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ADR Bulletin

Court influence on mediation practice

Compulsion, delegation and disclosure — changing forces in commercial mediation

Andrew Robertson

Mediation — concerns it is over reaching

The issue for this article is the impact of certain court-led forces on mediation and my suggested conclusion about the effect of these forces upon, in particular, commercial mediation. The decisions discussed in this article considered in isolation may be seen as a positive endorsement of the efficacy of commercial mediation and the professionalism of commercial mediators. However, I suggest that when considered together they may in reality be detrimental to mediation as a process.

Therefore bodies like The Institute of Arbitrators & Mediators Australia (the Institute) may need to start a discussion about whether movement in this direction should be encouraged or discouraged.

Mediation as a process has seen significant growth in use and acceptance in the last few decades.[1] Generally it is seen as a process with a lot to offer, and I personally believe it has a lot to offer. However, it is not a general panacea for the resolution of all disputes. If the mediation community wishes to maintain a positive image it may be time to highlight those areas to which mediation should not be pressed as it may be that in extending too far, the process itself will be weakened.

My perspective comes from a litigation practice in which I am more often acting for a party in a mediation rather than as the mediator of a dispute. When acting for a party, legal advisers, quite correctly, have in mind how the process may be used to obtain the best outcome for their client. The advisers must look at mediation as part of the bigger picture of the entire relationship between the parties, which may also include litigation, commercial negotiations and other processes. No matter what support they may personally have for mediation as a process they are obliged to adopt an attitude that the mediation process is but one tool of many to obtain the best outcome for their client. Even when the mediation is conducted, if it is in the interest of their client to do so, they must act in a manner contrary to the mediation process to the extent permissible and consistent with the mediation agreement.

In the commercial context mediations will usually be conducted in an environment of actual or threatened litigation. The legal adviser will consider the dispute holistically in which any mediation, actual or proposed, is but a component. How a legal adviser will think about mediation will be influenced by:

- the power of a court to compel mediation at any given time, and the weight given to the attitude they or their opponent may have;
- the powers delegated by a court to the process of mediation or the mediator; and
- the extent of disclosure of the content of a mediation permitted by a court after mediation, especially a failed mediation, in the sense no agreement is reached on the day.

The conclusion I tentatively reach is that there is a danger in too much compulsion, delegation and disclosure by the court. Mediation may be better served by advocating less interference from courts. The more mediation occurs in an environment divorced from the litigation process, the less the litigator needs to consider how the process is to be approached and shaped for the client's advantage in the litigation. Since the litigator cannot assume the mediation will be successful, he or she must adopt a strategy that includes the possibility that the mediation will not resolve the dispute. The less the litigator is obliged to think about how to shape the approach to mediation and the mediation process for a later forensic advantage, the more the mediation can be the parties' mediation where they can genuinely and confidently engage in a discussion of their respective interests to identify a mutually acceptable commercial resolution.

I want to now look at in more detail:

- authorities on compulsion to mediate by directing mediation;
- authorities compelling mediation through the use of costs orders,
- an authority relating to the delegation of court power to a mediator;
- authorities permitting the use of information obtained in a mediation in subsequent litigation; and
- authorities permitting disclosure of the details of mediation in relation to costs arguments.

Compulsion to mediate

There was once an understanding that although mediation is a useful process, a court will not order mediation over the objections of a party except in exceptional circumstances, which may on occasion permit an order being made.[2]

This is not a 20th century world view. This view was clearly stated in this century (*Morrow v chinadotcom* [2001] NSWSC 309; [2001] ANZ Conv R 341):

> [44] The clearly stated preference of one party to continue with the litigation which that party sees as the most appropriate means of dispute resolution must cause a Court to think very carefully before compelling what, on the face of things, may well turn out to be an exercise in futility attended by

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delay and expense. There will no doubt be some cases where such a course will be justified: where, for example, the Court perceives that emotional or other non-rational forces (including unreasonable intransigence) are at work and a proper sense of proportion may be introduced into the picture by the efforts of a third party skilled in conciliation.

[45] The present proceedings involve commercial parties engaged in a commercial transaction. They may be taken to possess a reasonable degree of business sophistication and acumen. Presumably they (and certainly their respective solicitors) are well aware of the potential benefits, in many cases, of mediation and other non-curial resolution processes. If, with the benefit of that knowledge and the advice of their solicitors, they do not all see sufficient value in resort to some alternative procedure of their own choosing there is, it seems to me, very little, if anything, that is likely to be gained by the Court compelling them to pay at least lip service to it.

And more than once (*Australian Competition & Consumer Commission v Collagen Aesthetics Australia Pty Ltd* [2002] FCA 1134):

[27] There is nothing in the material of the respondent or in the submissions made by counsel on its behalf to indicate that there is any likelihood that the respondent will move from its position that it has done nothing wrong, or, if some breach has occurred, it is other than immaterial or the consequence of the conduct of some other person or agency. A mediator is sought by the respondent to apply pressure on the ACCC to abandon its position, to accept or substantially accept the position adopted by the respondent, and to abandon the proceedings or to accept some form of remedial advertising that will not further adversely affect the commercial interests of the respondent. On the material before the Court, and having heard counsel on behalf of the ACCC, I am satisfied that there is no reasonable prospect of that happening.

[28] To order the parties to mediation would, in my view, simply incur additional cost and delay without any reasonable prospect that the parties would by mutual agreement resolve the matters in dispute between them. Although I have been referred to statements of a number of Judges of this Court and other courts in favour of and against a reference to mediation in the face of objection from one of the parties, it is, in the end, a matter in each case for the Court to make an assessment of the utility of mediation in the particular circumstances of the case in question, rather than the adoption of some rule or principle applicable to categories of cases. In my view, there is no utility in the circumstances of this case ordering that the matter be referred to mediation.

