

COMMENTS OF THE NSW BAR ASSOCIATION

Confidentiality

Should all ADR processes be subject to confidentiality obligations?

1. The Association believes that mediation and conciliation (and any other types of assisted negotiated settlement) should be the only ADR processes routinely subject to confidentiality obligations.
2. Arbitration and other ADR processes do not involve the consensual settlement procedures or the levels of confidentiality that characterize mediation and conciliation and usually require some form of determination by the ADR practitioner and they therefore have at least some characteristics of litigation. There is sometimes good reason for these processes and their results to be kept confidential but this will depend upon the particular circumstances of the dispute and the wishes of the parties. Some disputants choose arbitration or expert determination for reasons of cost or to achieve a quicker result and it may be important in specific cases for the determination to be made public. The decision as to whether the process and/or the result are confidential should be a matter for the parties to agree upon.
3. It is extremely important for the future of mediation that the process be confidential – confidentiality is a critical factor in the decision to choose mediation. Mediators must appear to be impartial and to respect the confidentiality of the process, and they must be able to conduct mediations on the basis that, in normal circumstances, their notes will not be seen by the disputants or others. It is important to note that there are two types of confidentiality in a mediation: the confidential mediation process and the additional confidentiality of private sessions. To protect the integrity of the mediation process, it is important to acknowledge that a duty of confidentiality is owed to the mediator as well as by the mediator to the disputants and by the disputants to each other.
4. The public interest in the efficacy of mediation should be given weight over any perceived desirability of further regulation of this ADR process.

What should be the source of confidentiality?

5. For court ordered mediations, the source should be the legislation or court rules pursuant to which the mediation is ordered. Some existing legislation deals with admissibility but not expressly with confidentiality. Section 53B of the *Federal Court Act 1976*, for example, deals with admissibility only and neither the Act nor Federal Court Rules Order 72 deals with confidentiality. (As noted below, admissibility is a matter of legal principle

to be determined by the court and not a matter of agreement between the parties, as confidentiality is).

6. In contrast, the *Civil Procedure Act 2005* (NSW) and the *Supreme Court Act 1935* (WA) deal with both admissibility (CPA, s 30; SCA WA, s 71) and also the obligation of confidentiality imposed on the mediator (CPA, s 31; SCA WA, s 72). The *Farm Debt Mediation Act 1994* (NSW), s 16 extends the obligation not to disclose information obtained in a mediation except in certain circumstances to 'any person'. It would be preferable if relevant legislation or court rules expressly provided that mediation is a confidential process and that information obtained in a mediation is not to be disclosed by any person unless (a) all parties to the mediation agreement, including the mediator, consent, or (b) if it is thought that exceptions should apply and then only in specified circumstances (see further below under 'Exceptions to the obligation of confidentiality').
7. Private mediations should be and generally are subject to written mediation agreements between the parties and the mediator which expressly set out the confidential and 'without prejudice' nature of the mediation process. Various organisations publish mediation agreements containing these clauses and mediators and parties should be encouraged to ensure that their agreements contain such provisions. The courts will generally uphold confidentiality provisions except where it is necessary in the interests of justice for evidence to be given of confidential matters. In *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140, of Brereton J indicated that the mediation agreement may be of overriding importance and that evidence may be rejected under s 135 of the *Evidence Act* if the mediation has been conducted on the basis that it is confidential:

[27] As I have concluded that evidence of what transpired at the mediation is not admissible, it is unnecessary for me to consider the plaintiffs' alternative argument that it should be rejected as a matter of discretion as unduly prejudicial under the Evidence Act, s 135, save to record that there is much force in that argument, given that the plaintiffs embarked on the mediation in the belief, encouraged by the mediation agreement to which all parties subscribed, that evidence could not subsequently be given of anything said or done at the mediation. This argument does not appear to have been considered.

8. In the absence of express agreement, admissions and statements at a private mediation will be protected to a certain extent by 'without prejudice' privilege and by s 131 of the *Evidence Act 1995* (Cth). They will however be subject to the statutory exceptions in s 131(2) and the fact that the privilege belongs to the disputants and not to the mediator is a matter of concern. While all mediators accredited under the National Standards will understand the need for confidentiality provisions in their mediations agreements, it may be that other mediators and disputants need to be educated in this regard.

