

CONFIDENTIALITY IN MEDIATION

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Introduction

Parties to alternative dispute resolution processes ('ADR processes') are sometimes assured that the process is confidential. Indeed, confidentiality is considered fundamental to ADR processes and is often cited as one of their most significant advantages. This section examines the confidentiality enjoyed by information disclosed during mediation.

Confidentiality is a multi-faceted concept. In the context of information disclosed in an ADR process, the separate aspects relevant to a consideration of the ambit of confidentiality include:

- ❑ The type of information which is the subject of confidentiality;
- ❑ The purpose for which information is confidential;
- ❑ The person able to assert confidentiality; and
- ❑ The person against whom confidentiality can be asserted.

Discussion as to the appropriate degree of protection to afford information disclosed during mediation most commonly arises in the context of litigation which ensues after a dispute has not been resolved at mediation. In that case, the principal tension is that between the importance of confidentiality to the success of the ADR process on the one hand, and on the other the public interest in ensuring that the court has before it the best possible evidence to enable it to ascertain the truth. Another context in which the question of protection arises is where a party seeks to prevent the information's subsequent disclosure to third parties, such as government authorities or commercial competitors.

The importance of confidentiality to ADR processes

It has often been asserted by mediators and commentators that confidentiality is one of the fundamental tenets of mediation and other ADR processes. It is submitted that the range of justifications for confidentiality articulated by writers is encapsulated in the following two propositions:

(a) confidentiality increases the parties' willingness to engage in an ADR process; and

(b) confidentiality enhances the effectiveness of the process.

This is an important and valued factor if the information is commercially sensitive or, as an American commentator has cynically but perhaps realistically stated, where there is a desire to avoid regulatory curiosity (see Restivo, James J. in *Alternatives*: 1987). Second, disputants may be comforted to know there are limitations on the extent to which information imparted during the process, if unsuccessful, can be used against them in ensuing litigation. An aspect which frequently features in the American literature is the importance of restricting the parties' ability to obtain from the mediator information acquired in the course of the mediation. It has been suggested that inadequate protection of confidentiality in this respect will adversely affect the public perception of mediators' neutrality (see Feedman and Prigoff, *Commentary* (1987) 2 Ohio St J Dis Res 39).

Effectiveness of the ADR process

It is not easy to identify with precision the criteria by which the effectiveness of mediation and other processes may be measured. Suffice it to say that an assessment would have regard to the frequency of settlements and any enhanced appreciation by a disputant of the others' position or interests. Confidentiality can also be seen as essential to the dynamic of the process in that it encourages the candid flow of information, which in turn makes it more likely that the real positions and interests of the parties will be ascertained.

A member of the American judiciary has argued that openness of communication is essential to rationality in negotiations (see Brazil, W. *Protecting the Confidentiality of Settlement Negotiations* (1988) 39 *Hastings Law Journal*, 307). Such rationality may increase the probability that parties will understand the basis for the proposals that are made, which in turn may promote settlement. The New South Wales Law Reform Commission has supported this argument, commenting in its 1991 report that it is almost a truism that the effectiveness of mediation depends on participation with openness and candour (see New South Wales Law Reform Commission, *Alternative Dispute Resolution - Training and Accreditation of Mediators*, Report No. 67, 1991, p 63).

However, if the bona fides of the parties are also considered essential to the effectiveness of the process, the role of confidentiality in encouraging or discouraging bona fides is relevant. It is argued by some that the more protection afforded to an ADR process, the less inclined parties will be to treat it as a fishing expedition, thereby minimising the possibility that parties, intent on litigation, will make cynical use of the process. Others argue that the broader the confidentiality afforded mediation, the greater the opportunity for the process to be used cynically by parties, to sterilise evidence adverse to them so as to preclude regulatory sanction or strengthen their position in subsequent litigation.

Protection afforded ADR processes by the law of privilege

The law of privilege governs the protection afforded information which is disclosed during an ADR process. The privileges considered below are the "without prejudice" privilege, legal professional privilege and the marital privilege.

Without prejudice privilege

A "without prejudice" communication is one made during the course of genuine negotiations conducted with a view to settling an existing dispute. It is a rule of evidence, often described as a privilege, that "without prejudice" communications cannot be put in evidence without the consent of both parties (see *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285). Importantly, the "without prejudice" privilege may attach to communications in the absence of formal proceedings between the parties regarding the dispute and may therefore apply to a mediation or other process whether or not related litigation is on foot (see McNicol, S. *Law of Privilege*, Law Book Co., Sydney, 1992, p445).

