MEDIATION SCHEMES FOR NATURAL DISASTER INSURANCE DISPUTES – A BETTER WAY FOR THE FUTURE?

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Presented as the Maxwell Lecture on 17 October 2017, and (as a shortened version) to the APIC Conference on 18 October 2017, Singapore

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Introduction

1. **[SLIDE]** At 1.58pm on the 23rd of December 2011, my wife, our two kids and I were in Christchurch visiting family for Christmas. The kids were laughing with their cousins **[SLIDE]**. The adults were about to have a drink. Then, everything around us shook and thundered as if the world was going to collapse. We scooped up the kids and raced outside. Huge nearby cliffs had collapsed, and clouds of red dust were billowing into the air **[SLIDES]**. We were all ok, but it was terrifying. The ground beneath our feet had become a beast of indiscriminate and dreadful violence.

2. **[SLIDE]** What we had experienced was an earthquake measuring 5.9 on the Richter scale[1]. That was in fact just the fourth biggest earthquake to hit Canterbury in a 4,000 quake sequence[2] which began on 2 September 2010, and still continues. The worst of the quakes, the one on 2 February 2011, killed 185 people[3]. **[SLIDES]**

3. As well as the awful fatalities, the Canterbury earthquakes caused many injuries, and untold psychological trauma. Christchurch was turned into a war zone, and parts of the city still look that way today.

4. **[SLIDE]** The earthquakes caused some $40B worth of damage[4]. It has been heartbreaking.

5. In the aftermath, some of that heartbreak has played out in ongoing disputes between property owners and insurers. In this regard:

   (a) The government insurer EQC, which generally deals with the first $115k of a claim, has fielded some 20,000 complaints[5] (I should say, in fairness, out of some half a million claims[6]);

   (b) The Insurance and Financial Services Ombudsman has dealt with at least 1,570 Canterbury earthquake complaint enquiries[7]; and

   (c) As at 30 June 2017, a total of 881 cases have been filed on the Christchurch High Court's Earthquake List.[8] And the pace of claims is on the rise as limitation dates have loomed **[SLIDE]**.

6. **[SLIDE]** These disputes take a heavy economic and emotional toll on the claimants. And they are no cake-walk for the insurers. Insurer representatives are often locals. They face financial pressure, over-claiming, and over-work. Some of them have not had their homes fixed either. Large scale disasters can and do put insurance companies under[9].

7. **[SLIDE]** Most Canterbury earthquake insurance disputes are eventually settled. At the end of 2016, Insurance Council Chief Executive Tim Grafton advised that insurers had fully settled 94% of all Canterbury earthquake residential property claims[10].

8. And many Canterbury earthquake insurance disputes have been settled by mediation. EQC has had a complaints mediation service that is independently run by the Arbitrators' and Mediators' Institute of New Zealand ("AMINZ")[11]. The Residential Advisory Service, supported by insurers, and run in conjunction with community law centres, organises pre-litigation multi-party meetings which are essentially

mediations[12]. And many earthquake disputes have been privately mediated, some by me.

9. But the use of mediation in Canterbury earthquake insurance disputes is very much ad hoc, and we are still mediating over seven years after the first of the major quakes. Mediation should have been used more often, and earlier, to resolve these disputes. Mediation has a proven track record of achieving high percentages of settlements which are durable, and save parties money[13].

10. There will be a variety of reasons why mediation was not used more often and earlier for Canterbury earthquake insurance disputes. The staged liability interplay between EQC and private insurers will have played a part, I suspect a large one. The lack of a Court-directed mediation program may also be relevant. Although it has to be acknowledged that the Courts have worked hard to create a settlement-conducive environment in relation to Canterbury earthquake insurance disputes. Auckland University Law School academic, and mediator, Nina Khouri has addressed this in detail in an excellent paper[14].

11. But I suspect that the lack of any plan for natural disaster mediation, or pre-agreed rules for it, has also been a problem. Natural disasters create unique challenges for any dispute resolution process. These are challenges which are best met by tailoring the process. But the aftermath of a natural disaster, when it is all people can do to keep chaos and misery at bay, is not the best time for tailoring anything.

12. The sad reality is that, one day, we will face another significant natural disaster. We should plan for this. In my view, countries such as New Zealand should create a template mediation scheme, ready to go, for insurance disputes between property owners and insurers arising out of future natural disasters.

13. Disaster mediation schemes have been established before, particularly in the US. These schemes have had real successes. They have also been criticised. There is much that we can learn from them.

