former solicitors sought contribution from the barristers that had represented her at mediation and the mediator through third party contribution notices. The basis for the contribution sought was that, if there was

a concluded agreement, the damage suffered by Mrs Tapoohi and claimed against her former solicitors was also caused by the breaches of contractual and tortious duties owed to her by her barristers and the mediator.

98. In the contribution notice against the mediator, one of the allegations was that he had "assumed responsibility for the interests of Mrs Tapoohi and gave advice in relation to matters affecting her interests".[72] There were four matters relied on to establish that allegation namely:
    (a) the mediator's insistence that terms of settlement be drafted and executed on the night of the mediation;
    (b) the advice provided by the mediator that it was in the interests of the parties that the terms of settlement be executed that night;
    (c) the drafting by the mediator of the terms of settlement; and
    (d) the mediator's advice that the sum of $1.00 should be inserted into the clause dealing with the proposed transfer of Mrs Tapoohi's shares.[73]
99. In dismissing the mediator's application for summary dismissal, Habersberger J held that it was arguable that the alleged breaches could be said to arise out of the mediator's conduct including the assumption of responsibility and the giving of advice by the mediator as alleged.[74]
100. The decision in *Tapoohi* has limited value as a precedent as it was decided on an interlocutory basis as a result of an application by the mediator for summary dismissal of the third party proceedings against him. Nevertheless, it sends a warning that mediators of voluntary (i.e. non-court ordered) mediations may be exposed to claims for breach of the mediation agreement or for breach of duty of care.

A mediator's potential liability for breach of fiduciary obligations

101. The key requirement for a claim based on breach of fiduciary obligation is that the mediator owes a fiduciary obligation to the plaintiff. There is no precedent which establishes that a mediator owes fiduciary obligations to the parties to a mediation. Whether a fiduciary obligation is owed by one person to another

[72] At [61].
[73] At [61].
[74] At [65].

depends on the facts and circumstances of each case. The categories of case where a fiduciary obligation may be owed are not closed.

102. In *Hospital Products Pty Ltd v United States Surgical Corp,*[75] Mason J stated that the critical features of fiduciary relationships are:[76]

> "...that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of", and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression by the Court of Appeal.".

103. A party to a mediation, seeking to establish the existence of a fiduciary obligation owed by a mediator, would appear to face considerable obstacles. The most significant obstacle confronting the party is establishing that the mediator owed to him/her obligations (in connection with the mediation) which differed from those of the other parties to the mediation. Otherwise, the claimant would have to assert that mediator owed simultaneous obligations to parties with clearly opposing interests. This would seem to be inconsistent with the nature of a fiduciary obligation which suggests that a duty is owed in the protection of a person's interests. The protection of the claimant's interests alone cannot arise while the mediator is serving the interests of two opposing parties with their express consent. It is also notable that the mediator is not empowered by the parties to the mediation to make decisions on their behalf. Therefore, the mediator lacks the ability to exercise power to the detriment of a party to the mediation.

104. Although the categories of fiduciary relationships are not closed, it would seem to be very difficult for a party to a mediation to establish that the mediator owed to them (only) a fiduciary obligation.

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[75] (1984) 156 CLR 41.

[76] At 96-97.

A mediator's potential liability for misleading or deceptive conduct under s 18 of the ACL

105. Statements made during court ordered mediations have been held not to have been made in "trade or commerce" for the purposes of the TPA (and correspondingly s 18 of the ACL).[77] That is because the mediation is being conducted as part of the court process. The expression "in trade or commerce", in s 18 of the ACL has been given a wide meaning.[78] That expression means that conduct itself must have a trading or commercial character and that conduct that is merely incidental to trade or commerce is not ***in*** trade or commerce.
106. There appears to be no decided case as to whether a voluntary (i.e. non-court ordered) mediation is considered to be "in trade or commerce" for the purposes of s 18 of the ACL. It would appear to be open to argument that a mediation of a commercial dispute is "in trade or commerce" as having a trading or commercial character.
107. It is also arguable that there are good policy grounds for the proposition that any conduct engaged in by a mediator in a voluntary (i.e. non-court ordered) mediation, which is seeking to resolve a dispute between the parties, should not be viewed as being "in trade or commerce" for the purposes of s 18 of the ACL. However the issue is not free from doubt. That is because the law surrounding what constitutes conduct "in trade or commerce" in s 18 of the ACL is complex and not free of ambiguity.

SECTION G: CONFIDENTIALITY AND WITHOUT PREJUDICE PRIVILEGE

The legislative provisions governing confidentiality and without prejudice privilege as to mediations

108. The confidentiality of communications in or in connection with mediation is fundamental to mediations. That confidentiality is sought to be protected by several legislative provisions. It is convenient to discuss the available legislative provisions for the protection of confidentiality for Supreme Court and for Federal Court ordered mediations. The ***Evidence Act 2008*** (Vic) and the

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[77] *WJ Green & Co (1984) Pty Ltd & Ors v Wilden Pty Ltd & Ors* unreported 24 April 1997, Supreme Court of Western Australia at p 32 per Parker J.

