Dispute resolution in a market economy

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Introduction

This paper will outline the evolution of the New Zealand Institute into a broad-based organisation encompassing a wide range of dispute resolution professionals. Mediation and arbitration therefore have equal emphasis and standing, an approach that we in New Zealand believe is sensible, practical, and in keeping with the requirements of the marketplace. The demand side of dispute resolution in a free market economy, New Zealand in the 1990s, will be discussed, with some thoughts on how our Institute is meeting the challenges of the present and how we are planning for the future.

My particular background is property management and valuation, with specialisation in the rural land economy, so although an experienced arbitrator and mediator I do not profess to be an expert amongst the highly qualified attendees at this conference. However, I am aware that in some parts of Australia, an expert is anyone from out of town, and on that score, I certainly qualify.

The New Zealand scene

The far reaching economic reforms that began under a change-oriented Labour Government in 1984 and continued under both Labour and National Governments through to the early 1990s transformed New Zealand society.

We went from being one of the most over regulated democracies on Earth (restricted trading hours, a fixed Government imposed exchange rate, agricultural subsidies, restricted trade and work practices, loss making state-owned enterprises and inefficient bureaucracies), to a more open economy where the value of private

enterprise was at last given due recognition. A reforming Minister of Finance – driven it must be said by necessity as much as ideology – slashed agricultural subsidies; floated the exchange rate; corporatised state trading entities; sold those where Government ownership was clearly unnecessary; and generally freed up business and commercial life. It took a little longer to bring about labour market reforms but the business competitiveness that became a necessary part of survival for many enterprises resulted in a trend towards labour efficiencies. This received further emphasis when the National Government took power in 1990 and Ruth Richardson's 'Ruthanasia' approach completed the reforms of the 'Rogernomics' era. As a trading nation, we are now a much more competitive and market-orientated society and, although this does raise some questions in the social and employment policy areas, there would be few in New Zealand who would now wish to live under the restrictions that we use to accept in the 1970s and early 1980s in particular. At one time the Government decreed that you could not build a house of more than a certain size; that you could not charge more than prescribed rates for first or second mortgages; and that you could buy an ice cream or newspaper on a Sunday, but not soap powder. The restrictions on shopping in particular seem ridiculous in today's context and underline how regulated New Zealand society was before the Rogernomic reforms. The New Zealanders present will regard these background comments as superfluous but I believe they are necessary to highlight to Australian participants the cultural changes we have undergone over the past 10 years. The economic reforms have definitely altered the public's perception of the respective roles of individuals, business, and Government, in almost all aspects of our lives. Dispute resolution has been no exception to this change in attitude. Whereas New Zealanders of a decade or so ago looked to the Government or the court system to legislate and adjudicate each and every problem, today there is a more healthy emphasis on taking responsibility at a business or personal level, with a will to solve disputes without Government intervention. This emphasis on private dispute resolution has of course also stemmed from some disillusionment with litigation and this has fuelled a trend towards alternatives to the court system. This disillusionment and quest for alternatives would appear to be widespread throughout the western world. Where adjudication is required then of course arbitration will remain the most applicable form of private dispute resolution but there is increasing interest in negotiation, expert assessment and mediation/conciliation. These approaches are seen as being less confrontational and more consensual – important aspects where there is an ongoing relationship of any description. In New Zealand we have seen the rise and rise of mediation in particular as the more enlightened members of the legal profession realise that a great range of disputes can be mediated, provided there is the will to resolve the matter.

The Institute

How have dispute resolution professionals in New Zealand responded to increasing awareness of the various alternatives to litigation? The most obvious response is that I address you today as the President of the Arbitrators and Mediators Institute of New Zealand. This is, I believe, a first for a Pacific Rim country. A little history provides useful background to the establishment of our present broad-based organisation.