14. In the first part of this paper, I will talk about some of the schemes which have been established before. In the second part, I will set out some thoughts on what a template disaster mediation scheme might look like.

Disaster mediation schemes established before

[SLIDE] *Newcastle, New South Wales, after the 1989 earthquake*

15. On Thursday 28 December 1989, Newcastle, New South Wales, suffered an earthquake that measured 5.6 on the Richter scale[15]. It killed 13 people, injured more than 160, and caused damage estimated at A$4B[16].

16. Mediation (as we now know it then in its infancy) was used by the Newcastle and Region Renewal Co-ordination Unit ("RCU") to help resolve disputes between homeowners and insurers[17]. Of note:

    (a) The effectiveness of mediation in this context was recognised in the RCU's 1993 report:

> "*Mediation began to emerge as the dominant tool for managing conflict resolution, especially as the simple cases gave way to more intractable problems and difficulties*."[18]

It was reported that all but one of the 551 cases dealt with by Newcastle's RCU were resolved, although it is not clear how many of those were mediated[19];

(b) Interestingly, the procedural approach taken to mediating was flexible. Apparently there were periodic mediations (multiple sessions over time), marathon mediations (long single sessions), and crisis mediations (short single sessions, presumably urgent)[20]. There was also a tendency to use preliminary conferences[21];

(c) The RCU considered it to be important to work with the insurance industry[22];

(d) Power imbalance between participants was a recognised issue[23]. Insurers are generally better resourced, and more experienced at dispute resolution, than claimants. The weakness of the claimants' position can be compounded by the fact that they have also suffered through the trauma of a disaster. Power imbalance issues are a recurring theme in writing on disaster insurance mediation[24], and will be the subject of further comment in this paper. It is worth remembering though that power imbalances will affect any kind of disaster insurance dispute resolution mechanism, from negotiations to trial. I think it is also important to remember that such power imbalances are not the *fault* of insurers. And, again, that disasters can and do put some insurance companies under; and

(e) The importance of establishing and funding a mediation scheme as soon as possible after a disaster was also noted. The RCU's 1993 report stated:

> "*A team of specialist mediators set in place as soon as practicable after a disaster would enable quick resolution of many disaster-related disputes before those disputes escalate and perhaps become intractable, and socially debilitating*." [25]

[SLIDE] *Florida, after Hurricane Andrew, 1992*

17. After Hurricane Andrew in 1992, Florida's Department of Insurance ("FDOI"), in conjunction with the American Arbitration Association ("AAA"), established a mediation scheme to help deal with the 25,000 insurance related claims that inundated the local court system and overwhelmed the insurance industry[26]. Of note:

    (a) This scheme:

        (i) Was generally for residential claims only;

        (ii) Provided that participation was optional for the insured, but required of the insurer;

        (iii) Was paid for by insurers;

        (iv) Obliged insurers to notify claimants of their right to mediate.

    These were generally common features of subsequent US schemes[27];

(b) The AAA provided bilingual administrators[28];

(c) The mediations were handled without counsel[29];

(d) It has been reported that 92% of the 2400 cases mediated under this scheme were resolved successfully[30]; and

(e) The success of the scheme led the FDOI to promulgate a permanent rule, which remains in force today with some amendments, for general mediation of property insurance claims[31].

Hawaii, after Hurricane Iniki, 1992

18. After Hurricane Iniki in 1992, Hawaii's state government and the AAA established a mediation scheme along similar lines to the one set up for Hurricane Andrew. Of note regarding this scheme was the use of town meetings throughout Kauai to address concerns of the victims and to educate them about mediation[32].

California, after the Northridge earthquake, 1994

19. After the Northridge earthquake in 1994, California established, and subsequently codified, a mediation scheme[33]. That scheme has been available for some civil disputes ever since, but does not appear to have had a high take-up[34]. It does not appear that the scheme has been invoked in a disaster context in California since 1994.

Florida, after multiple hurricanes in 2004

20. After four hurricanes in Florida in 2004 (Charley, Frances, Jean and Ivan), there were 2.5 million insurance claims[35]. The State Commissioner of Insurance initiated a state-sponsored mediation program, based on that used for Hurricane Andrew. Of note[36]:

(a) The scheme required that the insurer's representative bring "*a copy of the policy and the entire claims file to the conference*";

(b) It also required the representative of the insurer to:

(i) Know the details of the policy and the claim; and

(ii) Have the authority to settle the full amount of the claim, and the ability to disburse the settlement amount at the conclusion of the conference;

(c) The scheme made a government attorney available during the mediation process, but they were not able to act as an advocate for the homeowner. This aspect of the scheme was, unsurprisingly, criticised[37]; and

(d) The scheme had a settlement rate of 86%.