Therefore it does necessarily follow that because a party opposes mediation that the client and the advisers have rationally concluded that litigation is the preferred dispute resolution mechanism to be adopted. A party may rationally conclude that to oppose mediation is a necessary stance to place that party in the appropriate strategic position in the negotiations, or even mediation, to follow. By adopting such a hard line it is hoped that they will be in a better position to dictate the terms of settlement to their opponent who is expected to perceive the intransigence as confidence. Similarly the same party may rationally believe that to adopt a pro-mediation stance will be perceived as a lack of confidence in the party's position and so ultimately will weaken the ability to negotiate an outcome.

It may be … counsel for a party will likely adopt a defiant stance about the correctness of their client's position in submissions made in open court … This reasoning assumes that support for the concept of mediation indicates that a party will compromise and hence is signalling concern with the party's case.

Such an approach could be criticised as being simplistic. A party's position is not always (indeed rarely is) what it seems. Therefore it can be suggested that if courts have confidence in the process of mediation they can compulsorily refer the matter to mediation.

It may be because counsel for a party will likely adopt a defiant stance about the correctness of their client's position in submissions made in open court. They will not weaken their client's position in an adversarial environment by signalling that their client's position is anything other than genuinely held. This is arguably the rational thing to do in the environment in which the submission is being made. Maintenance of a façade of a genuine belief in their client's claim may also be demonstrated by their opposition to the concept of mediation. This reasoning assumes that support for the concept of mediation indicates that a party will compromise and hence is signalling concern with the party's case.

While it was once thought that forcing parties to mediate reduced the prospects of settlement at mediation, it is now said that the empirical research into the impact of orders for compulsory mediation on the success or failure of the mediation, as measured by a settlement, is inconclusive.[3] While some studies suggest voluntarily submitting to mediation increases the chance of settlement, the data is not sufficiently conclusive to determine this with certainty.

Therefore some authorities suggest that the Court's reluctance to force a recalcitrant party to mediation is being relegated to the past (*Azmin Firoz Days v CNA Reinsurance Co Ltd* [2004] NSWSC 705):[4]

[9] The plaintiff has conveniently

referred also to statements by Hamilton J in *Singh v Singh* [2002] NSWSC 852 where his Honour said:

'3 The culture of the Court in relation to the perceived usefulness of compulsory arbitrations has shifted radically in the comparatively short period since s 110K was introduced. In *Morrow v chinadotcom Corp* [2001] NSWSC 209, Barrett J refused to order a reluctant party to engage in mediation on the basis that, if mediation were not engaged upon willingly, the process would be pointless and likely to be a waste of money. However, in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, a very large commercial case, Einstein J made orders for mediation over opposition, as did I in *Remuneration Planning Corp Pty Ltd v Fitton* [2001] NSWSC 1208. In that case I made the following comment on the change in the perceived wisdom relating to this subject matter at [3]:

"This is an area in which the received wisdom has in my experience changed radically in a period of a few months. A short time ago there was general acceptance of the view adopted by Barrett J in the decision to which I have referred, that there was no point in a mediation engaged in by a reluctant party. Of course, there may be situations where the Court will, in the exercise of its discretion, take the view that mediation is pointless in a particular case because of the attitudes of the parties or other circumstances and decline to order a mediation. However, since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered."'

[10] More recently, and again as the plaintiff has observed, the Court of Appeal in *Amalgamated Television Services Pty Ltd v Marsden* (No 2) [2003] NSWCA 186 in a context in which the Court [Beazley, Giles and Santow JJA] was dealing with the Court of Appeal electing to entertain a section 110K application said as follows:

'[62] In proceedings which have already been of unprecedented length and enormous cost, the overriding purpose of the Rules, to facilitate the "just, quick and cheap resolution of the real issues" must be borne constantly in mind. That overriding purpose is a matter which the Court is not merely entitled to take into account, it is required to do so; *Idoport v National Australia Bank Ltd* [2000] NSWSC 1141 at [45]. Nor is it a stricture which the parties themselves are free to disregard. That is why, in considering the threshold question whether this Court should consider whether or not to order mediation, as sought by the respondent and opposed by the appellant (who submits this should be determined by a single judge), we give weight to the fact that, were an order for mediation not to be made by consent, it would not be just, quick and cheap to remit such a matter to a judge in the Common Law Division.'

[11] As the plaintiff has submitted, those very same observations are of equal importance and significance when one set of proceedings in the Court raises cognate or similar issues to those canvassed in proceedings of great potential length and cost, a fortiori, where those cognate proceedings are already subject to an extant order for compulsory mediation.

[12] Where one has a very clear stand taken by a respondent to an application for compulsory mediation plainly enough the Court must pay particular care to the reasons for that position being taken. On the other hand, the clear imperative is for the Court to stand back from the position taken by both parties on such applications and, in exercising the discretion to order or to refuse to order the section 110K compulsory mediation, to look at the situation in perspective. Experience in the area of mediation throws up the fact that the process of mediation may even in major commercial litigation lead to quite unexpected results. From time to time the parties can find some form of unexpected way in which to achieve a compromise. From time to time the very circumstance that the compulsory mediation will cause the major players to have to listen to one another may have a cathartic effect. Particularly is this so when, as so very often will occur, hearing in person, the other side's point of view may change even an entrenched point of view. [cf *Aiton v Transfield* (1999) 153 FLR 236 where the requirements of mediation in good faith were examined.]