Section 131 of the Evidence Act 1995 (Cth) precludes evidence being adduced of communications made or other documents prepared by a party in dispute, in connection with an attempt to negotiate a settlement and provides:

131 (1) 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.*

Significant examples of the courts' willingness to extend the operation of the "without prejudice" privilege on the grounds of public policy are the decisions of the NSW Supreme Court in *Lukies v Ripley (No. 2)* (1994) 35 NSWLR 283 and the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280. Each of these cases is discussed below.

Lukies v Ripley (No. 2)

In *Lukies v Ripley (No. 2)*, Justice Young considered the question of costs, having previously delivered his reasons for judgment in the substantive proceedings. Simply put, the dispute arose when a house the plaintiffs had agreed to purchase, burnt down between contract and completion. His Honour found for the plaintiffs in relation to their claim for abatement of the purchase price and damages for delay, but also held there should be a verdict on the vendor's cross-claim against his insurer.

His Honour considered whether the Court should receive in evidence two letters: the first from the plaintiffs' solicitor to the insurer's solicitor suggesting that a proposed conference be deferred until the plaintiffs provided a 'ball park' settlement figure; and the second from the defendants' solicitor referring to the upcoming conference and asking that the plaintiffs have their figures prepared so "*matters can be swiftly agreed to*". His Honour inferred from the correspondence that the parties intended that their conference be "without prejudice" and that the purpose of the conference was to reach agreement on certain issues with a view to shortening rather than settling the proceedings.

In exploring the bases of the "without prejudice" rule, Justice Young (at pp 286-287) identified four current theories:

- admissions in settlement negotiations are likely to be hypothetical or conditional only and as only unqualified admissions are admissible, admissions in settlement negotiations being conditional are inadmissible;
- public policy;
- contractual duties of confidentiality; and
- the admissions are not relevant.

His Honour proceeded (at p287) to express his formulation of the true rule as follows, and in doing so accepted only the public policy theory:

...if parties have attempted to settle the whole or part of litigation and if they have agreed between themselves expressly or impliedly that they will not give in evidence any communication made during those discussions, then public policy makes those discussions privileged from disclosure in a court of law or equity.

The issue before Justice Young was whether negotiations aimed at reducing the ambit of the litigation rather than settling the entire proceedings attract the "without prejudice" privilege. His Honour declined to admit the correspondence into evidence and concluded that the rule as he formulated,

...includes the situation that parties who are settling not the whole dispute but an issue or part of a dispute have the advantage of a privilege not to disclose what was discussed during those negotiations.

The decision is important because it confirms that a mediation conducted with a view to settling only an aspect of a dispute attracts the "without prejudice" privilege.

Rush & Tompkins Ltd v Greater London Council

Rush & Tompkins Ltd and the Greater London Council entered a building contract for a housing development. Subsequently, Rush & Tompkins engaged a subcontractor to perform certain works specified in the main contract. The subcontractor submitted claims to Rush & Tompkins, who in turn claimed reimbursement by the Greater London Council. The dispute arose when the Greater London Council refused to meet the subcontractors expenses. Rush & Tompkins and the subcontractor commenced proceedings against the Greater London Council.

Before the proceedings were heard, Rush & Tompkins settled with the Greater London Council, accepting a global sum in settlement of all outstanding claims under the main contract on the basis that Rush & Tompkins would be responsible for all subcontractors' claims. The settlement sum was disclosed to the subcontractor but Rush & Tompkins did not reveal the value placed upon the subcontractor's claim in arriving at the overall settlement. The subcontractor issued a summons for specific discovery of the without prejudice correspondence that had passed between Rush & Tompkins and the Greater London Council.

The Court of Appeal held that the protection afforded to the "without prejudice" correspondence came to an end once settlement had been effected. The House of Lords overturned this decision and Lord Griffiths, who delivered the majority judgment, stated (at p 1300) that the issue was to be looked at broadly and:

... resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.

The subcontractor submitted that he had a legitimate interest in this correspondence as it would reveal the valuation placed upon his claim by Rush & Tompkins, which would provide a starting point for negotiations and was likely to facilitate a compromise.

Lord Griffiths addressed the distinction between discoverability and admissibility of documents and cited the general principle that a party is entitled to discovery of all documents relevant to a question in the proceedings irrespective of their admissibility. However, upon a review of the English authorities, his Lordship concluded that a party was not obliged to give discovery of "without prejudice" correspondence and that "without prejudice" communications between parties to litigation should be protected from disclosure to other parties in the same litigation. His Lordship described the nature of multi-party litigation and the fetter which would be placed on negotiations between those parties willing to compromise if they knew that what passed between them had to be disclosed to an obdurate litigant.