The Chartered Institute of Arbitrators – New Zealand Branch

Originally, we were the New Zealand branch of the Chartered Institute of Arbitrators. Active membership was not large, with a limited range of professions represented, dominated by building construction, engineering and the legal profession. The specific needs of arbitrators in New Zealand, and no doubt a hint of nationalism with a wish to run our own affairs, saw the New Zealand Branch of the Chartered Institute evolve into a separate autonomous organisation 10 years ago. The Arbitrators Institute of New Zealand was born following a trip to London by Phillip Green (the founding President), where he obviously exercised his mediation and negotiation skills to pry us loose from the British. We are indeed fortunate that the instigators of this move away from the Chartered Institute were meticulous about emphasising standards of competence and education with the result that reciprocal fellowship rights have been maintained with the Chartered Institute and our experienced practitioners continue to have high international standing.

The Arbitrators Institute of New Zealand

The new professional body numbered less than 100 strong at inception, but rapidly became an active and respected organisation that grew steadily in membership, with a widening in the professional backgrounds of Associates and Fellows from the predominance of lawyers, engineers and quantity surveyors in the initial membership. However, although members of the Arbitrators Institute of New Zealand were also involved in mediation and other forms of dispute resolution, the main emphasis of the Institute during the late 1980s and early 1990s was arbitration. Certainly the letterhead referred to mediation, conciliation and alternative dispute resolution methods, in much the same way that the letterhead of the Institute of Arbitrators Australia refers to arbitrators, mediators and conciliators.

Mediators Institute of New Zealand

But there was a separate Mediators Institute of New Zealand which catered specifically for those involved in mediation and a third Institute catering for employment arbitrators and mediators. A number of dispute resolution practitioners belonged to at least two of these professional bodies and, assisted by

the educational programmes at Massey University, a consensus view developed within the Arbitrators Institute. This was that what we were concerned with was dispute resolution in all its facets, not just arbitration with mediation as a 'clip on' component.

Merger

The then President of the Institute the Rt Hon. Ian McKay, assisted by senior members, set about negotiating a merger with the Mediators Institute of New Zealand, and the Institute of Employment Arbitrators and Mediators of New Zealand. As anyone who has been in merger negotiations will appreciate, such discussions are never easy and require an enormous amount of time and energy, not to mention patience and understanding. I would like to record my appreciation, on behalf of our Institute's current membership, to the Rt Hon. Ian McKay and to the leadership of both other Institutes for their perseverance and vision in bringing about the formation of the Arbitrators and Mediators Institute of New Zealand.

Arbitrators and Mediators Institute of New Zealand

I can record that we have recently completed our first financial year as a merged organisation. As expected, it has been a demanding year, putting in place membership information and systems to cope with a much broader spectrum of interest than was previously the case, and generally meeting the increased demands of a more diverse membership. In addition, there has been a much greater number of enquiries from the public requiring information about arbitration and mediation procedures. Despite some inevitable problems – you cannot merge three different organisations and then continue as if there has been no change – the merger has been an unqualified success, unifying almost all of those active in dispute resolution in New Zealand and becoming their voice, as well as the first point of reference for both the public and private sectors. The only other organisation with a profile in this field is a lawyers' alternative dispute resolution grouping, but this would appear to have a somewhat different role, with an emphasis on improving the awareness and knowledge of ADR approaches within the legal profession. This is to the mutual benefit of all, the consumer or client, the lawyers, and of course dispute resolution professionals. With regard to the merging of interests, the wider membership and broader view of dispute resolution within the Institute has stimulated some intense debates, while policies and approaches are still evolving on our broader role as a professional organisation. Issues receiving attention from the governing Council of the Institute include the cost of appointments and the administrative time involved; the public projection of arbitration and mediation as alternatives to litigation; and the provision of expert witness directories. The servicing and resourcing of individual

membership remains the major function, including education and professional development generally, but our role in profiling dispute resolution outside the court system is definitely increasing.