[78] *Re Ku-ring-gai Co-Operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at 648-9 per Deane J; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

Evidence Act 1995 (Cth) (collectively **the Evidence Acts)** also provide protection as to communications in settlement negotiations including mediation. The relevant provisions of the Evidence Acts are also discussed.

The *Supreme Court Act 1986* (Vic)

109. Section 24A of the SC Act reads as follows:

> "Where the Court refers a proceeding or any part of a proceeding to mediation other than judicial resolution conference, unless all of 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.".

110. In *Simply Irresistible Pty Ltd v Couper & Ors,*[79] Kyrou J considered the operation of s 24A of the SC Act. His Honour held that s 24A was confined to the admission of evidence at the hearing of the proceeding to which the mediation related and "did not apply to the hearing of a subsequent proceeding.".[80]

111. In *Slea Pty Ltd v Connective Services Pty Ltd & Ors*,[81] Almond J also stated that s 24A of the SC Act is expressly confined to "the proceeding" in which the mediation takes place.

112. In *Forsyth vs Sinclair (No 2),*[82] the Court of Appeal of the Supreme Court of Victoria dealt with the operation of s 24A of the SC Act, in the context of whether something that had been said at a mediation for an appeal relating to the costs of the appeal, was admissible in the hearing relating to costs. The Court of Appeal, relying on s 24A of the SC Act, held that the evidence of what had been said at the mediation of the appeal was not admissible at the hearing relating to the costs of the appeal, unless "all the parties who attended the mediation agreed in writing".[83]

***The Federal Court of Australia Act 1976* (Cth)**

113. The FC Act also contains a provision dealing with admissions made to mediators. Section 53B of that Act states:

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[79] [2010] VSC 505 (8 November 2010).
[80] At [12].
[81] [2017] VSC 232 (4 May 2017).
[82] [2010] VSCA 195 (5 August 2010).
[83] At [15], Neave and Redlich AJA and Habersberger AJA.

> "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:
> (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.".

114. It would appear that s 53B of the FC Act is not limited in the same way as s 24A of the SC Act. That is, s 53B prohibits the admission of evidence in any court, of anything said or any admission made in a court ordered mediation. Unlike s 24A of the SC Act, the prohibition in s 53B of the FC Act is not limited to the hearing of the proceeding to which the mediation relates.

The Evidence Acts

115. Each of the Evidence Acts contain a provision which protects communications in settlement negotiations. This extends to mediations.[84] Section 131(1) of the Evidence Acts provide as follows:

> "Evidence is not to be adduced of:
> (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
> (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute."

Sub-section 131(2) of the Evidence Acts provide exceptions to the operation of s 131(1).

116. An exception of relevance is that contained in s 131(2)(f) of the Evidence Acts. Section 131(2)(f) states that s 131(1) does not apply if:

> " (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue;".

117. The exception in s 131(2)(f) applies in respect of two separate situations, namely:

(a) in a proceeding to enforce an agreement between the persons in dispute to settle the dispute; or

[84] See Australian Law Reform Commission report 102, para 15.179.

(b) a proceeding in which the making of an agreement between the persons in dispute to settle the proceeding is in issue.

In either of those circumstances, communications and documents are admissible.

118. In *SWV Pty Ltd v Spiroc Pty Ltd,*[85] it was held that the exception in s 131(2)(f) applies to the offer and acceptance said to constitute the settlement agreement and to all communications leading up to it.[86]

Conclusion

119. The CPA imposes onerous allegations on legal practitioners in civil proceedings in the Victorian courts and practitioners must take great care to ensure that they, or their clients, do not contravene the overarching obligations, including in connection with mediations.

120. The CDRA also places onerous obligations on legal practitioners as to:
    (a) the taking of genuine steps before proceedings are commenced in the Federal Courts; and
    (b) the filing of genuine steps statements by both the applicant and the respondent.

121. Part VB of the FC Act imposes overarching obligations as to proceedings in the Federal Court, including mediations. These obligations are seemingly not as onerous as those under the CPA.

122. The statutory schemes of court ordered mediations provide mediators with immunity from suit. However mediators of voluntary (i.e. non-court ordered) mediations are exposed to potential claims for their conduct.

123. Mediators need to be mindful of their reporting obligations as to mediations. Legal practitioners need to remain aware of the issues surrounding confidentiality and without prejudice privilege in connection with mediations.

124. Overall, the framework of legislation and court rules appear to promote the use of mediation as a key element for the expeditious resolution of commercial disputes.

125. There would appear to be a need to consider legislative change to seek to protect mediators that undertake voluntary (i.e. non-court ordered mediations)

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[85] (2006) 201 FLR 238.
[86] At [41]-[44].

from claims that could be made against them. Providing those mediators with the same immunity as mediators of court ordered mediations, may enhance the use of mediations as a mechanism for dispute resolution in commercial matters. Extending the immunity to mediators conducting voluntary mediations may also assist in promoting mediation as a means to achieve the purposes of the CDRA.

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