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# Legal issues in the mediation process

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### Mediation— legal issues

## Legal issues in the mediation process

**Robert Angyal**

This article considers four sets of legal issues related to mediation. These are not, by any means, the only issues that can and do arise, but they are among the most prominent. This article does not pretend to treat the issues comprehensively and is only an introduction to them. The author would be happy to suggest further reading for those interested in more detail. The issues are:

1. Enforceability of agreements to mediate.
2. Conduct of the mediation.
3. Statutory protection.
4. Enforceability of agreements reached at mediation.

### Enforceability

Will the courts enforce an agreement between parties to mediate their dispute? Such an agreement may be in the contract between the parties from which the dispute has arisen, or it may have been entered into specifically to facilitate resolution of the dispute in question.

The law, at least in NSW, is clear, and there is no reason to think that the courts of other States would approach the question differently. A properly drafted agreement to mediate will be given effect by the courts: *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd* (1992) 28 NSWLR 194; *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

### Mode of enforcement

The court will not give effect to an agreement to mediate by decree of specific performance mandating that there be a mediation (because that would require the court to supervise the mediation). Rather, the court will injunct any court or arbitral proceedings commenced in breach of the agreement to mediate.

Because legislative recognition has not been given to agreements to mediate (compare the recognition given to agreements to arbitrate under the *Commercial Arbitration Act 1984* (NSW) ss 4(1), 53, 55), they must, to be effective, prohibit the commencement of court or arbitral proceedings before the mediation has finished. In terms of the law of arbitration, they must be in *Scott v Avery* form.

At first blush, it is counter-intuitive or self-contradictory, perhaps futile, for the court to force the parties to enter into a consensual process like mediation. But on deeper analysis, there is no necessary futility. Giles J (as he then was) in *Hooper Bailie* (1992) 28 NSWLR 194 at 206 analysed the situation in this way:

Conciliation or mediation is essentially consensual, and the opponents of enforceability contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent cannot be enforced; equally, they say that there can be no ➤



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➤ loss to the other party if for want of co-operation and consent the consensual process would have led to no result. The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to co-operation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, in particular where a skilled conciliator or mediator is interposed between the parties. *What is enforced is not co-operation and consent, but participation in a process from which co-operation and consent might come.* [emphasis added]

### Requirements of enforceability

Not only must an enforceable agreement to mediate be in *Scott v Avery* form, it must require a process that is certain enough to be enforced. What *Hooper Bailie* and *Elizabeth Bay* show is that the agreement must specify with some precision what process the parties must follow, either by spelling it out in the agreement itself, or by incorporating by reference a document that does.

Thus, a process for selecting a mediator and determining the mediator's remuneration must be stated. Likewise, the agreement should set out in detail the process of mediation to be followed, either by stating it in the agreement or by incorporating by reference existing mediation rules or a mediation agreement.<sup>1</sup> There cannot be stages in the process where the parties need to agree on a course of action before it can

proceed because, if they cannot agree, the agreement almost certainly will be regarded by the courts as a mere agreement to agree. In this case, either the agreement will be void for lack of certainty or, if the parties reach the stage where agreement is needed, and cannot agree, the agreement is spent: *T A Mellen Ltd v Allgas Energy Ltd* (unreported, Sup Ct Qld, Mackenzie J, 16 July 1992).

### Agreements to negotiate in good faith

Language requiring negotiation in good faith should be avoided in mediation agreements. An agreement to negotiate in good faith may — depending on the circumstances — be enforceable in NSW: *Coal Cliff Collieries Pty Ltd v Sijehama* (1991) 24 NSWLR 1; cf *Australis Media Holdings Pty Ltd v Telstra Corp Ltd* (1998) 43 NSWLR 104 at 127-8; *Walford v Miles* [1992] 2 AC 128.

But *Hooper Bailie* and *Elizabeth Bay*, which dealt specifically with agreements to mediate, indicate that there is a:

... necessary tension between negotiation, in which a person is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith.<sup>2</sup>

That tension may lead a court to regard an agreement to mediate in good faith as too uncertain to be enforceable.

On the other hand, there is no objection to requiring the parties to use their best endeavours during mediation to work towards a resolution of the dispute, and requiring this may deter a party from behaving unreasonably or walking out of the mediation.