Benefits of merger

I am able to say that the unified approach the Institute can now take to dispute resolution has delivered immediate benefits with respect to dealings with Government and the judiciary; with tertiary education issues and in particular liaison with Massey University's Dispute Resolution Centre; and with the public perception of who we are and what we do. The tremendous width and depth of expertise encompassed within the organisation is a very real positive. Our diversity is clearly one of our great strengths. From advisors and advocates to mediators and arbitrators; from accountants and lawyers to valuers and engineers; from self-employed professionals to the judiciary and officers of large organisations. At last count, the Arbitrators and Mediators Institute of New Zealand encompassed over 40 different occupations or specialisations, a tremendous range of talent and expertise. This is demonstrated by a list of occupations and professions which is not necessarily exhaustive as there are many subspecialities within the groupings shown. Without downgrading the very necessary input of our legally qualified members, who have been absolutely unstinting in the formation and development of our Institute, this breadth of expertise makes us unique in New Zealand, as far as professional organisations are concerned, and possibly in the western world. Although New Zealand is relatively isolated geographically, being out in the south-eastern corner of the Pacific Rim, Kiwis have proved to be adaptive and progressive for much of our history, with the possible exception of the stultifying years when a 'cradle to grave' welfare state sapped the initiative of the nation. Like Australia, New Zealand is a relatively young country. A pioneer society only a few generations ago, Maori and European demonstrated vision, resilience and determination, to lay the groundwork that has changed an isolated wilderness of difficult topography into a modern economy. The legend of the Kiwi farmer and his ability to fix anything with a piece of number eight wire has been as pervasive as that of the laconic outback Aussie farmer stoically enduring drought, bush fires and isolation. The point is that there is a strong tradition of 'can do' in both Australian and New Zealand cultures. In my view this enables us to address a problem and bring about change more effectively that more structured and traditional societies in the northern hemisphere. It is also obvious, when comparing our countries, that the size, population and political structure of New Zealand is such as to make change easier to achieve than is the case in Australia. The vast size of the Australian continent, and the federal system, results in additional layers of decision-making and responsibility for most of your national organisations, and this may well inhibit the development of an overall national

outlook. Perth, for example, is further from Sydney in airtime than Auckland, no doubt making State or chapter governance essential. In contrast, most of New Zealand, despite geographical limitations, is within easy flying time of Wellington, the centrally located capital city. Therefore, despite our cultural similarities there are a number of reasons why the Institute of Arbitrators Australia may have some added difficulty in moving to encompass all forms of dispute resolution. Despite this, we in New Zealand can tell you that it is worth the effort to give arbitration and mediation equal standing and thus fulfil the prime requirement in a market economy which is to meet the needs of the public as end users of our services.

Trends in dispute resolution

I earlier referred to a trend towards mediation in New Zealand. The Institute expects that, as awareness of alternatives to litigation increases, there will be increased market demand. I do not propose to discuss all of the alternatives available in this address. Suffice to say that, for the average disputant, the practical alternatives to litigation are negotiation, mediation, expert assessment and arbitration.

Litigation

As the public's awareness of the various alternatives available increases there will be demand for a number of approaches to dispute resolution. Societies since the beginning of civilisation have recognised the need for a system to deliver justice and resolve disputes. In ancient times the power to make binding decisions lay with the Chief, the King or the Emperor. That is, the tribe, or the more structured societies that subsequently developed, saw it as a function of the head of state – however described – to provide a mechanism to resolve disputes within their society. The power wielded was often enormous and modern concepts of natural justice and fairness did not really arise. But the principle of a chiefly or imperial authority providing adjudication eventually evolved into the justice system that we have today. For most of New Zealand and Australia's history, the only means of settling a commercial dispute seriously considered by the legal profession has been by submitting the matter to the judicial system. A decision is imposed on the parties by judges, supported by the full power of the State.

Arbitration

However, early in the development of our pioneer societies a need was recognised for a parallel method of formal dispute resolution and this was arbitration. In New Zealand the Arbitration Act 1908 was based on earlier English legislation and has been with us for most of the 20th century. A new Act, the Arbitration Act 1996, comes into force on 1 July this year, as described by the Rt Hon. Ian McKay earlier in this conference, and we expect this to increase the demand for arbitrators. In arbitration of course, the dispute is submitted for

binding determination but with the power conferred by the agreement of the parties to arbitrate, the legislation merely providing a framework and support structure for that decision, and for subsequent enforcement.