[SLIDE] *Louisiana and Mississippi, after Hurricanes Katrina and Rita, 2005*

21. Hurricanes Katrina and Rita were colossal in effect. Katrina alone was the most expensive natural disaster ever in the US[38]. Mediation schemes for homeowner and insurer disputes were established in both Louisiana and Mississippi. Of note:

(a) The schemes were administered by the AAA[39];

(b) As I understand it, many of the mediations were only two hours long[40];

(c) In Louisiana more than 15,000 cases were dealt with, at a settlement rate of c.74%. In Mississippi, more than 5,000 cases were dealt with, at a settlement rate of 82%[41]; and

(d) The scale of this scheme prompted further academic and NGO analysis of such schemes generally. A common thread of that analysis was that, while such schemes have real advantages and potential, it is very important to be aware of, and manage, the power imbalance issues that will arise[42].

[SLIDE] *North Carolina, after flooding, 2006*

22. After flooding in 2006 North Carolina established a mediation scheme.

23. The North Carolina state legislature subsequently enacted a statutory scheme for the mediation of emergency or disaster related property insurance claims[43]. North Carolina's scheme was activated in October 2016 after Hurricane Matthew[44].

Texas, after Hurricane Ike, 2008

24. After Hurricane Ike in 2008, the Texas State Insurance Department established a mediation scheme under the independent administration of a Texas firm. The material that I have seen in relation to this scheme suggests a relatively low take-up. One issue may be that participation was voluntary for insurers, and those which participated accounted for only a quarter of the market[45].

25. At a similar time, Texas was also looking to establish a statutory mediation scheme[46], but it does not yet seem to have done so[47]. The proposed legislation is still in bill form[48].

New York and New Jersey after Superstorm Sandy, 2012

26. Mediation schemes were established in both New York and New Jersey after Superstorm Sandy. Of note[49]:

(a) Both schemes were run by the AAA;

(b) New Jersey's program lagged behind New York's in terms of uptake. There was a suggestion that this was down to a lack of public awareness in that state. There was also a suggestion that the two hour duration of the mediations[50] was insufficient[51]; and

(c) The New York scheme reportedly had a 64% settlement rate[52].

[SLIDE] *Establishing in advance*

27. The mediation schemes I have described were all established in the aftermath of natural disasters. But commentators have argued for the benefits of establishing or maintaining such schemes in advance of further disasters:

(a) David L Lane:

> "*The most significant criticism of all of these programs is that, for them to be truly helpful, they would be set up in advance, enabled by any required legislation and regulations and not allowed to be dismantled when the rush from the storm de jour has passed."*[53]

(b) Melvin A Rubin:

> "…*obstacles must be removed ahead of time, not during the disaster itself. …The responsible government bodies must be ready to step in with well-drafted emergency rules to allow the implementation of the* [ADR] *process with the full commitment of all the stakeholders, particularly the insurance companies.."*[54]

(c) Non-profit advocacy group United Policy Holders states that a disaster mediation scheme:

> "*..should have infrastructure permanently in place to allow for quick and effective implementation when a disaster strikes.*"[55]

28. As noted, in California and North Carolina, legislators have seen the benefit of leaving the schemes in place for use in future natural disasters[56]. And in Connecticut, a statutory disaster mediation was enacted in 2013[57].

[SLIDE] What a template natural disaster mediation scheme might look like

29. So, what might a template natural disaster mediation scheme for New Zealand and countries like it look like?

30. Firstly, a theoretical framework. On the back of their pioneering work in the 1980s at the Caney Creek mine, Ury, Brett and Goldberg established six principles of dispute resolution systems design ("DSD"). They are:

(a) Principle 1: put the focus on interests;

(b) Principle 2: provide low-cost rights and power backups;

(c) Principle 3: build in "loop-backs" to negotiation;

(d) Principle 4: build in consultation before, feedback after;

(e) Principle 5: arrange procedures in a low-to-high-cost sequence; and

(f) Principle 6: provide the necessary motivation, skills, and resources[58].

31. I will refer back to the DSD Principles, and the lessons learned from disaster mediation schemes established before, as I cover the potential components of a template disaster mediation scheme.

