TASMAN ASH FLEMING (HE/HIM)
Barrister & Mediator (NMAS)

Mediation and s131 of the Evidence Act 2008 (Vic)[1]

1. S131(1) of the Evidence Act 2008 (Vic) (The Act) governs the admissibility of evidence of settlement negotiations in Victoria, subject to common law, contractual arrangements and statutory constraints.
2. At common law evidence of conduct at, representations in and offers at mediations and during settlement negotiations is on a "without prejudice" basis and is inadmissible. Whereas s131 of the Act states: Evidence is not to be adduced of
    a. (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. (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.
3. There are a number of exceptions pursuant to s131(2).
4. Most notably these exceptions can include:
    a. Where the evidence tends to contradict or qualify other evidence s131(2)(e),

[1] This paper is an aide memoire of a lecture on the above topic delivered by Zoom 8am 29 March 2022 as part of the Svenson Barristers List S March Breakfast CPD Program collection by Tasman Ash Fleming, Barrister & Mediator at the Victorian Bar and Adjunct Lecturer at the College of Law Victoria.

fleming@vicbar.com.au
0430490161
Clerk: Svensons Barristers List S
C/- Owen Dixon Chambers 205 William Street Melbourne 3000

b. Where the proceedings is to enforce an agreement to settle a dispute or where the making of such an agreement is at issue S131(2)(f),
c. Where evidence in the proceeding has been given which is likely to mislead unless the evidence of settlement negotiations is admitted to contradict or qualify that evidence S131(2)(g)
d. Where the evidence is necessary to resolve a question of costs pursuant to s131(2)(h).

5. Individual legislations governing court ordered mediations affect the admissibility of the mediation in the proceedings they are held unless by consent, Viz. Supreme Court Act 1986, s24A, Magistrates' Court Act 1989, s108(2), County Court Act 1958 s47B, Federal Court of Australia Act 1976 s 53A etc. similar provisions also apply in particular acts such as the Retail Leases Act (collectively the 'Court ordered provisions').

6. If the proceedings are separate, s131 operates but the s131(2) exceptions will still apply.

7. There are public policy reasons why the parties should have their documents and oral communications Where a mediation is arranged privately between parties and is not ordered by a court, the Court ordered provisions will not apply and s131 will apply unaffected.

8. Judicial Resolution Conferences (JRCs) in Victoria are subject to a test in s67 of the Civil Procedure Act 2010 (Appendix 3) which states that evidence of things said and done in the mediation are admissible if a court orders 'having regard to the interests of fairness and justice.'

9. This paper will look at the general principles along with some selected examples of matters where s131 has been raised.

Field v Commissioner for Railways for New South Wales [1957] HCA 92; (1957) 99 CLR 285

10. This is a long standing authority for privilege not to be extended to objective facts, the test at common law is set out at paragraph 8

    'The question really is whether it was fairly incidental to the purposes of the negotiations to which the medical examination was subsidiary or ancillary that the plaintiff should communicate to the surgeon appointed by the Railway Commissioner the manner in which the accident was caused. To answer this question in the affirmative stretches the notion of incidental protection very far. The defendant's contention that it was outside the scope of the purpose of the plaintiff's visit to the doctor to enter upon such a question seems clearly right. On the whole the conclusion of the Supreme Court that the plaintiff's admission fell outside the area of protection must command assent as correct. It was not reasonably incidental to the negotiations that such an admission should be protected. It was made without any proper connexion with any purpose connected with the settlement of the action. In these circumstances it appears that the evidence of Dr. Teece on this subject was admissible' [2]

[2] Field v Commissioner for Railways for New South Wales [1957] HCA 92; (1957) 99 CLR 285 per Dixon CJ, Webb, Kitto and Taylor JJ at 293

11. The matter concerned an action injury sustained, at issue was whether Field was getting off the train as it was moving or whether it started moving as he was getting off.

12. He gave a medical history to a Dr Teece, in that he mentioned that the train was already moving.

State Rail Authority of New South Wales v Smith (1998) 45 NSWLR 382

13. Privilege applies to documents and oral representations made during settlement negotiations, it does not apply to the settlement document itself.

Private Mediations

Silver Fox Co Pty Ltd (as Trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3) [2004] FCA 1570; (2004) 214 ALR 621 (Silver Fox)

14. This is Decision in The Federal Court of Australia of Mansfield J.

15. The plaintiff attempted to adduce evidence of a private mediation pursuant to a mediation agreement which amounted to the final offers being given.

