SEMINAR PAPER

TAILORED COMMERCIAL MEDIATION OPTIONS: WHAT ARE THEY, AND HOW CAN A SCEPTICAL MARKET BE ENCOURAGED TO TRY THEM?

Presented to the AMINZ Annual Conference

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24 July 2015

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TAILORED COMMERCIAL MEDIATION OPTIONS: WHAT ARE THEY, AND HOW CAN A SCEPTICAL MARKET BE ENCOURAGED TO TRY THEM?

1. Mediation prides itself on its flexibility. **[Slide 2]** We like to think we are the yoga gurus of dispute resolution. **[Slide 3]** Yet, in New Zealand, commercial mediations tend to be quite a particular beast. Research by Grant Morris of Victoria University suggests that 94% of commercial mediations in New Zealand are one day or less[1]. I suspect that most are also conducted on classic, LEADR-format, lines.

2. This "all in" one-day model has a very high success rate[2], and has real cost and time-efficiency advantages. For us commercial mediators it is our bread and butter. And for repeat users it has a reassuring familiarity and reliability.

3. But the "all in" one-day mediation model is not best suited to every dispute and context. Mediation can and should sometimes be better tailored. The American commentator Brian Jarrett put it thus **[Slide 4]**:

> "..*the finely textured and fluid nature of social conflict with its associated multi-causality resists any exclusive a priori approach*."[3]

4. Academic support for the tailoring of mediation can be found in the ongoing work being done on dispute systems design ("DSD")[4]. DSD has been around since the 1980s, when Ury, Brett and Goldberg did their pioneering work in the Caney Creek Coal Mine. The central thesis is: the more apt the dispute system, the better the likely result.

5. Internationally, commercial mediation tailoring options proliferate. Such options include **[Slide 5]**: deal mediation, having a mediator to the dispute, staged mediation, online mediation, and mediation/arbitration/adjudication combinations. This seminar examines those options, which I will call "commercial mediation process tailoring options". I will also comment on tailoring within any mediation process, to make the process fit better to the issues it is addressing.

6. I believe that the development and promotion of such commercial mediation tailoring is in the interests of both mediators and our market. Hopefully, it will serve to expand and better use mediation skills and benefits. Interestingly, in the US, moves in this direction may even be client-driven. **[Slide 6]** A 2008 study by an American Bar Association Task Force found that mediation users are demanding that mediators move away from a "cookie cutter" approach, and towards customised processes[5].

7. But I suspect that the New Zealand market is likely still quite sceptical. Our users like the tried and true, and are suspicious of new ideas in this field. How can this be changed? Education and targeted marketing are key. Tailoring proponents must also be sensitive to, and address, the questions and fears that lawyers and clients will have about tailored options. I will conclude with some thoughts on how the Government might also encourage tailored commercial mediation.

[Slide 7] COMMERCIAL MEDIATION PROCESS TAILORING OPTIONS

8. Let us look first at commercial mediation process tailoring options. These all involve processes which are different to the classic LEADR format that we are all so familiar with.

Deal mediation

9. Deal mediation, or "counsel to the deal", involves having a mediator appointed to assist parties who are not in a dispute, but, rather, are trying to reach a commercial agreement. Deal mediation has been cited as an emerging international trend by the International Mediation Institute[6]. In the US, which seems to be leading the way in this field, deal mediation has been described as:

> "..*among the most exciting developments on the evolving landscape of facilitated negotiation and mediation."*[7]

10. Parties often invest a great deal in getting to a commercial negotiating table. They may have undertaken due diligence, forgone other opportunities, and spent large sums on accountants, lawyers and bankers. But, with the best will in the world, there is a naturally adversarial aspect to commercial agreement negotiation. This can lead to miscommunication, misunderstanding and mistrust. Parties fail to appreciate their shared interests, and overlook opportunities for mutual gain[8]. Deals can consequently reach impasse, or fall over.

11. Parties' agents and consultants are not always best placed to help them through such issues. Because of their remuneration structure, and/or their tendency to identify psychologically with their client, they lack neutrality, and, often, objectivity[9].

12. A deal mediator can come from a neutral and objective perspective. This should give the deal mediator a degree of trust from both sides that the sides may not have in each other. The deal mediator can help build relationships, coach negotiation techniques, reality check, identify submerged issues, assist in option generation and manage expectations[10]. The deal mediator becomes a lifejacket to keep the deal afloat[11].

