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# ADR: the New Zealand Government takes it seriously

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# ADR bulletin

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**New perspectives in ADR**

## ADR: the New Zealand Government takes it seriously

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**SPECIAL ISSUE on  
ADR in NEW ZEALAND**

This special edition of the *ADR Bulletin* explores some of the diverse directions of ADR in New Zealand. However, there are common threads. The three main articles (on the mediation service set up under the *Employment Relations Act 2000* (NZ), dispute system design across a primary industry and restorative justice initiatives) highlight a significant trend. Not only do they reflect thinking that goes beyond conventional and habitual responses to conflict and disputes, and concentrate on questions such as: When is the best time to attempt resolution? What underlies the conflict? How is it best resolved? What cultural factors are brought to disputes? What does a successful resolution look like? They also reflect that much of this thinking is happening at the governmental level.

Particularly notable is the discernible movement within the Government to at least ask whether mediation and ADR might be appropriate. This signifies a fundamental appreciation that most disputes are resolved. It is just a question of how and when — and at what cost. While we, as ADR advocates, understand that cost savings are but one potential benefit, it is naïve to think that savings on the bottom line don't sharpen the focus — not least that of the Government which ultimately bears much cost for dispute 'disposal' through the existing court infrastructure.

Our current (Labour) Government has recently shown support for ADR in a number of different areas. This is against a backdrop of mediation or other ADR processes being incorporated in statute over the last 20 years. Claire Baylis has identified 'over 30 statutes that contain some form of mediation or conciliation model': Baylis C 'Reviewing statutory models of mediation/conciliation in New Zealand: three conclusions' (1999) 30 VUWLR 279.

Some of these have ADR processes as a central — and effectively mandated — plank of dispute resolution (for example, the *Residential Tenancies Act 1986* (NZ) and the *Employment Relations Act 2000* (NZ)). Others provide for processes that pay lip service to mediation, but stipulate a decision making process. For example, the *Fire Service Act 1975* (NZ) prescribes the appointment of a rural fire mediator 'to investigate and determine' matters, with their 'decision' being final and binding.

The most recent — and significant — areas of legislative intervention are the systems set up under the *Employment Relations Act* (discussed in this issue) and the fledgling Weathertight Homes Resolution Service. The latter is a particularly interesting development from an ADR perspective.

By way of background, a festering sore was exposed last year in our building industry caused by rotting and leaking homes built in the last decade. Despite widely differing estimates of the extent of damage and the number of homes involved, there



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has been little question that the problems are far reaching. Clear evidence of widespread failure in the building industry and the associated regulatory regime propelled the 'leaky homes' issue to the political level: Jeff Gamlin *National Business Review* (NZ) 11 October 2002.

Questions were raised about the Government's responsibility and liability in the saga. Facing financial risk, it was expected to step in and do something. But exactly what to do was the difficulty as the crisis threw up a quagmire of issues for the legal and construction industry, including limitation periods, contractors gone 'bust', multiple potential respondents and so on.

The response has been the Weathertight Homes Resolution Service (the Service) — set up under the Internal Affairs Department pursuant to a piece of purposive legislation, the *Weathertight Homes Resolution Act 2002* (NZ). (Note the name of the new service is a lovely reframe!)

The Service aims to provide 'speedy, flexible and cost effective processes' for assessment and resolution of claims relating to the leaks. After an assessment process which will determine eligibility against defined criteria, mediation will be offered to the parties. If mediation is not accepted, compulsory adjudication will follow.

It is very new, with case managers appointed just before Christmas 2002, a panel of 15 mediators appointed in January 2003 (and due to start mediations shortly) and an adjudication panel being set up now. Fees are paid — but at between \$200 (for mediation) and \$400 (for adjudication) they compare most favourably to private mediation and/or arbitration.

This service departs from other statutory mediation systems in this country on two notable fronts. First, it is not seen as lasting for an indefinite period. Second, it has put a premium on its mediators being expert in the mediation process (rather than the building industry per se).

