
Confidentiality and privilege in mediation

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Introduction

Mediation has been described as a form of assisted “without prejudice” negotiation.¹ It is enabled and facilitated by confidentiality and privilege, as well as by statute and legal and equitable principle. Without confidentiality and the *without prejudice privilege*, the parties would be unwilling to negotiate with the other party for fear that what they said during negotiations may be used against them if the matter went to court. Indeed, confidentiality has been described as the *sine qua non* of mediation.² But what is confidentiality and how is it underpinned in the mediation context? In order to answer this question it is necessary to distinguish between, and define, the terms *confidentiality* and *privilege* as, although they are related concepts, they cover different areas.

Confidentiality

In the context of mediation, *confidentiality* means that which is confidential both as between the parties as well as between the parties and the mediator. In a mediation context, the basis of confidentiality is contract — rights and obligations of confidentiality primarily arise from the mediation agreement itself but also from statute,³ as well as from common law and equitable principles. At least the contractual rights and obligations are of a tripartite nature. As with an arbitration agreement, the terms of a mediation agreement will bind the parties as well as the third party neutral⁴ appointed pursuant to it.⁵

Mediation will be assisted, or even enabled by, legislative and also court intervention.⁶ For example, in Victoria each of the Acts which establish the respective Victorian Courts and various rules of court provide assistance to mediation and other alternative dispute resolution (ADR) processes by legislating that:

- the court may, at the instance of the parties or of its own motion, refer a proceeding to mediation⁷ or other form of ADR;⁸
- unless all of the parties who attend the mediation otherwise agree in writing, no evidence of anything said or done by any person at the mediation can be admitted at the hearing of the proceeding;⁹ and

- a mediator to whom a civil proceeding (or part) is court referred has the same protection and immunity as a judge.¹⁰

To what extent is confidentiality enforceable?

A confidentiality provision in a mediation agreement will be enforceable like any other contractual term.¹¹ This will primarily depend on the terms of the particular contract, as well as any applicable legislation and legal or equitable principles.¹² Any of the parties and also the mediator may enforce a confidentiality provision.¹³ Courts will generally lend their support to upholding confidentiality except where it is necessary in the interests of justice for the evidence to be given.¹⁴

Without prejudice privilege

Without prejudice privilege, on the other hand, becomes important in relation to any proceedings that arise *out of* a mediation.¹⁵ This privilege means that if statements are made “without prejudice”, their contents cannot be put in evidence without the consent of all relevant parties.¹⁶ Such statements will be so made where parties are endeavouring to settle the whole or part of a dispute.¹⁷ Parties in a mediation cannot speak freely if they must constantly monitor every sentence with their lawyers and advisors.¹⁸ In litigation the privilege will often relate to an offer of a compromise,¹⁹ or a “without prejudice save as to costs letter”.²⁰ It is possible that some settlement discussions will be “on the record” and others will be “off the record”, such that part of the discussion will be privileged but the rest will not be.²¹

Federally, and in several states including New South Wales and Victoria, the without prejudice privilege has been codified under the Uniform Evidence Act in the following terms:²²

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.

The basis and scope of the privilege

The basis of the without prejudice privilege is that parties should be encouraged, as far as possible, to settle their dispute without resorting to litigation and should

not be discouraged in their negotiations by knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of a legal proceeding. In other words, the parties should be encouraged to be frank and “put their cards on the table”.²³ Another basis of the rule is the express or implied²⁴ agreement of the parties themselves that communications in the course of negotiations should not be admissible in evidence if, despite negotiations, a trial ensues.²⁵

The without prejudice privilege is only relevant to court proceedings and exists as between the parties. It is not a privilege of the mediator.²⁶ The parties can waive the privilege, as can be done in the example already given, by stating that part of their conversation is “off the record” while the rest is not.

Separately, legal advice/litigation privilege may also attach to statements or documents which are made or produced in mediation. The disclosure of such documents to the mediator, or even the other parties, during the course of the negotiation will not waive that privilege.²⁷

Exceptions to the “without prejudice privilege”

The without prejudice privilege is subject to, and must be seen in the context of, its various common law exceptions, at least in those states and territories not governed by the Uniform Evidence Acts. In the latter jurisdictions, the specified legislative exceptions will apply.²⁸ As mediation is simply a form of assisted without prejudice negotiation these exceptions will also apply to negotiations occurring during a mediation.²⁹ If an exception applies, the relevant communications will be able to be adduced as evidence in a proceeding. The exceptions include³⁰ whether the without prejudice communications resulted in a concluded settlement or compromise,³¹ whether a concluded agreement entered into as a result of without prejudice negotiations should be set aside on the grounds of some vitiating circumstance at law, in equity or under statute,³² if the exclusion of the evidence would act as a cloak for perjury, blackmail or other impropriety,³³ or if communications or documents revealed during mediation relate to the existence or possible existence of objectively provable facts, or matters which one of the parties was already aware of.³⁴

The exceptions to the without prejudice privilege or the exclusion of evidence of settlement negotiations contained in s 131 of the Evidence Act 1995 (Cth) and corresponding state and territory legislation are similar to the common law exceptions.³⁵

The mediation agreement

As stated, the primary basis by which it may be said that mediations are *confidential* are the express (and

implied³⁶) terms of the mediation agreement. The agreement between the parties will be supplemented by statute and the general law of confidential information.³⁷ This highlights the great importance to the mediator, as well as to the parties, that there be an effective tripartite mediation agreement.