13. Deal mediators were able to make the difference in the 2007 contract negotiations between the New York Yankees and star player Alex Rodriguez. The Yankees had baulked at Rodriguez's request for $350M, and their owner was vexed at a threat by Rodriguez to exercise the opt-out provision in his contract. Two Goldman Sachs MDs were called in to act as deal mediators. They were reportedly able to neutralise the personal conflicts and misunderstandings which had arisen, and, apparently of significance, convince the Yankees' owner that Rodriguez wanted to stay in New York. A ten year $275M agreement was reached[12].

14. After an agreement is reached, the deal mediator may well stay on, and be transformed into a mediator to the agreement. The parties know and trust the mediator. The mediator knows the parties, the agreement, and the fundamentals of the business dynamic. They are well placed to mediate disputes which arise under the agreement.

15. In terms of opportunities for deal mediation, my sense is that the low hanging fruit are agreements where the parties expect that they will have disputes during the course of their relationship *after* agreement is reached. Construction contracts are an obvious example. Another, cited by UK commentator Sean McTernan, is in software installation contracts, where user acceptance testing can quite quickly lead to disputes[13]. For these sorts of contracts, parties are more likely to be receptive to having a mediator involved at an early point in helping to design their dispute resolution processes. It would not seem such a great step to suggest that the mediator play a facilitative role in relation to road block issues as the rest of the

agreement is negotiated. The same mediator may then also transform into a mediator to the agreement after the agreement is signed, mediating such disputes as do arise.

16. North American writers have also advocated strongly for the utility of deal mediation in cross-cultural commercial negotiations[14]. They key point being that there is so much more opportunity in this context for issues to be "lost in translation". One example cited has been the successful use of a kiwi deal mediator in a negotiation between Canadian and Japanese companies over a JV in New Zealand[15].

[Slide 8] Mediator to the dispute

17. The mediator to the dispute concept involves having a mediator who is with the dispute from the earliest possible juncture. The ultimate aim will be for the mediator to facilitate settlement if the case can be settled. But the mediator will also assist in smoothing, and driving, the dispute in the direction of settlement. This might involve[16]:

    (a) Assisting in the early identification of impediments to settlement, such as personality issues and misperceptions; and ensuring that the right personnel are looking at the problem;

    (b) Assisting with information exchange. There can be a vast difference between what parties are required to discover in a legal proceeding, and what parties need to know to settle a case. And excessive discovery is a major cost issue in any litigation. A mediator to the dispute can assist with focus in this regard;

    (c) Managing relationships and coalitions in multi-party disputes;

    (d) Dispute process design. A dispute may be amenable to a MED-ARD combination, or it may be that it needs binding or non-binding expert input on specific issues, or there may be another applicable hybrid process. A mediator can help shape such a process; and/or

    (e) Advising the parties when the dispute is ripe to mediate in the classic sense.

18. The mediator to the dispute concept can seem, at first blush, to be somewhat defeatist. Mediators and those who instruct them generally like to believe that, once a mediator is appointed, settlement will quickly be brought to a head. But I think this is because, usually, when mediators are instructed, settlement is *ready* to be brought to a head. The idea of getting a mediator involved at an earlier juncture is about helping it get to that point in a quicker, more efficient, way.

19. I would suggest that complex, and large multi-party, cases are particularly well suited to having a mediator to the dispute. Complexity and numbers of participants tend to be the major factors which slow litigation, and make it more difficult to resolve. A mediator to the dispute could help the parties cut through that. Such cases would also be best able to afford the extra expense of having a mediator to the dispute.

20. I suspect that, in our market, the mediator to the dispute concept will tend to be a hard sell. It is quite novel here, and involves giving thought to being constructive at a time in disputes when the focus of all is generally combative. To promote the concept, I wonder if, in appropriate cases, the prospect of having a mediator to the

dispute would be a good one for a judge to direct the parties to consider ahead of a first case management conference.

[Slide 9] Staged mediation

21. Staging commercial mediation is another important option. By staging, I mean spreading the mediation out, usually over more than one day. I appreciate that does happen here. But the research by Grant Morris of Victoria suggests that it is very rare for New Zealand commercial mediations to go over a day[17]. Many disputes are years in the genesis, and some take years to contest. It is strange to expect that mediation can always settle them so quickly.