His Lordship recognised that a party which obtained discovery of "without prejudice" correspondence may gain some insight into its opponent's case notwithstanding that it could not make use of the material at the trial as it was inadmissible. His Lordship held that despite this forensic advantage, the public interest was better served in extending the protection afforded genuine negotiations.

Burchett J in *Austotel Management Pty Ltd & Anor v Hugh H. Jamieson & Ors* (unreported judgment Sydney Registry of the Federal Court dated 7 June 1995) faced with a situation not dissimilar from that in *Rush v Tompkins* stated, (at p 6):

*The negotiating room is a private room where those who enter it do not speak to any outside audience, but when they have shut the door they speak to each other and are heard in secret ... I do not think it is really open to me to decline to apply in these circumstances the decision of the House of Lords in *Rush & Tompkins*.*

Some of the more complex issues discussed in this paper have yet to be considered by New Zealand courts. However, New Zealand judges have so far readily accepted the view that disclosures made in mediation are essentially subject to the rules that apply to "without prejudice" negotiation and thus inadmissible.

In *Rio Beverages Limited v Kiwi Blue Limited* (unreported, 12.1.96, High Court Auckland, CP597/95) Williams J deprecated attempts by the parties to adduce evidence of matters discussed at, and documents produced during, a mediation and commented:

Mediation as a form of dispute resolution is a relatively recent arrival in New Zealand, certainly as part of the litigation process, and in this Court's opinion its integrity is to be preserved. Confidentiality is an integral part of that process and the parties' attempts to adduce evidence of what passed between them during that process is as much to be reprehended as is the adducing of evidence by parties as to what passes between them in "without prejudice" negotiations.

Similarly, in *Vaughan Holdings Limited v Lindsay* (1997) 10 PRNZ 557 the Court of Appeal rejected an attempt to introduce evidence about what had taken place during an earlier, unsuccessful, mediation. In delivering the judgment of the Court Barker J said, at 559:

One other factor which assumed prominence in the argument before us, was that there had been a mediation in March 1996 involving this and another share transaction in another company between the same parties. In the documentation for the mediation the claims of the appellant seem to be based on breaches of warranty in the original sale and purchase agreement rather than on the alleged settlement agreement. We do not consider that the mediation agreement should have been referred to either before the Master or before this Court. Mediation agreements such as this one are confidential; any matters arising in the course of mediation are not usually to be put in issue in any subsequent litigation or arbitration. In this spirit, we do not think that statements in the documents prepared for the assistance of the mediator should be relied on in subsequent litigation. The whole point of mediation is to remove the process from litigation or arbitration and to ensure that anything said or done in a mediation does not later rebound to the detriment of any party, should the mediation fail to achieve a settlement.

In a further chapter of this litigation, Williams J adopted that reasoning and, after reviewing the leading Australian authorities, concluded that a document which is discoverable and admissible is not rendered inadmissible merely by the fact that its existence is disclosed during a mediation, but went on to decide that as a matter of principle documents prepared for the mediation were inadmissible, if only because the parties had agreed that they should remain confidential.

Limitations on the 'without prejudice' privilege

General

The broad exclusionary provision contained in section 131 (1) of the Evidence Act 1995 (Cth) does not apply in the situation set out in section 131(2) namely:

- (a) *the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or*
- (b) *the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or*
- (c) *the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or*
- (d) *the communication or document included a statement to the effect that it was not to be treated as confidential; or*
- (e) *the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or*
- (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; or*
- (g) *evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or*
- (h) *the communication or document is relevant to determining liability for costs; or*
- (i) *making the communication, or preparing the document, affects a right of a person; or*
- (j) *the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission or an act that renders a person liable to a civil penalty; or*
- (k) *one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.*

The Law Institute of Victoria has conveniently summarised the type of communications which will not attract the “without prejudice” privilege:

- the statement is made in circumstances that cannot be objectively considered as part of the negotiations for the settlement or reasonably incidental thereto;
- the statements are part of the settlement negotiations but are unqualified admissions concerning objective facts;
- the statement is ‘not concerned with. the same subject matter’ as the negotiations;
- a party engages in conduct which is misleading or deceptive or likely to mislead or deceive contrary to section 52 of the Trade Practices Act 1974 (Cth) and as a result an action for breach of the Trade Practice Act is instituted;
- they are communications that contain an offer and an acceptance which thereby create a contract;
- they are communications which constitute criminal conduct;
- they are communications the disclosure of which will prevent a party from misleading the court; and
- they are communications which will constitute tortious conduct.

(see *Mediation - A Guide for Victorian Solicitors*, Law Institute of Victoria, 1995, p41).