32. **[SLIDE]** I think it is also useful to bear in mind the following United Policy Holders recommendation in relation to the design of disaster mediation schemes:

> "*A Model Program must balance the objective of resolving a large number of claims quickly against the goal of adequately and fairly compensating disaster victims through a process that recognizes the inherent power gap that exists between insurers and policyholders*"[59]

[SLIDE] *Scheme promotes mediation, early*

33. A disaster mediation scheme should promote mediation as an important and early part of disaster insurance dispute resolution.

34. Using mediation gives parties an opportunity to address DSD Principle 1, putting the focus on interests. Whilst mediation may not always be the nirvana of interest realisation that we wish it would be, it is still the procedure with the best hope of addressing parties' interests. In a natural disaster insurance dispute, a homeowner's interests will be in getting their house fixed quickly and well, and the dispute out of their lives. Insurers will have interests in getting claims dealt with efficiently, maintaining customer relations, and avoiding bad press/precedents. Mediation can address those interests.

35. Promoting mediation as an early part of disaster insurance dispute resolution also addresses DSD Principle 5 (arrange procedures in a low-to-high-cost sequence). Mediation will inevitably be cheaper for all concerned than the next most likely alternative, continued litigation.

Scheme should be developed in conjunction with insurers and consumer groups

36. It is important that a scheme be developed in conjunction with insurers and consumer groups. Both stand to benefit, and both should have input into and ownership of such a scheme.

37. The importance of insurer "buy-in" was noted in the Newcastle scheme, and in many of the other schemes which I have referred to. There is a risk that insurers can be cast as the villain of the piece in natural disaster insurance disputes. But that can be unfair. Most insurance claims are settled without rancour, and insurers are not generally frothing at the mouth to litigate. Professor Robert H. Jerry (of the Missouri School of Law) has gone so far as to say of the insurance industry that:

> "..*it is hard to imagine an industry where dispute avoidance is more highly valued, dispute resolution rules and processes matter more, or the number of occasions in which dispute resolution procedures are invoked is larger*."[60]

38. Insurers in the US have even established their own ADR schemes in response to natural disasters[61]. Insurers in New Zealand are regular participants in mediations.

39. Obviously it is important for consumers to have a say too, although identifying who might best speak for consumers may be more difficult. Government and NGOs may have a role here.

40. Developing a scheme in conjunction with insurers and consumer groups addresses DSD Principle 4 (consultation).

Scheme should be statute-based

41. As noted previously, some of the US schemes received statutory backing. Codes of conduct, contracts and the like can be forgotten, varied, or breached by either side with relative impunity in this context. There is also a risk that, over time, they are simply shelved. Setting out a scheme in a statute will provide part of the motivation for parties to participate, as per DSD Principle 6.

Paid for by insurers, government?

42. A common thread in the US schemes was that the mediations were paid for by insurer contributions. I would suggest that be looked at, or something co-funded by government and insurers. The concern for claimants is that the disaster may have already caused them financial stress. But, that said, sometimes it helps for all participants to have "skin in the game". Perhaps a small contribution from the homeowner could also be factored in.

43. In New Zealand, insurers are already involved in earthquake dispute mediation funding. In the private earthquake mediations that I do, the insurer will typically pay the mediator's fee if the matter settles. Insurers also part-fund the RAS.

44. Governments could also assist practically, by:

    (a) Providing mediators. Many skilled mediators work for governments;

    (b) Helping to pay for legal and expert support (which I will comment on further); and

    (c) Providing facilities for mediation – eg rooms and equipment. Schools, universities and military bases could be utilised in this regard.

45. These steps would be in accordance with DSD Principle 2, which requires the provision of low-cost rights; and DSD Principle 6, which requires the provision of the necessary resources.

Scheme should be mandatory, at least for insurers

46. The US schemes were generally mandatory for insurers. I suspect the rationale for this lay in a perception that insurers otherwise stood to gain from protracting dispute resolution, and not mediating. If so, I would suggest that is too harsh on insurers in many instances. But other factors may hold insurers back unduly, such as perceptions that certain cases are intractable, perceptions that more information is needed, and "file fatigue".

47. The scheme set up in Texas after Hurricane Ike was not compulsory for insurers, and seemed to have been the worse for it.

48. Typically the US schemes were not mandatory for claimants. Perhaps the rationale for this lay with the more classic view that parties should generally come to mediation of their own accord.

49. I do not see mandatory mediation as the evil that others do. I have written on this topic elsewhere[62]. Parties are compelled to mediate in many contexts, without obvious ill-

effect. Compulsion to mediate is not the same as compulsion to settle. But once parties are around the table, there is a high chance of settlement.

