

SHOULD MEDIATION BE AN EVIDENTIARY ‘BLACK HOLE’?

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In their enthusiasm to support the use of mediation for the resolution of disputes, Australian state and federal legislatures have frequently enacted provisions designed to prevent evidence being given of communications made at mediation, often in terms which override the common law exceptions to the ‘without prejudice’ rule and the statutory provisions of the state and federal Evidence Acts, with consequences that may not have been intended.

An example is the *Federal Court of Australia Act 1976* (Cth). Section 53A gives the judge power to order the parties into mediation. Section 53B provides in broad terms:

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or
- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

Similarly, under section 69 of the *Retail Leases Act 1994* (NSW), any statement or admission made in the course of the mediation of a retail tenancy dispute is not admissible at a hearing of a retail tenancy claim before the Administrative Decisions Tribunal or in ‘any other legal proceeding’. The same approach is adopted in section 88 of the *Retail Leases Act 2003* (Vic).

As originally enacted, the terms of section 15 of the *Farm Debt Mediation Act 1994* (NSW) were virtually identical to section 53B. The New South Wales (‘NSW’) Court of Appeal held that a decision by the Rural Assistance Authority to issue a certificate entitling the creditor to commence proceedings against the debtor was not amenable to judicial review because section 15 rendered inadmissible the very evidence upon which any such review would need to be conducted.¹ The Act was subsequently amended to render admissible, *inter alia*, the mediator’s report on which the certificate is based² but it continues to preclude evidence of what happened in circumstances in which the common law

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¹ *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252.

² *Farm Debt Mediation Amendment Act 2002* (NSW).

would admit it. Section 26 of the *Farm Debt Mediation Act 2011* (Vic) is in similar terms.

A slightly different approach is taken in the *Civil Procedure Act 2005* (NSW), in which limited exceptions allow evidence, including from the mediator, that a settlement has been reached in a court-ordered mediation and as to its substance.³ Further, specified disclosures by the mediator are also allowed in certain circumstances.⁴ In Victoria, evidence of what transpired in court referred mediation of a proceeding or part of a proceeding (not being a judicial resolution conference) is inadmissible at the hearing of the proceeding unless all the parties who attend otherwise agree in writing.⁵ The position in Queensland is similar, save where fraud is involved.⁶ Comparable restrictive provisions, with very limited exceptions, apply under Commonwealth legislation, for example the *Administrative Appeals Tribunal Act 1975* (Cth), the *Native Title Act 1993* (Cth) and the *Family Law Act 1975* (Cth).⁷ A comprehensive list of similar federal, state and territory legislation has been compiled by the National Alternative Dispute Resolution Advisory Council ('NADRAC'), which advises the Commonwealth Attorney-General on alternative dispute resolution ('ADR') matters.⁸

The twin policies said to underlie such statutory provisions are to encourage use of mediation and to discourage satellite litigation.⁹ Both appear to be seriously flawed by allowing mediation in court-ordered mediation, as distinct from private mediation, to become an evidentiary 'black hole' in circumstances which prevent justice being done.

I THE 'WITHOUT PREJUDICE' RULE

The common law has long encouraged parties to attempt to resolve their disputes by according 'without prejudice' privilege to communications made in the course of settlement negotiations. Initially, this was to spare the parties' embarrassment should the negotiations fail and their communications be liable to be put in evidence.¹⁰ In *Cutts v Head*, Oliver LJ stated:

3 *Civil Procedure Act 2005* (NSW) s 29.

4 *Civil Procedure Act 2005* (NSW) ss 30–1.

5 *Supreme Court Act 1986* (Vic) s 24A; *County Court Act 1958* (Vic) s 47B; *Magistrates' Court Act 1989* (Vic) s 108. See the discussion in *Simply Irresistible Pty Ltd v Couper* [2010] VSC 505, [10]–[13].

