



**ARBITRATORS' AND MEDIATORS'
INSTITUTE OF NEW ZEALAND INC**

Te Mana Kaiwhakataū, Takawaenga o Aotearoa

Improving Access to Justice

**Comments of The Arbitrators' and
Mediators' Institute of New Zealand on the
Paper of the Rules Committee of the High
Court dated 14 May 2021**

July 2, 2021

THE ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND ("AMINZ")

1. AMINZ is New Zealand's largest organisation for dispute resolution professionals. It has over 1,000 fee paying members and more student members. Its membership includes many of this country's leading DR professionals and academics.
2. AMINZ is internationally recognised.¹ It trains and credentials dispute resolution professionals across a wide range of schemes. It has robust and long-standing ethics, CPD and complaints-management regimes.²
3. AMINZ is referenced in over 40 pieces of legislation to appoint dispute resolvers.³
4. AMINZ has a long history of working with Government on best practice dispute resolution.
5. AMINZ has extensive experience in establishing, administering and/or providing mediators for mediation schemes. Recent examples include:
 - (a) AMINZ is an Approved Dispute Resolution Organisation for credentialing of family mediators; and
 - (b) By agreement with the EQC, AMINZ independently administers, and provides mediators for, the EQC mediation scheme;
 - (c) The Farm Debt Mediation scheme, where AMINZ worked in partnership with Resolution Institute and the Ministry of Primary Industries to craft and implement the training and credentialing regime for the new scheme; and
 - (d) AMINZ provides mediators for the Retirement Villages mediation scheme.

¹ AMINZ is the only organisation globally that has reciprocal rights of membership with the Chartered Institute of Arbitrators – the largest dispute resolution organisation world-wide.

² Ibid

³ See Appendix 1: List of legislation that names AMINZ

6. AMINZ is an Approved Nominating Authority pursuant to the Construction Contracts Act to appoint adjudicators.
7. AMINZ is the body nominated by the Minister of Justice to make appointments of arbitrators in the stead of the High Court, pursuant to the Arbitration Act 1996.

INTRODUCTORY REMARKS AND RECOMMENDATIONS

8. The Rules Committee has proposed reforms to:
 - i. the jurisdiction and processes of the Disputes Tribunal;
 - ii. introduce new roles and training and processes in the District Court; and
 - iii. a new framework for the High Court civil jurisdiction.

Comments on the proposed Disputes Tribunal reforms

9. We propose that the jurisdiction of the Disputes Tribunal remains as it is. We propose that, instead of expanding the Disputes Tribunal's jurisdiction, there should be an *optional jurisdiction* for claims of between \$30,000 (the upper end of the Disputes Tribunal's jurisdiction) and \$125,000 to be resolved by "on the papers" arbitration proceedings (which we refer to as *short form arbitration*).⁴
10. "Optional" means that either party could choose to commence short form arbitration proceedings, in relation to a dispute that involves claims of \$30,000 to \$125,000. It would not be possible to contract out of the option.
11. We suggest that this process could use similar processes to those applying to adjudications under the Construction Contracts Act 2002. The Ministry of Justice could name Authorised Nominating Authorities (as under the Construction Contracts Act 2002) who would appoint qualified arbitrators to conduct the short form arbitration proceedings.

⁴ If the jurisdiction of the Disputes Tribunal is expanded to \$50,000 (as is proposed in the paper dated 14 May 2021), then the jurisdiction of the optional arbitration scheme could be from, for example, \$50,000 to \$125,000.

12. We consider that this approach would avoid the complexities of introducing a right of appeal, on points of law, in relation to Disputes Tribunal decisions.
13. We propose two alternative options as to the finality of the arbitration award:
- a. Option one is the position that applies to domestic arbitration awards under the Arbitration Act 1996 (where the option to appeal on a point of law as set out in Schedule 2 of the Arbitration Act 1996, has not been excluded), which means that a party that is dissatisfied with a decision could apply to the District Court for leave to appeal on a point of law;
 - b. Option two is akin to the position that applies to adjudication decisions under the Construction Contracts Act 2002. The decision is final and binding and must be complied with unless and until the decision is reversed or changed in subsequent District Court proceedings (on a *de novo* basis).
14. We consider that option b. is the more preferable of the options. This approach works well in the construction sphere. It means that the short form arbitration decision must be complied with in the meantime and it requires a dissatisfied party to consider whether they want to go through a full court process (with evidence and disclosure), given the potential costs that may be incurred.
15. We consider that the parties should be free to have legal representation in the short form arbitration proceedings (this is to be contrasted with the situation in the Disputes Tribunal). Equally it would be possible for a party to participate in the proceedings without legal representation.
16. While it would be necessary for the parties to pay for the time of the arbitrator; the parties would not need to pay the hearing and filing fees required in the District Court and High Court, and if a quicker and more confined process is adopted then legal fees should be reduced. The Ministry of Justice could also consider subsidising such arbitration proceedings, as was proposed in relation to the Commercial Lease Arbitration Scheme, to deal with COVID-19 lock-out issues.
17. Members of the AMINZ Arbitration and Adjudication panels already have the necessary experience to undertake acting as arbitrators in such short form arbitration proceedings. It would not be necessary to introduce part-time Deputy Judges/Recorders (as is proposed in the 14 May 2021 paper). This would also avoid the potential issue of having members

of the profession being part-time members of the judiciary, while also continuing to appear as Counsel in the Courts.