22. Staging a mediation may give everyone the opportunity to look at discrete issues more closely and/or settle cases piece by piece. It might also avoid the risk of people doing what they later see as bad deals in the pressure-cooker of an all-in-one-day approach.

23. The use of mediation to resolve the dispute between Universal, Sony BMG, and Warner and Baidu is a classic example of what can be required, and what can be achieved.

24. Baidu is a search engine behemoth in China. It is a direct competitor to Google. In 2011 its China market share was 80% vs 20% for Google[18]. It was also considered in the West to be a dominant player in the illegal downloading of music in China. From 2005-2010, music companies tried and failed to hold Baidu to account in litigation in the Chinese courts[19].

25. In August 2010, three music companies, Universal, Sony BMG, and Warner appealed a loss against Baidu in a lower Court to the Beijing Higher People's Court. The Court heard the appeal, but decided not to give a verdict. Instead, it referred the case to mediation with the Mediation Centre of the Internet Society of China.

26. The mediation lasted for six months. A settlement was reached in July 2011 whereby[20]:

    (a) Baidu was granted a license to over 500,000 songs, which could be offered to Chinese internet users for free;

    (b) Baidu would pay the music companies on a per-play and per-download basis;

    (c) The licensed music would be supported by advertising on Baidu; and

    (d) Baidu agreed to donate an undisclosed amount to an anti-piracy fund.

27. The settlement has been heralded as a step forward for copyright protection in China. A similar deal was subsequently reached in 2013, between four music companies and two other Chinese internet companies, Sohu and Sogou – again after a Court-directed mediation, this one lasting for 19 months[21].

28. It seems that, in continental Europe, there does tend to be a more staged approach. The European Association of Chambers of Commerce and Industry undertook a "Survey on the Use and Practice of b2b Mediation" in the 2012/2013 year[22], in furtherance of the EU "mediation directive"[23]. Its report was released in November 2014. It looked at thousands of civil and commercial mediations across the EU, including in France, Germany and Italy. The majority of participating countries reported that mediations had an average of up to three sessions[24].

29. I would suggest that, in New Zealand, there is scope for us to look at staging more often in mediations, particularly for large and intractable cases.

[Slide 10] Online mediation

30. Let me turn now to online commercial mediation. It is probably naive to be referring to online mediation merely as a tailoring option. The reality is that, in the not too distant future, there will probably be an online aspect to all commercial mediation work.

31. As things presently stand, online commercial mediation is undergoing major growth and expansion. Here are but a few examples of systems in operation worldwide:

(a) eBay - Some 60 million disagreements amongst traders on eBay are resolved every year using online dispute resolution[25]. The process is two tiered. The first tier encourages parties to resolve the dispute themselves via online negotiation. They are assisted in this by guidelines and practical advice - a sort of textual mediation. The next tier involves moving to a binding determination by an eBay staff member. Reportedly, over 80% of the disputes handled by eBay's system are resolved without a need for any human involvement[26];

(b) The Canadian Civil Resolution Tribunal (www.civilresolutionbc.ca) – this is an online tribunal due to be launched this year in British Columbia. It will deal with claims up to $25k, relating to debts, damages, recovery of personal property, and certain kinds of condominium disputes. It is multi-tiered. At first, parties are assisted to explore settlement options. Then, parties are required to use an online negotiation platform, with short timelines, and supported by templates for statements and arguments. If settlement is not reached, a case manager mediates online, or over the phone. If the matter still does not settle, the parties can then agree to seek a binding adjudication[27];

(c) Youstice (www.youstice.com) – this international service handles large volumes of low value consumer complaints. It is two-tiered. The first tier helps the parties to frame arguments, and suggests suitable solutions. If settlement is not reached, the second tier involves escalation to independent review by an accredited neutral[28];

(d) Online Schlicter (www.online-schlicter.de) – this is an online mediation service for e-commerce and direct selling disputes. It is a German-French initiative. The service is free, and includes assistance from lawyer mediators. There is an emphasis on analysing a case from the start and early evaluation of legal positions. Advice is partly automated, using textual building blocks and decision trees. The mediator makes a non-binding recommendation. In about two thirds of cases both parties accept the recommendation, and the case is settled accordingly[29];

(e) "Blind bidding" services. There have been various sites, worldwide, with mechanisms for blind bidding in settlement negotiations. In essence, parties post settlement ranges which are acceptable to them, but kept confidential from the other side, until one side bids within the other's range. Examples have included Cybersettle (which was claimed to have handled 200,000

claims with a combined value in excess of $1.6B), TryToSettle.com, and SmartSettle.com[30]; and

(f) On a slightly different tack is "Olé!". Olé! is available at www.imimediation.org/ole. It is a case analysis and evaluation tool, which can be used by counsel and parties in advance of negotiations and mediations. It is simple, easy to use, and contains many of the analytical steps that mediators are familiar with, including costs analyses, SWOT, BATNA, WATNA and PATNA.