The AWA Judgments

Significant limitations on the "without prejudice" privilege were the subject of two interlocutory judgments of the Supreme Court of NSW in *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* (unreported, SC NSW, Rogers CJ, 24 February 1992): The claim arose from the conduct of the company's foreign exchange manager who had concealed significant losses incurred by his operations. AWA sought damages from its auditors for failing to audit its accounts properly. After 12 days of hearing, the trial judge, Rogers CJ Comm Div (as he then was) by consent referred the proceedings to mediation. Shortly after the commencement of the mediation, AWA upon the request of the auditors disclosed the existence of a deed by which AWA provided a complete indemnity to its directors in respect of the proceedings. The mediation failed to resolve the dispute. Once litigation resumed, the auditors served upon AWA a notice to produce, formally requiring production of the deed of indemnity. AWA sought orders that the notice be set aside, arguing that disclosure of the existence of the deed at the mediation was stated to have been "without prejudice" and confidential to the mediation.

The trial judge referred AWA's application to Justice Rolfe, whose judgment identified two competing policy considerations for the protection of confidentiality in mediation. On the one hand, parties will be disinclined to agree to mediate where information obtained during the mediation can be used later against them. On the other hand, if information imparted during mediation cannot form the basis for calling admissible evidence if the mediation fails, parties could use the process to sterilise evidence unfavourable to them.

In arriving at his decision, Rolfe J. relied on the High Court's decision in *Field v. Commissioner for Railways (NSW)* ((1957) 99 CLR 285) In that case, Mr Field sued the

Commissioner for Railways in negligence, claiming that while he was lawfully alighting from a train he was thrown onto the platform and injured. During the course of "without prejudice" negotiations, Mr Field attended a medical examination arranged on behalf of the Commissioner of Railways. At the examination, the plaintiff told the medical examiner that the train was moving slowly when he alighted. The medical examiner reported this to the legal representatives for the Commissioner for Railways. The proceedings did not settle.

At the hearing the Judge described the single issue in the case as: "*Did the train start while the plaintiff was in the act of getting off it?*" The medical practitioner was called to give evidence of the statements made by the plaintiff during the medical examination. Argument ensued as to whether such comments were admissible given they were made during settlement negotiations.

The High Court found that Field's comments to the medical examiner constituted an admission that he was getting off the train while it was in motion. The Court described the issue before it as whether the admission was "... *fairly incidental to the purposes of the negotiations to which the medical examination was subsidiary or ancillary...*". The Court held that the admission should not be protected as it was not reasonably incidental to the negotiations. In arriving at its decision, the Court discussed the role of the "without prejudice" privilege and stated that it was "not concerned with objective facts which may be ascertained during the course of negotiations".

Rolfe J characterised the request by the auditors as an attempt to prove, by admissible evidence, a fact to which reference was made at mediation. His Honour ordered AWA to produce the deed of indemnity.

The issue was revisited when the auditors sought to tender the deed of indemnity in evidence. Rogers CJ Comm Div, in a separate judgment, which allowed the tender, agreed with the conclusion of Rolfe J but disagreed with his Honour's reasoning. Rogers CJ Comm Div stated that the High Court's judgment in Field's case dealt with the admissibility of an admission made during the course of settlement negotiations. His Honour considered the High Court's comments as to the admissibility of objective evidence and proof by extrinsic evidence as strictly obiter, and held that Field's case was therefore not determinative of the question before him.

Rogers CJ Comm Div identified two reasons, both pragmatic, as to why the deed should be admitted in evidence. First, other evidence had made it clear that before the mediation the auditors were aware of the likely existence of a deed. Second, if the deed were relevant to the proceedings, AWA should have already disclosed it to the auditors when giving discovery of documents.

Absent these pragmatic reasons, it is not clear how Rogers CJ Comm Div would have determined the question of the admissibility of deed of indemnity. His Honour stated (at p467):

Rolfe J was prepared to take the view ... that objective evidence will not be excluded merely because the defendants learnt of the relevant facts in the course of the mediation. With very great respect I would prefer to consider that question further if, and when, it arises on some further occasion.

His Honour went on to describe (at pp 467-468) a situation which would cause him to hesitate "long before concluding that the objective evidence so revealed is admissible". That situation was where a disputant,

... has absolutely no inkling of some matter, which, if known about is capable of being established by objective evidence, but which would not ordinarily come to the knowledge of the other side in the normal progress of litigation and its existence is revealed only by a statement made in the course of, and for the purposes of the mediation...

The AWA judgments, while affirming that the "without prejudice" privilege applies to mediation, fell short of settling more complicated questions such as:

- the extent to which the limitations of this privilege might be removed in the context of mediations or other ADR processes; and
- whether a mediator might, without the consent of the parties, be required to give evidence of what transpired at a mediation.