Senior mediators from NZ's two professional bodies (LEADR NZ and the Arbitrators and Mediators

Institute of NZ (AMINZ)) were invited to apply for contracts to do a set number of mediations within a limited period. The writers' understanding is that this not only allowed the designers confidence of expertise in the process but also gave them the back up of relevant professional codes and disciplinary processes. This is in contrast to the make up of the other specialist statutory mediation or ADR panels which frequently prioritise expertise in the relevant subject area over dispute resolution expertise.

Both the Government and those in private mediation practice will follow with interest the effectiveness of this service — it will provide one lead for future development of ADR in a number of spheres.

Mediation is also being considered on a broader policy scale in reviews of both our Family Court and our civil courts. The Law Commission (our publicly funded, independent body that looks at areas of law reform) is at different stages of review of the processes within the Family Court and the courts in general.

Arguably, the Law Commission is giving us a gentle nudge in the direction of ADR at the starting blocks. The names of the papers (available at <www.lawcom.govt.nz>) themselves indicate an approach that is in tune with ADR principles: *Access to Justice* and *Seeking Solutions* in the case of the general Civil Court review and *Family Court Dispute Resolution* (which in itself is suggestive of a consensual as opposed to adversarial traditional court process) in the family arena.

In terms of the review of the Family Court, the Commission's report, following public submissions on a discussion paper, is expected by the end of March 2003. The discussion paper recognised that while 'mediation' is already built into the Family Court system, the mediation process followed, while often valuable, is not what many professional mediators would call 'mediation'. Rather it is carried out by judges, usually completed within 1 to 1½ hours and is more proximate to a 'settlement conference' than a client



centred mediation process. A number of those within the family arena recognise the potential benefits of the latter process and it is expected that some thought will be given to this in the upcoming report.

*Seeking Solutions* is the second stage of an overarching review of the court system in NZ. It discusses the issues that arose from the first discussion document called *Striking the Balance* which focused on access to justice and how well the current court system works. This second document raises a number of options across a wide range of areas. ADR is clearly in the frame with recognition in the paper of some of the advantages of avoiding trial. This question is raised as to the value (or risk) of integrating mediation into our civil court system, which leads to the next question: if the answer is yes, how? And the paper begins to explore possible options; for example, a State funded community ADR service or court ordered mediation.

A new research initiative underpins this policy paper. The Department for Courts has, in the last week of January 2003, approved a relatively extensive budget for a commissioned program of research looking at ADR in civil cases. The use of ADR has been promoted within civil case management guidelines for five years, but to advance further development more empirical evidence of its real benefits — for courts and parties — is sought. The research will look at how and why cases settle, what effect ADR currently has in this process, what the barriers for use might be and what quality assurance frameworks currently operate.

A further (linked) trend within this country seems to be towards self-resolution. Academic discussion is increasingly looking at dispute systems design and conflict management rather than dispute resolution. Some practitioners, anecdotally, report the same. Geoff Sharp, a commercial mediator who has written for this issue, predicts that within 5 to 10 years we may see a seismic shift and a genuine fall off of third party interventions as we know them as parties approach conflict

holistically and internally. Indeed, both the articles on the mediation service and disputes systems design in the Fisheries Department in this issue point this way. They provide clear messages that the Government, too, is seeking to prevent conflict — or resolve it at the lowest possible level.

Cumulatively, the direct and indirect exploration and use of mediation and ADR indicated here suggests a groundswell of awareness — both of the processes and the benefits they offer. That the Government is focusing on it so resolutely is encouraging. We just sound one note of warning — there is some risk. Some of our legislation contains confusing signals, evidence that legislation has been drafted without much recourse to the particular nature of the disputes or even knowledge about the fundamental differences in some of the ADR processes. This has led to inconsistency and confusion over definitions and labels — to name but one area. We are heartened by the fact that ADR experts were called on to help design the system for the Weathertight Homes Resolution Service. We are also pleased that our professional bodies are contributing to the debate and will look to influence formulation of principal and further legislation. This should ensure that as mediation and ADR develop — at all levels — the basic integrity of the various processes has the best chance of being maintained. ●

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