32. In the UK, the Online Dispute Resolution Advisory Group to the Civil Justice Council released a report this year[31] recommending the establishment of a new internet based court service, to be known as HM Online Court ("HMOC"). The advisory group has further recommended that the HMOC should be a three-tier court. Tier one would provide online evaluation, assisting users to classify and categorise their problem, and understand their options. Tier two would essentially involve online mediation, with some automated functions, but teleconferencing with a mediator available too. Tier three would involve determination of cases that are not settled by judges. The initial proposal is for the HMOC to handle cases of up to £25K, but the suggestion is that its jurisdiction would be extendable.

33. How do these international systems and developments affect how we can tailor mediations here in New Zealand? Some of the online tools are available to us, and may be appropriate to use in certain cases, eg Youstice, bidding services, and Olé!. We can also use what is going on worldwide to drive local developments and thinking in relation to mediation. The recent attempt to focus District Court civil proceedings towards settlement processes seems to have foundered. I wonder if it would have stood a better chance if it had an online focus, and a built-in mediation tier, along the lines of the system being introduced in British Columbia, and that being proposed in the UK.

34. I mentioned the UK's Online Dispute Resolution Advisory Group to the Civil Justice Council, an august body, chaired by Professor Richard Susskind. Let me leave the topic of online mediation with their prediction for the future in this field **[Slide 11]**:

> "*The third generation of systems, which we can expect to be in widespread use in the 2020s..will be those that are enabled by AI (artificial intelligence)…For certain categories of dispute, in Tier Two, these systems will themselves be able, without the direct involvement of human beings, to facilitate negotiation and informal settlement. In Tier Three, these AI systems will act as "intelligent assistants" for judges – advising on possible decisions and lines of reasoning. We are not anticipating, at least for the purposes of this report, that AI-based systems will replace human online judges."* [32]
>
> [emphasis added]

35. "I need your clothes, and your motorcycle….."

[Slide 12] Mediation/arbitration/adjudication combinations

36. A great deal has been written over the years on the ways in which mediation, arbitration and adjudication can be combined. I have listed various resources on this topic in my paper[33]. For these purposes, I will just mention a few international developments and points of, I hope, interest. In particular:

(a) There are now various international rules that suggest MED/ARB/ADJ formats. They include those of the: World Intellectual Property Organisation ("WIPO"), International Chamber of Commerce, Chartered Institute of Arbitrators, and the American Arbitration Association[34];

(b) In 2009, CEDR promulgated its "*Rules for the Facilitation of Settlement in International Arbitration".* Those rules encourage the arbitral tribunal to take proactive steps to assist the parties to achieve settlement (Art 3.2). They also direct that, if requested to do so by the parties, the arbitral tribunal should insert a "Mediation Window" into the proceeding, whereby they adjourn the proceeding to allow mediation to take place (Art 5.3);

(c) In late 2014, in Singapore, the Singapore International Mediation Centre ("SIMC") was launched. It has an international panel of mediators. An interesting aspect of the SMIC is that it offers an ARB-MED-ARB procedure, in partnership with the Singapore International Arbitration Centre. Under this procedure, a dispute begins as an arbitration, which is adjourned while mediation is tried. If a settlement is reached at the mediation, the mediated agreement can be formally incorporated in a consent arbitration award. As consent awards properly made in arbitral proceedings, they are generally enforceable in approximately 150 countries under the New York Convention[35];

(d) There has also been reported use of ARB-MED[36]. This process is said to work particularly well for quantum disputes. As reported, it involves a short form, "rough and ready", arbitration. Once the arbitration is concluded, the arbitrator prepares an award, and gives it to the parties in a sealed envelope. The parties then mediate, and only open the award if they cannot reach a settlement. The thinking is that the preceding arbitration gives the parties a thorough reality check, but the mediation gives them a chance to still come to a mutually acceptable agreement; and

(e) Finally, a mention of MEDALOA[37]. This is a hybrid that uses a combination of mediation followed by last offer arbitration/adjudication. It is apparently used in the US in labour disputes and in the baseball industry. A mediation is conducted. If settlement is not reached, the mediator then changes hats, and takes on a determinative role. She decides the matter solely by choosing between the parties' last offers.

