

Should there be a distinct ‘Mediation Privilege’?

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Since the utmost confidentiality that the law will allow is a key ingredient of the success of mediation as a mechanism for consensual dispute resolution, any derogation from that degree of confidentiality weakens the process. On the other hand, if courts cannot receive relevant evidence, there is scope for injustice. As John Locke put it in 1690: "Where-ever law ends, tyranny begins".²

Does the “without prejudice” rule strike the right balance or should there be a distinct “mediation privilege”?

In the recent UK case of *Brown v. Rice and Patel*³, the question before the court was whether litigation between the parties had been settled the day after an inconclusive mediation, by the alleged acceptance of an offer claimed to have been “left on the table”. ADR Group, one of the oldest ADR providers in the UK, was allowed to make submissions as *amicus curiae*. By consent, the court heard evidence of what transpired at the mediation before ruling on its admissibility. Mr. Stuart Isaacs QC, sitting as a Deputy Judge of the High Court, examined the common law “without prejudice” rule and held that mediation takes the form of assisted “without prejudice” negotiation. He rejected a submission that a special mediation privilege exists or is beginning to emerge, finding no authority to support the proposition, while leaving open the possibility that the need for such a privilege may need future consideration.

This may therefore be an opportune time to examine the “without prejudice” rule to see whether it goes far enough in the context of mediation. To get the full picture, it is also necessary to take into account the parties’ agreement to mediate, statutory and other regulatory provisions applicable to mediation and mediation guidelines and rules of dispute resolution providers such as IAMA.

The “without prejudice” rule

Australia adopts the common law principle which accords evidentiary privilege to “without prejudice” communications, i.e. those made in the course of genuine negotiations with intent to settle an existing dispute. The purpose of the principle is to encourage compromises by sparing the parties the embarrassment which

¹ Arbitrator and mediator. Website: www.strategic-resolution.com.

² John Locke, *Second Treatise of Government* (1690), Chap XVII, s.202 Cambridge University Press, 1988, p 400, cited by Spender J. in *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August, 2007).

³ [2007] EWHC 625 (Ch) (14 March 2007).

might be caused to them if the negotiations fail and later their communications are liable to be put in evidence.⁴

In *Brown v. Rice and Patel*, two justifications for the “without prejudice” rule were acknowledged. The first is the public policy that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged from attempting to do so by the knowledge that what transpires in the course of their settlement negotiations may be used against them in the litigation. The second lies in the express or implied agreement of the parties themselves that what transpires in their negotiations should not be admissible in evidence in the litigation if a settlement does not result.

Several important features of the rule should be noted:

- it operates to exclude evidence before a court or tribunal;
- what is excluded is evidence of communications made for the purpose of negotiations;
- it is designed to protect the disputing parties;
- it applies only where the dispute is not settled; and
- it is a judge-made rule.

Important consequences follow from these features:

- it does not prevent other forms of disclosure;
- it does not apply to communications made for other purposes⁵;
- it does not protect the parties’ lawyers nor the mediator;
- it does not operate once the dispute has been settled; and
- it may be overridden by statute.

By way of illustration of the normal operation of the rule, after an unsuccessful mediation, a party issued a notice to the other to produce documents, the existence of which had been revealed during the mediation. The other party applied to have the notice set aside as an abuse of process because the statements that revealed the existence of the documents were confidential and without prejudice. The application was refused because the notice did not seek to prove what was said at the mediation but to prove, by admissible evidence, facts by reference to the **source** of what was said at the mediation⁶. At trial, the

⁴ *Field v. Commissioner for Railways for NSW* (1957) 99 CLR 285 at 291; *Rush and Tompkins Ltd v. Greater London Council* (1989) AC 1280 at 1300.

⁵ “...the rule covers only those communications which are genuinely aimed at a settlement to avoid litigation”: *Forster v. Friedland* (10 November, 1992, UK Court of Appeal, Civil Division, Transcript No. 1052, p.5) per Hoffman LJ (unreported).