6 *Civil Proceedings Act 2011* (Qld) s 53, replacing a similar provision in the *Supreme Court of Queensland Act 1991* (Qld) s 114.

7 *Administrative Appeals Tribunal Act 1975* (Cth) s 34E; *Native Title Act 1993* (Cth) s 94D(4); *Family Law Act 1975* (Cth) s 10J.

8 See NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice through People* (28 February 2011), apps 4.1, 4.2 <http://www.nadrac.gov.au/about_NADRAC/NADRACProjects/Pages/IntegrityofADRProcesses.aspx>.

9 Interview with Robert McClelland, Commonwealth Attorney-General ('ADR: Supporting Access to Justice, Truth or Illusion?' Q&A, Baker & McKenzie, Sydney, 7 June 2011).

10 *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285, 291; *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, 1300.

That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151, 156, be encouraged fully and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.¹¹

The ‘other basis or foundation [of the rule] is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues’.¹²

The rule is no longer limited, as it was initially, to admissions ‘but now extends much more widely to the content of discussions’ and ‘is thus now very much wider than it was historically’.¹³

II MEDIATION IS ASSISTED ‘WITHOUT PREJUDICE’ NEGOTIATION

In the English case of *Brown v Rice* the issue was whether ‘without prejudice’ communications in a mediation had resulted in a concluded settlement. The deputy judge rejected a submission by ADR Group, intervening, that:

nothing said or done in preparation for, at or in consequence of the mediation which is liable to disclose the nature of the negotiations can ever be used outside the mediation process, in the absence of a *prima facie* case or credible evidence of unambiguous impropriety by a party to the mediation.¹⁴

Holding that the exceptions to the ‘without prejudice’ rule, even in the mediation context, go wider than this, the deputy judge based his decision on one of those exceptions, describing mediation as ‘a form of assisted without prejudice negotiation’.¹⁵

The deputy judge therefore found it unnecessary to rule on a submission by one of the parties that there is a ‘mediation privilege, distinct from the “without prejudice” rule, under which (at least) a mediator cannot be required to appear as a witness or produce documents and under which the parties could not waive the

11 *Cutts v Head* [1984] Ch 290, 306 (Oliver LJ), cited with approval in *Rush & Tompkins v Greater London Council* [1989] AC 1280, 1299 (Lord Griffiths) and cited in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436, 2441–2.

12 *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436, 2442. See also *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209, [86] (Lander J).

13 *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2011] 1 AC 662, 676 [25]–[27].

14 *Brown v Rice* [2007] EWHC 625 (Ch), [22].

15 *Ibid* [13], [21].

mediator's entitlement not to give evidence in respect of the contents of a mediation'.¹⁶

When those very issues came before the court in *Farm Assist Limited (in liq) v The Secretary of State for the Environment, Food and Rural Affairs (No 2)*,¹⁷ a case in which there was, as is usual, a confidentiality provision in the agreement between the parties and the mediator, the court held that the position as to confidentiality, privilege and the 'without prejudice' principle in relation to mediation is generally as follows:

- (1) Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.
- (2) Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.
- (3) Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege.¹⁸

In the circumstances of that case, where the issue was whether the settlement agreement should be set aside for economic duress, the court dismissed an application by the mediator to set aside a summons to give evidence, on the ground that the interests of justice in receiving the evidence prevailed over the mediator's right to confidentiality.¹⁹

III EXCEPTIONS TO THE 'WITHOUT PREJUDICE' RULE

Over time, the courts have developed and continue to develop numerous judge-made exceptions to the rule, designed to enable justice to be done and to avoid mediation and bilateral settlement negotiation becoming an evidentiary 'black hole': 'the privilege that may arise from the cloak of "without prejudice" must not be abused for the purpose of misleading the court.'²⁰ Thus mediation under the common law 'without prejudice' rule is not a 'no go area'²¹ for all purposes. However, 'the more relevant to the underlying dispute the events are the more likely they are to be covered by the without prejudice protection.'²²

16 Ibid [19]–[20].

17 [2009] BLR 399.