This reasoning strongly suggests that parties will find that compulsory court ordered mediation, even over the objections of a party, will be the norm not the exception. The older authorities identifying impediments to the use of mediation orders may now no longer hold sway. For example, I note that in the later decision of *Unconventional Conventions Pty Ltd v Accent Oz Pty Ltd* [2004] NSWSC 1050 Justice Hamilton, without referring to authority and possibly using similar reasoning to Justice Einstein, ordered a second compulsory mediation in a dispute over the objections of a party.

Similarly in *ASIC v Rich* [2005] NSWSC 489, where one party was not opposing mediation, albeit, not seeking it and the other opposed mediation, it was said:

> [25] In summary, the prospect, less than overwhelming though it may presently be, that when confronted with the need to mediate the parties might find the basis for a negotiated outcome, is sufficient to justify the making of a mediation order notwithstanding the defendants' opposition to it, when one has regard to the huge commitment of time and financial resources of the parties that will be required if the case runs to its conclusion, and the pressure that this unexpectedly long trial is placing on the Court's resources.

Albeit in the more recent *Lewis v Nortex Pty Ltd (In Liq); Lamru Pty Ltd v Kation Pty Ltd* [2005] NSWSC 1127 the Court declined, 'with some reluctance' to order a second mediation because of concerns regarding funding of the mediation (which would have been expensive and complex) and, perhaps even more significantly, because no-party was actually asking for the matter to be referred to mediation. It appears the idea of a second mediation had originated wholly with his Honour. While mediation was not ordered the fact it was contemplated with neither party seeking it shows the judicial support for Court ordered compulsory mediation.

However the distribution of these authorities may not be consistent with

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New South Wales and perhaps older decisions in South Australia[5] and Queensland is more inclined to such orders than the Federal or other State jurisdictions.[6]

It seems that at least in some court orders will be made to compel parties to mediate. Further, based on the authorities, if an order for mediation is made it requires the party to attend,[7] and the legal practitioners involved have a duty to the court to see the order put into proper effect.[8] The parties must mediate in 'good faith'.[9] It may also mean a particular person must attend[10] or potentially a particular person must not attend.[11]

This to leads to the conclusion that the suggestion of, and in particular the timing of, proposals to mediate could be driven as much by perceived tactical advantage to a party as the desire to mediate. In a case where a party is applying substantial pressure on all fronts and the opposing party is under-resourced the opposing party may suggest mediation, for reasons other than confidence in the process: if the mediation is successful well and good, if unsuccessful the opposing party will have had an opportunity to re-group and marshal its resources. Further if the other party refuses mediation then the opposing party can use this fact to turn the tables at the next appearance. If parties are thinking like this in considering mediation — is it a good thing for mediation?

Compelling mediation through cost orders or to obtain a trial

Some authorities from the United Kingdom, which have been cited in Australia, in correspondence at least, indicate the potential for the court to compel mediation through the practical effect of its approach to cost orders.

In the decision of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 the Court of Appeal gave some guidance on the factors to be considered in deciding if the Court should deviate from the usual course of costs following the event by reason of a refusal to mediate (paragraph [16]):

> In deciding whether a party has acted unreasonably in refusing ADR, these considerations should be borne in mind. But we accept the submission made by the Law Society that mediation and other ADR processes do not offer a panacea, and can have disadvantages as well as advantages: they are not appropriate for every case. We do not, therefore, accept the submission made on behalf of the Civil Mediation Council that there should be a presumption in favour of mediation. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success … We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list.

The weight of this line of authority[12] in Australia remains to be seen[13] but provides a potentially useful tool in seeking to encourage a recalcitrant party to mediate. In other words, the threat that you will be potentially deprived of your costs even if you win is enough in practical terms to compel parties to mediate in circumstances where they would not otherwise.

I understand the practice in some States, if not necessarily in the formal Rules, is an order that the parties mediate ahead of the trial being set will be a normal interlocutory order. However there is the risk that the power to compel can also be used strategically. For example a party will seek to force mediation at times when strategically doing so is convenient, for whatever reason. In combination what will these actual (discussed in the section 'Compulsion to mediate') and practical (discussed here in 'Compelling mediation through cost orders or to obtain a trial') pressures to compel mediation have upon the participation of parties in the mediation?

… there is the risk that the power to compel can also be used strategically. For example a party will seek to force mediation at times when strategically doing so is convenient, for whatever reason.

Delegation of powers to mediators — compulsory disclosure

Aside from the authorities having an impact on how parties get to mediation, they also compel behaviour of the parties at the mediation: who will attend and rules on how they will behave are part of the compulsion process.[14]

It is one thing for the authorities to impinge on the behaviour of the parties, what if they will also have an impact on how the mediator is to do.

The decision in *Addstead Pty Limited (In liquidation) v Simmons (No 2)* [2005] SASC 25 reaches the conclusion that the mediator can be clothed in power to compel, through delegated power from the Court, a party in a mediation to disclose a document. This is a power that seems to fit very

uncomfortably with the role of mediator. However in some respects it is no more that a progression on the obligations imposed on mediators to report back to nominating authorities as to whether parties have conducted themselves properly.[15] The mediator is to make an assessment of the parties with the potential for sanctions following that assessment.

However this authority takes it a step further because based on the assessment by the mediator the course of the mediation itself may take differing paths. The case deals with a mediation being conducted pursuant to a Court order under s 65 of the *Supreme Court Act 1935* (SA). Some of the parties to the litigation attempted for some time to access a portion of a settlement deed from related proceedings. An application for discovery and inspection was unsuccessful.