16. His Honour discussed the admissibility of this:

30 'Clauses 15 to 19 of the Mediation Agreement deal with confidentiality of the mediation process. Clause 15 imposes a confidentiality obligation upon the mediator. Clause 16 imposes a confidentiality obligation upon any information or document provided during the mediation unless disclosure is required by law or by clauses 17 or 21 of the agreement. Clause 17 permits a party to disclose information or documents to persons 'within that party's

legitimate field of intimacy'. Clause 18 provides (inter alia) that, subject to clause 21, any settlement proposal made in the course of the mediation will be 'privileged' and will not be tendered as evidence in any proceedings relating to the dispute. The dispute is defined to include the present proceedings reflected in the applicants' claims and the first respondent's cross-claim. Clause 21 authorises disclosure to enforce any settlement made at the mediation.

31 Notwithstanding the terms of the Mediation Agreement, the applicants seek to rely upon the communications at the mediation. They contend that the receipt of the evidence of those communications is authorised by s131 (2)(h)of the Evidence Act 1995 (Cth).

32 In my judgment, the terms of the Mediation Agreement are clear. They do not permit the adducing of evidence of the course of the mediation or what offers were made in the course of the mediation.

33 It may nevertheless be assumed that the terms of the offers made during the mediation are relevant to determining liability for costs, so that prima facie s131(2)(h) of the Evidence Act would remove the prohibition in s131(1) from adducing evidence of communications in an attempt to negotiate a settlement of a dispute'[3]

14 His Honour had some very interesting remarks about what the parties had before them on the question of costs. Bearing in mind that only the final offers were adduced and not the substantive discussions between the parties at the Mediation. The knowledge of the parties of the

[3] *Silver Fox Co Pty Ltd (as Trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3)* [2004] FCA 1570; (2004) 214 ALR 621 Per Mansfield J Paragraphs 30-33

strengths of their cases would have been different and His Honour declined to make an order as to costs as proposed by the Applicant His Honour wrote:

'39 I also bear in mind that the evidence discloses only the final negotiating offers of the parties. It is not clear to what extent evidence which was adduced at the hearing was made available or adverted to at the mediation. Given the timing of the mediation, it is unlikely that all the material led in evidence was then available. Clearly the medical evidence was not. The picture available to the parties at the time of the mediation is not shown to be, and probably was not, the same as that ultimately before the Court.'[4]

Conflict with the Court ordered provisions

Pinot Nominees Pty Ltd v The Commissioner of Taxation [2009] FCA 1508

15 A case in the Federal Court of Australia and a Decision of Siopsis J which looked at the provisions in s53A of the Federal Court of Australia Act 1976 ('FCA') which is a similar provision to s24A of the Supreme Court Act 1986 (Vic) and the Evidence Act 1995 (Cth) s131.

16 His Honour found that there was a conflict between the operation of the FCA and s131(2) provisions and that s53A of the FCA took precedence. Therefore the **evidence of what was said or done at the mediation was not admissible.**

[4] Ibid. per Mansfield J at paragraph 39

17 This was a Taxation case, Pinot Nominees did not prepare a tax return for 6 years from 1997 to 2003, the Commissioner issued a tax assessment.

18 The matter was contested and went to the Federal Court and was referred to a mediation by a Registrar, which it did over three days.

19 The Applicant made submissions on liability for costs and argued that the Commissioner had acted unreasonably in rejecting offers and sought to adduce evidence of what was effectively two offers of compromise which had occurred at mediation.

20 The Commissioner relied on s53A and s53B of the FCA.

21 The Applicant relied on s131(2)(h) and Silver Fox.

22 But as I have outlined above the Silver Fox litigation arose out of a mediation agreement not Court referral.

23 Siopsis J described the operation of the two pieces of legislation:

'In my view, the provisions of s 53B of the Federal Court Act can be reconciled with s131(2)(h) of the Evidence Act on the basis that s131(2)(h) applies to "without prejudice" communications other than those communications which are made during the course of a mediation conference to which s 53B applies.'[5]

Forsyth v Sinclair (No 2) [2010] VSCA 195

[5] Pinot Nominees Pty Ltd v The Commissioner of Taxation [2009] FCA 1508 at Paragraph 30 per Siopsis J

24 This is a major case in this Jurisdiction and affirms the Federal decision of Siopsis J in Pinot for Victoria.

25 was a matter which went to the Court of Appeal of Victoria and a Judgment of Neave, Redlich JJA and Habersberger AJA which dealt with the admissibility of what was said at two separate Mediations one the (' 2009 Mediation' and the '2005 Mediation') and the admissibility of offers pursuant to s131(2)(h) on the question of costs.