From the mediator’s point of view, a formal agreement is essential for a number of reasons, including:

- to provide for his or her immunity which will not automatically be provided for unless the mediation is court ordered. If the mediation is court ordered, then, in Australia, there are various provisions which give the mediator the same immunity from suit as a judge enjoys;³⁸ and
- to precisely demark the obligations of the parties and the mediator insofar as confidentiality and other matters (rate and deposit of fees) are concerned.

It has been suggested that nationally mediation agreements generally take a similar form in relation to confidentiality.³⁹ The mediation agreement will commonly provide that both the mediator and the parties must not disclose to any person (other than the parties’ professional advisers for the purposes of the mediation) information obtained during the mediation without the prior written consent of the parties, unless compelled by law to do so. There will commonly be a separate confidentiality agreement for non-parties who attend the mediation. The confidentiality clause will aid negotiation even if a settlement agreement is not reached and in Australia an agreement to negotiate may be legally enforceable if it is clearly or unequivocally expressed.⁴⁰

On an international level

Internationally, similar protections to those provided in this country are given by such instruments as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation.⁴¹ Of relevance in the European Union is the EU Directive on certain aspects of mediation on civil and commercial matters.⁴²

Conclusion

We have examined the concept of confidentiality in mediation, which is primarily the contractual right and obligation express or implied under the mediation agreement, as augmented by the common law, equity and statute, and the without prejudice privilege which has common law origins and has been codified at least in parts of Australia. Together, these measures seek to provide for a confidential mediation environment where the parties can work with the mediator through without prejudice negotiations to achieve an agreed resolution.

While these measures create an evidentiary "black hole" so that not all relevant evidence will be before the court which decides the dispute, the creation and facilitation of a free and frank negotiation environment conducive to resolving disputes is evidently considered to be worth the cost.⁴³



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Footnotes

1. *Brown v Rice* [2007] EWHC 625 (Ch) at [13], [21] cited in Alan L Limbury "Should Mediation be an evidentiary 'black hole'?" (2012) 35(3) *University of New South Wales Law Journal* 914 at 916 www.unswlawjournal.unsw.edu.au.
2. Klaus Reichart "Confidentiality in International Mediation" (Nov 2004–Jan 2005) 59(4) *Dispute Resolution Journal* 60.
3. And rules of court.
4. Arbitrator or mediator.
5. *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 43 WAR 91; 287 ALR 315; (2012) 262 FLR 1; [2012] WASCA 50; BC201201101 at [165]–[166].
6. See John K Arthur "Statutory requirements to attend or use ADR: Victoria" (2014) 1(1) *Australian Alternative Dispute Resolution Bulletin* 12 www.gordonandjackson.com.au.
7. For example, Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 50.07(1).
8. See Civil Procedure Act 2010 (Vic), s 66.
9. Eg Supreme Court Act 1986 (Vic), s 24A. Similar provisions apply in respect of each of the courts in the Victorian court hierarchy.
10. Eg Supreme Court Act 1986 (Vic), s 27A. Similar provisions apply in respect of each of the courts in the Victorian court hierarchy.
11. For example, see term in the NSW Bar Association Mediation Agreement, see <www.nswbar.asn.au/docs/webdocs/mediation1.doc>.
12. See Michael Pryles, *Mediation Confidentiality*, www.acica.org.au/downloads/mediation_confidentiality.doc. As to the equitable principles of confidential information: see *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354; BC200909905 at [24].
13. The contractual terms providing for confidentiality are enforceable by any party to the agreement as well as the mediator: see *Australian Football League v Age Co Ltd* (2006) 15 VR 419; [2006] SVC 308; BC200606690 and Anthony Nolan SC and Michael O'Brien *Confidentiality in Mediations — A work in progress* (12 May 2010) p 5 <http://barristers.com.au>.
14. *Farm Assist Ltd (in liq) v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] BLR 399; 125 ConLR 154; [2009] EWHC 1102 (TCC) at [44] per Ramsay J.
15. That which is privileged is a fundamental civil right: Limbury, above n 1; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561; 43 ACSR 189; [2002] HCA 49; BC200206568 at [85]; see also Law Institute of Victoria, *Confidentiality and privilege*, 2015, www.liv.asn.au; Limbury, above n 1.
16. J D Heydon *Cross on Evidence* LexisNexis Australia vol 1 at [25350].
17. Above n 16.
18. Above n 16.
19. Above n 16.
20. *MT Associates Pty Ltd v Aqua-Max Pty Ltd (No 3)* [2000] VSC 163; BC200002334; *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435; [2005] VSCA 298; BC200510663; *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344; BC201108674 at [8].
21. Above n 16.
22. Evidence Act 1995 (Cth), s 131(1).
23. *Cutts v Head* [1984] Ch 290, 306 (Oliver LJ); Limbury, above n 1, at 914, 916.
24. Above n 23; Above n 14, at [28], [29]. *Quaere* whether this represents the common law of Australia, see *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 CLR 10; 128 ALR 391; BC9506416 and A Nolan QC and M O'Brien, "Confidentiality and admissibility of Communications made in the course of a Mediation" (Paper presented at VicBar CPD program, 4 May 2010) <https://portal.barweb.com.au/Upload/FCK/Hanger%20AM%20QC%20Ian_Paper.pdf>.
25. *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 at 2442; *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209; [2011] FCA 240; BC201101349 at [86], cited in Limbury, above n 1, at 916.
26. Above n 14, at [44].
27. Above n 26; Justice PA Bergin, "The Global Trend in Mediation; Confidentiality; and Mediation in complex Commercial Disputes — An Australian perspective" (Paper delivered at Mediation Conference, Hong Kong, 20 March 2014).
28. Set out in the Evidence Act, s 131(2) and NSW and Victorian equivalents; see Hon Justice Bellew and J K Arthur, *Australian Uniform Evidence* LexisNexis Online/Red, www.lexisnexus.com
29. Limbury, above n 1, at 916.
30. See Limbury, above n 1, at 918, referring to exceptions stated in *Unilever Plc v Procter & Gamble*, above n 25 subsequently approved in *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990; [2009] 2 WLR 749; Limbury, above n 1, at 919–920, referring, inter alia, to *Tapoohi v Lewenberg (No 2)* [2003]