18 Ibid [44].

19 Ibid [29].

20 *McFadden v Snow* (1952) 69 WN (NSW) 8.

21 *Hall v Pertemps Group Ltd* [2005] ADR LR 11/01, [14] (Lewison J).

22 Ibid.

The exceptions to the ‘without prejudice’ rule, as they stood in 1999, were set out by Robert Walker LJ in the England and Wales Court of Appeal in *Unilever Plc v Procter & Gamble Co*:

- (1) [W]hen the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible[.]
- (2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.
- (3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178,191 and his view on that point was not disapproved by this court on appeal [[1998] FSR 530].
- (4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other ‘unambiguous impropriety’ ... But this court has, in *Forster v Friedland* [(Unreported, Court of Appeal (Civil Division), Neill, Butler-Sloss and Hoffmann LLJ, 10 November 1992)] and *Fazil-Alizadeh v Nikbin* [(Unreported, Court of Appeal (Civil Division), Simon Brown LJ, 25 February 1993)] , warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.
- (5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* [(1889)] 23 QBD 335, 338, noted this exception but regarded it as limited to ‘the fact that such letters have been written and the dates at which they were written’. But, occasionally, fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay.
- (6) In *Muller’s case* [*Muller v Linsley & Mortimer* [1996] PNLR 74] (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.
- (7) The exception (or apparent exception) for an offer expressly made ‘without prejudice except as to costs’ was clearly recognised by this court in *Cutts v Head* [[1984] Ch 290], and by the House of Lords in the *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy ... There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach. In *Cutts v Head* [2984] Ch 290, 316 Fox LJ said:

what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to usage in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after

- (8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation[.]²³

In 2010 the United Kingdom Supreme Court further extended the exceptions to allow evidence of 'without prejudice' communications in construing a contract between the parties.²⁴

Circumstances in which Australian courts have recognised the common law exceptions include where the court would otherwise be misled,²⁵ for example, by excluding evidence which would rebut inferences upon which a party seeks to rely,²⁶ where a party seeks to rely on what was communicated during mediation in order to prove that settlement was reached,²⁷ or that a settlement that was reached should be set aside, for example, by reason of alleged misrepresentation,²⁸ oppression²⁹ or unconscionable conduct;³⁰ or where a party sues his or her solicitors over their conduct in the mediation;³¹ or where those solicitors join counsel and the mediator seeking contribution as joint tortfeasors.³²

The same approach has been applied when holding admissible communications within mediation alleged to constitute misleading and deceptive conduct in contravention of the *Trade Practices Act 1974* (Cth).³³ As Hill J put it:

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. A fortiori where the party suffering damage was not at all a party to the negotiation. The public policy to be found in Pt V of the *Trade Practices Act* is not to be rendered nugatory by permitting a

23 [2000] 1 WLR 2436, 2444–5, cited with approval by the House of Lords in *Ofulue v Bossert* [2009] 1 AC 990.

24 *Oceanbulk Shipping & Trading v TMT Asia* [2011] 1 AC 662.

25 *Pitts v Adney* [1961] NSW 535.

26 Ibid 539, cited in *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1988) 13 NSWLR 486, 487; *Trade Practices Commission v Arnotts* (1989) 88 ALR 69, 73. See also *McFadden v Snow* (1952) 69 WN (NSW) 8, 10.

27 *Barry v City West Water Limited* [2002] FCA 1214.

28 *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209, 225–6 [97]–[108].

29 *Pittorino v Meynert* [2002] WASC 76.

30 *Abriel v Australian Guarantee Corporation Limited* [2000] FCA 1198; *Commonwealth Development Bank of Australia Pty Limited v Cassegrain* [2002] NSWSC 965.

31 *Tapoohi v Lewenberg (No 2)* [2003] VSC 410.