The Dispute Resolution Committee of the NSW Law Society has developed revised guidelines for practitioners acting as a mediator. The guidelines require mediators to inform the parties that generally in a mediation communications are agreed to be confidential and cannot be used as evidence subsequently. The mediator is also obliged to recommend to the parties that their further or specific enquiries should be directed to their legal representatives. The revision tacitly acknowledges the difficulties identified in the AWA case.

The Law Institute of Victoria is more cautious in its advice to practitioners. In a publication which was forwarded to its members the Institute suggested:

Warning the Client

In view of the complexity of this issue it is important for solicitors to advise their clients in writing that there may be limitations on the extent to which courts will protect all communications made during a mediation.

(see *Mediation - A Guide for Victorian Solicitors*, Law Institute of Victoria, 1995).

Other Limitations

There are a number of other limitations to the 'without prejudice' rule. As Lord Griffiths stated in *Rush & Tompkins*:

...the rule is not absolute and resort may be had to 'without prejudice' material for a variety of reasons when the justice of the case requires it.

David Foskett outlines a number of instances where the courts will lift or disregard the 'without prejudice' veil. (see Foskett, *The Law and Practice of Compromise*, Sweet & Maxwell, London, 1991). He reviews authorities where Commonwealth courts have admitted correspondence which bore "without prejudice" tags, such as communications which constituted a threat or revealed a lack of good faith or abuse of the privilege. Foskett cites Vaver's commentary on these authorities as follows:

... misrepresentation, libels, threats of insolvency or bankruptcy in the event of non-acceptance, blackmail, threats of perjury, suborning or flight from the jurisdiction must all amount to the sort of improper pressure which ought to be admitted in evidence if relevant to some matter in issue- this notwithstanding they occur during without prejudice negotiations.

(see Vaver, *University of British Columbia Law Review*, (1974) pp 152-153).

Legal Professional Privilege

At common law legal professional privilege attaches to confidential communications brought into existence solely for the purpose of existing or contemplated legal proceedings or for the purpose of giving or obtaining legal advice (see *Grant v Downs* (1976) 135 CLR 674). The rule generally applies to communications between lawyer and client. However, the privilege can extend to the following communications with third parties, provided the sole purpose test formulated by the High Court in *Grant v. Downs* is satisfied:

- those between the lawyer and the client's agent;
- those between the lawyer and third parties; and
- those between the client (or client's agents) and third parties.

The Evidence Act 1995 (Cth) (ss 118-120), which became operational on 18 April 1995, enlarges the privilege in Commonwealth jurisdictions by permitting a party to prevent another from adducing in evidence documents created for the dominant, as opposed to - sole, purpose of either limb of the *Grant v Downs* test. These sections provide that "evidence is not to be adduced" thereby arguably leaving the sole purpose test of the common law to govern the discovery process and production of documents by any compulsory process. The author understands that court rules, to exclude the sole purpose test in this domain as well, are being considered. The Evidence Act 1995 (NSW) which contains almost identical provisions became operational on 1 September 1995. (see Nicholson J in *Hardie Finance Corporations Pty Ltd v CCA Australia Pty Ltd and Ors* (unreported judgment, Federal Court of Australia, Perth Registry, 14 July 1995) where these provisions are discussed.

Legal professional privilege and ADR

McNicol (in *Law of Privilege*, Law Book Company, 1992) after reviewing a range of judicially pronounced rationales, states (at pp 48-49) that the privilege

...foster[s] candour and trust in the lawyer-client relationship, and ... protect[s] the information of each party to adjudication from disclosure to the other side.

Such a rationale does not sit easily with the culture of alternative dispute resolution. The Law Reform Commission of Western Australia has linked the privilege even more clearly to curial culture, stating that the privilege promotes and protects the following principal public interests:

- the adversarial system of law where the judge as neutral umpire decides the issues on the basis of evidence adduced by the parties; and
- a client's ability to receive the best legal advice based on full and frank disclosure of relevant information.

(see Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications*, Project No. 90, May, 1993, p 29).

The marital privilege

The balancing of competing public interest has also featured in judicial consideration of the marital privilege, which arises in the context of marital conciliation.

In *re D (Minors)(Conciliation: Disclosure of Information)* ([1993] 2 WLR 721) the English Court of Appeal considered whether evidence of statements made by a party in the course of meetings held with a clinical psychologist for the purpose of reconciliation, could be tendered as evidence in proceedings under the Children Act 1989 (UK). The Master of the Rolls, Sir Thomas Bingham, emphasised the issue's importance and attributed it to the growth of conciliation, an expression the Court used to embrace mediation, in resolving custody disputes and the particular regard which the law has for children's interests.