- VSC 410; BC200306153; *Harrington v Lowe* (1996) 190 CLR 311; 136 ALR 42; BC9601354; *Quad Consulting Pty Ltd v Bleakley and Associates Pty Ltd* (1990) 19 IPR 264; (1990) 98 ALR 659; BC9003697.
31. In determining whether a binding agreement has been reached at mediation, the evidence which is available is much more extensive than is available in determining what the terms of an agreement are: see *Gangemi v Osborne* [2009] VSCA 297; BC200911282 at [24]; *Factory 5 Pty Ltd (in liq) v State of Victoria (No 2)* [2012] FCAFC 150; BC201208238 at [104(k)]; compare with *Electricity Generation Corp v Woodside Energy Ltd* (2014) 251 CLR 640; 306 ALR 25; [2014] HCA 7; BC201401090 at [35]. See the equivalent exception in the Evidence Act, s 131(2)(f).
 32. Such as misrepresentation, fraud, undue influence or misleading and deceptive conduct; Limbury, above n 1. See the equivalent exception in the Evidence Act, s 131(2)(j).
 33. Limbury, above n 1; this exception may be compared to the Evidence Act, s 131(2)(j) and see *Pihiga Pty Ltd v Roche*, above n 25.
 34. Bergin J, above n 27, pp 12–13 and cases there cited including *Field v Commissioner for Railways NSW* (1957) 99 CLR 285; (1957) 32 ALJR 110; BC5700900 — if this exception did not exist a party may seek to disclose a relevant document during a mediation thereby sterilising it from subsequent disclosure, Limbury above n 1.
 35. Such exceptions have been expressed as being too wide: Nolan QC and O'Brien, above n 24, p 18.
 36. See above n 24.
 37. However these equitable principles will yield to the terms of the agreement: Bergin, above n 27, p 14.
 38. *Supreme Court Act 1986* (Vic) s 27A; *Supreme Court (General Civil Procedure) Rules 2005* r 50.07; *County Court Act 1958* (Vic) s 48C; *Magistrates' Court Act 1989* (Vic) s 108A. The lack of statutory immunity enabled proceedings to be brought in the case of *Tapoohi v Lewenberg (No 2)* [2003] VSC 410
 39. Bergin JA, above n 27, p 13. For example, along the lines of the draft NSW Bar Association Mediation Agreement, above n 11.
 40. See *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 274 ALR 731; (2011) 81 ACSR 563; [2011] FCAFC 19; BC201100543 at [121]–[123] per Keane CJ.
 41. See *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, UN GAOR, 4th comm, 57th sess, 52nd plen mtg, Agenda Item 155, UN Doc A/RES/57/18 (19 November 2002) art 9, 10.
 42. For example, *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3, art 7.
 43. See Limbury, above n 1 and Pryles, above n 12.