50. I would suggest then that a scheme should be compulsory for insurers at the very least. I appreciate this may be taking matters to a somewhat more dictatorial level than Ury et al had in mind, but I would argue that this is a legitimate part of DSD Principle 6 (motivation).

[SLIDE] *Scheme must be administered by an independent with DR expertise*

51. Many of the schemes in the US were administered by the AAA[63]. United Policy Holders recommends that disaster mediation programs should be administered by independent ADR providers with experience in post-disaster scenarios[64]. In New Zealand I would suggest that AMINZ would be well placed to take on this role (but must here declare my interest as an AMINZ councillor).

52. The Insurance and Financial Services Ombudsman has been suggested as another option in New Zealand[65].

53. This would be in accordance with DSD Principle 6 (skills).

Mediators must be trained, get extra training in trauma, and local if possible

54. It is important that the scheme adopt an appropriate credentialing regime to ensure that the mediators used are properly trained. These mediations will be over significant issues for the participants, and they deserve skilled mediators.

55. Disaster mediation training was provided to at least some of the mediators on the US schemes[66]. US commentators have also suggested that specialist training in trauma, and cultural competence when dealing with minority group participants, may well be valuable[67].

56. Mediators should be locals if possible, people who know the area and its character[68]. Obviously that will be subject to availability.

57. This would be in accordance with DSD Principle 6 (skills).

Limitation clock pauses?

58. Various schemes in the US (including the Katrina scheme in Louisiana[69], the California Code[70] and the draft Texas legislation[71]) allowed for limitation periods to be "tolled" whilst the mediation process was in train.

59. In Canterbury there has been a considerable increase in claims as limitations periods near[72]. There have also been warnings about large numbers of claims which may still be out there[73].

60. Hopefully, a disaster mediation scheme will mean there are far fewer litigated cases, and fewer that go on for so long. But it can take time for people to rebuild their lives, and gather the resources to pursue a claim. The staged liability interplay between EQC and private insurers slows things in New Zealand too (albeit, as I understand it, there have been recent moves in the context of the Kaikoura earthquakes to streamline this). So I would suggest that a limitation clock pause should be considered.

Insurers must notify of right to mediate – four times!

61. The US schemes generally placed an obligation on insurers to notify the homeowner of their right to mediate, often by way of prescribed forms. I think it will be important for uptake and education for a scheme to mandate a "loud and clear" prescribed notification process. I would suggest that claimants be notified:

    (a) When they take out their policy;

    (b) When a disaster strikes;

    (c) When they make a claim after a disaster; and

    (d) When a claim is disputed in any way.

62. I am conscious that this may seem onerous on insurers. But it will be a matter of standard forms (sometimes prescribed in the US). Hopefully it will also lead to more cases being mediated, and insurers will see that as being in everyone's interests.

Parties should have the opportunity, and be encouraged, to get legal representation and expert advice

63. Some of the US disaster mediation schemes discouraged the presence of lawyers for either party[74]. This has been criticised, as having the potential to exacerbate power imbalances, given the far greater experience and resources that insurers will inevitably have[75]. I think this criticism is fair. Lawyers can assist with power imbalance issues, and should be present if possible.

64. I also think that lawyers can also have a broader, but related, value, in terms of their ability to help inform the parties on significant issues. Sometimes the legal implications of policy wording will be critical, and will need to be assessed and explained. Having an understanding of legal precedent will be important too, as many issues repeat in disaster litigation. Nina Khouri's paper talks about the power of precedent in this context. Lawyers can also talk sensibly to parties about the costs and consequences of not settling.

65. Some claimants will not be able to afford lawyers. Perversely, such economically vulnerable people, who can be disproportionately comprised of minority groups, can be the worst affected by natural disasters[76]. In my view, governments should make legal aid readily available to such people[77].

66. There is an interesting article by John Pardun of JAMS about a very successful disaster mediation scheme, apparently set up by the Courts, in the aftermath of major wildfires in San Diego in 2007[78]. That scheme achieved a staggering 98% settlement rate, and recovery of more than $800M. One of the reasons for its success was perceived to be the extensive involvement of competent attorneys[79].

67. Technical issues around engineering and construction are also often pertinent to disaster insurance disputes. I think it would be useful if a scheme allowed for the establishment and funding of a pool of independent experts to assist in this regard. Ideally both parties would use the same expert(s). This would reduce the scope for the kind of adversarial expert advocacy that can arise when both parties have competing experts, appointed by lawyers in preparation for a trial.