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## Contributions

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## Conduct of the mediation

### ➤ **A duty to the process of mediation?**

Unless the dispute has been sent to compulsory mediation by a court, there will normally be an agreement between the parties setting out their agreement to conduct the mediation. Such agreements usually provide a skeleton procedure for the conduct of the mediation.<sup>3</sup> Do the parties' legal representatives have duties to the process of mediation beyond anything specified in the agreement to mediate? Some mediators, anxious no doubt that lawyers unfamiliar with the mediation process not torpedo it by behaving in an inappropriately adversarial manner, seek to confine their role essentially to advising their respective clients on the law and drafting the settlement agreement once agreement has been reached.

Some commentators go further and suggest that legal representatives at a mediation have a duty to the process itself that apparently is inherent in the process, and which may conflict with their duties to their clients.<sup>4</sup>

### **A duty to the client**

This author is of the view that a legal representative's duty at a mediation is to his or her client. Obviously, the legal representative may (on instructions from the client) accept restrictions, such as an obligation of confidence, in order to participate in the mediation. Beyond that, however, the lawyer's duty is to the client, not to the 'process'. Suggestions that the lawyer's duty to his or her client is somehow subjugated to the demands of the mediation process are at odds with the lawyer's duty to his or her client, and probably unworkable in practice.

To suggest this is not to confirm some commentators' worst fears about lawyers. Nor is it to say that a lawyer serves his or her client well at a mediation by behaving as though a court hearing was taking place. To the contrary: in most cases, that behaviour would not be helpful to the client because it would be unlikely to facilitate a settlement.

### **Using mediation skills to assist the client**

To suggest that a lawyer's duty at a mediation is to the client is to say that a lawyer knowledgeable about and skilled in the mediation process can and should use his or her knowledge and skills to assist the client.

Some of the consequences of this suggestion are uncontroversial. A lawyer skilled in mediation can use active listening skills to the client's good advantage. A lawyer skilled in mediation can assist the client, and perhaps the other party, to delve beyond positions and to expose the underlying interests. A lawyer skilled in mediation can help create options for settlement of the dispute. The lawyer can assist in drafting objectively-based and clearly-structured settlement proposals that can be debated rationally. And so on.

But some of the consequences of this suggestion may be controversial. Should a lawyer skilled in mediation (if the mediator permits it) arrange the seating so the lawyer sits directly opposite the opposing party, so that the lawyer's comments can have maximum effect, and seat his or her client in a way that minimises the effect of the other party's lawyer? Should a lawyer skilled in mediation (if the mediator permits it) make *ad hominem* remarks to the other lawyer that will particularly irritate or unsettle him or her? Should a lawyer skilled in mediation attempt to co-opt the mediator into making comments favourable to the lawyer's client's position?

When he or she sees the other party wilting under the pressure of the 'end game' of a mediation, should the lawyer skilled in mediation urge that the mediation continue even if the mediator thinks a break/adjournment would be appropriate? Should the lawyer insist on a break/adjournment when he or she sees their client succumbing to the pressure of the end game, even when the mediator wants to continue?

This author suggests that all these techniques constitute permissible conduct by a lawyer representing a client at

mediation if, according to the lawyer's professional judgment, they are likely to advance his or her client's interests in achieving the best possible resolution of the dispute.

### **Confidentiality of the mediation**

There are four ways in which the confidentiality of what happens at the mediation can be protected.

1. Statutory protection.
2. Protection by contract.
3. Protection by law of confidential information.
4. Protection by the 'without prejudice' privilege.

### **Statutory protection**

A number of statutes render inadmissible as evidence anything said at a mediation. See, for example, *Supreme Court Act 1970* (NSW) s 110P (and corresponding provisions for all other NSW courts); *Federal Court of Australia Act 1976* s 53B; *Farm Debt Mediation Act 1994* (NSW) s 15.

Some provisions go further than merely restricting admissibility into evidence. For example, s 110Q of the *Supreme Court Act 1970* (NSW) (and the corresponding provision for each NSW court) forbids the mediator disclosing information obtained in a mediation under that Act (with various exceptions). And s 16 of the *Farm Debt Mediation Act 1994* (NSW) forbids *any* person from disclosing information obtained in a mediation under that Act (again with various exceptions).

