The evidentiary 'black hole' of mediation

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In their enthusiasm to support the use of mediation for the resolution of disputes, Australian State and Federal legislatures have frequently enacted provisions designed to prevent evidence being given of communications made at court-ordered mediation, often in terms which override both the common law exceptions to the 'without prejudice' rule and statutory provisions designed to codify that rule, with consequences that may not have been intended.

The twin policies said to underlie such legislation are to encourage use of mediation and to discourage 'satellite litigation'. Both appear to be seriously flawed by allowing court-ordered mediation, as distinct from private mediation, to become an evidentiary 'black hole' in circumstances which prevent justice being done.

The common law has long encouraged parties to attempt to resolve their disputes by according 'without prejudice' privilege to communications made in the course of settlement negotiations. The public policy justification for this rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.[1] The rule is no longer limited to admissions and is now very much wider than it was historically.[2]

Over time, the courts have developed and **continue** to develop numerous judge-made exceptions to the 'without prejudice' rule, designed to enable justice to be done and to avoid mediation and bilateral settlement negotiation becoming an evidentiary 'black hole' on the basis that the privilege that may arise from the cloak of 'without prejudice' must not be abused for the purpose of misleading the court.[3] Thus mediation under the common law 'without prejudice' rule is not a 'no go area'[4] for all purposes.

Circumstances in which Australian courts have recognised the common law exceptions include where the court would otherwise be misled,[5] for example by excluding evidence which would rebut inferences upon which a party seeks to rely;[6] where a party seeks to rely on what was communicated during mediation in order to prove that settlement was reached[7] or that a settlement that was reached should be set aside, for example by reason of alleged misrepresentation,[8] oppression[9] or unconscionable conduct;[10] or where a party sues his or her solicitors over their conduct in the mediation;[11] or where those solicitors join counsel and the mediator seeking contribution as joint tortfeasors.[12]

The same approach has been applied when holding admissible communications within mediation alleged to constitute misleading and deceptive conduct in contravention of statutory competition and consumer protection law, on the basis that a party cannot, with impunity, engage in misleading or deceptive conduct resulting in loss to another under the cover of 'without prejudice' negotiations.[13]

It is difficult to see how justice can be done when such matters are in issue unless all the evidence is available to the court. It is also difficult simply to brush aside as 'satellite litigation' the circumstances recognised at common law as exceptions to the 'without prejudice' rule, as if no issue of injustice warranting judicial remedy could ever arise in the course of mediation.

It therefore appears that, contrary to the policy of encouraging mediation, the legislation governing court-ordered mediation, by placing parties in a worse position than in privately agreed mediation or bilateral negotiation, could have the opposite effect of discouraging resort to court-ordered mediation.

It is hard to argue with the proposition that misbehaviour should see the light of day, whether occurring in mediation or not.

As John Locke put it in 1690: 'Where-ever law ends, tyranny begins'.[14]

Following a comprehensive review of the law of evidence, the Law Reform Commission (now known as the Australian Law Reform Commission) recommended in 1985[15] and 1987[16] that the common law be codified in all matters of evidence, including without prejudice settlement negotiations. This led to the enactment of a statutory version of the 'without prejudice' rule in relation to civil disputes, with a somewhat different and narrower list of exceptions, in s 131 of the *Evidence Act 1995* (Cth) and corresponding State and Territory legislation.[17]

In *Pinot Nominees Pty Ltd v Commissioner of Taxation*,[18] a case in which offers of compromise made during mediation were held inadmissible on the question of costs, Siopis J reconciled the provisions of s 53B of the *Federal Court of Australia Act 1976* (Cth) with s 131(2)(h) of the *Evidence Act 1995* (Cth) on the basis that the latter applies to without prejudice communications other than those made during the course of a court-ordered mediation to which s 53B applies.