⁶ *AWA Ltd v. Daniels (t/a Deloitte Haskins & Sells)* unreported, Supreme Court of NSW, Commercial Division, Rolfe J, 18 March 1992, following *Field* (supra).

documents eventually produced in response to the notice were admitted into evidence⁷.

Several cases have confirmed that the “without prejudice” rule applies to communications made for the purpose or in the course of mediation, without distinguishing between mediation and bilateral negotiation. The decision in *Brown v. Rice and Patel* is consistent with the position in Australia, although, so far as I am aware, no Australian court has been asked to find that there is a mediation privilege separate and distinct from the usual “without prejudice” privilege. It follows that the exceptions to the “without prejudice” rule presently apply with respect to communications made in the course of and for the purpose of mediation.

It should be no surprise that, amongst several long established exceptions to this evidentiary privilege are circumstances in which, in the absence of evidence of the “without prejudice” communication, the court hearing the dispute would be misled⁸, for example, by shutting out evidence which would rebut inferences upon which a party seeks to rely⁹:

“[T]he privilege that may arise from the cloak of ‘without prejudice’ must not be abused for the purpose of misleading the court”.¹⁰

Apart from the exception which prevents the court from being misled when hearing the very dispute that was the subject of the “without prejudice” communication, other established exceptions to the “without prejudice” rule at common law include situations in which a party seeks to rely on what was communicated during the mediation in order to prove that settlement was reached;¹¹ or that a settlement that was reached should be set aside, for example, by reason of alleged misleading conduct,¹² misrepresentation,¹³ oppression¹⁴ or unconscionable conduct;¹⁵ or that even in the absence of a concluded settlement, what transpired gave rise to an estoppel,¹⁶ or where a

⁷ *AWA Ltd v. Daniels (t/a Deloitte Haskins & Sells)* unreported, Supreme Court of NSW, Commercial Division, Rogers CJ, 12 May 1992.

⁸ *Pitts v. Adney* [1961] NSW 535.

⁹ *Ibid* at 539. See also *McFadden v. Snow* (1952) 69 WN (NSW) 8 at 10, referred to in *A.M.E.V. Finance Ltd v. Artes Studios Thoroughbreds Pty Ltd* (1988) 13 NSWLR 486 at 487 and *Trade Practices Commission v. Arnotts* (1989) 88 ALR 69 at 73.

¹⁰ *McFadden v. Snow* (1952) 69 WN (NSW) 8.

¹¹ *Barry v. City West Water Limited* [2002] FCA 1214; *Rush and Tompkins Ltd v. Greater London Council* (1989) AC 1280 at 1300; *Tomlin v. Standard Telephones and Cables Ltd* [1969] 1 WLR. 1378.

¹² *Quad Consulting Pty Ltd v. David R Bleakley and Associates Pty Ltd* (1990) 27 FCR 86.

¹³ *Williams v. Commonwealth Bank* [1999] NSWCA 345; *Underwood v. Cox* (1912) 4 DLR. 66.

¹⁴ *Pittorino v. Meynert* [2002] WASC 76.

¹⁵ *Abriel v. Australian Guarantee Corporation Limited* [2000] FCA 1198; *Commonwealth Development Bank of Australia Pty Limited & Anor v. Cassegrain* [2002] NSWSC 965.

¹⁶ *Hodgkinson & Corby Ltd v. Wards Mobility Services Ltd* [1997] FSR. 178.

party sues her solicitors over their conduct in the mediation,¹⁷ or where those solicitors join counsel and the mediator seeking contribution as joint tortfeasors.¹⁸

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. Accordingly, in my opinion, the “without prejudice” rule (by which I include its exceptions) works as an instrument of justice by appropriately protecting the parties while also, where appropriate, exposing what transpires in mediation to judicial scrutiny.¹⁹