The *Farm Debt Mediation Act* provisions have been held to prevent the admission into evidence of information about what happened at the mediation in attempts to go behind certificates issued under the Act permitting creditors to commence court proceedings after mediation had been unsuccessful: *State Bank of NSW v Freeman* (unreported, Sup Ct NSW, Badgery-Parker J, 31 January 1996); *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 (Ct of App); *Commonwealth Bank* ➤



'Mediation is inherently confidential, so even in the absence of an express promise by the parties to keep the mediation confidential, the law of confidential information would in most cases be available to protect confidences disclosed in a mediation.'

➤ of *Australia v McConnell* (unreported, Sup Ct NSW, Rolfe J, 24 July 1997).

The *Farm Debt Mediation Act* provisions are particularly difficult to construe, because s 7(1) of the Act states that:

Nothing in this Act affects the operation of the *Contracts Review Act 1980* or any other Act or law that deals with the granting of relief in respect of harsh, oppressive, unconscionable or unjust contracts or on the grounds of hardship.

In *Commonwealth Bank of Australia v McConnell*, Rolfe J wrestled with, but did not have to resolve, how this provision could be reconciled with the prohibition on admissibility (s 15) and on disclosure (s 16 — breach of this section is a criminal offence). How could the court determine whether an agreement made in the course of a farm debt mediation to settle a dispute was unjust 'in the circumstances relating to the contract at the time it was made' (*Contracts Review Act 1980* ss 7(1), 9(1)) if it could not take evidence of what happened at the mediation?

#### **Protection by contract**

Most agreements to mediate contain a term by which the parties and the mediator promise each other to keep confidential everything said, and documents exchanged, at and for the purposes of the mediation. Some parties take the view that legal advisors should also enter into a similar agreement, because they may not be bound by their clients' promises of confidentiality. Often, the parties also promise each other that in subsequent litigation they will not subpoena each other, the mediator, or documents exchanged at the mediation.

On the assumption that these terms are properly drafted, there is no reason they should not be enforceable by injunction restraining breach. Whether it would be possible to claim damages for breach would depend on the circumstances.

#### **Protection by the law of confidential information**

Mediation is inherently confidential, so even in the absence of an express promise by the parties to keep the mediation

confidential, the law of confidential information would in most cases be available to protect confidences disclosed in a mediation. The three elements that have to be established in order for information disclosed in a mediation to be confidential are as follows.<sup>5</sup>

1. The information must have the quality of confidentiality.
2. The information must have been imparted in circumstances importing an obligation of confidence.
3. An unauthorised use of the information must be threatened.

The only doubt cast on this proposition arises from the recent decision of the High Court in *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 CLR 285, which held that confidentiality is not an essential element of a commercial arbitration. But that case (involving an arbitration likely to affect the electricity prices of all Victorians) probably stands in a category different to the typical mediation, limited to the resolution of a private dispute between two or at most a small number of parties.

In *M v Independent Newspapers Ltd* [1992] 1 ERNZ 202, the High Court of New Zealand was asked to permanently restrain a newspaper from publishing a handwritten settlement agreement made at an informal mediation concerning complaints of sexual harassment at a university. In that case, Gallen J had no difficulty in finding that the elements of an action for breach of confidence had been made out.

#### **Protection by the 'without prejudice' privilege**

Most mediations provide expressly that the mediation is conducted on a 'without prejudice' basis. Even if the agreement did not so provide, the privilege usually would apply because the mediation is an attempt, by negotiation, to resolve a dispute: see *Rodgers v Rodgers* (1964) 114 CLR 608 at 614; *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1292 at 1299-1300; *Quad Consulting Pty Ltd v* ➤



➤ *David R Bleakley & Associates Pty Ltd (1990) 98 ALR 659 at 662; Evidence Act 1995 s 131(1).*

What are the limits of the privilege? In NSW, the AWA litigation (*AWA Ltd v Daniels*) led to three interlocutory decisions (unreported, Sup Ct NSW, Rolfe J, 18 March 1992) on this question. It was held in the second of these decisions that it is permissible to prove, by admissible evidence (at 13):

... a fact to which reference was made at the mediation, not by reference to the statement but to the factual material which sourced the statement.

