

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
PANEL DISCUSSION – ‘PRIVILEGE, CONFIDENTIALITY AND
PRIVACY IN THE ADR FORUM’
LAW SOCIETY OF NSW
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1. It’s a pleasure to have been invited to join Tania, Robert, Joanne, Phillip and Mary to discuss some of the complex issues that can arise in the ADR setting.

2. We’re all well aware of the extent to which ADR has become embedded in the formal justice system over the course of the past few decades. As many of you will know, there is currently a New South Wales Law Reform Commission inquiry into the framework for dispute resolution in this State. The object of the inquiry is to recommend, where appropriate, a consistent model for ADR across the statutory landscape. The consultation paper that was released in April this year refers to the “ADR Revolution”, which is probably a fairly apt description.¹

3. According to the paper, there are now around 50 statutes in New South Wales alone that provide for some form of ADR in a variety of different circumstances. These range from well-trodden provisions in the *Civil Procedure Act*, through to

* I express thanks to my Research Director, Haydn Flack, for his assistance in the preparation of these remarks. These remarks differ somewhat from the presentation as part of the panel discussion. Check against delivery.

¹ New South Wales Law Reform Commission, *Dispute resolution: frameworks in New South Wales* (Consultation Paper 16, April 2014).

more obscure regimes such as that in the *Entertainment Industry Act 2013*, which is a piece of legislation that I should confess to not having been aware of.

RISKS AND BENEFITS OF DISCLOSURE

4. The topics on tonight's program will only increase in significance as ADR is progressively viewed as an ordinary step to be expected as part of the formal justice system. It is however somewhat surprising that core issues like privilege and confidentiality continue to pose difficult questions after decades of ADR.
5. I've been given what is probably the simplest task of the evening: to say a few words about the risks and benefits of disclosure in ADR. In practice, there are often complex questions of strategy in determining whether to disclose a certain fact or document during the course of mediation. However, like most matters in relation to ADR practice, it's almost impossible to offer definitive advice, beyond agreeing that there are indeed risks and benefits to disclosure in that setting.
6. The obvious risk, of course, is weakness. Disclosing flaws in your case during mediation exposes chinks in your armour that can be exploited by the opposing party. That is to be expected. As we know, while there may be confidentiality obligations under the relevant statute, as a term of the mediation agreement or as a matter of privilege, this will not prevent derivative use of information. The use made of details gleaned during a mediation can vary greatly; from a formal

notice to produce scenario – I recall only to well the course taken in *AWA v Daniels*² – through to simply having a better picture of the flaws in your case.

7. Unfortunately, the *benefits* that can come from disclosure in mediation are also related to exposing weakness. The central benefit of disclosure is self-evident: parties must be able to satisfy themselves that the case presented by those across the negotiating table is being put forward warts and all. If people are negotiating in circumstances where they believe the other side is giving a fair appraisal of their case, the parties are much more likely to reach a consensus.

8. Questions continue to be raised about the precise content of the concept of good faith. Reference is often made to the three notions of good faith in relation to contract outlined many years ago by Sir Anthony Mason in the *Law Quarterly Review*. The notions are an obligation to co-operate to achieve the contractual objects, compliance with honest standards of conduct, and meeting standards of conduct that are reasonable having regard to the interests of the parties.³ To put it simply, I would also suggest that a need for a certain degree of trust rests at the core of good faith. One aspect of achieving a necessary level of trust is by each party ventilating their case in such a way that allows the other side to assess the competing positions. Appropriate disclosure is part of that process.

² See *AWA Ltd v Daniels* (1992) 7 ACSR 463 referring to *AWA Ltd v Daniels* (Unreported, Supreme Court, 18 March 1992).

³ See, for example, *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 (2013) 29 BCL 329 at [145] and *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268; (2010) 15 BPR 28,563 at [146] referring to A F Mason “Contract, Good Faith and Equitable Standards in Fair Dealing” (2000) 116 *Law Quarterly Review* 66 at 69.