District Court Rules

18. We propose the introduction of a new District Court Rule, allowing a judge to direct the parties to attempt to settle their dispute by mediation or other alternative dispute resolution as directed by the judge. A genuine attempt to settle by mediation would be a condition of being allowed to continue with the court proceedings. This type of Court directed mediation as a pre-condition to setting-down the substantive fixture has been adopted in Australia⁵. Obviously if the matter settles at mediation, then no further orders or Court assistance will be required.
19. Mandatory mediation could also be introduced as a pre-condition to pursuing claims within the jurisdiction of the short-form arbitration process promoted above. A gate-keeper function would be performed by requiring the parties to first attempt to resolve the dispute through a bona-fide mediation, with a certificate from the mediator being required before the issue of the adjudication process.

High Court Rules

20. We propose an amendment of High Court Rule 7.79, to mirror the proposed new rule for the District Court (as referred to above). Currently High Court Rule 7.79(5) allows a Judge, with the consent of the parties, to make an order directing the parties to attempt to settle their dispute. We consider that Judge should be given the power to direct the parties to attempt settle their dispute by mediation (where, in the Judge's view, that would be an appropriate course of action).
21. It is acknowledged that some categories of case might require exemption, such as where Public Law remedies are being sought.

Costs

⁵ Refer the attached paper Mandatory and quasi-mandatory mediation (2019) 47 Aust Bar Rev 215

22. Whether or not any rule is introduced whereby parties can be required to attend mediation, we propose that HCR 14.7(f) and DCR 14.7 (e) have added, an additional factor (vi) *failing, without reasonable justification, to attend a mediation to attempt to resolve the proceeding.*

Nicole Smith and Malcolm Wallace

For the AMINZ Council

2 July 2021

Appendix 1

AMINZ is named in legislation.

To appoint arbitrators as follows:

- Fisheries Act 1996
- Fisheries Amendment Act 2011
- Sharemilking Agreements Act 1937
- Sharemilking Agreements Order 2001
- Sharemilking Agreements Order 2011

To appoint independent decision makers as follows:

- Titi (Muttonbird) Island Regulations 1978 and amendments 2007

To appoint mediators as follows:

- Maori Television Service (Te Aratuku Whakaata Iriangi Maori) Act 2003
- Building (Residential Consumer Rights and Remedies) regulations 2014
- Commodity Levies (Arable Crops) Order 2012
- Commodity Levies (Asparagus) Order 2012
- Commodity Levies (Avocados) Order 2013
- Commodity Levies (Blackcurrents) Order 2013
- Commodity Levies (Cereal Silage) Order 2012
- Commodity Levies (Citrus Fruit) Order 2014
- Commodity Levies (Feijoas) Order 2014
- Commodity Levies (Foveaux Starit Dredge Oysters Order 2013
- Commodity Levies (Harvested Wood Material) Order 2013
- Commodity Levies (Kiwifruit) Order 2012
- Commodity Levies (Maize) Order 2012
- Commodity Levies (Meat) Order 2015
- Commodity Levies (Milk solids) Order 2014
- Commodity Levies (Mussels, Oysters, and Salmon) Order 2013
- Commodity Levies (Nashi Pears) Order 2012
- Commodity Levies (Non-proprietary and Uncertified Herbage Seeds) Order 2014
- Commodity Levies (Onions) Order 2013
- Commodity Levies (Paeonies) Order 2012
- Commodity Levies (Passionfruit) Order 2014
- Commodity Levies (Paua) Order 2013
- Commodity Levies (Pipfruit) Order 2012
- Commodity Levies (Potatoes) Order 2013
- Commodity Levies (Rock Lobster) Order 2013

- Commodity Levies (Summerfruit) Order 2014
- Commodity Levies (Tamarillos) Order 2010
- Commodity Levies (Vegetables and Fruit) Order 2013
- Commodity Levies (Wheat Grain) Order 2014
- Commodity Levies (Winegrapes) Order 2016
- Wine (Grape Wine Levy) Order 2005
- Wine (Grape Wine Levy) Order 2016
- Wine (Non-grape Wine Levy) Order 2008
- Maori Reserved Land Amendment Act 1997
- Commodity Levies (Eggs) Order 2010
- Commodity Levies (Nashi Asian Pears) Order 2006
- Commodity Levies (Naval Oranges) Order 2012
- Commodity Levies (Satsuma Mandarins) Order 2008
- Commodity Levies (Southern Scallops) Order 2007