In *Brown v. Rice and Patel* counsel for Mrs Patel argued for the existence of a mediation privilege distinct from the “without prejudice” rule, under which (at least) a mediator could not be required to appear as a witness or produce documents and under which the parties could not waive the mediator’s entitlement not to give evidence in respect of the contents of a mediation. Counsel cited a case in which the evidence of a probation officer who had been present at a “without prejudice” interview between a divorcing couple was admitted because the wife had not objected to the husband giving evidence as to what transpired at the interview²⁰ and a House of Lords case in which it was said that there was a distinct category of privilege in matrimonial cases extending to communications received in confidence with a view to matrimonial conciliation.²¹

The court was also referred to a discussion of the possible existence and desirability of a distinct privilege attaching to the entire mediation process in *Brown & Marriott ADR Principles and Practice* (2nd edition, 1999).²² However, counsel conceded that the instant case could be decided under the “without prejudice” rule and the Deputy Judge agreed, saying that future consideration by either the legislature or the courts may need to be given to the existence of a distinct mediation privilege.

Since the issue was whether the “without prejudice” communications in question had resulted in a concluded settlement, the Deputy Judge held that the admission of those communications in evidence was not prevented by the

¹⁷ *Tapoohi v Lewenberg & Ors (No 2)* [2003] VSC 410 (21 October 2003).

¹⁸ *Ibid.*

¹⁹ There is no exception at common law where the court is considering liability for the costs of the proceeding following inconclusive mediation but this has not prevented one court in Western Australia from taking into account on the question of costs a report of the registrar who conducted the mediation: *Capolingua v. Phylum Pty Ltd* (1991) 5 WAR 137. See also *The Silver Fox Co Pty Ltd and ors v. Lenard’s Pty Ltd and ors (No. 3)* (2004) 214 ALR 621 (a case under section 131(2)(h) of the Evidence Act 1995 (Commonwealth), which permits the disclosure of otherwise privileged communications where relevant to determining liability for costs.

²⁰ *McTaggart v McTaggart* [1948] 2 All ER 754.

²¹ *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.

²² at paras 22-079 to 22-097.

“without prejudice” rule since the situation was fairly and squarely within one of the recognised exceptions. He continued:

“The fact that the communications took place in the context of a mediation – a form of assisted without prejudice negotiation - does not confer on them a status distinct from any other without prejudice communications such as to take them outside the scope of the exception or otherwise to render them inadmissible.

...No investigation of the underlying merits of the dispute is involved.

...It would be an odd result if in any given case the court was prevented from determining the existence of a concluded settlement solely because the alleged settlement arose within the context of a mediation”.

ADR Group, in attempting to identify the content of a distinct rule of mediation privilege, submitted that nothing said or done in preparation for, at or in consequence of the mediation which is liable to disclose the nature of the negotiations can ever be used outside the mediation process, in the absence of a *prima facie* case or credible evidence of “unambiguous impropriety” by a party to the mediation²³. This submission was rejected by the Deputy Judge on the basis that the exceptions to the “without prejudice” rule, even in the mediation context, go wider than this.

Thus the “without prejudice” rule affords protection to the parties so they may speak freely and frankly in an effort to settle their dispute, while permitting evidence of their discussions on other issues, whether they be issues between the parties themselves or between a party and a lawyer or the mediator, such as claims of breach of the lawyer’s retainer or a complaint about the conduct of the mediator.²⁴

Rules of court

Where a party to a family law conciliation conference sought to set aside a settlement agreement executed some time later on the ground that it did not reflect what had been orally agreed at the conference, the trial judge admitted evidence of what had transpired at the conference, holding invalid a rule made by the judges of the Family Court of Australia purporting to render such evidence inadmissible “in any court”. The Full Court of the Family Court reversed that

²³ This submission derives from the remark of Hoffman LJ in *Forster v. Friedland* (supra): “the value of the without prejudice rule would be seriously impaired if its protection could be removed (for) anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition.”

²⁴The question whether mediators appointed by the parties to court proceedings should be accorded the same immunity from suit as those to whom the proceedings are referred by the court is an issue which we may leave to another day. See, for example, s.53C Federal Court of Australia Act 1976; and s.33 Civil Procedure Act 2005 (NSW).

decision, holding the rule valid. The High Court of Australia reinstated the judge's finding, holding the rule *ultra vires* the rule-making power of the Family Court under the Family Law Act. In doing so, the High Court reaffirmed that, where the ordinary rules of evidence apply, "without prejudice" material will be admissible in the situations I have mentioned above²⁵.