37. I am sure there is greater scope for mediation and arbitration/adjudication to work more closely together in New Zealand. Combinations can and should be tailored to specific disputes. A particular area of opportunity may lie in disputes where one or more party is domiciled overseas. Such disputes may be well suited to an ARB-MED-ARB combination of the type used in Singapore, which could give the parties the benefit of New York Convention rights for international enforcement purposes.

[Slide 13] TAILORING WITHIN THE MEDIATION PROCESS

38. So far, this seminar has looked at commercial mediation process tailoring options which are different from the classic LEADR format. Obviously tailoring should not be just about the choice of process though. If possible, tailoring can and should occur within whatever process is adopted. Some comments on this follow.

39. A mediator needs material to tailor. You have to know a bit about the case to be able to advise on how it might best be mediated. In this regard preliminary meetings can

have real value. Carol Powell has written about this in a 2013 article in the New Zealand Law Journal[38]. Absent a preliminary meeting, my respectful view is that a mediator should still try and do his/her best to find out about the case, and at least offer to work with the parties on tailoring the mediation.

40. There are a very broad range of options and issues to consider when it comes to such tailoring. A non-exhaustive list includes the following:

(a) Issues around information and documents exchange. Has discovery been completed? If not, do documents need to be exchanged, and, if so, how and when can this be done?

(b) Are there exhibits or samples which need to be brought to the mediation, and/or could be looked at beforehand. Leading UK IP mediator Jon Lang recommends that samples be brought along to IP mediations, and says that:

> "*Many cases have been settled with parties looking over products bearing an allegedly infringing trade mark, or which are said to infringe another's design right, with parties suggesting changes that could be made to resolve the dispute*"[39]

(c) Are experts involved? If so, have reports been exchanged or should they be? Should the experts meet ahead of the mediation to narrow areas of difference? Often experts end up having such meetings during the mediation, off in a room on their own. This can work, but it can also lead to others waiting around for them. Sometimes too, by the time the experts report back, the commercial dynamic has gone past the point where what the experts have to say matters;

(d) Can there be agreement on some points ahead of the mediation? Issues in this regard might include anything from scale costs to boilerplate settlement terms;

(e) Are there any preliminary technical or legal issues that might benefit from a non-binding opinion by a neutral expert or lawyer? And

(f) Practical issues such as timing, access, travel, translators, and the need for third parties to be consulted.

41. The basic idea is to get an understanding of the dispute, and to then to help the parties find the most efficient and effective way of getting to a workable settlement.

[Slide 14] HOW CAN A SCEPTICAL MARKET BE CONVINCED TO TRY TAILORED OPTIONS?

42. To us mediators, getting involved in tailoring sounds like a great idea "from the get go". We think that we are good at resolving disputes, and we think that the more we are involved in doing so, the better for all. But our enthusiasm plainly has a self-motivated aspect to it. And we need to be careful about being too zealous as advocates for anything, because our neutrality and considered approach are our greatest assets.

43. I think that the New Zealand commercial mediation market is likely still quite sceptical of tailoring. Our users like the tried and true, and are suspicious of new ideas in this field. They also like their mediators to be low maintenance, and ready to leap to

mediate at short notice. They do not want us to make things any more complicated than they already are. They do not generally look to us to tell them how best to settle their cases. Because we are creatures of our market, we work hard to be what our market wants us to be.

44. So, against that backdrop, how can our market be gently convinced to try tailored options?

Education and targeted marketing

45. Perhaps the first point to make is that, of course, tailoring is already a reality in some contexts in New Zealand. Employment, domain name and tenancy mediations are all tailored to their circumstances in one way or another. I am sure there are other examples. And I know that some commercial cases are tailored in various ways. So, what we are really talking about, to trot out a favourite mediator's term, is "expanding the pie".

46. I think that we can further educate our users on what the options are, and how they might be of benefit. That can be done via material on websites, or provided at the point of instruction. It can be done at preliminary meetings.

47. Targeted marketing may also assist. Certain types of tailoring will suit certain industries. For example, as mentioned above, the construction and software industries may well provide opportunities for deal mediation, particularly for mediators who have expertise in the relevant field.