Exceptions to the obligation of confidentiality

9. As noted above, the Association does not believe that ADR processes other than those involving consensual settlement should be routinely subject to confidentiality.
10. Section 131 of the *Evidence Act 1995* (Cth) precludes evidence being adduced of communications made or other documents prepared by a party in dispute, in connection

with an attempt to negotiate a settlement except in identified circumstances, but this section has been held not to apply to mediations ordered by the court where there are more specific provisions relating to mediation such as s 30(4) of the *Civil Procedure Act 2005* (NSW) (see the decisions of Brereton J in *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140 at [23]-[26]) and s 53B of the *Federal Court Act* (see the decision of Siopis J in *Pinot Nominees Pty Ltd v Commissioner of Taxation* [2009] FCA 1508 at [30]-[31]. See also the decision of Palmer J in *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 476 at [16]. The court's view is that s 131 is concerned with the exclusion from and admission into evidence generally of matters which may otherwise attract the principles of the common law relating to 'without prejudice' communications between parties made for the purposes of negotiating settlement and is not intended to apply to the special process of settlement negotiation provided by a mediation ordered by the court.

11. Therefore, the exceptions in s 131(2) will not apply in relation to court ordered mediations. There are good policy reasons for this. The 'without prejudice' privilege that is encapsulated in s 131 belongs to the parties to a dispute, and not to a mediator. The mediation process is a consensual process involving the mediator and the disputants, all of whom are parties to the agreement which regulates the mediation and imposes obligations of confidentiality on them. Evidence from mediations which are not subject to a court order and to relevant legislation or court rules may fall within s 131 but no protection is given to the mediator, whose consent is not required for disclosure and who may have to disclose, for example, notes he or she made in private session. This would clearly violate the integrity of the mediation process.
12. Section 131(2)(h) makes information relevant to determining liability for costs an exception to confidentiality. In both *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* and *Pinot Nominees Pty Ltd v Commissioner of Taxation*, the court rejected the admission of offers made during the mediation process as there was no such exception under the relevant legislation. There is no prejudice in this approach to a party seeking to tender its offers. It is commonplace for parties who make an offer during an unsuccessful mediation to protect their positions by making the same offer after the conclusion of the mediation, either on a 'without prejudice' basis or otherwise.
13. The Association notes the statutory exceptions to confidentiality set out in the *Family Law Act* which recognize the real issues that may arise in ADR processes conducted in the area of family law. No need has been identified, however, that warrants the extension of those exceptions to confidentiality to all ADR processes. The question of disclosure by consent of all parties including the mediator should be a matter of agreement in the mediation agreement and it should not be necessary to legislate in this regard. Similarly, the question of disclosure required by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth can be and usually is included in the mediation agreement.
14. Whether there should be specific exceptions to admissibility under s 53B of the *Federal Court Act* and similar legislation where there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to any person or damage to any property is a more difficult issue. It is an issue which is unlikely to arise in

many mediations. A statutory exception or standard practice in relation to this would give rise to concerns that mediators may feel obliged to disclose matters or that parties will have an expectation of the mediator, and the mediator's decision to disclose or not may be open to challenge. The question should be left to the discretion of individual mediators in the particular circumstances of the mediation.

To whom should confidentiality belong?

15. Confidentiality should belong to the parties to any agreement, including the ADR practitioner, for an ADR process which the parties choose to be conducted under the cloak of confidentiality. Only the parties to the ADR agreement should have the power to waive confidentiality (as distinct from being compelled by law to disclose information). A mediator should be able to refuse to disclose a mediation communication, in particular, information provided in a private session, and should be able to prevent other persons from disclosing such communications. In private sessions, mediators very often are informed of matters that one party wishes to keep confidential from the other, and the mediator may take notes of this information or form an opinion in relation to it.

Should there be a process or circumstances in which a waiver is prohibited?

16. Disputants should not be able to waive confidentiality without the consent of the mediator. Except in circumstances where legislation overrides the confidentiality, a waiver should not be permitted without the consent of all parties to the mediation agreement, that is, both the disputants and the mediator. The mediator should have the right to veto any waiver. This is particularly important in relation to notes or information obtained in private sessions.

Non-admissibility

Are the current non-admissibility provisions sufficient to encourage greater use of ADR in the civil justice system?

17. Yes, and see the discussion above. One of the purpose of provisions such as s 30(4) of the *Civil Procedure Act* and s 53B of the *Federal Court Act* is to avoid generating satellite litigation: see Brereton J in *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140 at [19] and Palmer J in *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 476 at [16].