Statutes

It is not so easy to hold statutes invalid, however. 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 protect the confidentiality of communications made at mediation, often in terms which override the common law exceptions to the "without prejudice" rule, with consequences that may not have been intended.

For example, under section 53B of the Federal Court Act 1976, 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 **in any court** (whether exercising federal jurisdiction or not); or **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 (emphasis added). A similar approach is taken in the Civil Procedure Act 2005 (NSW) although there are specified exceptions which do allow evidence, including from the mediator, that a settlement has been reached and as to its substance and which allow specified disclosures by the mediator in certain circumstances.²⁶

Some legislative schemes in which such provisions appear require mediation before litigation may commence, often where there is thought to be an inherent imbalance of power. Under section 69 of the Retail Leases Act 1994 (NSW) any statement or admission made in the course of the mediation of a retail tenancy dispute is not admissible at a hearing of a claim under Division 3 or in "any other legal proceeding".

Disputes between financial institutions and farmers in New South Wales are another example, since farmers affected by drought often fail to maintain their mortgage payments to their banks. Before the bank can take action to enforce its mortgage, it must offer mediation to the farmer and must obtain a certificate from the Rural Assistance Authority that the parties participated in the mediation in good faith. The Authority obtains a report from the mediator before issuing the certificate.

As originally enacted, section 15 of the NSW Farm Debt Mediation Act, 1994 provided, in language that is found in other statutory schemes:

²⁵ *Harrington v. Lowe* [1996] HC 8.

²⁶ Civil Procedure Act 2005 (NSW), sections 29, 30 and 31.

- “(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 evidence²⁷.
- (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 NSW Court of Appeal held that a decision by the Rural Assistance Authority to issue a certificate entitling the creditor to commence proceedings against the debtor was not amenable to judicial review because section 15 rendered inadmissible the very evidence upon which any such review would need to be conducted.²⁸ The Act was subsequently amended to render admissible, *inter alia*, the mediator’s report on which the certificate is based.²⁹

Following the enactment of that amendment but before its commencement, in a case in which it was sought to set aside Heads of Agreement reached during a farm debt mediation session on the ground of alleged unconscionable conduct (including suggested threats to appoint a receiver unless the Heads were signed and the emotional state of the customer representative at the mediation), the following mediator’s report was admitted into evidence without objection:

“Did party A make an adequate opening statement? Yes

Did party B make an adequate opening statement? Yes

Were Party A’s issues and concerns isolated/identified from the opening statement? Yes

Were Party B’s issues and concerns isolated/identified from the opening statement? Yes

Were each party’s issues/concerns discussed face to face sufficiently to enable the other party to appreciate the other’s perspective? Yes

Were Party A’s options for settlement canvassed? Yes

Were Party B’s options for settlement canvassed? Yes

How many settlement options were proposed? 2 - 3

²⁷ This would, of course, include an arbitrator.

²⁸ *Gain v. Commonwealth Bank of Australia* unreported, NSW CA 16 September 1997.

²⁹ Farm Debt Mediation Amendment Act 2002.

By whom? *Mutually*

Were both parties prepared to consider/discuss the others settlement options? Yes".³⁰

One may speculate that the lack of objection was due to the opacity of the report!

Also before that amendment came into force, the NSW Supreme Court did some mental gymnastics in order to hold that evidence of the preparation of Heads of Agreement or terms of settlement was not rendered inadmissible by section 15, holding that, by the time that step was taken, the mediation session had ended; the preparation of such documents did not "follow-up" the mediation session; and "to construe the section so as to exclude from evidence terms of settlement reached at a mediation would go beyond the purposes of the Act and might even defeat them".³¹

A statutory version of the "without prejudice" rule in relation to civil disputes, with a somewhat longer list of exceptions, is to be found in section 131 of the Evidence Act 1995 (Commonwealth) and corresponding State and Territory legislation.³² One of those exceptions relates to communications made in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

Mediation agreements

The operation of the "without prejudice" rule and similar statutory provisions comprise only part of the picture as regards the confidentiality of mediation. Confidentiality is usually stipulated by agreement between the parties and the mediator, or by their adhesion to a set of rules formulated by an institution under whose auspices the mediation takes place.