48. I suspect that mediators should also be talking more to in-house counsel. Their numbers are on the rise in New Zealand – from 1995 to 2014, in-house counsel rose from 12% to 21% of all New Zealand lawyers[40]. Traditionally, in New Zealand, the process of referring commercial cases to mediation, and representing clients at them, has fallen to private practice litigators. But change may well be in the wind on this. In the UK, in 2013, CEDR noted a huge increase in direct referrals to mediation from in-house counsel – from nearly zero to just over one-third of its cases in 2012[41].

[Slide 15] Addressing questions and fears

49. Tailoring proponents must also be sensitive to, and address, the questions and fears that lawyers and clients will have about tailored options. Why is this better? Will it cost more? Will I lose control? Will I appear weak?

50. One answer to these questions is to point out that they are the same questions as were once asked of, and hopefully largely answered by, commercial mediation generally, when it was first introduced to New Zealand in its modern form in the 1990s. But, looked at more specifically, these questions might be answered as follows:

    (a) Why is this better? The answer to that will of course vary case by case. But the general idea is that when the mediation is better tailored to the case, it will be more likely to settle it, and the settlement will be more likely to last;

    (b) Will it cost more? Again, this will depend on the case. But:

        (i) Mediator's costs are often a drop in the bucket when considered as part of the overall costs of a large commercial case;

(ii) Much of the rationale behind tailoring is about making the case run more efficiently;

(iii) There are some aspects of tailoring which are specifically aimed at saving costs, such as online mediation;

(c) Will I lose control? No. Mediation is, by its very essence, consensual. No mediator can make anyone agree to anything. Even with a hybrid process that has an arbitration or adjudication aspect to it, the parties must first agree to that process before they can be bound by it; and

(d) Will I appear weak? No. The other side has to agree to whatever tailoring is proposed. If they do, then they obviously share your view that it is worthwhile. If they do not, you have lost nothing as far as other means of resolving the dispute are concerned. Some forms of tailoring, eg having a deal mediator, actually free the advocates/parties up from having to approach matters in quite such an objective way[42].

[Slide 16] Government has a role too

51. There are areas where the government can and should further encourage tailored commercial mediation. I examine some possibilities as follows.

52. The Intellectual Property Office of New Zealand ("IPONZ") is a good place to start[43]. Here is why and how:

(a) For many reasons, intellectual property is a field which is highly amenable to mediation – disputes are often multi-national, cases are expensive to litigate, the law is complex, damages are often hard to quantify, and much can be achieved by way of agreement that cannot be achieved in Court (eg royalty and territory agreements);

(b) IPONZ deals with many trade mark and patent disputes at first instance;

(c) Worldwide, government intellectual property offices commonly operate IP-specific mediation schemes. Examples can be found in the UK, Brazil, Colombia, Singapore, the Philippines, Korea and Indonesia. Most often these schemes are operated in conjunction with WIPO, which has mediation rules which are tailored to IP cases (expert mediators, deadlock provisions, limitation "pausing" provisions); and

(d) IPONZ has some ability to regulate its own procedure, and can also pause matters before it in some contexts[44]. It seems likely that there is scope therein for IPONZ to promulgate a tailored IP mediation scheme, potentially in conjunction with WIPO.

53. Farm debt mediation ("FDM") is another field with potential. With dairy prices in free-fall, and many farms highly leveraged, we may well soon sadly need to look more carefully at how farm debt issues are managed. In Australia there are legislated FDM schemes in New South Wales and Victoria. Those schemes are tailored to farm debt cases (including, for instance, a specific requirement that the mediation should have as little formality and technicality, and as much expedition, as possible) [45]. The Federal Government is seeking to develop a nationally consistent approach[46]. New Zealand First is seeking to introduce similar legislation into Parliament here[47].

54. It is straying somewhat from strictly commercial mediation, but I wanted to comment briefly on the Health and Disability Commissioner ("HDC"). The HDC does have a mediation service, but it is acknowledged to be significantly underutilised[48]. It has been suggested that the reason for this lies in some poor experiences which patients attending mediations have had, where they have felt that they did not understand what was going on, and were rail-roaded into the process. That seems to me to be an area which cries out for a properly tailored approach.

55. Consumer disputes are also area which could benefit from the government encouraging tailored mediation. An ODR scheme like Online Schlicter could be apt.