68. Taking such steps would be further in accordance with DSD principle 6 (skills, and resources).

Insurers must provide all relevant documentation ahead of time, parties to advise positions pre-mediation

69. It is important that a scheme direct insurers to provide claimants with all relevant documents, including the policy, and any assessor reports, well ahead of the mediation. Sometimes claimants' documentation is lost or destroyed in the disaster[80]. Post-disaster, because of its effects, the claimant may also be less able to organise relevant documentation.

70. Both parties should be obliged, to the extent they can, to advise each other of their respective positions pre-mediation. This will better allow expectations and authority limits to be managed.

71. This step would be in accordance with DSD Principle 6 (resources).

[SLIDE] *Parties should be educated about the mediation process*

72. Parties should be educated about the mediation process as part of the scheme. The importance of educating parties in this regard has been emphasised by various US commentators[81]. It is a further way of encouraging uptake, reducing power imbalance, and making a scheme work effectively. Such education can take the form of town meetings (as per the scheme set up for Hurricane Iniki in Hawaii), leaflets, handbooks and instructional videos, websites and/or an information service.

73. This step would be in accordance with DSD Principle 4 (consultation), and DSD Principle 6 (resources and skills).

Sanctions for non-attendance

74. The scheme should mandate sanctions for non-attendance at a mediation without reasonable excuse. At least one of the US schemes had such sanctions[82]. For an insurer it might be a costs sanction. For a claimant it might be the loss of funding for a further mediation. See DSD Principle 6 (motivation).

No cookie cutter approach

75. I would suggest that the scheme should resist being too prescriptive about what mediations conducted under the scheme should look like. In mediation generally, there has been a move away from the cookie cutter approach[83].

76. Mediations in some of the US schemes, including at least some of those for Katrina and Superstorm Sandy[84], appear to have been limited to just one two hour session[85]. From my own experience of mediating earthquake disputes, I am confident that is unlikely to be long enough to give a mediation the best chance of getting a good result. I note the more adaptable approach that was adopted in Newcastle. As I understand it, many of the mediations that AMINZ conducts for the EQC are staged over multiple meetings.

77. In the San Diego wildfires example I referred to earlier, there was extensive tailoring of the process to fit the circumstances, and that was perceived as a major positive[86].

78. I appreciate that insurers and governments will be resistant to writing a blank cheque to an open-ended mediation scheme, and that some limits will have to be imposed. But I would suggest that the scheme will work best if there is reasonable scope for the mediators and the parties to tailor the process appropriately, and if time limits are not too harsh. I think this is part of addressing DSD Principle 6 (resources).

Three day cool-off

79. At least some of the US schemes allowed for three day cool off periods, during which a homeowner could decide whether or not to rescind any settlement reached at mediation[87]. This provision can help address power imbalance and trauma issues, by allowing a homeowner time to "breathe" before finally committing to a settlement. I would suggest that such a provision be adopted. See DSD Principle 2 (power backups).

Looping back

80. The scheme should provide (as many mediated agreements do), that any disputes in relation to the implementation of a settlement agreement (eg over the extent of an agreed rebuild strategy) should first be mediated if possible. This is in accordance with DSD Principle 3 (loop-backs to negotiation).

Reporting and monitoring

81. The US schemes generally had provision for reporting and monitoring[88], and the scheme should have provision for these too. This is important, because it will help the scheme "learn" and develop towards better achieving its objectives. It will also be important for all stakeholders to see how well the scheme is working, and for those who are paying for it to see that they are getting value.

82. But reporting and monitoring needs to be handled sensitively, given the confidential nature of mediation, and the traumatic nature of the experience that the claimants will have been through.

83. Reporting and monitoring is in accordance with DSD Principle 4 (feedback).

[SLIDE] Concluding remarks

84. The tragedy of the Canterbury earthquakes has been compounded by the delays in getting some disputes between claimants and insurers resolved. It did not need to be so hard. Disaster mediation schemes have had real success in the past. They enable large numbers of insurance disputes to be resolved quickly. In my view, we should take what others have learnt, and set up a fair and well-planned template disaster mediation scheme, which will be ready to go when the sad day of another disaster inevitably comes. Hopefully this paper can be part of a conversation about that.

85. **[SLIDE]** We had our most recent family Christmas in the Coromandel. Happily there were no natural disasters this year. My nine-year-old nephew did manage to take out his sister with a supposedly harmless toy bow and arrow. Which just goes to show that you can't plan for everything!