9. Mediators and practitioners obviously have a role to play in fostering trust between the parties. For mediators, this involves managing the discussion, as well as assisting the parties to constructively identify the issues in dispute and options for settlement. The role of practitioners is perhaps more complicated. The Law Society's professional standards for practitioners in mediation describe the practitioner's role as being to participate in a non-adversarial manner; they direct that those who don't understand this are an impediment to mediation.⁴ While this may well be true, it must be acknowledged that there are challenges for practitioners when transitioning from an advocate to an advisor in mediation.
10. What is important is that legal practitioners work – to the extent possible in the particular circumstances – to build trust with opposing practitioners and between the parties. In a recent paper given by Tania, she referred to a study in Arizona and Missouri which found that when faced with a client's request to engage in a fraudulent settlement negotiation, 30% of respondents agreed to do so in one of two situations.⁵ Another fairly recent paper provides anecdotal comments, like the Arizona mediation instructor who advises his or her students to not believe “anything a lawyer tells you during a mediation.”⁶ This is not to suggest that these are the prevailing views or practices in this country. However, it does illustrate that lawyers have work to do in order to build trust during mediations.

⁴ Law Society of New South Wales, “Professional Standards for Legal Practitioners in Mediation” in *Dispute Resolution Kit* (December 2012) available at <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/675694.pdf>

⁵ A Hinshaw and J K Alberts, “Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics” (2011) 16 *Harvard Negotiation Law Review* 95.

⁶ D Peters, “When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal” (2007) 1 *Journal of Dispute Resolution* 119, 120.

11. The degree of trust between parties will also be affected by the timing of the mediation. I would broadly divide mediations into three classes: first, where at some stage of a dispute the parties voluntarily agree to mediate; second, where parties participate in ADR as a result of a mediation clause in an agreement; and third, compulsory mediation, either before filing proceedings or by a court order. It is really only the first category which is completely voluntary. The degree to which parties have elected to come to mediation – and perhaps in a related sense, the period of time over which the proceedings have extended – will inform the prevailing level of trust that exists between the parties.

12. As a matter of practice, a balance has to be struck in relation to disclosure. Harnessing the benefits of mediation requires an appropriate degree of trust between opposing parties and practitioners. Trust, in turn, requires a level of disclosure to demonstrate to those across the table that proposed settlement terms reflect the relative strengths and weaknesses of the competing positions. Determining where that balance lies and precisely how many cards should be turned face up on the table will very much depend on the circumstances.

ADVOCATES' IMMUNITY

13. Having said that, I thought at this point I would deviate slightly from my assigned task and briefly address several other issues of interest regarding ADR. I hope that in doing so I don't encroach on the territory that will be covered by others. The first matter concerns the extent that courts can step behind mediations.

14. I believe Joanne may address issues of confidentiality and without prejudice privilege in relation to mediation, and circumstances where the rule does not apply. In this respect, there are many fascinating questions regarding when a court can step behind a mediation. For instance, the 2011 decision of *Pihiga Pty Ltd v Roche* concerned an application to declare a settlement deed void on the basis of misleading or deceptive conduct; the settlement deed had been entered into following a consensual mediation.⁷ At the conclusion of his judgment, Justice Lander made a number of passing comments querying how s 53B of the *Federal Court Act* – which makes inadmissible anything said during a court-ordered mediation – might sit with exceptions to the without prejudice rule.⁸ It is interesting to consider if similar issues might arise in relation to equivalent provision under the *Civil Procedure Act*.
15. However, I want to take one step further down that path and query how mediation and advocates' immunity interact. The general principles regarding advocates' immunity are well known.⁹ There are, however, several recent first instance decisions that consider the scope of the immunity in relation to ADR.
16. The first case is the 2012 decision of Justice Bell in the Victorian Supreme Court in the matter of *Goddard Elliott v Fritsch*.¹⁰ While admittedly it is somewhat

⁷ *Pihiga Pty Ltd v Roche* [2011] FCA 240; (2011) 278 ALR 209.

⁸ *Pihiga Pty Ltd v Roche* [2011] FCA 240; (2011) 278 ALR 209 at [114]-[115].