56. I am sure that there are many other areas where the government can and should further encourage tailored commercial mediation.

[Slide 17] CONCLUDING REMARKS

57. I am conscious this has been something of a gallop. Each aspect of commercial mediation tailoring I have addressed above might warrant a seminar on its own. But I think that the strength and appeal of commercial mediation tailoring lies in the breadth of the options available. Hopefully this seminar has served to illuminate those options.

58. Ultimately, we are service providers, and we have to give our market what it wants. But if we can gently encourage our market to let us help tailor commercial mediation solutions, to the advantage of all, we may yet get to be the truly flexible yoga gurus of dispute resolution.

Mark Kelly,
24 July 2015

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[5] "*ABA Section of Dispute Resolution Task Force on Improving Mediation Quality Final Report*", April 2006-February 2008, American Bar Association Section of Dispute Resolution, p12
[6] Vanenkova *"International Trends in mediation",* http://kluwermediationblog.com/2013/01/27/international-trends-in-mediation/
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[9] Stearns Johnsen, "*Alternative "Deal" Resolution: The Facilitated Negotiation of Transactions*", 2011, 30 Windsor Rev. Legal & Soc. Issues 193, p198-199
[10] Ibid, p200
[11] McTernan, "*Media and Mediation: Putting Wheels on the Deals*", http://www.mondaq.com/x/29259/Media/Media+and+Mediation+Putting+Wheels+on+the+Deals+Deal+Mediation
[12] n9, p200-201
[13] n10

[14] n9, p205-209, see also Apollon, "*Cross-Cultural Deal Mediation as a new ADR Method for International Business Transactions*", 201", L. & Bus. Rev. Am. 255
[15] n9, p208
[16] See Hardin & Lack "*The Seven Principles of Guided Choice Dispute Resolution Processes*", 2014, http://whoswholegal.com/news/features/article/31680/seven-principles-guided-choice-dispute-resolution-processes, and "*ADR in Business Practice and Issues across Countries and Cultures*", Ed. Ingen-Housz, 2011 Kluwer Law International BV, The Netherlands, p364
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[26] Rabinovich-Einy, Katsh, "*Lessons from Online Dispute Resolution for Dispute Systems Design*", http://www.mediate.com/pdf/rabinovitch_katsh.pdf, p54
[27] n25, p13
[28] n25, p14
[29] n25, p15
[30] n25, p15
[31] n25
[32] n25, pp24-25
[33] See "*ADR in Business Practice and Issues across Countries and Cultures*" n15; "*Dispute Resolution in New Zealand*", 2cnd Ed., Spiller ed., Oxford University Press; Deason, "*Combinations of Mediation and Arbitration With the Same Neutral: A Framework for Judicial Review"*, Yearbook on Arbitration and Mediation, 2013, 219; Blankley, "*Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*", 2011, 63 Baylor L. Rev. 317
[34] "*ADR in Business Practice and Issues across Countries and Cultures*" n15, p357
[35] Lee, "*Singapore Developments – the Singapore International Mediation Institute and the Singapore International Mediation Centre*", 14 Nov 2014, http://kluwermediationblog.com/2014/11/14/singapore-developments-the-singapore-international-mediation-institute-and-the-singapore-international-mediation-centre/
[36] n34, p358
[37] n34, p366-7
[38] Powell, "*Preliminary Meetings*", [2013] NZLJ 261
[39] *How to Master Commercial Mediation*, Richbell et al, Bloomsbury, 2015, p207
[40] McCarty, "*In-house roles: no longer the low-paid alternative*", 7 May 2014, NZ Lawyer
[41] The Law Society Gazette, "*Commercial mediation: resolution revolution?*", Grania Langdon-Down, 30 September 2013
[42] Abrams, "*THE ART OF THE DEAL "Deal mediation""*, https://imimediation.org/hesha-abrams-article-new
[43] For further commentary on this, see Kelly, "*Trends And Developments in IP Mediation*", Seminar presented to IPSANZ 27 & 28 May 2015, at www.markkelly.co.nz
[44] See Trade Marks Regulations 2003, rr27,28, and Patents Regulations 2014, rr156,159
[45] Farm Debt mediation Act 2011 (Vic), Farm Debt mediation Act 1994 (NSW)
[46] http://www.agriculture.gov.au/ag-farm-food/drought/assistance/approach_to_farm_debt_mediation
[47] Receiverships (Agricultural Debt mediation) Amendment Bill
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