Expert Determination

Allied to formal arbitration is a process widely used in New Zealand, particularly in the setting of commercial rentals, known as expert determination. The dispute is submitted to a chosen expert for that person to consider and bring down a decision. It is therefore akin to arbitration in that the decision is imposed by the expert whose power to determine the matter arises out of a contract between the parties. But there are no procedural requirements in an expert determination and issues of natural justice do not arise. The expert considers the matter and delivers his or her findings which the parties have agreed to be bound.

These three dispute resolution approaches, litigation, arbitration and expert determination, have a common characteristic in that the decision is being imposed. In contrast, the various approaches that have come to be known generically as 'ADR' do not impose decisions. An impartial third person assists the parties but has no authority to impose a binding decision or make a determination.

Mediation

Mediation is the 'ADR' approach favoured by the market and I referred earlier to the rise of mediation as a dispute resolution procedure, not only in New Zealand, but worldwide. When analysing the reasons for this situation, one of the strongest would appear to be that the process is consensual. It starts with an agreement to have discussions, aided by a third party; continues only so long as the disputing parties wish to; and ends when either decide to discontinue or when resolution is reached and a mediation agreement is signed. The 'by consent' rather than 'by coercion' resolution approach has definite appeal to people in the 1990s. The philosophy that it is the parties themselves who are enabled – by the procedures and the mediator – to negotiate towards resolution of the dispute is a natural outcome of the 'let's do for ourselves' outlook that modern market economies have developed. This is in contrast to the more structured view of earlier times when people were more inclined to look to Government or the Courts, or in general be told what the outcome should be.

The mediation approach requires a more open minded view and lateral thinking, encouraging the parties, and hopefully their advisors, to see the solution rather than the problem. I believe that the trend for parties to attempt to resolve their disputes themselves – with the assistance of mediation – will continue. The legal profession cannot afford to ignore the trend, and those of us involved in dispute resolution in our various fields of expertise must be prepared to provide for increasing demand in this area. Individuals in our society no longer take the

decisions of professionals, politicians or even the Courts, at face value. The modern consumer is articulate, well informed as to his or her rights, and wants full justification and reasoning for decisions reached. There is a modern expectation that the people affected by decisions will have a greater involvement in the decision-making. We are certainly seeing this in New Zealand with regard to environmental matters, health care, and education. Perhaps it is only coincidental that these are also the 'big ticket' items of Government or State expenditure. In my view, the move towards private dispute resolution is therefore not just a reaction to the horrific costs of litigation through the Court system, but part of a general expectation by people that they can become more directly involved to the point where, as in mediation, they are in control rather than being controlled.

Awareness of alternatives

The Courts in New Zealand have recognised this trend and proposals are now being considered to extend the use of 'ADR' in civil cases. The cynic would say that this is merely a response to the overburdened Court system, but there does appear to be a genuine awareness of the benefits that may accrue. The Arbitrators and Mediators Institute of New Zealand recently published two useful booklets:

a) Guide to Mediation (and Conciliation); and
b) Guide to Arbitration.

These publications were compiled for parties in dispute and their advisors, as well as for mediators and arbitrators, and were very well received. With regard to mediation, there is an explanation of the process; a model clause for mediation; a draft agreement to mediate; the Institute's mediation protocol; and a draft memorandum of confidentiality. The Institute's Code of Ethics for Mediators and our panel list at the date of issue are also included. For arbitration, there is an explanation of the arbitration process; a model clause for arbitration; a draft agreement to arbitrate; and the Institute's arbitration protocol. Again, the Code of Ethics for Arbitrators and our panel list at the date of issue are included.

The Institute's Council made a specific policy decision to send these guides to the judiciary in New Zealand. We received extremely positive feedback and the profile presented no doubt raised the confidence of Judges that there was a professional organisation comprising almost all experienced arbitrators and mediators in the country providing the required degree of professionalism, including an adherence to standards and a Code of Ethics. When consideration is being given to the referral of disputes to a private resolution process rather than the Courts, then matters of public protection assume very high importance. It is clear that the level of confidence in private dispute resolution has been raised by our initiatives and the ability to profile both mediation and arbitration has been a major benefit of the merger.