⁹ *Giannarelli v Wraith* (1988) 165 CLR 543; *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR

¹⁰ *Goddard Elliott v Fritsch* [2012] VSC 87.

removed from the mediation context, it addresses in detail a range of issues concerning the immunity. The decision, which covers more than 300 pages, involved a claim for outstanding legal fees, as well as a counterclaim on bases including negligence, breach of fiduciary duties and misleading or deceptive conduct. Justice Bell considered the immunity at length. In particular, he addressed how advocates' immunity interacts with statutory claims under the *Fair Trading Act*, and by extension the Australian Consumer Law. He held that the immunity is a general immunity against suit, and the legislation (in that case s 9 of the *Fair Trading Act*) did not manifestly intend to abrogate the immunity.¹¹

17. Perhaps more interesting is the lengthy discussion of finality – the rationale which underpins advocates' immunity – and how that sits with cases which are settled.¹² Justice Bell describes the argument that, and I quote

*“...if a case is settled without a hearing and the court does not pronounce a judgment on the issues, the public policy consideration of ensuring finality and preventing re-litigation of matters that have been judicially determined is not engaged.”*¹³

As he then notes, the counter argument is there shouldn't be any difference between cases of negligence settled without litigation, and those settled in litigation without a court determining the issues. Ultimately, of course, in respect

¹¹ *Goddard Elliott v Fritsch* [2012] VSC 87 at [834]-[839].

¹² *Goddard Elliott v Fritsch* [2012] VSC 87 at [798]-[816].

¹³ *Goddard Elliott v Fritsch* [2012] VSC 87 at [807].

of advocates' immunity, reference should be had to the High Court's statements in cases such as *D'Orta-Ekenaike*,¹⁴ as well as intermediate appellate guidance, including the 2012 Court of Appeal decision in *Donnellan v Woodland*.¹⁵

18. Some of you may already have seen a very recent decision delivered by Justice Davies in mid June, which directly concerns advocates' immunity in the context of mediation. *Stillman v Rushbourne* involved a claim brought by a former client against a firm of solicitors in relation to allegedly negligent advice given at mediation.¹⁶ The plaintiff claimed that to his detriment, the solicitors strongly urged him to settle proceedings at mediation. The terms of settlement included that judgment be entered by consent against the plaintiff and his company.
19. Justice Davies determined the issue of advocates' immunity on a strike out application. He ultimately held that while the negligence was out of court conduct, it led to the decision to settle the case which resulted in the final judgment pursuant to the deed. Relying on *Donnellan v Woodland*, he indicated that advice leading to settlement is work leading to the conduct of the case in court, and further, the fact that advice was given in advance of the hearing – such as at mediation – is irrelevant if it results in the resolution of the proceedings in one of the categories identified by the joint judgment in *D'Orta*.¹⁷

¹⁴ *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1.

¹⁵ *Donnellan v Woodland* [2012] NSWCA 433.

¹⁶ *Stillman v Rushbourne* [2014] NSWSC 730.

¹⁷ *Stillman v Rushbourne* [2014] NSWSC 730 at [36].

20. At present, there appear to be continuing questions about the scope of advocates' immunity. It seems likely that some of those issues will concern the immunity in an ADR context. I'm certainly aware of several disputes in this space that are presently before the Court of Appeal; and I wouldn't want to be misinterpreted as offering any concluded views. However, I will pick up Justice Davies' comment in *Stillman* that the difficulty in dealing with cases involving the immunity is identifying exactly what out of court work attracts the protection.¹⁸

GOOD FAITH

21. There are two further issues that I want to mention very briefly. The first is the concept of good faith, which I understand Robert will be discussing very shortly.

22. In recent years courts have given further substance to the notion of good faith. I am thinking in particular of decisions like *United Group Rail* and *Macquarie International Health Clinic* in our Court of Appeal,¹⁹ and *Strzelecki Holdings* in the Western Australia Court of Appeal.²⁰ However, the vast majority of recent case law concerning good faith has obviously arisen in the area of enterprise bargaining, and the specific good faith requirements under the *Fair Work Act*.²¹

23. That said, significant decisions in the industrial space – such as Justice Flick's 2012 judgment in *Endeavour Coal* – draw heavily on the general common law

¹⁸ *Stillman v Rushbourne* [2014] NSWSC 730 at [21].

¹⁹ *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177 ; (2009) 74 NSWLR 618; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268; (2010) 15 BPR 28,563.

²⁰ *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; (2010) 41 WAR 318.

²¹ *Fair Work Act 2009* (Cth) s 228.

understanding of good faith.²² In *Endeavour*, emphasis is placed on the fact that while parties are not required to put self-interest aside, they need to keep an open mind and cannot simply sit mute at the negotiating table.²³ As Justice Flick aptly puts it, you cannot just adopt the role of a “disinterested suitor”.²⁴ This of course raises questions about the extent to which a party may need to make counter offers, especially if they believe their case is particularly strong.