32 Ibid.

33 Replaced by the *Competition and Consumer Act 2010* (Cth).

party to hide behind the fact that his or her conduct, which is misleading or deceptive conduct, occurred during the course of ‘without prejudice’ negotiations. A party can not, with impunity, engage in misleading or deceptive conduct resulting in loss to another under the cover of ‘without prejudice’ negotiations.³⁴

It is difficult to see how justice can be done when such matters are in issue unless all the evidence is available to the court. The High Court of Australia has reaffirmed that:

in a proceeding in which the ordinary rules of evidence apply, ‘without prejudice’ material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement. So also where what is in issue is the entry into an impugned agreement as a consequence of engagement in misleading and deceptive conduct by another party.³⁵

It is also difficult simply to brush aside as ‘satellite litigation’ the circumstances recognised at common law as exceptions to the ‘without prejudice’ rule, as if no issue of injustice warranting judicial remedy could ever arise in the course of mediation.

It therefore appears that, contrary to the policy of encouraging mediation, legislation such as section 53B, by placing parties in a worse position than in privately agreed mediation or bilateral negotiation, could have the opposite effect of discouraging resort to court-ordered mediation, at least by those who do not intend to act misleadingly, unconscionably or oppressively and by those who do not wish to be left without remedy against those who do.

It is hard to argue with the proposition that such misbehaviour should see the light of day, whether occurring in mediation or not. As John Locke put it in 1690: ‘Where-ever law ends, tyranny begins’.³⁶

IV THE EVIDENCE ACT 1995 (CTH) AND ITS STATE COUNTERPARTS

Following a comprehensive review of the law of evidence, the Law Reform Commission (now known as the Australian Law Reform Commission) recommended in 1985³⁷ and 1987³⁸ that the common law be codified in all matters of evidence, including without prejudice settlement negotiations. This led to the enactment of a statutory version of the ‘without prejudice’ rule in relation

34 *Re Quad Consulting Pty Ltd v David R Bleakley and Associates Pty Ltd* (1990) 98 ALR 659, 666; see also *Williams v Commonwealth Bank of Australia* [1999] NSWCA 345; *Rosebanner Pty Ltd v Energy Australia* (2009) 223 FLR 460.

35 *Harrington v Lowe* (1996) 190 CLR 311, [30], citing *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280, 1300; *Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd* (1990) 98 ALR 659.

36 John Locke, *Second Treatise of Government* (Cambridge University Press, first published 1690, 1988 ed) 400, cited in *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 48 [37] (Spender J).

37 Law Reform Commission, *Evidence*, Interim Report No 26 (1985) vol 2, app C, 285 [250]–[256].

38 Law Reform Commission, *Evidence*, Report No 38 (1987) [222]–[223].

to civil disputes, with a somewhat different list of exceptions, in section 131 of the *Evidence Act 1995* (Cth) and corresponding state and territory legislation.³⁹

Subsections (1) and (2) provide:

Exclusion of evidence of settlement negotiations

(1) Evidence is not to be adduced of:

- (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
- (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply if:

- (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or
- (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
- (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or
- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
- (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
- (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
- (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
- (h) the communication or document is relevant to determining liability for costs; or
- (i) making the communication, or preparing the document, affects a right of a person; or
- (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

³⁹ *Evidence Act 1995* (NSW) s 131; *Evidence Act 2008* (Vic) s 131; *Evidence Act 1929* (SA) s 67C; *Evidence Act 2001* (Tas) s 131; *Human Rights Commission Act 2005* (ACT) s 66(2); *Evidence (National Uniform Legislation Act) 2011* (NT) s 131. Note that the South Australian Act adopts a slightly different formulation from the other provisions. There is no corresponding statutory provision in Queensland, instead the common law privilege applies: Queensland Law Reform Commission, *A Review of the Uniform Evidence Acts*, Report No 60 (2005), 318 [7.333]. However, *Civil Proceedings Act 2011* (Qld) s 53 provides: 'Evidence of anything done or said, or an admission made, at an ADR process about the dispute is admissible at the trial of the dispute or in another civil proceeding ... only if all parties to the dispute agree.'