Undaunted following the order that the matter was to proceed to mediation the parties brought the application again on the basis that documents may be necessary for an efficacious mediation. This was an approach adopted by Justice Bleby who considered that it may be necessary to make orders relating to mediation for a wider disclosure of documents than those that would normally occur in the proceedings.

> [19] Once it has ordered mediation under s 65 the Court has a duty to do all in its power to facilitate that process. In doing so, the Court cannot be limited in its orders and directions by the type of orders it might make in the course of pre-trial management of conventional litigation. In particular, in giving any such directions which may involve the disclosure of information or the production of documents, the Court will not be limited in its orders to information or documents which are directly relevant to an issue arising on the pleadings. The Court should not hesitate to give any necessary or appropriate direction if, in the opinion of the Court, such a direction will facilitate the mediation process, assist the task of a mediator or render the mediation process efficacious.
>
> [20] Similarly, if the Court apprehends that the success of the mediation may be prejudiced by failure to disclose a piece of information or to produce a document that may assist in a successful outcome of the mediation, the Court is able to give directions for disclosure of that information or production of that document, even though the information or document may not be directly relevant to any issue arising on the pleadings, and even though the order may not be appropriate to the management of conventional litigation relating to the dispute.
>
> [21] The power of the Court to refer a matter to mediation under s 65(1) of the *Supreme Court Act* is prefaced by the phrase:
>
> 'Subject to and in accordance with the rules of court, …'
>
> [22] I reject any suggestion that, in considering orders to be made incidental to an order for mediation, that qualification in some way limits the nature of orders that can be made to orders that could otherwise be made under the rules of court. The qualification in s 65(1) is there to enable rules to be made as to the method of appointment and qualification of mediators, the costs of mediations, reports as to the outcomes of mediations and a number of other like matters. The expression is not intended to limit orders that may be made to those authorised by other rules of court applying to quite different situations and matters. There is also nothing in r 76 of the *Supreme Court Rules* or in the practice direction published in amplification of that rule which would limit in any way the nature of an order that a Judge may make in order to assist a mediation in the manner to which I have referred.

His Honour envisaged a highly interventionist approach by the Court into the conduct of the mediation based on the Court's inherent power to control a mediation which the Court has compelled. In isolation this may make sense but considering how that information once obtained may be used[16] and how that conduct can later be reviewed it, becomes clear that such intervention needs to be carefully weighed. It is not yet clear how the Court will determine, bearing in mind the mediator will not be making submissions or even be before the Court, whether it is in fact encouraging a proper engagement with the process.

In the course of his reasoning his Honour expressed a view in obiter dictum that material obtained in the course of the mediation was subject to the implied undertaking not to use it for any collateral or an improper purpose as applied to material obtained under discovery. His Honour states he wished to preserve the protection afforded by s 65(6) that evidence of things said or done in the mediation is not admissible in evidence. That raises the question of whether it would prevent a party from amending pleadings in that same manner as occurred in *789Ten*.[17]

Ultimately however his Honour felt the document ought not be produced because of the prospect of undue prejudice to the disclosing party. If the matter had rested there it would be interesting enough for the comments extracted. However his Honour then went on to consider s 65(2) of the *Supreme Court Act* which provides:

> (2) A mediator appointed under this section has the privileges and immunities of a judge and such of the powers of the court as the court may delegate.[18]

His Honour said (at [39]):

> However, I also cannot overlook the possibility that something which I cannot presently foresee may happen in the course of the mediation which might cause that situation to change. I will not be privy to the unfolding of the mediation and what may be said or done in the course of it. The mediator will. It is only he who will be able to make a judgment as to whether, in any circumstances as they may occur, the complete deed should be produced or disclosure of its contents should be made. In the interests of the efficacy of the mediation the mediator should be equipped to make any such decision.

His Honour then proceeded to delegate to the mediator the Court's power to direct the documents to be produced. This power is left to the mediator to exercise in the circumstances as they unfold before him. Bearing in mind a mediator does not act in accordance with natural justice,[19] hearing confidential submissions from one party without other parties being aware of those submissions or having an opportunity to respond, there seems to be significant scope for later review of the exercise of the power. If the absence of natural justice,[20] as the law understands that expression, is permitted

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in mediation because the process is consensual and not determinative, then it follows if the process is determinative natural justice is required. How then does a mediator receive delegated power to direct actions? The answer is not clear.

If the mediator is to have these powers then more so than ever the mediation process is in danger of becoming an adversarial process where the parties seek to convince the mediator of their position in order to persuade/dissuade the exercise of the mediator's delegated powers. Even if this does not arise because of an obligation to do natural justice it will arise because the parties' attitudes to the process lead them to adopt adversarial stances.

It is an open question whether the presence of a power akin to s 65(2) of the *Supreme Court Act* is necessary for a court to delegate the power the mediator or whether the ability to delegate the power can arise implicitly from the court's power to order mediation.[21]

Disclosure in aid of on-going litigation

If all these decisions impact on what parties and mediations do in relation to a proposed and actual mediation, what happens to the parties after the mediation, since not all mediations will result in the dispute being resolved? If there is threatened or actual litigation how will the mediation interact with that litigation?

The decision in *789Ten v Westpac* [2004] NSWSC 594 dealt with an application seeking to have pleadings struck out as an abuse of process because it was alleged the knowledge of the material facts disclosed in the pleadings was only obtained through a mediation process.

The mediation in question was conducted pursuant to a mediation agreement which provided:

- the parties agreed to keep as confidential all information disclosed to them during the mediation; and
- proposals, statements, admissions, concessions and documents in the mediation were to be privileged.