Mark Kelly,

October 2017

[1] http://info.geonet.org.nz/display/home/Canterbury+Aftershocks (viewed 5/8/2016)
[2] http://info.geonet.org.nz/display/home/Canterbury+Aftershocks (viewed 5/8/2016)
[3] https://en.wikipedia.org/wiki/2011_Christchurch_earthquake (viewed 5/8/2016)
[4] https://en.wikipedia.org/wiki/2011_Christchurch_earthquake#Economic_impact (viewed 5/8/2016)
[5] http://www.radionz.co.nz/news/regional/279908/more-than-23,000-eqc-complaints-lodged (viewed 6/8/2016)
[6] http://www.radionz.co.nz/news/regional/279908/more-than-23,000-eqc-complaints-lodged
[7] http://www.iombudsman.org.nz/complaints/complaint-data/ (viewed 24/7/2017)
[8] http://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/earthquake-list-christchurch (viewed 24/7/2017)
[9] In April 2011, the New Zealand government essentially took over local insurer AMI, which had been overwhelmed by Canterbury earthquake claims, see - http://southernresponse.co.nz/here-for-you/about-us (viewed 6/8/2016). See also Harges, Bobby Marzine "*Disaster Mediation Programs – Ensuring Fairness and Quality for Minority Participants*" Cap. UL Rev, no 39 (2011):893, note 8
[10] http://www.lawsociety.org.nz/news-and-communications/latest-news/news/canterbury-quake-insurance-settlements-near-$19-billion 01 November 2016 (viewed 24/7/2017)
[11] http://www.eqc.govt.nz/sites/public_files/guide-eqc-mediation-service.pdf (viewed 6/8/2016). I note that I am an AMINZ councillor.
[12] Goddard, J, "*Multi Party Meetings: A New Horizon for Dispute Resolution*", paper presented to the AMINZ annual conference, Wellington, July 2015
[13] See figures and references at http://www.markkelly.co.nz/documents/190216-AMINZ-Conference-2016-Gatekeepers-to-Commercial-Mediation.pdf, para 16, and *A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation*, Sarah Vander Veen, January 2014 http://www.mediatebc.com/PDFs/1-52-Reports-and-Publications/The-Case-for-Mediation.aspx,
[14] Nina Khouri, "*Innovative Dispute Resolution in Response to Natural Disaster: The Canterbury Earthquake Claims"* AMINZ Conference, Auckland, 28 July 2017
[15] https://en.wikipedia.org/wiki/1989_Newcastle_earthquake
[16] https://en.wikipedia.org/wiki/1989_Newcastle_earthquake
[17] Report of the Newcastle and Region Renewal Co-ordination Unit: "*The Newcastle Experience – Earthquake Renewal : 1990-1993"*, Vol 4, pp4-23.
[18] Report of the Newcastle RUC, n17, p15
[19]Report of the Newcastle RUC, n17, p17
[20] Report of the Newcastle RUC, n17, p16
[21] Report of the Newcastle RUC, n17, p16
[22]Report of the Newcastle RUC, n17, p18
[23] Report of the Newcastle RUC, n17, p15
[24] See:

a. Harges, Bobby Marzine "*Disaster Mediation Programs – Ensuring Fairness and Quality for Minority Participants*" Cap. UL Rev, no 39 (2011):893, p11;
b. Nancy Kramer, "*Storm Sandy Cases-Mediation Like No Other*", Mediate.Com, December 2013
c. Murrill, E B (2007), "*Mass Disaster Mediation: Innovative ADR, or a Lion's Den?*", Pepperdine Report of the Newcastle RUC, n16, p15Dispute Resolution Law Journal: Vol 7, Iss 3, Article 2

[25] Report of the Newcastle RUC, n17, p22
[26] Cindy Fazzi, "*Disaster*", Dispute Resolution Journal (February 1998), 16-18
[27] David L Lane, "*The Storm is Just Beginning when the Hurricane Finally Ends: Applicability of mediation to Settlement of Insurance Claims in Mass Disasters"* American Journal of Mediation 3 (2009) 51-63
[28] Fazzi, n26, p17
[29] Fazzi, n26, p17
[30] Robert H. Jerry, "*Dispute Resolution, Insurance and Points of Convergence*", Journal of Dispute Resolution (forthcoming, 2015), University of Missouri School of Law legal Studies Research Paper No 2015-28
[31] Jerry, n30, p14
[32] Fazzi, n26, p18
[33] Cal Ins Code 10089.70-10089.83
[34] Author's review of the California Commissioner of Insurance Annual Reports