- (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

It has been suggested that section 131(2)(h), insofar as it operates outside court-ordered mediations, ‘constitutes an unnecessary and serious infringement of the confidentiality of the mediation process’; ‘that parties should be entitled to contract out’ of its provisions and that the subsection ‘serves no purpose that could not otherwise be achieved’, since ‘a party wishing to protect itself on the question of costs can, at the conclusion of an unsuccessful mediation, make a formal offer pursuant to relevant rules of court or a [Calderbank] offer’.⁴⁰

V LEGISLATIVE ENCROACHMENT UPON THE ‘WITHOUT PREJUDICE’ RULE AND EVIDENCE ACT EXCEPTIONS

In *Pinot Nominees Pty Ltd v Commissioner of Taxation*,⁴¹ a case in which offers of compromise made during mediation were held inadmissible on the question of costs, Siopis J reconciled the provisions of section 53B of the *Federal Court of Australia Act 1976* (Cth) with section 131(2)(h) of the *Evidence Act 1995* (Cth) on the basis that the latter applies to without prejudice communications other than those made during the course of a court-ordered mediation to which section 53B applies.⁴²

In *Pihiga Pty Ltd v Roche*,⁴³ a proceeding in the Federal Court of Australia to set aside, upon the ground of alleged misrepresentation, a settlement deed entered into following a non-court-ordered mediation, Lander J rejected an application by the respondent for an injunction to prevent evidence being given of what transpired at the mediation and any documents brought into existence for the mediation, finding:

- (i) ‘the common law without prejudice rule does not prevent [evidence being adduced] in circumstances where the applicants claim that a concluded compromise agreement has been reached in circumstances where they were misled’;⁴⁴
- (ii) where ‘without prejudice privilege is lost because of the exceptions at common law it cannot be maintained under the mediation agreement’;⁴⁵ and

40 Ian Hanger QC, ‘Confidentiality and Admissibility of Communications Made in the Course of Mediation’ (Paper presented at the Queensland Bar Association Mediator’s Conference, Gold Coast, August 2010) 8 <https://portal.barweb.com.au/Upload/FCK/Hanger%20AM%20QC%20Ian_Paper.pdf>.

41 (2009) 181 FCR 392 (*Pinot Nominees*).

42 *Ibid* 397 [30].

43 (2011) 278 ALR 209.

44 *Ibid* 225 [97].

45 *Ibid* 227 [111].

- (iii) 'A party is not entitled to avoid the consequences of ... the *Trade Practices Act 1974* (Cth) by relying on a contractual exclusionary provision'.⁴⁶

His Honour also found the proposed evidence admissible under the statutory exceptions in subsections 131(2)(f) and (i) of the *Evidence Act 1995* (Cth) and left it to the High Court to resolve the conflict between the limited evidentiary permissiveness of the *Evidence Act 1995* (Cth) section 131 and the outright prohibition of section 53B:

The respondents' counsel took me to s 53B of the Federal Court Act which applies when an order of the court has been made for a mediation by the court under s 53A. It has no direct application on this proceeding. He also referred me to State legislation which is in like terms. Section 53B provides that evidence of anything said or any admission made at a mediation is not admissible in any court whether exercising federal jurisdiction or not in any proceedings authorised by a law of the Commonwealth. It is in absolute terms and admits of no exceptions. He said that the section and the corresponding state legislation indicated the various Parliaments policy to the confidentiality of a mediation. He said that it would be curious if different rules applied depending upon whether the mediation was ordered by the court or not. This is not the time to embark on a construction of s 53B which, as I have said, does not govern the situation.