The allegation was not that the pleadings themselves contained any privileged or confidential material, but rather that the pleadings themselves were derived from privileged or confidential material.

In considering the matter his Honour Justice McDougall referred to an unreported decision of *AWA Ltd v Daniels* (Rolfe J, NSW Supreme Court, 5029 of 1991, 18 March 1992, BC9201994). In that case an analogy was drawn between the mediation process and without prejudice negotiations between the parties.

> If the absence of natural justice, as the law understands that expression, is permitted in mediation because the process is consensual not determinative then it follows if the process is determinative natural justice is required.

It was said there are significant differences. Mediation requires a greater degree of frankness and disclosure than other settlement negotiations. His Honour then made the position somewhat confusing by saying there is a marked similarity between the processes.

Plainly in a mediation, which is generally conducted on a without prejudice basis and in a confidential environment, parties become aware of facts they would not otherwise have known.

In *789Ten v Westpac* Justice McDougall quotes Justice Rolfe at length including his conclusion in *AWA Ltd v Daniels* that a party may pursue a line of enquiry and utilise the court appropriate processes (in that case a notice to produce) on matters learnt at the mediation, the mediation having failed to resolve the dispute.

Justice McDougall then went on to quote Rogers CJ CommD who heard the argument for the admissibility of the documents obtained on the notice to produce in *AWA Ltd v Daniels* (1992) 7 ACSR 463. The Chief Justice, with the greatest of respect to Justice Rolfe, did not want to go as far as Justice Rolfe by questioning whether a party could obtain as admissible evidence material which they had 'no inkling about' prior to the mediation.

After then considering the cases which have followed, which appear to be more inclined to Rolfe J's approach, McDougall J stated his conclusion:

> [27] I think that the analogy between without prejudice discussions and mediation is compelling. I do not think that the relative formality of the latter process affords a relevant ground of distinction. Nor do I think that the perceived need for greater frankness in the latter process does so. *There is no compulsion on a party to disclose information for the purposes of mediation. If a party wishes to protect itself from the consequences of disclosure, it is open to it to seek to do this by an appropriately drafted mediation agreement. If the parties do not do so, I do not think that, on policy grounds, the Court should do it for them.*
>
> [28] I, therefore, like Rolfe J take the statement by the High Court in *Field*, to which his Honour referred, as being decisive. I do not need to consider whether, as Rogers CJ Comm D suggested, that statement was strictly obiter because, as his Honour pointed out, a judge at first instance is hardly likely to take a different view.
>
> [29] In any event, if I were to consider the matter on the basis that I was not bound, in the circumstances of this case, by the statement of principle in *Field*, I would conclude that the relevant privilege requires a distinction to be drawn between communications (written or oral) and the information contained in them. I think that the balancing considerations to which both Rolfe J and Rogers CJ Comm D pointed require that conclusion.

> Any attempt to extend the common law privilege from statements or documents to information contained in them would raise well nigh insuperable problems. [emphasis added — of course this statement may not stand given the discussion on compulsory disclosure in this article][22]

The reasoning of the Court seems to rest on the basis that as mediation is consensual the parties can control what they disclose. Though some of the decisions discussed in this paper may call into question the consensual nature of the process. The logical extension of this reasoning is that parties should be coy in mediation about disclosing information because it may be subject to later consequences. This type of reasoning is not consistent with any ideal of mediation enabling the parties to make proper disclosure of their respective position to allow true interest based negotiation.[23] Moreover, this distinction between documents and information, given that much of what happens in mediation is more of an information exchange rather than a documentary exchange, raises in my view a serious concern regarding the freedom with which a party can engage in the mediation process.

It is also interesting to note that as recently as *Village/Nine Network v Mercantile Mutual* [1999] QCA 276 the Queensland Court of Appeal seemed to take the opposite tack. The case dealt with a different question, namely if a document in a mediation between A and B is privileged from production to C. The reasoning of the Court assumed that the process of mediation is subject to the protection of the settlement privilege, and the process should be kept as confidential as possible with disclosure limited to exceptional circumstances:

> [20] One can understand rational arguments being advanced, as a matter of policy, against too great an extension of the privilege, one being that it can be a cloak for dishonesty. But that can be so whether or not the person damaged by application of the privilege is a party to the negotiated dispute. There is no sound basis for holding that the basic purpose of protecting negotiations is sufficiently served if one allows the negotiators to be exposed to the risk that what they privately say, to settle their dispute, may be broadcast to the world at the instance of any person who can make use of it in litigation, unless that person is a party to the dispute being negotiated. '

Plainly *789Ten v Westpac* and *Village/Nine Network v Mercantile Mutual* are distinguishable,[24] one deals with disclosure of information by the same parties outside of the mediation and the other deals with disclosure of documents involving different parties[25] outside of the mediation. However the different approaches to the question of how far should the contents of the mediation be protected are interesting.

If the process is open to disclosure, and it seems from the reasoning in *789Ten v Westpac* this is in part because it is a consensual process, then parties must be able to use their freedom in negotiating to be selective in what they disclose. However the effect of *Addstead* is to the counter[26] as may be the effect of orders[27] compelling who is to attend and how a party is to behave in mediation.

Disclosure in aid of the settlement privilege

Settlement privilege protects negotiations in mediation leading up to a final settlement, but not including the final settlement, from disclosure.[28]

It has been understood for some time that mal fides will enable the conduct of a mediation to be opened up to scrutiny. So if there is undue influence,[29] economic duress[30] or misleading and deceptive conduct[31] during the course of the mediation what has taken place in the mediation process will be open to scrutiny. This is logically defensible as actionable conduct of this nature falls outside of the mediation process.