24. A further interesting issue is the extent to which good faith obligations are enforceable in a court-ordered mediation. As I alluded to earlier, section 30(4) of the *Civil Procedure Act* makes inadmissible anything said, any admission made, or any document prepared for or during a court-ordered mediation. This provision would seem to make it difficult to adduce evidence in order to establish a breach of the obligation under section 27 to participate in mediation in good faith; although I’m not aware of any recent decisions addressing how the two provisions might interact.²⁵ In this regard, there may well be issues as to the enforceability of good faith obligations in court-ordered mediation, as compared to the first two classes of voluntary mediation which I referred to.

25. Other questions could well be raised about the operation of Part 4 of the *Civil Procedure Act* regarding mediation. For instance, section 29(2) provides an

²² *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764; (2012) 206 FCR 576.

²³ *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764; (2012) 206 FCR 576 at [34]-[35].

²⁴ *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764; (2012) 206 FCR 576 at [35].

²⁵ Note, however, *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 476 at [20] in relation to the previous ss 100L and 110P of the *Supreme Court Act 1970* (NSW).

exception to the protection afforded by section 30. It allows a party to call evidence – including from the mediator or someone engaged in the mediation – as to the fact that an agreement was reached and its substance. However, one might query precisely how sections 29(2) and 30(4) are meant to interact. Say, for instance, a party makes an application under section 29 seeking to adduce evidence that an agreement was reached during mediation and the terms of that agreement. To what extent can the opposing party lead evidence of the contents of the mediation? Obviously, they might seek to prove an agreement was not reached. However, to take the example further, could they adduce evidence to establish that while an agreement was reached, it was formed on the basis of misleading or deceptive conduct? Or perhaps one step even further, that any agreement reached was void *ab initio* on the basis of fraud.²⁶

26. These are to name just a few of the fascinating questions that can be raised in relation to the procedure which govern court-ordered mediations.

LAWYERS IN MEDIATION

27. The final issue that I want to mention is probably best phrased as a question: might additional benefits come from conducting a greater number of mediations without legal representatives in the room? In New South Wales, a variety of provisions address representation in ADR processes; from generic provisions such as those in the UCPR which allow a party to be accompanied by a legal

²⁶ In relation to the application of s 29(2), see, for example, *Owners Corporation Strata Plan 62285 v Betona Corporation (NSW) Pty Ltd* [2006] NSWSC 216.

representative unless the mediator orders otherwise,²⁷ to others which require leave to be given before a party can be represented by any other person.²⁸

28. Direct discussions between parties in mediation in the absence of their lawyers will obviously not be suitable in every case. In many instances, significant power imbalances will make direct facilitated negotiations inappropriate. What is just as likely (and to bring the discussion back to disclosure), is that many practitioners would be wringing their hands outside the mediation room about the potential for sensitive information to be revealed by a client in a moment of indiscretion. Despite this, in my experience remarkable results can be produced by an expert mediator assisting willing and fairly balanced parties. We should encourage parties to be actively involved in mediation and sometimes, where it is appropriate, to go it alone. This is an important aspect of ensuring that ADR continues to assist parties to resolve disputes in a non-adversarial forum.

CONCLUSION

29. And now I should let you hear from Robert, Joanne, Phillip and Mary. As I've said, disclosure in the ADR setting will involve questions of strategy which will almost entirely be dependant on the particular circumstances of the case. Practitioners will need to weigh up the possible disadvantages of exposing the weaknesses in their case, alongside the potential for the other side to be more amenable to settlement if they know that the respective cases are being

²⁷ Uniform Civil Procedure Rules 2005 (NSW) r 20.6(b). Representation is discussed in New South Wales Law Reform Commission, *Dispute resolution: frameworks in New South Wales* (Consultation Paper 16, April 2014) at 45-46.

²⁸ *Anti-Discrimination Act 1977* (NSW) s 91B.

presented fairly and accurately. Trust – between opposing practitioners and the parties themselves – will to a considerable extent dictate the likelihood of successfully negotiating settlement during mediation. An appropriate degree of disclosure across the negotiating table will be important in building that trust.