

# KELLEHERS AUSTRALIA

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## In-House Memo

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### **Confidentiality in Mediation**

Parties must be careful not to disadvantage another party in proceedings, as VCAT may dismiss or strike them out or determine the proceedings in favour of the applicant (s78, VCAT Act). They must also be cautious not to prejudice or embarrass particular proceedings as they may be found in contempt (s137(1)(f), VCAT Act).

A breach of the duty of confidentiality may also result in various remedies for other parties. This generally requires the other party to suffer detriment from the breach. Courts have broadly interpreted what may amount to detriment, which does not need to be financial.

The Victorian Supreme Court (Emerton J), in 2011, considered the principles of confidentiality in mediation<sup>1</sup>:

*“The question whether there was the necessary quality of confidentiality was very much informed by the terms of the mediation agreement and the circumstances of the mediation”<sup>2</sup>*

Her Honour concluded that:

*“the circumstances in which ... information is divulged and, in particular, the understanding of the persons to whom it was divulged that it be kept confidential, may give rise to an obligation of confidentiality. A compulsory conference held for the purposes of enabling the parties to “lay bare their souls” in order to facilitate conciliation and resolution of the dispute is most likely to import an understanding by the participants that anything said is in confidence”.*

In this case, whilst acknowledged that no mediation agreement existed, the Court found that, in that case, an obligation of confidentiality extended to the ‘movements in negotiation’ and ‘steps by which settlement was reached’.

Exceptions to confidentiality all relate to cases where ‘there is either consent or where the use of the documents is necessary in the interests of justice’<sup>3</sup>.

### **VCAT**

The circumstances of confidentiality within a VCAT mediation are also somewhat imprecise.

### **Legislation, Code of Conduct and Practice Notes**

Ss85 and 92 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (‘VCAT Act’) prohibit admission of evidence at the ultimate hearing, of things said or done in the course of a compulsory conference or VCAT-ordered mediation.

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<sup>1</sup> *West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd* [2011] VSC 287.

<sup>2</sup> *Ibid*, per Emerton J at [15].

<sup>3</sup> *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] England and Wales High Court (Technology and Construction Court) 1102 (TCC), per Ramsey J.

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Cl.7 of the VCAT *Mediator Code of Conduct* applies s92 VCAT Act. It notes that the mediator's duty of confidentiality extends to anything discussed in a private session, as well as the affairs of a person acquired in the performance of functions under the VCAT Act.

VCAT Practice Note 1 '*Common Procedures*' notes, under the heading '*Can I make an audio or video recording of the hearing?*', that:

*'Due to the confidential nature of discussions that may take place, mediations and compulsory conferences are not usually recorded.'*

VCAT Practice Note 4 '*Alternative Dispute Resolutions*' includes, within the heading '*Is a compulsory conference or mediation confidential?*', the observation that that:

*'parties ... may be asked to sign a confidentiality undertaking.'*

It also notes that the Tribunal may make orders as to confidentiality. However, it does not impose any duties of confidentiality upon parties or mediator. Further, it does not cover the circumstance where no orders are made and no confidentiality agreement is signed. Under the heading '*What happens in a compulsory conference?*', the Note states that:

*'[a]s in mediation, the discussions will be conducted on a "without prejudice" basis – meaning that a settlement offer which is not accepted cannot be disclosed to the Tribunal at the hearing, and is confidential.'*

Notably, this only refers to the settlement offer and is silent as to discussions during mediation.

## **VCAT decisions**

Deputy President Gibson in *Beaver v Indigo SC*<sup>4</sup> referred to the:

*"potential for the parties to identify their real concerns, and possibly narrow the issues in dispute, in the confidential environment of a mediation"*<sup>5</sup>

Dr Mainwaring in *Oroszvary Architects Pty Ltd v Melbourne CC*<sup>6</sup> remarked that 'the proceedings of the Tribunal at mediation are confidential', but did not indicate whether an express confidentiality clause was in place in the particular case.

In *Gude v Stephens (Domestic Building)*<sup>7</sup>, Aird DP stated that:

*'[t]o hear evidence about what transpired at a mediation, and to be asked to determine the reasons that settlement was not achieved, undermines the whole objective of mediation – to provide a confidential, without prejudice environment in which parties can freely discuss the issues in dispute.'*

However, again, there was no statement as to whether any express confidentiality clause was in place.

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<sup>4</sup> [2008] VCAT 740

<sup>5</sup> *ibid*, at [13]

<sup>6</sup> [2007] VCAT 1372

<sup>7</sup> [2007] VCAT 810

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## Conclusion

The 'without prejudice' principle of mediation is vital to ensuring the open and genuine participation of parties to litigation. While information disclosed at mediation is generally inadmissible as evidence in proceedings, the confidentiality of a mediation will actually depend on a number of factors. In the absence of any specific agreement, confidentiality may be implied by the nature and circumstances of the mediation itself.

Protecting the confidentiality of a mediation is best secured by ensuring this is agreed at the outset and, where possible, confirmed in writing. Agreement needs to cover not only the confidentiality of settlement offers discussed, but whether confidentiality extends to a broader ambit of matters or indeed all matters.

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IN-HOUSE ONLY

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