What about conduct which may be considered inappropriate but not actionable — the reluctant litigant refusing to settle a claim which in common sense should be resolved at mediation?

The decision of *Silver Fox Co Pty Ltd (as trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3)* (2004) 214 ALR 621 provides an interesting analysis of the extent to which a later court process will look at what happened in the mediation.

The mediation in question was conducted pursuant to a mediation agreement which provided that:

- information or documents provided during the mediation was confidential unless disclosure was required by law; and
- any settlement proposal was 'privileged' except to the extent disclosure was required to enforce the mediation agreement.

Nevertheless after trial the successful party sought to adduce to the Court the details of offers made at the mediation at the time the mediation failed in support of an application for indemnity costs.

Justice Mansfield said (at [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.

Nevertheless the application was pressed pursuant to s 131(2)(h) of the *Evidence Act 1995* (Cth) which permits the disclosure of otherwise privileged communications (subject to the settlement privilege set out in s 131(1)) where 'the communication or document is relevant to determining liability for costs'.[32]

It may be thought that the intention of the parties, as shown by the mediation agreement, was to exclude from later inquiry by the court into the conduct of the parties at the mediation. Therefore the provisions in the mediation agreement were directed at this very type of disclosure at a later hearing.

Justice Mansfield received into evidence the offers made at mediation (at [36]):

> Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations — whether private or by mediation — are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations to explore resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of s 131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of

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the expression 'without prejudice' or by a mediation agreement.'

While his Honour was only dealing with the case before him, this statement seems designed to be of broader application and seems to be a statement of general principle. Therefore parties to a mediation may conduct themselves on the basis that the offers made and refused at the mediation may be later used in costs submissions.

It may be said there is in fact a public interest in preserving the privilege so that in mediation the parties can attempt to genuinely resolve the issues before them in an interest-based rather than a rights-based environment.[33] They may feel more free to explore their interests and not their rights if they know that their decisions will not later be reviewed by another process in a rights-based environment.

It is also interesting to note the view apparently held by the Commercial Bar Association of Victoria is that the conclusion of Justice Mansfield quoted above, based as it is on the *Evidence Act*, reflects the same conclusion the common law would arrive at.[34] However in *Pinto atf Marvian Family Trust v Kinkela atf Kinkela Family Trust* [2003] WASC 126, albeit interpreting Western Australian legislation[35] in a costs argument held that (at [13]) 'I declined to allow either party to refer to any matter pertaining to the mediation process other than the fact and timing of its occurrence'.

The *Silver Fox Co Pty Ltd (as trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3)* case itself was the subject of a successful appeal and the costs order made were set aside (*Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* [2005] FCAFC 131). The appeal does not discuss the issue relevant to this article.

It seems unnecessary for courts to consider opening up the details of mediation to later inquiry. It encourages parties to say and do things at the mediation for use in later submissions before courts.

If a court is minded to recognise the apparent intent of the parties as evidenced in the mediation agreement that there is another, more practical, way for the parties to achieve the same protection on costs. There is nothing to stop a party, following an unsuccessful mediation, from repeating their final offer in Calderbank[36] correspondence[37] following the mediation. The letter will speak for itself without the need for an inquiry into the detail of the mediation. The letter should be expressly marked as being 'Without prejudice except as to costs'.

A party properly advised when receiving such an offer will understand that its purpose is tactical and can be used in later costs arguments. The party in rejecting or otherwise responding to such a proposal will know their conduct has cost consequences which consequences are the principal purpose of the original letter. Imposing the discipline of a subsequent Calderbank letter enables the party, which seeks to obtain the benefit from a sensible commercial settlement, to still obtain the cost benefit on the parties while preserving the process of mediation as truly confidential. Parties will presumably not, apart from some knowledge of these authorities, have cost consequences in mind in rejecting an offer made at mediation.

It seems unnecessary for courts to consider opening up the details of mediation to later inquiry. It encourages parties to say and do things at the mediation for use in later submissions before courts.

Where is this taking mediation?

I am not certain there is a clear answer to the question: where is this taking mediation?

What needs to be borne in mind by participants in commercial litigation is that there may be a fair amount of received wisdom about mediation that is inconsistent with some of the reasoning referred to in this article. What it may be doing is making mediation less attractive to disputants, when the process becomes less confidential, the protection of privilege is understood as quite narrow and the process itself has become compulsory.

The representative of a party in litigation will use his or her knowledge of these authorities to determine in the context of actual or threatened litigation:

- when and what advice is given about the possibility of mediation;
- who will conduct and how the mediation will be conducted;
- what is prepared for and provided to the other side in the mediation; and
- what is done after the mediation if unsuccessful.

These authorities will impact on the behaviour of parties. In isolation each of these decisions by courts can be seen as very positive endorsements for the professionalism of mediators and the utility of the process. They demonstrate success of the work of bodies such as the institute in promoting both of these aims. However the pendulum may be swinging too far towards incorporating mediation into the court provided dispute resolution mechanism. In doing so it will undermine the manner in which mediation is perceived and approached by litigants and their advisers. Mediation may work better as a 'black box' generally operating outside of the gaze or supervision of the Courts. Otherwise mediation may become a step in the litigation process like pleadings or discovery are for example.

If this occurs then the efficacy of mediation as a resolution mechanism may be weakened. Counter intuitively[38] the value of mediation as a process may be maximised by encouraging a more hands off approach, so that it occurs in the shadow of litigation but not in the light of it. The very confidentiality,

consensus and freedom that the process offers is then maximised, and accordingly the efficacy of the process is strengthened.