In *Pihiga Pty Ltd v Roche*,[19] a proceeding in the Federal Court of Australia to set aside, upon the ground of alleged misrepresentation, a settlement deed entered into following a non-court-ordered mediation, Lander J rejected an application by the respondent for an injunction to prevent evidence being given of what transpired at the mediation and any documents brought into existence for the mediation, finding:

i. 'the common law without prejudice rule does not prevent [evidence being adduced] in circumstances where the applicants claim that a concluded compromise agreement has been reached in circumstances where they were misled';
ii. where 'without prejudice privilege is lost because of the exceptions at common law it cannot be maintained under the mediation agreement'; and
iii. 'A party is not entitled to avoid the consequences of … the *Trade Practices Act 1974* (Cth) by relying on a contractual exclusionary provision'.

His Honour also found the proposed evidence admissible under the statutory exceptions in the *Evidence Act 1995* (Cth) and left it to the High Court to resolve the conflict between the limited evidentiary permissiveness of the *Evidence Act 1995* (Cth) s 131 and the outright prohibition of s 53B of the *Federal Court of Australia Act 1976*.

In *Rajski v Tectran Corporation Pty Limited*,[20] the limited evidentiary permissiveness of s 131 of the *Evidence Act 1995* (NSW) was held to have been overridden by the more restrictive prohibitions applicable to court-ordered mediations in Part 7B of the *Supreme Court Act 1970* (NSW) and by the subsequently enacted provisions of Part 4 of the *Civil Procedure Act 2005* (NSW), which replaced Part 7B. In *Forsyth v Sinclair (No 2)*,[21] the Court of Appeal in Victoria adopted a similar approach in finding that s 24A of the *Supreme Court Act 1986* (Vic) trumped s 131(2)(h) of the *Evidence Act 2008* (Vic).

In *Azzi v Volvo Car Australia Pty Ltd*,[22] a case concerning Part 4 of the *Civil Procedure Act 2005* (NSW), the Court noted that while the *Evidence Act* contains a general provision excluding evidence of settlement negotiations, with an exception to that general exclusion where the negotiations are relevant to costs, s 30(4) of the *Civil Procedure Act* is a more specific provision directed specifically to negotiations in a mediation session, excluding evidence of such negotiations, without any corresponding exception. When it applies, the later and more specific provision prevails over the more general one.

The current regime has been described as unacceptable: ‘There is no justification for the multiple schemes associated with admissibility of matters which occur at an ADR process … Ideally there should be one regime which codifies the admissibility of things said or done at all structured ADR processes.’[23]

Another example of the problems that can arise from a legislated mediation ‘black hole’ is the *California Evidence Code*, which prohibits evidence of what transpired in **any** mediation, not solely court-ordered mediation.[24] It has been found by the California Supreme Court to preclude evidence in a legal malpractice action of private communications between attorney and client in the course of mediation.[25]

In February 2011 an Australian advisory committee, the National ADR Advisory Council (NADRAC), recommended that there would be significant benefit in having uniform federal, state and territory legislation that clearly provides for the inadmissibility of ADR communications as the general rule, subject to leave being granted by a court in the public interest. NADRAC recommended that in deciding whether leave should be given, a court or tribunal should be required to take into account:

- the general public interest in favour of preserving the confidentiality of ADR communications, and
- whether leave is being sought to advance a party's interests or rights with respect to a matter falling within an exception to confidentiality.[26]

In other words, in order to eliminate mediation 'black holes' and to allow judges to continue to develop and apply exceptions to the 'without prejudice' rule in the interests of justice, statutory attempts to codify and override the common law rule should be replaced by such provisions.

This would enable judges to strike the right balance between competing public interests by continuing, where appropriate, to protect the integrity of mediation and other ADR processes while at the same time avoiding injustice by granting leave, where appropriate, to introduce evidence of what happened.

In Hong Kong, the *Mediation Ordinance* achieves this result, by providing that mediation communications are confidential and may be disclosed or admitted into evidence only with the prior leave of the Court or tribunal, which must take into account, *inter alia*, the public interest or the interests of justice.[27]

It would be unethical for a lawyer to recommend court-ordered mediation to enable clients to engage in improper conduct with impunity. On the other hand, it would be prudent for a lawyer to recommend private, as opposed to court-ordered mediation, to enable clients to invoke the court's assistance in the event that the other party engages in improper conduct. Hence the current Federal and State legislation which

makes mediation an evidentiary ‘black hole’ may, over time, deter rather than encourage resort to court-ordered mediation.

