

## **Federal Court of Australia Submission to the NADRAC Reference Concerning The Integrity Of ADR Processes**

The role of mediation and other forms of ADR in effective case management is well understood by the Judges of the Federal Court (the Court) and is increasingly becoming part of the language of litigation used by parties. This fact is reflected in the approximately 40% increase in referrals to mediation made by Judges in the 2008-09 reporting year. The vast majority of these mediations are conducted by our registrar mediators, as parties who intend to use private mediators usually do so by agreement and without the need for a Judge to order a referral to mediation.

For ease of reference comments on the reference are provided under the same subject headings used in the attachment to Professor Kellam's letter dated 8 December 2009. Where information about the legislative provisions applicable to mediations conducted in the Court has been included in NADRAC's recent report, *The resolve to resolve – Embracing ADR to improve access to justice in the federal jurisdiction*, it has not been reproduced it here.

### **Confidentiality**

The often stated aim of confidentiality in ADR processes is to encourage the participants to communicate in a full and frank manner with each other about their dispute, with the intention of improving the effectiveness of their communication. There can be little doubt that the veil of confidentiality affords the participants an opportunity to do this without the concern that these communications could be used against them in future litigation. Similarly, the confidentiality that parties may attach to terms of settlement can encourage resolution of disputes where similar terms would not be offered in a non-confidential setting. Depending however, on the type of dispute, the nature of the disputants (corporate or individual), the nature of the terms of settlement and the method of recording the settlement, it may be necessary and desirable to reveal aspects of the ADR process discussions to people who have not been 'in the room'. The practical implications

of any statutory obligation to maintain confidentiality should not operate to inadvertently stifle or lengthen settlement discussions.

Within mediations conducted in the Court there are several aspects to the issue of confidentiality. It is helpful to identify these as:

- communications between the mediator and the Judge;
- admissibility of offers, counter-offers and conduct at the mediation in the court proceeding;
- communication of offers, counter-offers and/or conduct by participants to persons not present at the mediation; and
- confidentiality of any agreement reached at mediation.

#### *Communication between the mediator and the Judge*

The Court recognises that central to maintaining confidence in the Court annexed mediation process is the principle that the mediator does not communicate the content of any discussions at the mediation to anyone, including the referring Judge, unless specifically authorised to do so by the mediation participants. While this principle is not enshrined in the Federal Court of Australia Act 1976 (the Act) or the Federal Court Rules (the Rules) it is a point that is often stressed by Judges of the Court at the time the referral to mediation is made and one that is routinely communicated to participants by our registrar mediators at mediation conferences. It is a practice of the Court that is scrupulously followed.

Native title is a particularly complex area of the Court's jurisdiction and one in which, following recent amendments to the Native Title Act 1993 (Cth) (the NTA), Court annexed mediators are increasingly likely to be active. The NTA provides that in particular circumstances the veil of confidentiality may be lifted. In particular, where the person conducting the mediation considers that a party or their representative has not acted in good faith in relation to the conduct of the mediation the mediator may report that failure to the Court (section 94P) or considers that a party does not have a relevant

interest in the proceeding, the mediator may refer to the Court the question of whether the party should cease to be a party to the proceeding (section 94J).

While no mediator has yet relied on the good faith reporting amendments to the NTA to file a report, these provisions raise a number of practical issues for the Court. These are discussed below in the *conduct obligations* section.

*Admissibility of offers, counter-offers and conduct at the mediation in the Court proceeding*

As noted in *The resolve to resolve*, s 53B of the Act prevents admission of evidence of anything said or any admission made at a Court referred mediation conference in any Court or proceedings. Within a court annexed context it is, however, widely recognised that one of the ‘sticks’ to encourage bona fide engagement with ADR processes is the ability of the Court to make an adverse costs order against a party that does not engage meaningfully with the process (see s 37N of the Act). A tension exists between the role of confidentiality in encouraging open communications at mediation and suitable external scrutiny of parties’ conduct at mediation to encourage appropriate engagement with the process.

The recent decision of the Court in *Pinot Nominees Pty Ltd v Commissioner of Taxation* [2009] FCA 1508, gives some indication of how the Court has dealt with this tension. In that case, one party sought to rely, in relation to a costs argument, on evidence of offers of compromise made at a mediation conference convened pursuant to a referral to mediation under s 53A of the Act. While the Judge confirmed that s 53B of the Act prevented the admission of this evidence he did find that the party could rely on an offer of compromise communicated in a “without prejudice” letter sent to the other party after the mediation. This decision has, in my view, a number of desirable practical implications for Court referred mediations. Firstly, it greatly reduces the chances of a mediator becoming involved in any dispute over a party’s conduct at the mediation, appropriately separating the mediator from the Court proceeding proper. Secondly, while it will always remain the mediator’s role to assess the conduct of parties to ensure the effectiveness of

the mediation, it takes the emphasis off the mediator as the potential reporter of bad conduct. This allows the mediator to remain and to be perceived by the parties as remaining in their primary role of mediator while preserving the possibility of adverse consequences for a party's unreasonable conduct. Finally, it positions responsibility for taking action in redress in the proceeding with the aggrieved party.