What impact is there for other forms of ADR?

What history has shown is that there is no process that works all the time in all circumstances. Mediation has seen substantial growth in the last decades but perhaps as litigants and litigators become more familiar with the process they learn how to subvert the process to their advantage. If this occurs and in response courts are too keen to 'assist' the process, the very attractiveness of the process may be lessened. It seems unlikely that litigants will therefore be driven into more litigation but it may be that a new ADR process (or more likely a re-discovered ADR process) will begin to gain ground in response to what is perceived as 'weaknesses' in the mediation process. The seeds of the defeat of the process may be in the victory over the sceptical court.

There may be a signal in the enthusiastic adoption of adjudication in building and construction payment claims across several States and Territories[39] that short, sharp and certain process is what parties want. To keep mediation as a stand alone short and sharp and confidential process may be better than having it as part of the litigation process.

A process described as Concise Dispute Resolution, based on a med-arb or perhaps mediation-adjudication model, was launched by the Institute in 2005. Based on the presentation this attempts to combine consensual elements of mediation/conciliation with a determinative adjudicative process. Parties will determine whether this is what they want.

The market will also determine if mediation is presently going down the right path.

Conclusions

The authorities show that parties can be compelled to mediate in a number of ways, further that once compelled to mediate they can be compelled in what they do and how they do it in the mediation: the powers delegated to a mediator may compel further action and the knowledge of the potential disclosure of the contents of mediation may compel parties' behaviour.

However this compelled behaviour is at the antithesis to the consensual nature of mediation. There is danger that this compulsion will impact on the behaviour of parties at mediation, and thereby impact on the efficacy of mediation. Consequently this will diminish confidence in mediation.

The courts and the mediation community need to find an appropriate balance so as to encourage mediation without compromising its efficacy. ●

There may be a signal in the enthusiastic adoption of adjudication in building and construction payment claims across several States and Territories that short, sharp and certain process is what parties want. To keep mediation as a stand alone short and sharp and confidential process may be better than having it as part of the litigation process.

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Endnotes

1. It has been suggested that mediation as a process did not begin to be recognised until the late 1970s, see 'A short history of alternative dispute resolution in Australia: 1975–2000' by Peter Condliffe, *The Arbitrator,* Volume 19, Number 2, November 2000.

2. *Baulderstone Hornibrook v Dare Sutton Clark* [2000] SASC 159.

3. 'Court referral to ADR: criteria and research', Kathy Mack, a joint publication by NADRAC and the Australian Institute of Judicial Administration, at section 6.2. At the time of writing it was available from the NADRAC website.

4. See also *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 478 but the facts of that case make the conclusion that the mediation was pursued not surprising.

5. In *Cawthorne v Olsen* [2005] SASC 34 Justice Perry said, 'It is very unusual to order mediation unless the parties agree on that course. This case is not so exceptional as to justify ordering a mediation so close to trial, against the wishes of the defendants.' However limited authorities were referred to and the decision seemed to be strongly influenced by the nature of the case involving lobster permits and his Honour's previous experience in abalone cases.

6. Above note 3 at section 8.5 suggests this distribution. I am uncertain as to the distribution of such orders and wonder whether the individual Judicial personality is perhaps more an important factor than jurisdiction but I would need to do more research to support such a conclusion.

7. *Baulderstone Hornibrook v Dare Sutton Clark* [2000] SASC 159.

8. *Hopeshore Pty Ltd v Melroad Equipment Pty Ltd* [2004] FCA 1445;

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(2004) 212 ALR 66.

9. *ASIC v Rich* [2005] NSWSC 489.

10. *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 478 and see also dicta in *Kilthistle No 6 Pty Ltd (receiver and manager appointed) and Ammrad Pty Ltd trading as Lloyds Transportable Homes and Better Look Homes Pty Ltd v Austwide Homes Pty Ltd* [1997] 1383 FCA.

11. *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 478.

12. See also *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803, *Dunnett v Railtrack plc* [2002] EWCA Civ 303, [2002] 1 WLR 2434, *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 Lloyds Rep 379 and *Burchell v Bullard* [2005] EWCA Civ 358.

13. In *Downie v Sorell Council* [2005] TASSC 74 it seems the idea of depriving a successful litigant of costs by reason of refusal to mediate was considered, although on the facts the absence of sufficient evidence meant the point was quickly disposed of.

14. See above.

15. For example something I have personally experienced with mediations conducted under the Franchising Code of Conduct, although this report back obligation is not unique to such mediations.

16. See 'Disclosure in aid of on-going litigation' and 'Disclosure in aid of settlement privilege' below.

17. See 'Disclosure in aid of on-going litigation' below.

18. I have not located a similar provision in other States.

19. As the definition of misconduct in s 4 of the *Commercial Arbitration Act* requires of arbitrators, the consequences of which I had always understood neutered the effectiveness of s 27 of the *Commercial Arbitration Act* because of the dichotomy between arbitration and mediation, and the lack of natural justice in a mediation.

20. Essentially I am thinking of the right of a party to know the case against them and the right of a party to be heard, for a more complete discussion on the topic of natural justice in an ADR environment see *The Arbitrator's Handbook* by Geoffrey Gibson (Federation Press) at pp 132–138.

21. '… notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise … Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent.' per Dawson J, with whom Mason CJ, Brennan and Toohey JJ agreed, in *Grassby v R* (1989) 168 CLR 1 at 16–17; 87 ALR 618 at 628.