26 Their Honours considered the propriety of disclosing what had been said at the 2009 Mediation and also effectively a chronological statement of the demands and offers at the 2005 Mediation.

27 The respondents had sought consent to adduce evidence of the 2009 Mediation, the appellants then wrote back with a supplementary submissions in which they agreed that the account of what had occurred at the 2009 Mediation was reasonably accurately set forth which the Court found to have been **equivalent of agreement in writing and thus admissible**.

28 The 2005 Mediation however, did not anything in writing amounting to an equivalent of agreement in writing and therefore caught by the provisions of s24A and **was not admissible.**

29 The Court relied on the Decision in Pinot and found that the Act took precedence over the s131(2)

30 The decision highlights how :

14 In our opinion, this is a sensible outcome in that it leaves the parties free at the mediation to explore all avenues of settlement without the fear that something said or done will be referred to later without their agreement. Positions eventually reached at the mediation can be relied on, if a party wishes to do so, by making an offer of compromise or an offer to compromise the appeal in accordance with O 26 of the Supreme Court (General Civil Procedure) Rules 2005 ('the Supreme Court Rules'), or by making a Calderbank offer, following the mediation. Thus, it would have been preferable, in our opinion, for the respondent to have made its position on the costs of the appeal clear by correspondence after the mediation rather than attempting to refer to what was said at the mediation.

15 This conclusion means that in the present case, the relevant provision was s24A of the Supreme Court Act and not s131(2)(h) of the Evidence Act. Thus, the evidence of something that had been said at the mediation was not admissible at the hearing relating to the costs of the appeal unless all the parties who attended the mediation agreed in writing. But instead of replying to the respondent's solicitors, saying whether or not the appellant agreed to the Court being informed of what had been said by senior counsel, the appellant's legal representatives prepared supplementary submissions in which it was admitted that the proposed letter from the respondent's solicitors to the Court did 'reasonably accurately set forth what was said' by the respondent's senior counsel on the question of the costs of the appeal 'save for two critical caveats'. These involved a debate about the timing and the manner in which senior counsel's statement had been made.

16 In the circumstances, the appellant's supplementary submissions must be taken to be the equivalent of his agreement in writing to the Court being informed of the statement by the appellant's senior counsel. It was implicit from the supplementary submissions that the appellant was agreeing to the evidence being admitted. However, it was an unsatisfactory way to proceed. It would have been preferable, in our opinion, for the question of consent to have been established first, with the parties' legal representatives then addressing the question of how and what the Court should be told, before further submissions were filed.

17 The problems that can result from this inappropriate procedure is illustrated when one turns to consider the propriety of the legal representatives for the appellant disclosing some of what had occurred at the 2005 mediation. This was held pursuant to the order of Master Evans, as he then was, made on 12 April 2005. Section 24A of the Supreme Court Act therefore applied to it. However, there has been no agreement in writing from the respondent to such a disclosure. Therefore, evidence as to what amount the respondent was seeking, and what offers were made, or what offers were sought to be made by the appellant but not put by the mediator, is totally inadmissible and should not have been mentioned. It seems that it was referred to almost on a tit for tat basis that if the respondent was going to rely on what was said in the 2009 mediation, then the appellant would mention what occurred at the 2005 mediation because that was thought to assist the appellant's argument. It certainly was not required to be disclosed, as suggested in the supplementary submissions, by the question asked by Habersberger

AJA at the costs hearing as to whether there had been any settlement offers made which were relevant to the costs of the appeal and which could be referred to, that is, not made on a without prejudice basis. Accordingly, we will put any reference to what occurred at the 2005 mediation out of our mind.'[6]

Some recent cases for illustration on the operation of s131(2) exceptions

S131(2)(f)

Beling v Victorian Legal Services Commissioner [2021] VSCA 256 a decision of Kaye and Niall JJA appeal on the question of costs

15 The Applicant had been found guilty by VCAT of professional misconduct and unprofessional conduct and had reached agreement on costs and Applicant had started to make payments but after three payments had defaulted.