Court referral to private dispute resolution

Earlier this year the Courts Consultative Committee in New Zealand issued a discussion paper entitled 'Court Referral to Alternative Dispute Resolution'. The object of the paper was stated to be the seeking of views on a proposal by the High Court Review Committee to incorporate mediation into the Court process. This Committee proposed that, where cases are identified by Judges as appropriate for referral, parties should be able to choose between arbitration and mediation. The view was expressed that mediation is increasingly seen as a useful precursor to arbitration as well as to the Court process and the Review Committee saw mediation as being more likely to be the choice of parties in the first instance. If arbitration is chosen then the dispute is likely to leave the Court with the conduct of the arbitration being governed by the Arbitration Act 1996. The discussion paper was therefore primarily about the mediation option and the Institute has welcomed the opportunity to make detailed submissions. Whatever the outcome of the deliberations of the Courts Consultative Committee, it is clear that there will be more Court-referred mediation in future and it is really a question of appropriate ground rules being put in place to facilitate and resource the process.

Mediation also received a significant boost when the Legal Services Board in New Zealand recently issued an instruction to allow grants of civil legal aid for the mediation of disputes under certain qualifying circumstances. The instructions are for the provisions to be used sparingly with the decision-making being required to take account of:

- the cost of litigation verses mediation;
- the urgency factor;
- the likely Court hearing date;
- the behaviour of the parties; and
- whether or not the parties agreed to mediate at an early stage.

Surprisingly, although legal aid is available for mediation, it is not yet available for arbitration although it would seem inevitable further down the track that this anomaly will be rectified.

Myths and misconceptions

Although we have made great strides in advancing the cause of dispute resolution outside of the Court system, a few myths and misconceptions persist with regard to the respective roles of mediation and arbitration. Discussions with John Muirhead, the President of the Arbitrators Institute of Australia, prior to this joint conference, gave the impression that the profile of arbitration in Australia may also suffer from perception drawbacks. These really stem from an invalid comparison between settling disputes by consensus and determining disputes by adjudication. An address on dispute resolution in a market economy would not be

complete without distinguishing the quite different market demand for the two main dispute resolution approaches.

Mediation is increasingly seen as a sensible forerunner to either litigation or arbitration. That is, before parties submit to an adjudicated decision, they should first consider – through negotiation and then mediation if necessary – whether or not a solution can be arrived at by agreement. The benefits of a solution by consensus should be obvious to all, but the importance and relevance of arbitration must not be overlooked, particularly when disputes arise in contractual situations.

Arbitration, like mediation, is applicable across the whole spectrum of human and business activity. Mediation is currently fashionable, modern, and even politically correct in the vernacular of the 1990s. Arbitration, by contrast, is seen by some as dull, old-fashioned and, in imposing a decision on the parties, not quite so attuned to the politics of correctness. But it is surely a matter of horses for courses. In real estate valuation, when comparing different transactions to the subject property, great care is needed to keep the comparisons, as far is as possible, on an 'apples for apples' basis. That is, an invalid comparison may lead to an inaccurate conclusion. Mediation and arbitration are dispute resolution approaches with different characteristics and direct comparison can also be invalid. Therefore, some of the statements that do compare the processes are myths or misconceptions:

- mediation is flexible;
- arbitration is high prescriptive;
- mediation is cost-effective;
- arbitration is expensive;
- mediation is fast and focused; and
- arbitration is slow and unwieldy;

I have detected a concern in Australia that arbitration may increasingly be seen as inflexible, bound by procedure, expensive, and slow. But one of the great benefits of an arbitral process is that it does not have to be highly prescriptive. Parties to a dispute can, by agreement, have an arbitration conducted at the appropriate level of formality relevant to the complexity of the dispute and the amount of money involved. Parties who insist on full 'whistles and bells' formality for a relatively minor dispute, where a simple arbitral process would suffice, should have their intransigence taken into account when the costs of the award are determined. The small businesses out there at the coal face, run by shopkeepers, builders, and farmers, often cannot handle the high cost structures that often accompany very formal arbitration procedures, with counsel and expert witnesses' costs as well as the cost of the hearing and the arbitrators' fees.

