AMINZ CONFERENCE 2025

MEDIATION IN AOTEAROA NEW ZEALAND: VALUE, SUCCESSES, OPPORTUNITIES

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Tēnā koutou, tēnā koutou, tēnā koutou katoa,

1. I begin in the Sinai, and will end where the sea glistens like greenstone.

2. The Sinai peninsula can be baking hot, and freezing cold. It is arid, and beautiful. Between 1956 and 1974 it was the scene of extensive, appalling slaughter, as the theatre for wars between Israel and Egypt. It was drenched in misery and rage. Then, as now nearby, humanity's worst instincts held sway.

3. Mediation played a key role in ending war in the Sinai. The 1978 Camp David meetings were essentially a 13-day mediation between Israel and Egypt.

4. The Camp David meetings were mediated by US President Jimmy Carter. Carter faced enormous challenges. The issues were perceived to be hopelessly intractable. Menachem Begin and Anwar Sadat, the leaders of Israel and Egypt, were proud, stubborn, men. Both had histories of violence. Both were beholden to domestic and international constituencies that opposed peace.

5. The Camp David meetings had many hallmarks that we know so well from far lesser mediations. There was grandstanding, there were unreasonable demands, there were personality clashes, there were repeated walk-out threats. There was a pervasive sense that agreement was impossible.

6. Carter used tools that we know well too. He created an environment conducive to dialogue, he had private and plenary sessions, he re-framed, he modelled courtesy, he appealed to the leaders' better natures, he reality tested, and he encouraged creativity in the generation of solutions. He was persistent, against the apparent odds. Carter also had the flexibility and wisdom to change approach as required. The personal chemistry between Begin and Sadat was so poor that, for the last 10 days, Carter kept them apart. Instead, the President of the United Sates shuttled between them from villa to villa.

7. Of note, before Camp David, Secretary of State Cyrus Vance, Carter's key advisor, had in turn taken advice from one of the heroes of the mediation world, Roger Fisher, of "Getting to Yes" fame.

8. The Camp David meetings resulted in the Camp David Accords, an imperfect, but durable, peace treaty between Israel and Egypt, that still holds today. Begin and Sadat were awarded the Nobel Peace Prize. Carter will be judged by history as a great peace-builder. Through his efforts, and despite the horrors nearby, there is no more war in the Sinai.

9. I began in the Sinai because it is an exemplar of the significance of mediation. Mediation is no-one's little brother. Mediation is not alternative dispute resolution. It is not the easy option. Mediation is how the most intractable issues can be resolved. We mediators, we at AMINZ, we dispute resolvers, need to own that. We need to be proud of, promote, and reflect, the *mana* of mediation. This is not about individuals and their achievements, significant as some have been. It is about the place of the process in the dispute resolution pantheon.

10. Let's stay in the 70s, but come home. Modern mediation in New Zealand arguably started in industrial relations. An Industrial Mediation Service was set up in 1970. And that was at a time when industrial relations here were a fraught, macho, and aggressive world, bestrode by the likes of Rob Muldoon and Blue Kennedy. From there, and

following international trends, mediation spread into other fields - notably family law via the Family Proceedings Act 1980, and environmental law through the Resource Management Act 1991.

11. From the 1990s mediation spread into commercial litigation, particularly in construction and insurance disputes. There were some early pioneers who deserve particular credit, including: Warren Sowerby, Geoff Sharp, Miriam Dean KC and Deb Clapshaw. They were knocking on doors that were not always easy to open. Their perseverance, and skill, resonate in the popularity of commercial mediation today.

12. Warren was involved in major mediations in the 90s that gained press attention. These included: one that resolved significant issues for Air New Zealand, and another that resulted in the creation of the Viaduct America's Cup village.

13. I was counsel in one of Geoff's early mediations in 2000, a large construction dispute that he handled with elan. Geoff has gone on to become a leading mediator in London and Singapore. His success in those highly competitive markets has been a credit to him, and to the calibre of New Zealand mediators.