Bingham MR described (at p 724) the conflicting public interest issues eloquently, in the following terms:

... it is plain that the parties will not make admissions or conciliatory gestures, or dilute their claims, or venture out of their entrenched positions unless they can be confident that their concessions and admissions cannot be used as weapons against them if conciliation fails and full-blooded litigation follows ... but it does not follow that this is a rule which permits of no exceptions at all, even where the safety of a child is at stake.

The parties to the appeal were estranged spouses who had participated in joint meetings with a clinical psychologist for the purpose of conciliation. In subsequent custody proceedings, the mother filed a statement by the psychologist based on three joint conciliation meetings. The father submitted that the statement was privileged and therefore inadmissible. The judge at first instance ruled that the evidence should be excluded.

At the appeal, the mother conceded that the statements made by the father were prima facie privileged on the basis that they were communications made without prejudice. However, the mother submitted that the without prejudice privilege was subject to the following exceptions:

- (a) it only protects communications made in the course of a bona fide attempt to negotiate and cannot be claimed by a party who makes no such bona fide attempt;
- (b) it does not exclude evidence of threats;
- (c) it can be pierced in circumstances where the public interest in disclosure outweighs the public interest in preserving confidentiality, such as where the interests of children are involved.

The father submitted that the privilege which applies to communications between spouses for the purpose of attempted conciliation is an independent head of privilege and can only be waived by both parties. Further, he submitted that if the rule is subject to any exceptions they can only be in relation to the commission of a criminal offence against a child or statements calling for action to prevent the commission of a serious criminal offence.

The Court of Appeal upheld the trial judge's view that the statement should not be admitted. The Court did not consider it fruitful to debate the relationship between the so called marital privilege and without prejudice, but agreed that the marital privilege can be regarded as having developed into a new category of privilege based on the public interest in the stability of marriage.

While the Court agreed that for a communication to attract the without prejudice privilege it must have been made in the course of genuine settlement negotiations, it did not accept that the privilege did not apply where in the judgment of one party, or the neutral, the other party did not show a genuine willingness to compromise. The Court's reluctance to accept evidence of one party's intransigence was twofold. First, it is inevitable that in an unsuccessful

negotiation each party will consider inadequate the other party's attempts to settle. Second, to permit evidence of one party's lack of bona fides in a negotiation process, would lead to negotiations being doomed to failure as parties would not speak freely due to a concern that to do so would weaken their positions in subsequent contested litigation.

In closing, the Court made three points:

- (a) where cases fall within the exception of the marital privilege, namely where the statement indicates that the maker has previously caused or may in the future cause serious harm to a child, the judge will still have the discretion not to admit such evidence and will only do so when the public interest in protecting the interests of the child outweighs the public interest in preserving the confidentiality of conciliations;
- (b) the judgment was only concerned with privilege and not with the duties of confidence and the circumstances in which public interest considerations may outweigh such a duty; and
- (c) the law as stated was appropriate to cover the particular case and it was undesirable to attempt any more general a statement.

A similar case is *McTaggart v. McTaggart* [1948] 2 All ER 754 in which the English Court of Appeal considered whether a probation officer of a Magistrates Court, who had been present at discussions between spouses conducted with a view to reconciliation, could be compelled to give evidence. Denning LJ stated (at p 756):

The probation officer has no privilege of his own ... that is a mistake ... there is no chance of reconciliation unless the parties are able to talk with frankness to the probation officer and with complete confidence that what they say will not be disclosed.

In a subsequent English case, *Theodoropoulos v Theodoropoulos* [1963] 2 All ER 772 Sir Jocelyn Simon P. stated (at p 774):

[A]lthough there are persons ... who will have a certain inherent standing as conciliators, the privilege attaches to them because they are attempting reconciliation in the case, and not because of their standing.

These decisions have been embraced by some. The Centre for Dispute Resolution in England has expressed the view that the rule in *McTaggart's* case should "as a matter of logic and public policy" be extended by the courts to mediation beyond the matrimonial context. In relation to *In re D (Minors)*, Robert Angyal has said

Although the privilege identified by the Court of Appeal is described as one based on the public interest in the stability of marriage, the public interest in encouraging the resolution of disputes without litigation would seem to support a similar privilege attaching to mediation of disputes generally.

(see Angyal, R. *Mediation and the Courts*, Bar News, 1993, 43 at 45).

However, the public policy issue underpinning the marital privilege is arguably restricted to the perceived public benefit served by stable marriages. The cases discussed relate to dispute resolution processes the aim of which is to reconcile estranged spouses, rather than to effect settlements without recourse to litigation. Had the Courts found that the marital privilege applied to conciliatory processes premised on an irretrievable breakdown of the marriage, such that the purpose of the process was, for example, the distribution of property without

recourse to litigation, such judicial analyses could more easily be transferred to the commercial context.