16 This case had a number of related proceedings in various fora, viz. County Court of Victoria, VCAT, The Supreme Court of Victoria and Court of Appeal but the heart of the relevance for our discussion today relates to s131(2)(f) Exception where an agreement is entered into as a result of misleading conduct, correspondence or communication.

17 This related to the correspondence and an offer which had been made pursuant to proceedings to enforce a settlement of a dispute as to costs.

[6] Forsyth v Sinclair (No 2) [2010] VSCA 195 At paragraphs 14-17 per Neave, Redlich JJA and Habersberger AJA

18 On ground eleven the Applicant argued that the Trial Judge had erred in admitting into evidence correspondence they had had with the Commissioner prior to entering into a settlement. Further that the Court had erred in excluding a without prejudice offer which the Commissioner had put to him.

19 The Applicant argued that a $20,000.00 offer (Offer) which had been made at a Judicial Resolution Conference and that exclusion of this evidence would be misleading not to include it and that it represented a complete abandonment of the claim and was an admission of the merits of the Applicant's case.

20 Could the negotiations and offer be admissible? These don't fall within the exceptions under s131.

21 The Court ruled the evidence of the Offer was clearly excluded on the basis s67 of the Civil Procedure Act 2010 see Appendix 3.

22 The evidence of the correspondence prior to the agreement however was necessary because it arose out of proceedings for the enforcement of that agreement.

S131(2)(g)

Chrisanthou v Chrisanthou (Building and Property) [2020] VCAT 200 (21 February 2020) a decision of Member F Marks

23 A VCAT Building and Property List matter which is (Pre-Covid) two brothers Con and Chris Chrisanthou who jointly owned a piece of land in Highett and had since 1993.

24 Con wanted to have the property sold and the proceeds divided equally between brothers.

25 Chris claimed that the brothers had a Deed of Family Arrangement (DOFA) dated 2000 whereby the property would become Chris's, severing their joint tenancy and converting it to tenants in common whereby Con would hold his portion on trust for Chris. If the property was sold Chris would be the sole beneficiary.

26 Chris sought a declaration for the above.

27 At the heart of this matter was whether there the DOFA was entered into.

28 S131 came into play here as there were a number of emails which were without prejudice, both parties agreed that they fell within s131(b) of the Act being a 'document…that has been prepared in connection with an attempt to negotiate a settlement of a dispute.'

29 The question became could the fall within one of the exceptions?

30 Is the exception to the rule in s131(2)(g) attracted merely because the evidence qualifies or contracts the evidence the answer is no. In this case the evidence was overwhelmingly necessarily to understand the context of the evidence and it.

31 Here there were repeated references to the DOFA which had been expressly denied in Con's oral evidence. Remember the DOFA was at the heart of this dispute. The admission of this evidence was necessary to understand Con's evidence and the DOFA itself.

32 **The Emails were admissible to enable the context to be understood.**

Slea Pty Ltd v Connective Services Pty Ltd & Ors [2017] VSC 232

33 This was a decision of the Almond J in the Supreme Court of Victoria.

34 Slea Pty Ltd (Slea) objected to evidence in witness statements which went to settlement discussions at mediation and sought a ruling that they were inadmissible.

35 Connective argued that the evidence was of neutral or objective fact not made in connection with an attempt to resolve the dispute and therefore could not be caught by s131, although would be admissible under s131(2)(g).

36 These statements were made in a mediation in a short but related proceedings.

37 Connective sought to rely on s131(2)(g) on the basis that the solicitor for Slea was taking instructions from a person other than Slea and that would contradict an earlier statement made that he would not have agreed to waive Slea's pre-emptive rights at the mediation had he known certain information.[7]

38 The Court asked two questions contained in s131(2)(g):

'(a) whether the disputed communications were made 'in connection with an attempt to negotiate a settlement of the dispute'; and, if so

[7] Slea Pty Ltd v Connective Services Pty Ltd & Ors [2017] VSC 232 per Almond J at Paragraph 7.

(b) whether evidence (which will be adduced in the proceeding) is likely to mislead the court unless evidence of the disputed communications is adduced to contradict or qualify that evidence.'[8]

39 His Honour held that they were in connection although there were circumstances where this might not be the case viz. 'I would like to have a cup of tea, now.'[9] That might be too broad, a mere neutral objective statement wouldn't be caught by the provision.

40 His Honour found that there was no evidence, even Objective's case at its highest that the evidence was necessary to qualify or to contradict the evidence which was misleading.