14. When the Weathertight Homes Resolution Services Act 2006 was enacted to deal with the leaky homes crisis, mediation was at the centre of its regime. Some 85% of leaky homes cases have since been resolved by mediation. David Clarke (now DCJ Clarke) was one of the pre-eminent mediators in this world.

15. Mediation was also central to the resolution of many Canterbury Earthquake Sequence insurance disputes. Nina Khouri, accomplished lawyer, academic and now leading mediator, and I mediated many CES disputes in the 20teens.

16. In 2017, I wrote a paper recommending the establishment of a mediation scheme, ready to go, for future insurance disputes between property owners and insurers resulting from natural disasters. Grant Morris of Victoria University undertook further research on this topic. Miriam Dean KC led work by MBIE on a dispute resolution scheme specifically for CES disputes. The Government subsequently established the Greater Canterbury Claims Resolution Service. The GCCRS had mediation at its heart. It brought finality to many claims. Christchurch mediator John Hardie deserves huge credit for the time and effort he put into leading the GCCRS.

17. The GCCRS has now morphed into the New Zealand Claims Resolution Service. The purpose of the NZCRS is to help homeowners resolve residential insurance issues resulting from natural disasters. It too has mediation at its heart.

18. Mediation, or its cousin, the JSC, is now a presumption, and indeed all but compulsory, in the Employment Court, the Family Court, and the District Court.

19. Mediation is now referred to in over 100 statutes, and sometimes mandated by them. Significant recent statutory developments have included:

    (a) The Farm Debt Mediation Act 2019. The FDMA is modelled on successful Australian legislation. It obliges creditors to mediate with farmers before they can enforce on debt. There have been over 120 mediations under the FDMA so far; and

(b) Section 145 of the Trust Act 2019. This gives the Courts the power to order recalcitrant parties to mediate trusts disputes. There have been multiple successful applications of this section.

20. Many contracts now require parties to mediate disputes before litigating them, especially in leasing and construction. In many other cases parties agree to mediate once a dispute has arisen.

21. Mediation is now very common in New Zealand. There will be thousands of employment and family mediations in New Zealand every year. It has been estimated that there are 800-1000 commercial mediations a year here.

22. New Zealand's mediators do a great job. Grant Morris's research suggests that settlement rates (not the only metric, but an important one) in New Zealand compare very favourably with overseas rates. The fact that the Government, the lower Courts, tribunals, and private parties turn so enthusiastically to mediation for dispute resolution speaks to the quality of the process, and those who guide it.

23. And yet. And yet, at the highest levels in New Zealand's dispute resolution world mediation is still not taken as seriously as it should be. The existing framework in New Zealand's senior courts does little to encourage mediation. We are an outlier in this compared to peer jurisdictions. Morris & Shaw state:

> "*The traditional New Zealand Courts possibly play the weakest recommendatory role in the English-speaking common law world*"

24. My latest Research Paper surveyed the approach taken to mediation by the senior courts in England and Wales, Australia and Canada. The senior courts in all have greater powers to encourage, or order, mediation than ours do.

25. In my view, there is an access to justice opportunity here. Giving New Zealand's senior courts such powers has the potential to get more cases resolved earlier and at less cost. I wrote about what such powers might look like in the Research Paper.

26. Some change is coming:

(a) The objective of the High Court Rules is to be amended. At r1.2 it is currently stated that: "These rules shall be so construed as to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application". The Rules Committee has recommended that the word "determination" be replaced by the word "resolution", expressly to encourage mediation; and

(b) The new Commercial List will have a focus on encouraging mediation as part of its case-management regime.

27. I applaud the Rules Committee for these changes. But, even with these changes, New Zealand's senior courts will still be outliers, when it comes their lack of powers to encourage, or order, mediation. There is much more that could be done.