In *Brown v. Rice and Patel* it was common ground between the parties that the court could not, of its own motion, properly require the mediator to give evidence and, in conformity with their agreement to mediate, neither party was intending to issue a witness summons against him.

Principle 5 of the IAMA Principles of Conduct for Mediators (2003) provides that the reasonable expectations of the parties with regard to confidentiality shall be met by the mediator and that the parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. It continues:

³⁰ *Commonwealth Development Bank of Australia Pty Limited & Anor v. Cassegrain* [2002] NSWSC 965.

³¹ *ANZ Bank v. Ciaverella* [2002] NSWSC 1186.

³² Evidence Act 1995 (NSW), s. 131; Evidence Act 1958 (Vic.), ss.21J and 21L; Evidence Act 1929 (SA) s. 67C; Evidence Act 2001 (Tas.), s.131; Human Rights Commission Act 2005 (ACT), s.66.

“The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or public policy”.

This goes further than the “without prejudice” rule. For example, where one party complains to IAMA about the conduct of the mediator, that party may be taken to have waived confidentiality for the purposes of the determination of the complaint. However, this Principle would preclude the mediator, in responding to the complaint, from relying on any communications confidential to the other party or parties unless they agree. One can imagine that the mediator’s response to a complaint might very well involve disclosure to the complaining party of communications confidential to other parties. Would public policy extend to enable the mediator to defend the complaint without the consent of all parties?

Rule 8 of the IAMA Rules for Mediation of Commercial Disputes (said on the web site to be “largely superseded”) provides that the mediator, the parties and all advisers and representatives of the parties must keep all matters relating to or arising out of the mediation confidential except :

- (a) where disclosure is compelled by law;
- (b) to the extent necessary to give effect to a mediation agreement or to enforce an agreement reached to settle or resolve the whole or any part of the dispute ;
- (c) where disclosure of the fact of the occurrence of the mediation (but not of any of the matters discussed or communicated in the mediation process) is necessary or desirable for the purpose of making submissions to a tribunal in subsequent proceedings relating to the dispute.

This would place a party in breach of the IAMA Rule and any contract incorporating that Rule if it sought to tender evidence which is admissible under an exception to the “without prejudice” rule, such as evidence showing that a settlement was procured by duress, fraud or misrepresentation. It would also preclude any examination of the conduct of the mediator or the parties’ lawyers.

Required and permitted disclosures

The laws of many countries require disclosure to relevant authorities of information coming to a person’s attention, regardless of the circumstances in which the information is imparted. I am not aware of any comprehensive compilation of such laws.

In New South Wales, for example, section 316 of the Crimes Act requires a person who becomes aware that a serious indictable offence has been committed (one carrying a possible sentence of 5 years) to inform the police, upon pain of a 2-year gaol sentence, and 5 years if consideration is accepted for

not telling. A mediator paid to keep things confidential may be looking at a 5-year sentence, not just two! Some small comfort is provided in that, where the Regulations specify certain occupations in which there is a relationship of confidence, such as solicitor and doctor, the approval of the Attorney-General is required before any prosecution. The outgoing Attorney-General recently accepted a submission from the Australian Branch of the Chartered Institute of Arbitrators that mediators and arbitrators be added to the list. It hasn't happened yet, however.

Apart from disclosures required or permitted by law for the purposes of implementation or enforcement of any settlement agreement or disclosures otherwise agreed by the parties, some statutes³³ model laws³⁴ and guidelines³⁵ and model mediation clauses³⁶ contemplate and some ADR providers stipulate in their rules or codes of conduct³⁷ that, under certain circumstances, the obligation of confidentiality does not apply, such as where “the mediator reasonably considers that there is serious risk of significant harm to the life or safety of any person if the information is not disclosed”.³⁸ Research by the UIA Forum of Mediation Centres has confirmed that there is no common approach on disclosure of what would otherwise be confidential information.

