

MODEL CLAUSES FOR ALTERNATIVE DISPUTE RESOLUTION

1 Background

This paper and the clauses that are set out below form a companion-piece to the chapter entitled “Alternative Dispute Resolution Clauses in Legislation” now included in the Legislation Advisory Committee’s *Guidelines*.

If it is considered that a Bill ought to include an alternative dispute resolution (ADR) process for the resolution of disputes, the appropriate scope of the clauses needs to be determined in light of the principles and guidelines set out in Parts 3 and 4 of Chapter 18 in the *Guidelines*.

Whether or not there is a particular policy imperative dictating the precise form and scope of an ADR scheme, consideration should be given to including provisions that set out the basic procedural steps for an ADR process, rather than leaving these open, as is the case in some of the enactments listed in Part A of Appendix 6 of the *Guidelines* (which relates to Chapter 18).

2 Comment

The model clauses included in this Part are designed for **mediation**. They would need to be modified to reflect any other ADR method being proposed. In particular, care would need to be taken to amend any method-specific terminology. For example, if conciliation rather than mediation were the preferred process, provision would need to be made for the impartial third person to take a proactive part in proposing how the dispute is to be resolved and any other matters that distinguish conciliation from mediation.

They are no more than draft model clauses, and are largely procedural in focus. As drafted, they accommodate the basic principles and procedural steps for mediation, providing a framework for an orderly ADR process, without undermining the essential independence and flexibility of the process. A process that provides for orderly notification and other procedural steps helps to ensure that ADR is approached and practised in a principled way, both by those administering the enactment and those subject to it.

The standard procedural requirements set out in the model clauses may need to be complemented by clauses tailored to the policy requirements of the relevant statute, as by including criteria for decision-makers, or particular sanctions against defaulters, or particular sanctions for non-participation if the intention of the policy were to make the process mandatory. Any such provisions must be consistent with the overall purpose and scheme of the Act.

At the very least, it is suggested, the matters that should be addressed are those covered in the model clauses proposed below. These basic procedural steps are intended to protect the integrity and reliability of the process and to provide a degree of certainty for parties entering into an ADR process in reliance on the statute. It is therefore suggested that the model clauses be included, adapted as necessary for the implementation of ADR, where a statute provides for recourse to ADR.

The clauses may be set out in a separate Part of the Act, or in a subpart of a Part, or in a schedule. If there are several “pressure points” where ADR is provided for in the scheme of an Act, reference can be made to clauses set out in a separate schedule, so long as the same process is

appropriate in every instance.¹ The Parliamentary Counsel Office will assist in determining how best to include such clauses within the structure of a Bill.²

Part [X] **Resolution of disputes**

1 Interpretation

In this Part, unless the context otherwise requires,—

dispute means the dispute described in the dispute notice

dispute notice means a notice provided for by **section 3**

mediation agreement means an agreement, whether or not in writing, as to the process by which the mediation is conducted, as provided for by **section 6**

mediator means an impartial third person appointed in accordance with this Part to assist the parties to reach an agreed settlement of the dispute³

notice in response means a notice provided for by **section 4**

party means a person, including a group of persons, whether or not incorporated⁴

settlement agreement means an agreement, whether or not in writing, reached at or after a mediation in settlement of part or all of a dispute

working day means any day except Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign's birthday, Waitangi Day, and the day observed as the anniversary day in the locality concerned.

¹ See, for example, sections 43G, 46B, 58A, 60, 64, and 65 of the Resource Management Act 1991, where reference is made to clauses set out separately in schedules. These clauses adapt model clauses for incorporation by reference, as prepared for the Regulations Review Committee by the Chief Parliamentary Counsel at the invitation of the Legislation Advisory Committee (LAC Guidelines Supplement (2003), Appendix 4).

² The footnotes included with the model clauses are intended to indicate where or how the clauses may be tailored for the circumstances of a particular Bill.

³ There may be circumstances when it would be useful to include the qualifications required of a mediator.

⁴ There may be a need to specify the persons or class or classes of persons who may be parties.

2 Application of Part

This Part applies to any dispute arising under [NAME OF ACT], unless the parties agree otherwise.⁵

Procedural requirements for mediation

3 Dispute notice

- (1) A party to a dispute may serve a dispute notice on any party to the dispute.
- (2) A dispute notice must—
 - (a) state that it is served under this Part; and
 - (b) state the nature of the dispute and give a brief description of the subject matter of, and the parties to, the dispute; and
 - (c) describe where and when the dispute arose; and
 - (d) set out the names and contact addresses of the parties; and
 - (e) state that the party issuing the dispute notice wishes the dispute to proceed to mediation; and
 - (f) provide the full name and contact address of the party or person serving the dispute notice.
- (3) The dispute notice must nominate at least 3 mediators.

⁵ (a) In most cases, the dispute resolution mechanism will relate to the particular Act or a particular area of the Act, but there may be related Acts that are appropriately included, or it may be enough to describe the source of the dispute more generally; see, for example, section 25 of the Construction Contracts Act 2002. It may be necessary to indicate particular areas of the Act to which the dispute resolution provisions will apply, if you need to circumscribe the particular disputes that may go through an ADR process; see, for example, section 180 of the Maori Fisheries Act 2004.