In other words, if a fact or a document is mentioned at the mediation, it is permissible to prove that fact or document by independent evidence (by, for example, serving a notice to produce the document).

What is not permissible is to rely on what was said or done at the mediation itself to prove the fact or document.

In the third AWA decision, Rogers J doubted the breadth of Rolfe J's holding, stating that there would be cases where the existence of the fact or document was known independently of the mediation (as, for example, where the document was discovered). In such cases, there could be no objection to admissibility just because the fact or document was discussed or exchanged at the mediation. But, his Honour commented, there could be facts and documents *whose existence would not be known to the party seeking to tender them but for the mediation*. His Honour 'would hesitate long before concluding that the objective evidence so revealed is admissible': *AWA Ltd v Daniels (1992) 7 ACSR 463 at 467-8*.

It also is clear that settlement negotiations designed to settle only part of a dispute attract the 'without prejudice' privilege: *Lukies v Ripley (No 2) (1994) 35 NSWLR 283*.

On the other hand, the privilege apparently does *not* protect from admissibility statements made in the course of negotiations that constitute misleading or deceptive conduct

within the meaning of s 52 of the *Trade Practices Act 1974* (Cth) or the corresponding section of the Fair Trading Acts: *Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd (1990) 98 ALR 659 at 666*. In that case, Hill J reasoned:

It seems to me that, if in the course of 'without prejudice' negotiations, a party to those negotiations engages in conduct which is misleading or deceptive or likely to mislead or deceive contrary to s 52 of the *Trade Practices Act* and as a result the other party to the negotiations relying, for example, upon the misleading or deceptive conduct suffers loss, proof of the negotiations should not be rendered impossible by the 'without prejudice' rule. There is, in such a case, no longer the same subject matter in dispute between the parties as was in dispute at the time of the negotiations.

This reasoning is supported by s 131(2)(i) of the *Evidence Act*, which provides that the privilege does not apply to a communication where 'making the communication ... affects a right of a person'. Arguably, making a misleading or deceptive statement is such a communication.

However, if a mediation is conducted under the auspices of s 53A of the *Federal Court of Australia Act*, s 53B applies. It provides, in very unequivocal language, that evidence of anything said, or of any admission made, is not admissible in any court (whether exercising federal jurisdiction or not). It remains to be seen whether the reasoning of Hill J would be available in proceedings following such a mediation. Indeed, the words of s 53B are so broad as perhaps to render impossible the proof of an oral settlement agreement reached at a mediation.

**Enforceability of agreements reached at mediation**

The validity of an agreement reached at a mediation will be

judged by the normal rules relating to the formation of contracts. Despite the 'without prejudice' privilege, evidence of the formation of such contracts can be adduced in proceedings to enforce the agreement: *Evidence Act 1995 s 131(2)(f)*. (However, in relation to mediations conducted under s 53A of the *Federal Court of Australia Act*, see the comments about the effect of s 53B above).

Likewise, agreements reached at a mediation are subject to the normal modes of challenge, such as undue influence, the *Contracts Review Act*, the *Trade Practices Act* and the Fair Trading Acts. However, as discussed above, there may be difficulty in having admitted into evidence the very material needed to make out a case under these statutes. There is as yet very little law in this area, probably because most agreements reached at mediation are adhered to. ♦

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**Endnotes**

1. For example, those adopted by the Law Society of NSW: *Australasian Dispute Resolution*, ed. Duncombe and Heap, LBC looseleaf, para 9.210.
2. *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd (1992) 28 NSWLR 194 at 209*; see also *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd (1995) 36 NSWLR 709 at 716*; *Walford v Miles [1992] 2 AC at 181-2*.
3. See, for example, the pro forma agreement to mediate adopted by the Law Society of NSW, reproduced in *Australasian Dispute Resolution*, ed. Duncombe and Heap, LBC looseleaf, para 9.210.
4. See, for example, A Ardagh and G Cumes, 'Lawyers and Mediation: Beyond the Adversarial System', (1998) 9 ADJR 72 at 74.
5. *Coco v A N Clark (Engineers) Ltd [1969] RPC 41*.