He also said the common law should be developed by reference to the policies evidence [sic] in the legislation enacted by those Parliaments and in the Evidence Act. Having regard to the state of the authorities to which I have referred, that is a matter for the High Court not for a Judge of this Court.⁴⁷

In NSW, as in *Pinot Nominees*, the limited evidentiary permissiveness of section 131 of the *Evidence Act 1995* (NSW) has been held to have been overridden by the more restrictive prohibitions applicable to court-ordered mediations in part 7B of the *Supreme Court Act 1970* (NSW)⁴⁸ and by the subsequently enacted provisions of part 4 of the *Civil Procedure Act 2005* (NSW), which replaced part 7B.⁴⁹ The Court of Appeal in Victoria has adopted a similar approach in finding that section 24A of the *Supreme Court Act 1986* (Vic) trumped section 131(2)(h) of the *Evidence Act 2008* (Vic).⁵⁰

Part 4 of the *Civil Procedure Act 2005* (NSW) renders inadmissible, in any proceedings before any court or other body, evidence of anything said or of any admission made in a court-ordered mediation⁵¹ and any document prepared for the purposes of, in the course of, or as a result of a court-ordered mediation,⁵² except:

46 Ibid 227 [112].

47 Ibid 227 [114]–[115].

48 See *Rajski v Tectran Corporation Pty Limited* [2003] NSWSC 476.

49 See *Azzi v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140.

50 *Forsyth v Sinclair (No 2)* (2010) 28 VR 635, [13]–[15].

51 *Civil Procedure Act 2005* (NSW) s 30(4)(a).

52 *Civil Procedure Act 2005* (NSW) s 30(4)(b).

- (a) with the consent of all concerned⁵³ or
- (b) in proceedings following a (permissible)⁵⁴ disclosure by the mediator designed to prevent or minimise the danger of injury to any person or damage to any property,⁵⁵ or
- (c) where, on an application for court orders to give effect to any settlement, evidence is called (including from the mediator) as to the fact of settlement and its substance.⁵⁶

In *Rajski v Tectran Corporation Pty Limited*,⁵⁷ a case concerning part 7B of the *Supreme Court Act 1970* (NSW), Palmer J 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 settlement; 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*. Pt 7B contains its own rules as to the evidentiary use which may be made of what is said and done in and for the purpose of settlement negotiations in a mediation under that Part and, in my view, those rules override the general provisions of s 131 of the *Evidence Act*.⁵⁸

Without using the expression ‘satellite litigation’, his Honour held that the purpose of the provisions of part 7B included avoiding the circumstance that mediation, rather than ‘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 [further] proceedings in court’.⁵⁹

In *Azzi v Volvo Car Australia Pty Ltd*,⁶⁰ a case concerning part 4 of the *Civil Procedure Act 2005* (NSW), the Court noted:

while the *Evidence Act* contains a general provision excluding evidence of settlement negotiations, with an exception to that general exclusion where the negotiations are relevant to costs, the *Civil Procedure Act*, s 30(4), is a more specific provision directed specifically to negotiations in a mediation session, excluding evidence of such negotiations, without any corresponding exception. When it applies, the later and more specific provision prevails over the more general one.⁶¹

53 *Civil Procedure Act 2005* (NSW) s 30(5)(a).

54 *Civil Procedure Act 2005* (NSW) s 31(c).

55 *Civil Procedure Act 2005* (NSW) s 30(5)(b).

56 *Civil Procedure Act 2005* (NSW) s 29(2).

57 [2003] NSWSC 476.

58 *Ibid* [16].

59 *Ibid* [11].

60 (2007) 71 NSWLR 140.

61 *Ibid* 145 [18].

The current regime has been described as unacceptable:

There is no justification for the multiple schemes associated with admissibility of matters which occur at an ADR process ... Ideally there should be one regime which codifies the admissibility of things said or done at all structured ADR processes.⁶²

Another example of the problems that can arise from a legislated mediation 'black hole' is the *California Evidence Code*, which goes even further than our section 53B by prohibiting evidence of what transpired in *any* mediation, not solely court-ordered mediation.⁶³

In finding that the *California Evidence Code* § 1119 precluded evidence in a legal malpractice action of private communications between attorney and client for the purpose of, in the course of, or pursuant to, a mediation, the California Supreme Court remarked:

The Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves ...

Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys.⁶⁴

In an attempt to address the problem but which would only have made it worse, a bill introduced into the California Legislative Assembly in February this year would have made communications between a lawyer and his or her client in mediation admissible in legal malpractice, breach of fiduciary duty or professional negligence proceedings by the client against the lawyer or in state bar disciplinary action against the lawyer, without enabling the lawyer to rely on other mediation communications (for example, between the mediator or the opposing counsel and the lawyer) by way of defence.⁶⁵ As one commentator put it: 'If you let in only selective mediation communications, it's completely unfair to the accused. If you let them all in, there's no more confidentiality.'⁶⁶

62 Anthony A Nolan SC and Michael O'Brien, 'Confidentiality in Mediations: A Work in Progress' (Paper presented at the Victoria Bar Alternative Dispute Resolution Committee, Melbourne, 12 May 2010) 25 [52]–[53] <<http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>>.

63 Cal Evid Code § 1119, 1120 (West 2011).

64 *Cassel v Superior Court*, 244 P 3d 1080, 1096 (Cal, 2011).

65 *Act to Amend Section 1120 of the Evidence Code, Relating to Evidence*, HR 2025, 2011-12 State Assemb, Reg Sess (Ca 2012).

66 Ron Kelly, *Threat to Mediation Confidentiality in California – Your Help Needed!* (13 March 2012) Mediate.com <<http://www.mediate.com/pfriendly.cfm?id=8551>>.

The unfairness was apparent and led to the bill being amended and referred to the California Law Revision Commission to report on the relationship between mediation confidentiality and attorney malpractice and misconduct.⁶⁷ As to the idea that ‘there’s no more confidentiality’, hence presumably discouraging resort to mediation, doubt has persisted over many years as to the need for a distinct mediation privilege to protect confidentiality in mediation:

Although most mediators assert that confidentiality is essential to the process, there is no data of which I am aware that supports this claim, and I am dubious that such data could be collected. Moreover, mediation has flourished without recognition of a privilege, most likely on assurance given by the parties and the mediator that they agree to keep mediation matters confidential, their awareness that attempts to use the fruits of mediation for litigation purposes are rare, and that courts, in appropriate instances, will accord mediation evidence Rule 408⁶⁸ and public policy-based protection.⁶⁹

In Australia, the NSW Court of Appeal, in finding that a solicitor acted properly in a mediation in putting pressure on the client to settle on best available terms, did not address and appears not to have been invited to address any question of inadmissibility of what transpired at the mediation.⁷⁰ Likewise, in the Queensland Legal Practice Tribunal, in disciplinary proceedings concerning the conduct of a barrister in mediation, no issue of inadmissibility of evidence of mediation communications appears to have been raised.⁷¹ In Victoria, an application to strike out a Supreme Court claim against a mediator was heard on the basis that, objections having been raised to the admissibility of the claimant’s affidavits, the parties consented to their admission for the purposes of the application. It is not apparent from the report whether the objections were based on a claim of mediation privilege.⁷²

67 *Act Relating to Mediation*, HR 2025, 2011-12 State Assemb, Reg Sess (Ca 2012).

68 *Fed R Evid* 408:

COMPROMISE OFFERS AND NEGOTIATIONS

(a) Prohibited Uses. Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim – except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

69 Eric D Green, ‘A Heretical View of the Mediation Privilege’ (1986) 2 *Ohio State Journal on Dispute Resolution* 1, 32 (arguing campaign to obtain blanket mediation privilege rests on ‘faulty logic, inadequate data, and shortsighted professional self-interest’), quoted in *Folb v Motion Picture Industry Pension & Health*, 16 F Supp 2d 1164, 1173 (CD Cal, 1998).