Cost-effectiveness

To the small business operator cost-effectiveness is an essential part of a fair and just solution. For instance, standard agreements in New Zealand have in the past often prescribed two arbitrators and an umpire, with attendant additional costs, when the dispute is quite clearly suitable for reference to a sole arbitrator. There is an ethical obligation on our members to ensure that the parties are aware of the likely costs and provide an opportunity to consider appointing, by agreement, a sole arbitrator. In future, of course, the role of umpire will disappear and our new Arbitration Act gives due emphasis to an arbitral tribunal of one for domestic arbitrations. In my view the flexibility of arbitral processes has been underplayed and many in the legal profession find it difficult to envisage anything other than a very formal and expensive approach. The cost-effectiveness of mediation, by contrast, lies in the fact that the parties remain in control at all times and will not be inflicted with additional costs without their full knowledge and agreement.

Fully informed

A major arbitral hearing may develop along the lines of a court hearing with the arbitrator or arbitrators very much in control and invested with considerable powers.

The parties are often not as fully informed as they should be before embarking on the arbitration, particularly if it is being handled by their lawyers, and often end up committed to a formal approach that may not be in keeping with the money or issues involved. When given the options that are possible, parties with limited resources will often agree on a relatively simple arbitral process. This could be the so-called 'look and sniff' approach; or a site inspection with the parties making their submissions to the arbitrator on the site without lawyers or expert witnesses; or a simple hearing involving a sole arbitrator and the parties without counsel or experts. Provided the variations are by agreement, the parties to a dispute can decide on a procedure to suit the circumstances, even when a different prescription is set out in the contract. There will be a market-led backlash against arbitration if it is inappropriately expensive and time consuming. The answer obviously lies with education and awareness, not least amongst the legal fraternity in general and even some of our members.

Swift resolution

The myth that arbitration is slow in relation to the speed of mediation is also rather persistent. Arbitration can be relatively swift where the parties are motivated, particularly during the preliminaries, and the arbitrator is conscious that they want the matter determined as soon as possible. Speed is relative but, in general, arbitration will be much faster than litigation where there can be major delays in getting access to the court system. It goes without saying that, if lawyers

are involved, they also need to be willing and able to act quickly. If a reasonable degree of formality is required, as is the case with complex disputes or where large amounts of money are involved, then the preliminary matters leading up to arbitration can take some time and may be slowed further by the attitudes of counsel. Mediation, by contrast, does not usually require a large amount of preliminary input by lawyers, while legal advice before the signing of a mediation settlement is usually responsive to any time constraints that the parties may be under.

Ultimately, an attraction of arbitration that will be enhanced by our new legislation is finality. Although a judge's decision can be appealed, and appealed again, a properly conducted arbitration, culminating in a clear written award, is unlikely to be appealed. The courts have reaffirmed in recent years that arbitration awards will not be lightly overturned and that, where an arbitral process has been chosen, a party cannot subsequently look to the courts in the event of a decision that is considered unfavourable.

Conclusion

To conclude, in my view all forms of dispute resolution that provide alternatives to litigation have a bright future in both Australia and New Zealand.

As the current President of the Arbitrators and Mediators Institute of New Zealand, and someone who both mediates and arbitrates, I have commented on the respective niche in the marketplace that each have, as preferred alternatives to the court system.

The use of both will rise in New Zealand, the strong possibility of court-referred mediation increasing the demand in this area; while the new Arbitration Act will make parties and their lawyers more inclined to choose arbitration as a means of determining commercial disputes with appropriate finality.

The challenge for our respective Institutes is to ensure that there are sufficient qualified and experienced dispute resolution professionals available, over the whole spectrum of personal and business activity, to meet the likely increased demand for such services. By merging the interests of mediators and arbitrators into one professional body we in New Zealand have gone some way towards focusing education, training, standards, ethics and public profile on the overall needs of our members, while providing sufficient scope for mediators and arbitrators to pursue their respective requirements within the Institute as a whole. Unity is strength and our strength is also our diversity.

Thank you.