(b) In some circumstances it may be appropriate to bar the jurisdiction to enforce a right until an option for ADR has been exhausted; see, for example, section 181(1) of the Maori Fisheries Act 2004. Arguably, that is also the effect implicit in the schemes for dispute resolution in Part 10 of the Employment Relations Act 2000 and in Part 4 of the Retirement Villages Act 2003.

(c) In some cases it may be necessary to include savings provisions, as for example, where certain other Acts or the general law must not be displaced by a settlement agreement.

(d) The rider in this clause permits parties to contract out of the procedures provided by the model clauses, but does not permit parties to opt out of mediation altogether.

4 Notice in response

- (1) Each party named in a dispute notice served under **section 3** must, not later than 10 working days after receiving the dispute notice, serve a notice in response on—
 - (a) the party that served the dispute notice; and
 - (b) every party named in the dispute notice.
- (2) A notice in response must state—
 - (a) that the notice in response is served under this Part; and
 - (b) whether the party serving the notice in response agrees—
 - (i) with the description of the dispute set out in the dispute notice; and
 - (ii) that the dispute notice correctly identifies the parties to the dispute; and
 - (iii) that the dispute may be mediated; and
 - (c) which, if any, of the mediators nominated in the dispute notice are acceptable to the party responding.
- (3) A party responding to a dispute notice may propose 1 or more alternative mediators.

5 When mediation must proceed

- (1) A dispute must proceed to mediation as soon as is reasonably practicable after all notices in response have been served under **section 4**, as long as the parties agree—
 - (a) that the dispute should be mediated; and
 - (b) on a mediator; and
 - (c) on a procedure for the mediation.
- (2) If each party agrees that the dispute should proceed to mediation, but they do not agree on a mediator, the parties must—
 - (a) jointly request that a mediator be appointed by an appropriate person; and⁶
 - (b) as soon as is reasonably practicable, proceed to mediation before the appointed mediator.

Mediation agreement

6 Requirement for mediation agreement as to procedure

The mediator and the parties must, within 20 working days after the mediator has been agreed under **section 5(1)** or appointed under **section 5(2)**, agree on the procedure for the mediation, which may include agreements on the following matters:

- (a) who has the authority to represent and bind the parties;
- (b) who may attend the mediation, including legal counsel and experts;
- (c) requirements as to confidentiality and privilege in respect of the mediator, the parties, and other persons attending the mediation, including who may be informed about any confidential matter;
- (d) how the costs of the mediation are to be met;
- (e) whether the mediator may engage an expert assessor for a stated or any other purpose;
- (f) exclusion of liability for the mediator;
- (g) disclosure of conflict of interest by the mediator;
- (h) how the mediation agreement may be terminated;
- (i) any other matter that, having regard to the nature of the dispute, the mediator and the parties agree is appropriate to best meet the needs and interests of the parties.

⁶ Possible sources for this assistance include the President of the New Zealand Law Society, the President of the Arbitrators' and Mediators' Institute of New Zealand, or the Chair LEADR NZ. For contact details, see the Guidelines.

7 When mediation cannot proceed

- (1) A mediation of a dispute cannot proceed if—
 - (a) a party on whom a dispute notice is served does not serve a notice in response in accordance with **section 4**; or
 - (b) a mediation agreement is not agreed in accordance with **section 6**; or
 - (c) at any time, in relation to 1 party to the dispute, that party gives notice of his, her, or its withdrawal from the mediation.
- (2) However, if 1 party to a mediation gives notice of withdrawal, that does not prevent other parties to the mediation to agree to enter into a new mediation agreement.

8 Confidentiality, privilege, and costs⁷

- (1) Except as required by law or unless otherwise agreed in the mediation agreement, the matters discussed, raised, agreed, admitted, or determined in, or in the course of, a mediation—
 - (a) must not be disclosed by the parties, the mediator, or persons attending the mediation; and
 - (b) are not admissible in a court, tribunal or other forum or before a person acting judicially, unless for the purpose of enforcing a settlement agreement.
- (2) A breach of the confidentiality required by **subsection (1)(a)** is a breach of an essential term of the settlement agreement.
- (3) The parties must—
 - (a) meet their own costs and expenses in relation to the mediation; and
 - (b) pay on an equally shared basis the fees and expenses of the mediator.

Settlement agreement

9 Resolution of dispute

- (1) If a resolution is reached on the whole or part of a dispute as a result of, or in the course of, a mediation, the terms of the settlement must be recorded in a settlement agreement.
- (2) A settlement agreement is binding on the parties.
- (3) A party may enforce the settlement agreement by way of proceedings in a court of competent jurisdiction.

Jurisdiction of courts and tribunals

10 No court proceedings or enforcement action

- (1) If a dispute notice is served under **section 3**, no party may commence or continue proceedings in any court or tribunal in relation to any matter related to the dispute described in the dispute notice until—
 - (a) the steps required by **sections 4 to 6** have been completed; and
 - (b) the mediation agreement has been terminated.
- (2) However, **subsection (1)** does not prevent a party from applying to a court for—
 - (a) orders to preserve that party's position pending the resolution of the dispute under this Part; or
 - (b) a stay of proceedings commenced or continued in breach of **subsection (1)**.

⁷

For most purposes, these restrictions reflect standard principles adopted in mediation, though parties may agree otherwise under clause 7 (see paragraphs (c) and (d)).