*Communication of offers, counter-offers and/or conduct by participants to persons not present at the mediation*

Many of the litigants in Court matters referred to mediation are commercial or statutory entities, including statutory commissions, corporations, partnerships, incorporated entities and trustees. In many cases the authority granted to the persons in attendance at the mediation may be limited or subject to final sign off by a board, shareholders or managers who cannot be present at the mediation. In these cases it is usual and necessary for offers and counter-offers to be communicated to persons not present at the mediation in order to achieve the timely, inexpensive and efficient resolution of matters.

Native title mediations conducted by the Court may take place with parties' legal representatives and/or a delegation of a particular party. Often the terms of agreements made at mediation require consultation with persons not at the mediation who may or may not be parties to the litigation, e.g. a state party may need to confer with several government departments, local government or consultant experts on aspects of a terms of settlement. Offers or agreements reached at mediations routinely are subject to ratification by the relevant wider native title claimant group or, in the case of state parties, cabinet approval. The necessity for these consultation processes are most usually the subject of explicit discussions at the mediation and thus either tacit or express agreement of the parties.

Any statutory obligation to maintain confidentiality must be in terms flexible enough to allow these processes to occur.

### *Confidentiality of any agreement reached at mediation*

The confidentiality of any agreement or part of agreement reached at Federal Court mediations is usually a subject addressed in any settlement agreement between the parties. Confidentiality is routinely a term of settlement agreements, however just as routinely in the case of prosecutions by statutory commissions and in native title matters, the whole or part of the agreement reached at mediation may be presented to the Court as consent orders.

Non-confidential agreements can provide information and guidance to non-parties who may have or be considering similar litigation. Access to such agreements may be particularly useful in jurisdictions covered by statutes that preference agreed over litigated resolution of matters. Indeed access to such knowledge could arguably encourage disputants to enter into informed negotiations without the need to commence litigation.

In light of the complexity of the matters being mediated in the Court and the ability of the parties to agree to lift confidentiality in appropriate circumstances any further attempt to codify confidentiality in ADR processes may not deliver any clear benefit and may inadvertently increase the cost and time taken to resolve disputes.

### **Non-admissibility**

As noted above the Act contains strong provisions preventing the admissibility of anything said or any admission made at a Court referred mediation conference in any Court or proceedings.

### **Conduct obligations**

Conduct obligations on parties to ADR processes provide a clear reference point for ADR practitioners and the parties themselves of the behaviour expected of parties. The advantages of conduct obligations must, however, be balanced against the considerable issues that may arise in their practical enforcement. ADR processes conducted in the Federal Court are subject to a number of layers of existing conduct obligations. These

include both statutory duties on parties as well as the implicit obligation on parties to comply in good faith with any Court order referring a matter to an ADR process. In light of these existing conduct obligations, further codification, through a statutory duty to mediate in good faith, is not supported.

The Act now includes conduct obligations on parties to a civil proceeding before the Court. These obligations are rooted in the overarching purpose of the civil practice and procedure provisions - to “facilitate the just resolution of disputes...as quickly, inexpensively and efficiently as possible” (section 37M). A number of objectives are identified in the Act including the efficient disposal of the Court’s overall caseload in a timely manner at a cost that is proportionate to the importance and complexity of the matters in dispute. Parties to a civil proceeding before the Court have a duty “to conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose” (section 37N). Legal representatives must, in the conduct of a civil proceeding before the Court (including settlement negotiations) assist their clients to comply with this duty.

The Court or a Judge may take account a failure to comply with the duty in making an award of costs in a civil proceeding, including that a lawyer personally bear costs (section 37N). Notwithstanding the application of the duty to settlement negotiations, as noted above, the current wording of s 53B of the Act (on the admissibility of evidence of a party’s conduct at court ordered mediation), is likely without other action by an aggrieved party to militate against such a costs order in response to a lack of good faith participation by a party in Court ordered mediation.

The particular legislation relevant to a proceeding in the Court may also contain conduct obligations. Several conduct obligations, including the requirement to mediate in good faith, powers to direct the production of documents and to prohibit disclosure, were included in 2007 by amendment to the NTA. Those amendments were included at the request of the National Native Title Tribunal (the Tribunal) to address concerns that Tribunal mediators, operating outside of the Court, did not have the powers necessary to

mediate effectively. The Court did not support those amendments and had concerns that they could inadvertently lengthen disposition times by giving rise to collateral litigation resulting from the imposition of a statutory duty to mediate in good faith, criminal sanctions for prohibited disclosure of information or the exercise of the new powers by mediators. To date these powers have not been relied upon by the Tribunal as indeed they were sufficiently empowered by the Court mediation referral to carry out their activities.