S131(2)(i)

Pihiga Pty Ltd v Roche [2011] FCA 240

41 This was a decision of Lander J in the Federal Court of Australia.

42 The question was whether or not ss131(2)(f,g,I,j) of the Evidence Act 1995 (Cth) applied.

43 The evidence related to a settlement statement agreed to at a mediation. Some Applicants sought to have the agreement voided ab initio whereas a number of the Respondents sought specific performance.

44 The Respondents' claim rested on Common law principles of without prejudice and also on the terms of the mediation agreement or inadmissible pursuant to s135 of the Evidence Act 1995 (Cth).

45 The mediation in question had been convened to settle a multiparty dispute involving shareholders in a group of companies.

[8] Ibid at paragraph 12
[9] Ibid, at Paragraph 20.

46 Five days before Trial the Respondents sought an injunction restraining the Second and Forth Applicants from adducing evidence of any document discussing or any oral exchange at the Mediation and named a number of specific documents such as

47 The terms of the mediation agreement were referred to in paragraph 49:

49. The relevant provisions of the mediation agreement are:

2. The mediation will be conducted in private. Only the parties to the dispute and their legal representatives may attend, unless all parties and the Mediator agree otherwise. All parties, including the Mediator, will keep confidential all things said or done during the mediation...

5. The parties must co-operate in good faith with the Mediator and each other during the mediation...

8. Every aspect of the communications which take place as part of the mediation is to be without prejudice...

10. None of the documents brought into existence for the mediation or documents discussing the events within the course of the mediation and none of the oral exchanges within the mediation can be introduced as evidence or relied on in any arbitral or judicial proceedings or otherwise used in any way for or against any party to the mediation.

11. Information, whether oral or written, disclosed to the Mediator by a party in the absence of the other party or parties shall not be disclosed

by the Mediator to the other party or parties unless the party from whom that information was received informs the Mediator to the contrary...

19. In any event that the Dispute is settled, either party will be at liberty:

(a) to enforce the terms of the settlement agreement by judicial proceedings;
(b) in any such proceedings, to adduce evidence of an (sic) incidental to the settlement agreement including from the Mediator and any person engaged in the mediation.[10]

48 Mediation began on day one and there was a break in the mediation when an offer had been put, the parties reconvened around 24 hours whereby there were some representations made around the valuation of some real estate.

49 There was a claim that some of the representations during the negotiations which were made were false and misleading and deception conduct.

50 His Honour declined to apply s131(2)(f) on the basis that a proceeding to void a settlement agreement is not a proceedings, however there was a cross claim and the Respondents argued that only they could adduce evidence on the basis of s131(2)(f).

51 His Honour highlighted that this doesn't seem a practical course of action.

[10] Pihiga Pty Ltd v Roche [2011] FCA 240 per Lander J at paragraph 49

'What if the terms of the settlement contract which was sought to be enforced were ambiguous? On the respondents' argument, only one party could lead evidence of the factual matrix which would be relevant for a determination of the objective intention of the parties.'[11]

52 His Honour accepted the argument that a right not to have false representations in the mediation was enough to enliven s131(2)(i).

53 The Respondents also argued that s131(2)(j) applied in relation to evidence of an offence but His Honour held that that would require reasonable grounds to be established as per s131(3) which were not made out.

54 Further, the Respondents alleged s131(2)(k) but that was rejected and it does not appear to have been the primary ground.

55 Ultimately the application was successful on grounds s131(2)(f&i).

56 Odgers lists the possible examples of the making a communication, or the preparation preparation of a document, capable of affecting a right of a person are defamatory utterances; acts of bankruptcy; threats (constituting a tort or crime); the exercise of an option; a contractual offer; or conduct amounting to an election.[12]

[11] Pihiga Pty Ltd v Roche [2011] FCA 240 per Lander J at paragraph 124
[12] Odgers, Stephen, Uniform Evidence Law, (2019) Law Book Co Sydney (14th Ed.) at 1190.

Conclusion

57 The admissibility of evidence of a mediation or settlement negotiation is limited by the operation of s131(1) save for the exceptions in s131(2).

58 Further, if a Court ordered mediation, then the provisions apply to that proceeding and admissibility is further limited but can be used in other proceedings.

59 A party to a mediation who wishes to adduce evidence of settlement negotiations including of a mediation must ask several questions. See checklist, Appendix 4.