Should all ADR processes be subject to non-admissibility? If not, which ones should not be subject to non-admissibility and why not? Should non-admissibility be customised to suit different processes and if so, how?

18. Apart from mediation, conciliation or other types of assisted negotiated settlement, the confidentiality of information provided in ADR processes should be a matter of agreement between the parties. While admissibility may be the subject of mediation and conciliation agreements, it should be noted that admissibility is a legal principle and not a matter of interparty agreement. As Brereton J said in *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140 at [24] approving a statement by

Mansfield J in *The Silver Fox Co Pty Ltd (as trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3)* (2004) 214 ALR 621:

I am inclined respectfully to agree with his Honour that the admissibility of offers is a question of legal principle and not a matter of interparty agreement, and that in the context of a mediation which took place unprotected by any statutory prohibition on admissibility of evidence of its offers made at it are not inadmissible by operation of s 131(1), because of s 131(2)(h), although I think it is a mistake to regard such offers as being admissible pursuant to s 131(2)(h): that provision, as I have said, does not make evidence of negotiations admissible, but simply removes one bar to their admissibility, namely that otherwise imposed by s 131(1).

19. While this statement related to evidence of offers of compromise, it is applicable to evidence that is the subject of the other exceptions in s 131(2).

Are exceptions needed and, if so, what kind of exceptions?

20. See the comments in relation to exceptions to confidentiality above.

Should parties be allowed to agree to the admissibility of things said or done, or admissions made in the course of ADR proceedings?

21. Parties should not be prohibited from reaching a private agreement in this regard as long as it is agreed by all parties to the mediation agreement, including the mediator but they should bear in mind Brereton J's statement referred to above that admissibility is a matter for the court not for interparty agreement. The fact that all parties, including the mediator, agree may however be a matter that the court takes into account in exercising its discretion to admit or reject evidence.

If so, do ADR practitioners need special protection from being compelled to give evidence?

22. As a rule, a mediator should not be able to be called as a witness within the framework of the dispute that was mediated. The only exception should be that under s 29(2) of the *Civil Procedure Act* where a party may call evidence from a mediator in proceedings to enforce a settlement agreement as to the fact that an agreement or arrangement was reached at mediation and as to the substance of the agreement or arrangement.
23. This is an important policy issue that reduces the risk of satellite litigation negating the benefits of mediation and assists in preserving the integrity and efficacy of mediation, as well as disputants' confidence in the mediation process. While evidence from a mediator may be useful in some circumstances, it is unlikely to be any more helpful than evidence which is routinely excluded by virtue of the 'without prejudice' privilege. In particular, a mediator should not be compelled to give evidence about private sessions.

What effect should the parties' agreement to allow into evidence things said or done in the course of ADR proceedings have on the ADR practitioner?

24. As noted above, the parties' agreement is not determinative of whether evidence will be admissible. It is a matter for individual ADR practitioners whether they agree to this. Such a term in a mediation agreement could create considerable difficulty for a mediator

in relation to private sessions and would inhibit the mediator's ability to discuss matters freely in private session.

Conduct obligations

Who should be subject to a conduct obligation?

25. The Association notes the concerns raised in Schedule 2 of the NADRAC Report, pp 136 to 138 in relation to the conduct of some lawyers at mediations. The Association believes that training and education are the most appropriate way of dealing with these issues. The Association provides continuing professional development seminars specifically relating to representation of parties at mediations which highlight the differences between appearing at mediations and appearing in court and the role of and limits to advocacy at mediations. These seminars also regularly deal with ethics, the obligation of good faith, and the *Mullins* decision.

What could be the ambit of any conduct obligations?

26. A good faith requirement such as that in s 27 of the *Civil Procedure Act* is important for mediations ordered by the court, particularly where one or more parties do not consent to the mediation. While the content of 'good faith' is somewhat nebulous and the CPA does not provide any sanctions for breach, s 27 serves to impose an obligation on parties which they may not otherwise consider and helps to establish an appropriate framework in which the mediation can be conducted. In private mediations, a term in the mediation agreement requiring parties to mediate in good faith is also an important tool for a mediator during the mediation process.

How should conduct obligations be framed?

27. The good faith requirement in s 27 of the *Civil Procedure Act* is sufficient and a similar provision should be included in the *Federal Court Act*

Should the framing differ according to ADR process or who is subject to it?