28. There is resistance to doing more though, from some senior judges, and some senior lawyers. In part, that is on them. Some may not fully understand the value of mediation. Some might not want to. Some may have formed negative views on the basis of limited and less than ideal experiences. But it is on us too. We mediators must also show that

we, and, much more importantly, what we do, are worthy of greater recognition by the senior courts. There is a great quote on this from leading UK commentator Tony Allen:

> "*This is not a one-way street. For their part ADR practitioners must earn the trust and support of other stakeholders*."

29. I think that New Zealand's mediators should take steps to:

    (a) Enhance trust in our competence, and the fairness of what we do;

    (b) Ensure that we are responsive to cultural dynamics, and that our ranks better reflect our community; and,

    (c) Communicate more with other stakeholders about what we do, how we can help, and how we can get better.

30. To help to achieve this, I have six recommendations. These are for us at AMINZ, ideally in co-operation with RI, to work on. They are:

    (a) Recommendation 1 - The creation of a panel of mediators who are accredited to mediate senior courts matters. The purpose of this would be to enhance trust in competence. I note here that:

        (i) The Law Commission recommended in a 2004 Report that there be work done on the qualification level for mediators to be placed on a court list;

        (ii) Such panels already exist for mediators who are authorised to undertake mediations under the FDMA; and

        (iii) Such panels exist in New South Wales, Ontario, and British Columbia;

    (b) Recommendation 2 - Mediators who are members of AMINZ (or RI) should be obliged to make parties aware that they are subject to ethical standards, and a complaints and discipline regime. The purpose of this would be to enhance trust in competence and fairness. I note here that:

        (i) This would be consistent with the obligations lawyers have under the Client Care Rules 2008;

        (ii) The Law Commission's 2004 Report considered that the availability of ethical standards and a complaints procedure would be important to court-mandated mediation;

    (c) Recommendation 3 - AMINZ should continue, enhance, and promote, the work we are already doing with other stakeholders on *tikanga* dynamics in mediation, and consider other cultural contexts;

    (d) Recommendation 4 - AMINZ should continue and improve our efforts to enhance the diversity of mediators, and report on improvements. The AMINZ Scholarships play an important role here, and I applaud AMINZ for its continued support of this initiative;

    (e) Recommendation 5 - I think we need regular surveys of the mediation landscape in New Zealand, that assess the use of mediation, and changes over

time. Such surveys can and should also canvas and feed into cultural and diversity developments. I commend the survey work that Grant Morris has already done. But there is certainly scope for more. Other reference points include the biannual CEDR audits, and the New Zealand Arbitration Survey. I know that RI has already started some work in this space; and

(f) Recommendation 6 - Last but not least, I would like to see enhanced communication between mediators (AMINZ, RI), lawyers (NZLS, the Bar Association), and the Courts (Judges, the Rules Committee) about the place of mediation, particularly in senior courts cases, how we can help, and how we can do better. Interestingly on this, I note that the Law Commission's 2004 Report recommended that:

> "*a multi-disciplinary working group of mediation practitioners, lawyers, policy-makers and trainers should oversee the implementation of court-mandated mediation*"

31. The above recommendations will require hard work. This is a challenge. AMINZ already does so much with so little. But, hopefully, there is capacity within the amazing membership to support turning these recommendations into reality. I want to do whatever I can to help.

32. It is a privilege to be able to help people resolve their disputes. It is a privilege that mediators do not, in my experience, take lightly. We should highlight and enhance what we do. We should take further steps, including those six I have recommended, to ensure that mediation has the trust and support of other stakeholders that it deserves.

33. Our world is not baking hot and arid. Thankfully we know no war. We live surrounded by our own special kinds of beauty. Yet we can always strive for greater harmony. Mediation has an important role to play in that.

34. Kia hora te marino, kia whakapapa pounamu te moana, kia tere te kārohirohi i mua i tō huarahi.

35. May peace be widespread, may the sea glisten like greenstone, and may the shimmering light guide you on your way.

Mark Kelly