70 *Studer v Boettcher* [2000] NSWCA 263.

71 *Legal Services Commissioner v Mullins* [2006] QLPT 12.

72 *Tapoohi v Lewenberg (No 2)* [2003] VSC 410, [13].

VI A PROPOSED SOLUTION

In 2005 the Australian Law Reform Commission, in conjunction with the NSW and Victorian Law Reform Commissions, considered it reasonably well settled that evidence of matters discussed at mediation falls within section 131 and commented that:

[w]hile the section could be amended to adopt the terms of a mediation privilege as expressed in Acts such as the *Federal Court of Australia Act 1976* (Cth), in the absence of strong submissions suggesting that such action is necessary, it is the view of the Commissions that amendment of s 131 is unwarranted.⁷³

In February 2011 NADRAC strongly recommended the very opposite, namely that, at the Commonwealth level with which NADRAC is concerned, ADR communications in or for the purposes of ADR required by federal legislation or by an order of a federal court or tribunal should generally be inadmissible and confidential save by consent of the disputants or by leave of the court.⁷⁴ NADRAC considered:

There would be significant benefit in having uniform federal, state and territory legislation that clearly provides for the inadmissibility of ADR communications as the general rule, subject to leave being granted by a court in the public interest. In deciding whether leave should be given, a court or tribunal should be required to take into account:

- the general public interest in favour of preserving the confidentiality of ADR communications, and
- whether leave is being sought to advance a party's interests or rights with respect to a matter falling within an exception to confidentiality.⁷⁵

In other words, in order to eliminate mediation 'black holes' and to allow judges to continue to develop and apply exceptions to 'without prejudice' rule in the interests of justice, section 53B and all other statutory attempts to codify and override the common law rule (including the *Evidence Act 1995* (Cth) section 131 and its counterparts) should be replaced by such provisions.

In rejecting the 'blanket prohibition' approach to admissibility exemplified in section 53B and the 'limited list of exceptions' approach of the Evidence Acts and other legislation, the NADRAC recommendation would enable judges to strike the right balance between competing public interests by continuing, where appropriate, to protect the integrity of mediation and other ADR processes while at the same time avoiding injustice by granting leave, where appropriate, to introduce evidence of what happened. NADRAC recommended that the Commonwealth Attorney-General liaise with state and territory counterparts to encourage them to consider introducing uniform admissibility provisions across Australia.⁷⁶

The approach recommended by NADRAC reflects that adopted in 2010 in Victoria in relation to the limited class of judicial resolution conferences:

⁷³ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 551 [15.179].

⁷⁴ NADRAC, above n 8, 69 [4.7.2]–[4.7.3].

⁷⁵ *Ibid* 67 [4.6.2].

⁷⁶ *Ibid* 70 [4.7.8].

If a court orders that a judicial resolution conference be conducted in relation to a civil proceeding, no evidence shall be admitted at the hearing of any proceeding of anything said or done by any person in the course of the conduct of the judicial resolution conference unless the court otherwise orders, having regard to the interests of justice and fairness.⁷⁷

In Hong Kong, the *Mediation Ordinance* gazetted on 21 June 2012 achieves, in relation to mediations generally, the result proposed by NADRAC, by providing that mediation communications are confidential and may be disclosed or admitted into evidence only with the prior leave of the Court or tribunal, which must take into account, *inter alia*, the public interest or the interests of justice.⁷⁸

It would be unethical for a lawyer to recommend court-ordered mediation to enable a client to engage in improper conduct with impunity. Yet avoiding court-ordered mediation may enable clients to invoke the court's assistance when the other party engages in such conduct. It is to be hoped that state and federal governments accept NADRAC's recommendations and emulate the Hong Kong legislature before too long.

⁷⁷ *Civil Procedure Act 2010* (Vic) s 67.

⁷⁸ *Mediation Ordinance* (Hong Kong) ss 8–10.