Concluding thoughts as to the protection afforded by the common law

Presently, the common law affords information disclosed during an ADR process no greater protection than it does without prejudice communications generally. Perhaps the courts will not consider whether the limitations of the without prejudice privilege should be removed in the context of mediation, unless and until faced with the situation envisaged by Rogers CJ Comm Div in the *AWA* case. Similarly, the position in relation to legal professional privilege in this context is not settled. In the meantime, assurances of confidentiality based on the common law require significant qualification.

A review of authorities on the law of privilege reveals a judiciary accustomed to balancing competing public interests in determining questions of confidentiality. The courts acknowledge the significant weight which is contained in one scale, namely the public's interest in resolving rather than litigating disputes. Even the marital reconciliation cases, although not necessarily translatable to a commercial context, demonstrate the judiciary's willingness to create, or acknowledge the existence of, novel heads of privilege based on newly perceived public interests.

Attempts to enhance the confidentiality protection afforded by the common law

Court-annexed mediations and early neutral evaluations are governed by legislation and invariably court rules containing provisions relating to confidentiality. These at least reinforce and often enhance the protection provided by the common law & recently enacted Evidence Acts. Further protection is sought in agreements entered into by the parties and the neutral prior to participating in the ADR process. Some examples of these are set out below.

Legislation

The Courts (Mediation and Arbitration) Act 1991 (Cth) amended legislation governing Federal Courts. Section 53B of the Federal Court Act 1976 (Cth) provides:

Evidence of anything said, or of any admission made, at a conference by an approved mediator, acting as such a mediator, is not admissible:

(a) *in any Court ... ; or*

(b) *in any proceedings ... to hear evidence.*

Protection from admissibility, of course, fails short of a guarantee of confidentiality, because the material may still be subpoenaed and used indirectly by third parties. This deficiency is discussed in more detail below.

In New South Wales, the Supreme Court Act 1970 (NSW) s 11OP, as amended by the Courts Legislation (Mediation and Evaluation) Amendment Act 1994 (NSW) now provides that there exists with respect to a mediation or early neutral evaluation session, and to documents provided to a mediator or evaluator, the same privilege with respect to defamation as exists with respect to judicial proceedings. Section 11OP(4) provides:

Evidence of anything said or of any admission made in a mediation session or early neutral evaluation session is not admissible in any proceeding before any

The Act also clarifies the protection afforded documents "prepared for the purposes of, or in the course of, or as a result of, a mediation or early neutral evaluation session" by stipulating in sub-section 11OP(5) that they are not admissible in any proceedings.

The mediator or evaluator is permitted to disclose information in limited circumstances, including the following:

- (a) *where there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property;*
- (b) *in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.*

The Farm Debt Mediation Act 1994 (NSW) which commenced on 12 February 1995 and establishes a regime for the compulsory mediation of certain disputes between financiers and farmers. Section 15 provides:

- (1) *Evidence of anything said or admitted during a mediation session and a document prepared for the purposes of, in the course of or pursuant to, a mediation session are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.*
- (2) *In this section, "mediation session" includes any steps taken in the course of making arrangements for a mediation session or in the course of the follow-up of a mediation session.*

The Victorian Supreme Court Rules allow a Judge or Master of the Supreme Court to refer a dispute to mediation. Order 50.07(6) of the Victorian Supreme Court Rules provides:

Except as all the parties who attend the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation.

The commentary to this rule refers to the interlocutory judgments of Rolfe J and Rogers CJComm Div in the AWA case and concludes that Order 50 does not prevent a party from "*obtaining curial advantage from what is learned at a mediation.*"

The above legislative provisions, while untested, appear to extend the protection afforded by the common law. The state legislation and court rules referred to above, render inadmissible, in subsequent proceedings anything said or any admissions made by a party during a court-ordered mediation or neutral evaluation. This is broader than the common law which, as discussed, protects only admissions fairly incidental to the purposes of negotiation.

Two significant deficiencies remain. First, the confidentiality provisions are evidentiary exclusion only. That is, they preclude the admission into evidence of information disclosed during the ADR process, but do not address the question of disclosure to the world at large or the question of the use which may be made of the information, apart from the specific instances of use in evidence. Second, as a necessary consequence of the first point, they do not contain sanctions for breach.