There may be other ways for a mediator to handle situations in which the mediator perceives a threat to life or safety than making or threatening disclosure, such as putting pressure on the party responsible to fix the problem or to make disclosure itself, or terminating the mediation on the ground that the mediator can no longer remain impartial, with the possible consequence that the defect might (eventually) see the light of day in court. This may not be sufficiently timely to prevent the apprehended harm, however.

It is argued that where the life or safety of any person is or may be at serious risk, preventing that consequence should take precedence over confidentiality and so institutions should make provision in their Rules and individual mediators should make provision in their mediation agreements for this exception, leaving it to the judgment of the mediator as to whether to make disclosure or not. The opposing argument is that mediators should not be expected to be the guardians of the public interest and that the local laws which apply to the mediation should be changed, if need be, to require or permit appropriate disclosure in such cases.³⁹

³³ Such as s. 21M of the Evidence Act 1958 (Vic.)

³⁴ Such as the UNCITRAL Model Law on International Commercial Conciliation (2002) Article 9.

³⁵ Such as the Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), Comments on Article 9 and the UIA Forum Guideline “Good Practices on Confidentiality” (Dublin, September 2006), paragraphs 11 and 12.

³⁶ Such as the Final Draft Model Confidentiality Clause for Mediation Rules for Members of the UIA World Forum of Mediation Centres (Dublin 2006).

³⁷ Such as the CEDR Solve Code of Conduct for mediators and other third party neutrals.

³⁸ Ibid.

³⁹ See, for example, s.31(c) of the Civil Procedure Act 2005 (NSW).

Contractual provisions permitting disclosure by the mediator in such circumstances raise the question whether the mediator may be held liable in damages to one or both parties for breach of contract or of confidence if the mediator happens to be mistaken as to the existence of the risk to third parties' lives or safety. What if the information comes from one party confidentially and is about what the other party may be threatening to do? Or is about what someone not present is threatening to do? What can the mediator do to verify the information? What if the information is wrong or out of date? These questions may sound far-fetched and it is suggested that these circumstances will only rarely arise. But they need to be considered because their application could place mediators in a very difficult position.

Conclusion

In my opinion, the "without prejudice" rule, once its exceptions are appreciated, draws the line in the right place, by

- protecting only communications made for the purpose of settlement negotiations, (thereby giving disputants the comfort they need that they can be as frank as they wish in their desire to achieve resolution without fear that whatever they may say or concede can be referred to in court upon the hearing of their dispute in the event that the mediation does not result in a binding settlement); and
- nevertheless permitting what transpires in mediation to see the light of day where the issue before the court is not the same as the issue over which the parties were negotiating.

Thus mediation under the "without prejudice" rule is not a "no go area" for all purposes and "the more relevant to the underlying dispute the events are the more likely they are to be covered by the without prejudice protection".⁴⁰ Any mediators who have been routinely telling the parties in the first open session that "nothing they say can be referred to in court" have been kidding themselves and misleading the parties. Better and accurate for the mediator to say that "mediation is as confidential as the law will allow" and to leave it to the parties' lawyers to advise them of the exceptions!

It follows that, in my view, to avoid allowing mediation to become another Guantánamo Bay, statutes and court rules should be revisited and suitably amended in order better to reflect the exceptions to "without prejudice" rule. The somewhat narrower amendment to the Farm Debt Mediation Act (NSW) in 2002 was a useful first step in that direction.

⁴⁰ *Hall v Pertemps Group Ltd* [2005] ADR LR 11/01, per Lewison J.

Biography

Alan Limbury qualified as a barrister in England and practiced as a solicitor in Sydney for 32 years. He currently practices full time in international mediation and arbitration and is recognised as one of Sydney's leading ADR practitioners.