28. This should apply only to mediations, conciliations and any other assisted negotiation processes.

Are conduct obligations appropriate in entirely private processes

29. As noted above, in private mediations, a term in the mediation agreement requiring parties to mediate in good faith is also an important tool for a mediator during the mediation process.

Should conduct applications apply by statute or by private agreement?

30. By statute for court-ordered mediations and otherwise by private agreement.

Immunity of ADR practitioners

What impact does immunity have on users of ADR services, particularly where ADR practitioners are negligent or engage in improper conduct.

31. Statistics of those courts governed by legislation which gives statutory immunity to mediators show that a large number of court-ordered mediations have been conducted. In private mediations, mediators commonly include a term in their mediation agreements giving them the same immunity as they would have under statute.
32. The Association is not aware of any disputants or their legal advisers who have rejected such terms.
33. Immunity does not appear to have had any impact on users of ADR services at this stage. Disputants who use mediators accredited under the National Standards have redress through the complaints mechanisms and disciplinary processes that recognised mediator accreditation bodies must have. Disputants who use any non-accredited mediators who are members of legal professional associations will have the same redress. No complaints have been made to the Association about any of its accredited mediators and it is not aware of complaints made in relation to other mediators.

Is broad immunity from suit appropriate at least in relation to some ADR processes?

34. Immunity provisions such as those in s 53C of the *Federal Court Act* and s 33 of the *Civil Procedure Act* are appropriate for mediations, or any other ADR process ordered by the court. For private mediations, if the mediator seeks contractual immunity, that should be a matter for the disputants. Immunity is particularly important for mediation for the following reasons:
 - o A mediator needs considerable flexibility in conducting a mediation both in relation to the structure of the mediation and dealings with the parties.
 - o A mediator must have independence and impartiality, and be able to be candid and frank with parties, particularly in private sessions.
 - o The purpose of the mediation is to avoid litigation, and any satellite litigation should be avoided if possible.
 - o Confidentiality is an extremely important feature of mediations.
 - o Settlement agreements reached at mediation are binding. Disputants should not be able to set aside a settlement agreement by litigation against a mediator.

Does the principle that mediators should not be conferred immunity unless strong public policy could justify it apply equally to other ADR processes, including advisory (eg conciliation) or determinative (eg arbitration) processes?

35. The Association believes that statutory immunity should extend to ADR processes ordered by the court. In private ADR processes, it is a matter for agreement between the ADR practitioner and the disputants.

Can ADR practitioners sufficiently limit their risks through indemnity insurance?

36. The Association believes that ADR practitioners can adequately limit risk by appropriate insurance.

How does immunity interact with nonadmissibility provisions? Do broad nonadmissibility provisions indirectly confer immunity?

37. Non-admissibility provisions do not necessarily confer immunity. The preferable approach to ensure certainty is to have immunity provisions such as those in s 53C of the *Federal Court Act* and s 33 of the *Civil Procedure Act*

Where immunity is conferred, how could sufficient professional scrutiny of ADR practitioners be ensured?

38. The complaints mechanisms and disciplinary processes referred to above should ensure professional scrutiny but they apply only to mediators accredited under the National Standards or to ADR practitioners who are members of a professional body with such processes. This raises the difficult issue of whether accreditation under the National Standards should be compulsory or whether mediators should at the least be obliged to become members of an association which has mechanisms required by the National Standards.

If immunity is conferred, what other mechanisms could be used to protect users of different types of ADR processes from negligent or improper conduct by the ADR practitioner (ie. negligent advice or biased determinations)

39. The finality of ADR processes is an important policy factor and broad immunity is important particularly in relation to those processes which involve assisted negotiated settlement. In relation to other types of ADR processes which involve a determination, the court will set the determination aside in certain circumstances. For example, an expert determination can be set aside for fraud, dishonesty or partiality on the part of the expert determiner - but is not invalidated by negligence, error or mistake unless the consequence of that is that the determination was not in accordance with the contract: *Wilden Pty Ltd v Green* [2009] WASCA 38 at [55] - [60]; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd (formerly TXU Networks (Gas) Pty Ltd* (2006) Aust Contract R 90-241; [2006] VSCA 173. In *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587, Barrett J said at [35]:

In the absence of factors such as fraud and collusion, an expert determination declared by contract to be final and binding is open to challenge only to the extent that it is not in conformity with the enabling contract, including such implied terms as there may be as to the conduct and procedures of the expert.