The scope of protection granted by these provisions has not yet been judicially considered and assurances of confidentiality made to disputants must be tempered accordingly. It is difficult

to predict the limits of what the courts will regard as constituting "danger of injury to any person or damage or any property." One may envisage, for instance, many situations where the applicant for an interlocutory injunction may seek to adduce evidence obtained in a mediation, arguing that the attendant disclosure is necessary to prevent continuing damage to property. Significantly, the exemption appears on its face to apply to threatened or anticipated injury and therefore does not deal with conduct which has in the past led to injury or damage. Such provisions, of course, do not apply to private mediations which remain governed by the common law subject to the modifying effect of the terms of agreements to mediate.

Agreements to Mediate

Almost invariably, parties to an ADR process enter into an agreement which contains a confidentiality provision. The neutral and the disputants are usually parties to the agreement. The Law Society of NSW Model Agreement to Mediate provides:

15. *The parties and the mediator will not disclose to anyone not involved in the mediation any information or document given to them during the mediation unless required by law to make such a disclosure.*
16. *The parties and the mediator agree that subject to [later provisions relating to enforcement of the settlement agreement], the following will be privileged and will not be disclosed in, or be the subject of a subpoena to give evidence or to produce documents, in any proceedings in respect of the Dispute:*
 - 16.1 *Any settlement proposal whether made by a party or the mediator.*
 - 16.2 *The willingness of a party to consider any such proposal.*
 - 16.3 *Any statement made by a party or the mediator during the mediation.*
 - 16.4 *Any information prepared for the mediation.*

The confidentiality provisions contained in mediation agreements have not been judicially considered in Australia and therefore their ultimate efficacy remains open to question. The extent to which the courts will uphold confidentiality clauses, and the redress the courts will grant a party aggrieved by disclosure are issues which remain uncertain although the High Court's recent decision in *Esso Australia Resources Ltd v Plowman* (1995) 69 ALJ 404 is instructive.

In that case the Court considered, among other things, whether documents disclosed by a party in the course of a private arbitration, some of which were private, confidential or commercially sensitive in nature could be disclosed to third parties. One of the arguments submitted by the party seeking to restrain disclosure was that the arbitration agreement included a term implied by law that the arbitration be conducted in private. A corollary of this, was a restriction upon disclosure of the documents to third parties not involved in arbitration.

The majority judgment delivered by Mason CJ rejected the case for an implied term. His Honour discussed the importance of confidentiality in arbitrations, but did not see that the confidentiality extended to documents produced or information disclosed during the course of an arbitration absent an express contractual provision restricting disclosure. The majority held that there was no basis for implying a term of confidentiality based on custom or business efficacy.

In contrast, Brennan J held that a term may be implied in an arbitration agreement under which a party is bound to produce documents or disclose information for the purpose of the arbitration, that the other party to the arbitration will keep such documents and information confidential subject to specific exceptions such as where the disclosure is required under compulsion by law or where there is a duty to the public to disclose the information (at 415).

Toohey J adopted a similar approach stating:

I would find such an obligation to be a term implied as a matter of law in commercial arbitration agreements. The term is implied from the entry by the parties into a formal dispute resolution which they choose because of the privacy they expect to result. If this is said to confuse privacy and confidentiality, the answer is that they are not distinct characteristics ... Any aspect of disclosure to third parties must infringe the privacy of the arbitration. (at 422)

The willingness of two High Court Justices to imply a term of confidentiality in an arbitration agreement and the tenor of the majority judgment augers well for the enforceability of confidentiality provisions in mediation agreements, at least insofar as those terms relate to disclosure of information to third parties or the world at large.

United States case law which considers the enforceability of confidentiality provisions is divided. Brown, in a detailed review of the cases where this question has been considered, concludes that the viability of confidentiality provisions in mediation agreements, insofar as such agreements seek to render inadmissible information disclosed in mediation, may be increasing. He comments that the courts are increasingly willing to see such provisions as fostering the public policy favouring mediation rather than threatening the public policy favouring admissibility of all available evidence. (Brown, K. *Confidentiality in Mediation: Status and Implications*, (1991) 2 *Journal of Dispute Resolution*, 307).

It is submitted that in the light of the clear public policy considerations underpinning the legislation discussed, Australian courts are likely to lean towards the enforcement of confidentiality provisions. The validity of such clauses may be subject to a test similar to that contained in the NSW legislation, so that they will be enforceable to the extent protection of confidentiality does not increase the likelihood of injury to any person or damage to any property.

Conclusion

No mediator should assure disputants and no legal representative should advise clients that everything said during the course of the mediation will remain confidential in all circumstances as there are a number of other ways in which a disputant can seek to gain curial advantage from information obtained during a mediation. However, while enforceability of confidentiality clauses in mediation agreements awaits judicial comment as does the breadth of the provisions in legislation, particularly that governing court annexed alternative dispute resolution, there is every indication that such attempts to enhance the confidentiality of mediation will be liberally construed.