Tasman Ash Fleming

27 March 2022

Legislation

Civil Procedure Act 2010 (Vic)

County Court Act 1958

Evidence Act 2008 (Vic)

Magistrates' Court Act 1989

Supreme Court Act 1986

Cases

Beling v Victorian Legal Services Commissioner [2021] VSCA 256

Chrisanthou v Chrisanthou (Building and Property) [2020] VCAT 200

Field v Commissioner for Railways for New South Wales [1957] HCA 92; (1957) 99 CLR 285

Forsyth v Sinclair (No 2) [2010] VSCA 195

Pihiga Pty Ltd v Roche [2011] FCA 240

Pinot Nominees Pty Ltd v The Commissioner of Taxation [2009] FCA 1508

Silver Fox Co Pty Ltd (as Trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3) [2004] FCA 1570; (2004) 214 ALR 621

State Rail Authority of New South Wales v Smith (1998) 45 NSWLR 382

Articles

Limbury, Alan L --- "Should Mediation Be An Evidentiary'Black Hole'?" [2012] UNSWLawJl 38; (2012) 35(3) UNSW Law Journal 914

Wolski, Bobette --- "Confidentiality and Privilege in Mediation: Concepts in Need of Better Regulation and Explanation" [2020] UNSWLawJl 55; (2020) 43(4) UNSW Law Journal 1552

Books

Oders, Stephen, Uniform Evidence Law, (2019) Law Book Co Sydney (14th Ed.)

Appendix 1

Evidence Act 2008 (vic) s131

Exclusion of evidence of settlement negotiations

(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.

(2) Subsection (1) does not apply if—

(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 of 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.

(3) For the purposes of subsection (2)(j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that—

(a) the fraud, offence or act was committed; and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act—

the court may find that the communication was so made or the document so prepared.

(4) For the purposes of subsection (2)(k), if—

(a) the abuse of power is a fact in issue; and

(b) there are reasonable grounds for finding that a communication was made or document prepared in furtherance of the abuse of power—

the court may find that the communication was so made or the document was so prepared.

(5) In this section—

(a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding; and

(b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and

(c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person; and

(d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent; and

(e) a reference to commission of an act includes a reference to a failure to act.

(6) In this section, "power" means a power conferred by or under an Australian law.

Appendix 2

Supreme Court Act 1986 s24A

Mediation

Where the Court refers a proceeding or any part of a proceeding to mediation, other than judicial resolution conference, unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation.

Appendix 3

Civil Procedure Act 2010 s67

Evidence of things said and done in appropriate dispute resolution which is judicial resolution conference

If a court orders that a judicial resolution conference be conducted in relation to a civil proceeding, no evidence shall be admitted at the hearing of any proceeding of anything said or done by any person in the course of the conduct of the judicial resolution conference unless the court otherwise orders, having regard to the interests of justice and fairness.

Appendix 4

Checklist

Private Mediation? **Yes/no**	Court ordered? **Yes/no**
S131 Applies to evidence unless an exception in s131(2) applies:	Is it a JRC? Interests of justice and fairness? **Evidence can be adduced**
S131(2)(a) Consent? **Evidence can be adduced**	Consent? If yes **Evidence can be adduced**
S131(2)(b) substance been disclosed with express implied consent by all parties? **Evidence can be adduced**	If parties don't agree, Court ordered provisions apply to these proceedings **Evidence cannot be adduced**
S131(2)(c) Partial disclosure with express implied consent and full disclosure is needed to clarify? **Evidence can be adduced**	If this is the same proceedings, Court ordered provisions apply to these proceedings **Evidence cannot be adduced**
S131(2)(d) Contains a statement to the effect that it should not be treated as confidential? **Evidence can be adduced**	If this is not the same proceedings, Court ordered proceedings do not apply to other proceedings. **Evidence can be adduced if they satisfy one of the exceptions in s131(2)**
S131(2)(e) Tends to qualify or contradict the evidence?	

Evidence can be adduced	
S131(2)(f) Enforcement proceedings? **Evidence can be adduced**	
S131(2)(g) contradict or clarify evidence likely to mislead? **Evidence can be adduced**	
S131(2)(h) Question of Costs? **Evidence can be adduced**	
S131(2)(i) It affects the rights of a person? **Evidence can be adduced**	
S131(2)(j) In furtherance of a fraud? **Evidence can be adduced**	
S131(2)(k) Did a party know it was created in a deliberate abuse of power? **Evidence can be adduced**	