In 2015 and 2016 Alan Limbury was described in Who’s Who Legal: Mediation as one of the 10 most highly regarded mediators in the world.

1. *Cutts v Head* [1984] Ch 290, 306 (Oliver LJ), cited with approval in *Rush & Tompkins v Greater London Council* [1989] AC 1280, 1299 (Lord Griffiths) and cited in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436, 2441–2442.

2. *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2011] 1 AC 662, 676 [25]–[27].

3. *McFadden v Snow* (1952) 69 WN (NSW) 8.

4. *Hall v Pertemps Group Ltd* [2005] ADR LR 11/01, [14] (Lewison J).

5. *Pitts v Adney* [1961] NSWR 535.

6. Ibid 539, cited in *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1988) 13 NSWLR 486, 487; *Trade Practices Commission v Arnotts* (1989) 88 ALR 69, 73. See also *McFadden v Snow* (1952) 69 WN (NSW) 8, 10.

7. *Barry v City West Water Limited* [2002] FCA 1214.

8. *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209, 225–226 [97]–[108].

9. *Pittorino v Meynert* [2002] WASC 76.

10. *Abriel v Australian Guarantee Corporation Limited* [2000] FCA 1198; *Commonwealth Development Bank of Australia Pty Limited v Cassegrain* [2002] NSWSC 965.

11. *Tapoohi v Lewenberg (No 2)* [2003] VSC 410.

12. Ibid.

13. *Re Quad Consulting Pty Ltd v David R Bleakley and Associates Pty Ltd* (1990) 98 ALR 659, 666; see also *Williams v Commonwealth Bank of Australia* [1999] NSWCA 345; *Rosebanner Pty Ltd v Energy Australia* (2009) 223 FLR 460.

14. John Locke, *Second Treatise of Government* (Cambridge University Press, first published 1690, 1988 ed. 400, cited in *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 48 [37] (Spender J).

15. Law Reform Commission, *Evidence*, Interim Report No 26 (1985) vol 2, app C, 285 [250]–[256].

16. Law Reform Commission, *Evidence*, Report No 38 (1987) [222]–[223].

17. *Evidence Act 1995* (NSW) s 131; *Evidence Act 2008* (Vic) s 131; *Evidence Act 1929* (SA) s 67C; *Evidence Act 2001* (Tas) s 131; *Human Rights Commission Act 2005* (ACT) s 66(2); *Evidence (National Uniform Legislation Act) 2011* (NT) s 131. Note that the South Australian Act adopts a slightly different formulation from the other provisions. There is no corresponding statutory provision in Queensland, instead the common law privilege applies: Queensland Law Reform Commission, *A Review of the Uniform Evidence Acts*, Report No 60 (2005), 318 [7.333]. However, *Civil Proceedings Act 2011* (Qld) s 53 provides:

‘Evidence of anything done or said, or an admission made, at an ADR process about the dispute is admissible at the trial of the dispute or in another civil proceeding … only if all parties to the dispute agree.’

18. (2009) 181 FCR 392.

19. (2011) 278 ALR 209.

20. [2003] NSWSC 476.

21. (2010) 28 VR 635, [13]–[15].

22. (2007) 71 NSWLR 140.

23. Anthony A Nolan SC and Michael O’Brien, ‘Confidentiality in Mediations: A Work in Progress’ (Paper presented at the Victoria Bar Alternative Dispute Resolution Committee, Melbourne, 12 May 2010) 25 [52]–[53].

24. Cal Evid Code § 1119, 1120 (West 2011).

25. *Cassel v Superior Court*, 244 P 3d 1080, 1096 (Cal, 2011).

26. NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice through People* (28 February 2011), 67 [4.6.2].

27. *Mediation Ordinance* (Hong Kong) ss 8–10.