The existence of the good faith reporting provisions of the NTA raise a number of practical issues for the Court: What action, if any, should the Judge with carriage of the matter take on receipt of such a report? Should such a report from the mediator form part of the Court file and, if so, who may inspect or copy the report? If the Judge allocated to hear the matter deals with the breach of good faith report, can that Judge continue to hear the matter in the event that the matter is not resolved at mediation? What orders should a Judge make in response to such a report if mediation is to continue? How are such orders to be enforced? It is not difficult to see how the existence of a statutory obligation to act in good faith in ADR processes, if disputed in a related proceeding, could inadvertently add time, cost and complexity to the litigation.

Registrar mediators, all accredited to the Australian National Mediator Standards, rely on the flexibility provided by the current wording of the Act and Rules, to craft mediation processes that best suit the needs of the particular case. These processes regularly include conducting pre-mediation conferences with the parties, identifying who will attend the mediation, dealing with the parties' confidentiality requirements and reporting back to the Court on the outcomes of the mediation.

In light of the already existing provisions and practice, further conduct obligations, e.g. directing attendance, mode of participation and reporting to the Court, would operate to regulate without any clear additional benefit, many aspects of what is already being effectively carried out.

**Immunity of ADR practitioners**

The immunity from prosecution afforded to Court annexed mediators and arbitrators arises, as noted in *The resolve to resolve* report, not from the nature of their profession but rather from the fact that their work is part of the “continuum of case management strategies” put in place and supervised by the Court. The Court accepts that the privilege of immunity brings concomitant responsibility in relation to its mediators’ skills and conduct.

While the Court’s mediators are all covered by the immunity provisions of the Act, there are several layers of checks and balances in place to ensure the standard of mediation. The Court as an institution has a particularly strong interest, arguably greater than other non-Court employers, in ensuring the good quality of its mediators. The Court is a Recognised Mediator Accreditation Body under the National Mediator Accreditation Scheme and thus has the responsibility of ensuring that the mediators it accredits have the knowledge and skills required by the National Mediator Approval and Practice Standards and that they maintain the prescribed hours of professional development. The Court has a complaints process in place to deal with complaints about the Court’s services, including its mediation services. Immunity thus does not mean a complete lack of opportunities for redress for users of the Courts mediation services, albeit that the modes of redress available are limited.

The recent amendments to the NTA provide that the Court may refer a matter to mediation by an appropriate person or body. An appropriate person or body may include the Tribunal, a Registrar of the Court or another suitably qualified ADR practitioner. Section 94R of the NTA provides that a person conducting the mediation has, in the performance of their duties as a person conducting the mediation, the same protection and immunity as a Justice of the High Court. Again, the existence of the immunity provisions means that the Court is particularly aware of its obligations to ensure the professional standards of any ADR practitioner it appoints. To this end the Court’s Native Title Coordination Committee of native title Judges and Registrars has been meeting to agree

an appropriate process for identifying suitably qualified ADR practitioners. This agreed process will be published by the Court in the near future.

### **Conclusion**

ADR processes are well understood and used by the Court. These ADR processes are already the subject of numerous statutory provisions contained within the Federal Court of Australia Act, Federal Court Rules and other legislation. Confidentiality, non-admissibility, conduct obligations and immunity of ADR practitioners are all the subject of existing provisions.

Issues relating to confidentiality are present in many aspects of the ADR processes currently undertaken by the Court. The range and complexity of the matters regularly being mediated and the existing statutory provisions mean that any attempt to further codify confidentiality may not deliver any clear benefit and may risk inadvertently increasing the cost and time taken to resolve disputes. While it is generally desirable that the parties retain control over what needs to be confidential to whom in the particular circumstances of their dispute, there may be good policy grounds for encouraging less confidentiality in relation to the outcomes of privately negotiated settlements.

Immunity from prosecution for ADR practitioners is a privilege that attaches considerable responsibility to ensure practitioners meet appropriate skill and conduct standards. The immunity provisions currently relating to Court annexed ADR practitioners continue to be appropriate because of the ADR practitioners role in the Court's case management strategy in a particular case and the Court's overarching supervision of the ADR process.

Mediations conducted in the Court are already subject to a number of layers of conduct obligations. The imposition of conduct obligations should be considered in light of the existing statutory provisions and the flexible practice adopted by Court annexed ADR practitioners to ensure that any additional obligations do not regulate without clear additional benefit, what is already being carried out effectively.

The complexity of the matters regularly the subject of Court annexed ADR processes, dictates that statutory provisions safeguarding or encouraging particular behaviours at the ADR process must be balanced against the need to allow the creativity and flexibility that are the hallmark of effective processes.