22. See 'Delegation of powers to mediators — compulsory disclosure' above.

23. This very concern has been recognised by some courts, in *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 476 Palmer J said of the need to maintain confidentiality (at [11]): 'That is so, it seems to me, in order to avoid the very thing that is occurring in this case; that is that instead of the mediation affording a haven from litigation in which parties may negotiate frankly and informally towards settlement of their dispute, the mediation itself becomes yet another area of conflict generating another whole set of proceedings in court.'

24. The decision in *Ingot Capital Investments v Macquarie* [2004] NSWSC 1091 also dealt with the refusal of a court to permit access to mediation documents however that decision seems to be based on relevance and forensic value, as much as it was based on privilege.

25. For a consistent decision in that other parties in multi-party litigation could not access without prejudice communication between parties in the same litigation, albeit the negotiations were not in a mediation see the house of Lords in *Rush & Tompkins v GLC* [1989] AC 1280 at 1305.

26. See 'Delegation of powers to mediators — compulsory disclosure' above.

27. See 0 above

28. *Wentworth v Rogers* [2004] NSWCA 109.

29. *Abriel v Australian Guarantee Corp* [1999] FCA 50.

30. *National Australia Bank Ltd v Freeman* [2001] QCA 473.

31. *Williams v Commonwealth Bank of Australia* [1999] NSWCA 345.

32. It should be noted that in the earlier decision of *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 476 Palmer J (at [16]) said: 'It seems to me that s 131(1) and (2) of the Evidence Act are concerned with the exclusion from and admission into evidence generally of matter which may otherwise attract the principles of the common law relating to "without prejudice" communications between parties made for the purposes of negotiating; they are not intended to apply to the special process of settlement negotiation provided by a mediation ordered by the Court under the provisions of Pt 7B of the *Supreme Court Act*.'

33. While mediation can in reality be either interest-based or rights-based, however it is more commonly seen as interest-based for example, <www.parliament.vic.gov.au/lawreform/restitution/interim/ch6.htm>. I leave as an open question how commercial disputes are mediated.

34. <www.austlii.edu.au/au/other/alrc/publications/dp/69/13.html>, ALRC publication at paragraph 13.269.

35 But citing a common law authority at [12].

36. A decision which decided that certain offers which would otherwise be privileged from disclosure can be considered by a court in determining the amount or scale of costs the court should award.

37. I know it could be debated whether such correspondence is correctly described as a Calderbank letter because of the formalities of such correspondence. I will not deal with in abstract the question of when and if the letter may properly be described as a Calderbank letter, the point is that the position on costs should presumably be no different that it would have been anyway if the court had considered the mediation offer. If it is or isn't a Calderbank or Rules of Court offer then its characterisation does not change merely because it is written down.

38. I think the mediation community has been pleased by endorsements from courts.

39. *Building and Construction Industry Security of Payment Act 1999* (NSW), *Building and Construction Industry Security of Payment Act 2002* (Vic), *Building and Construction Industry Payment Act 2004* (Qld), *Construction Contracts Act 2004* (WA) and *Construction Contracts (Security Of Payments) Act 2004* (NT).

ADR diary

- **CEDR** will be holding the *Mediations that changed lives* conference in London on 13 December 2006. While issues to be discussed will be confirmed nearer to the time to provide a forum for discussion of current issues and developments, speakers will include Colin Russ (CEDR), Beverley Rogers (Serle Court), Neil Goodrum (McCormicks), Nerys Owen (Healthcare Commission). For more information, or to book a place, contact Alice Tapfield at <atapfield@cedr.co.uk>.
- The **Straus Institute for Dispute Resolution** is holding a *Mediating the Litigated Case* workshop in Irvine, California on 25–27 January and 22–24 February 2007. This six-day program is for experienced litigators, in-house counsel, and other practitioners. Professionals can study the mediation of litigated cases to either become a mediator or to be a better advocate. The program will focus on the various stages of the process, identifying and working with different negotiation styles, and facilitating problem solving regardless of whether the case involves contractual, tort, personal injury, employment, partnership, or securities issues. For more information, or to book a place, contact Lori Rushford at <lori.rushford@pepperdine.edu>.
- In recognition of the growing importance of mediation, the **National Institute of Trial Advocacy (NITA)** is launching a training program for lawyers who represent clients in mediation. The program plans to cover how to choose a mediator and gain the mediator's support, identifying interests and developing options, when to disclose information, and how to deal with combative opponents and 'aberrant' mediators. The program will be held in San Diego, California on 15–17 December 2006 and in New York City, New York on 2–4 February 2007. For more information visit <www.nita.org>.
- The **Centre for Information Technology and Dispute Resolution** will be holding the **Fifth UN Forum on Online Dispute Resolution** on 19–21 April 2007, in Liverpool, United Kingdom. For more information, or to register, visit <www.odr.info>.
- The **Australian Commercial Dispute Centre** is holding a **Conflict Resolution/Dispute Avoidance Certificate** workshop in Sydney, New South Wales on 23 January 2007 and 22 February 2007. This is a one-day workshop that includes the foundation skills and information to handle conflict and disputes. It also prepares participants for the mediation workshop. For more information, or to register, visit <www.acdcltd.com.au>.
- **Mediation and Training Alternatives** is holding **Mediation Masters Classes** in London, United Kingdom on 1 February, 1 March, 29 March and 3 May 2007. These courses are open to both practicing mediators and non-mediator guests, and involve a prominent mediator being interviewed and some techniques of this mediator being identified and put into practice in interactive workshops. For more information, or to register, visit <www.mata.org.uk> or contact David Richbell at <david@mata.org.uk>.

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