[35] Harges, n24a
[36] Harges, n24a,p18 et seq
[37] Harges, n24a, p20
[38] https://en.wikipedia.org/wiki/List_of_disasters_by_cost
[39] Murrill, n24c, p10
[40] Murrill, n24c, p16
[41] Ed Beeson, "*Slack demand, but big promise seen for Hurricane Sandy insurance mediation*", The Star-Ledger, 11 August 2013
[42] See:
a. Murrill, n24c
b. Lane, n27
c. Harges, n24a
d. United Policy Holders, "*Best Practices for Post-Disaster Insurance Claim Mediation Programs*"
[43] G.S. 58-44-70 (North Carolina)
[44] Patrick McQuillan Aul "*IN Catastrophes: Preparing for Hurricane Matthew Claims in the Carolinas*", October 2016, Cozen O'Connor, https://www.cozen.com/news-resources/publications/2016/in-catastrophes-preparing-for-hurricane-matthew-claims-in-the-carolinas
[45] Russ Bleemer and Erica Jaffe, "*Texas launches new hurricane insurance mediation program*", Alternatives 27, no. 11 (2009): 185-187
[46] Bleemer and Jaffe, n45, p187
[47] Writer's internet search, August 2016
[48] www.legis.state.tx.us/billlookup/History.aspx?LegSess=81R&Bill=HB2539
[49] See:
a. Beeson, n41; and
b. Kramer, n24b
[50] Kramer, n24b
[51] Beeson, n41
[52] Kramer, n24b
[53] Lane, n27
[54] Melvin Rubin, "*Disaster Mediation: Lessons in Conflict Coordination*", Dispute Resolution Magazine 13 (2006): 1, p2
[55] United Policy Holders, "*Best Practices for Post-Disaster Insurance Claim Mediation Programs*", p1
[56] Jerry, n30, p15
[57] Maria Volpe, "*Post Disaster ADR Responses: Promises and Challenges* (2014-2015) 26 Fordham Envtl L Rev 95, p125
[58] William Ury, Jeanne Bret, and Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, (London: Jossey-Bass Publishers, 1988).
[59] United Policy Holders, "*Best Practices for Post-Disaster Insurance Claim Mediation Programs*", p13
[60] Jerry, n30, p8
[61] Volpe, n57 p117
[62] Mark Kelly, "*The case for mandatory mediation of civil disputes*", NZ Lawyer, March 2015, p56
[63] See American Arbitration Association "Disaster Recovery Claims Resolution Services Programs" (n.d) adr.org
[64] United Policy Holders, "*Best Practices for Post-Disaster Insurance Claim Mediation Programs*"
[65] Email from Mr Nick Mereu of ICNZ to the writer dated 5 October 2016
[66] Kramer n24b
[67] See:
a. Harges, n24a, p24
b. Murrill, n24c
[68] Rubin, n54, p3
[69] Michael Patterson, "*Evaluating the Louisiana Department of Insurance's Hurricane Katrina Homeowners Mediation Program*", Dispute Resolution Journal 62, no.3, (2007):34, p37
[70] Cal Ins Code 10089.70-10089.82
[71] www.legis.state.tx.us/billlookup/History.aspx?LegSess=81R&Bill=HB2539;
[72] http://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/earthquake-list-christchurch (viewed 24/7/2017)
[73] https://www.lawsociety.org.nz/news-and-communications/latest-news/news/lawyer-warns-deadline-for-earthquake-claims-looming 20 July 2017 - By Nick Butcher (viewed 24/7/2017)

[74] Harges, n24a, p14
[75] Harges, n24a, p14 et seq
[76] Harges, n24a, p7 et seq
[77] Harges, n24a, has the same view, see p22
[78] John Pardun, "*How ADR Can be Used to Resolve Mass Disaster and Insurance Claims"* (2013) 6(3) Int In-house Counsel Journal 1
[79] Pardun, n78, p4
[80] Harges, n24a, p12
[81] See:

a. Harges, n24a, p5 et seq
b. Murrill, n24c, p23
c. Patterson, n69 p40 (Louisiana)

[82] www.legis.state.tx.us/billlookup/History.aspx?LegSess=81R&Bill=HB2539;
[83] 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 - "*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
[84] See:

a. Beeson, n41; and
b. Kramer, n24b

[85] See:

a. Beeson, n41; and
b. Murrill, n24c, p16

[86] Pardun, n78, p2
[87] See:

a. G.S. 58-44-70 (North Carolina)
b. Patterson, n69 p36 (Louisiana)

[88] See:

a. www.legis.state.tx.us/billlookup/History.aspx?LegSess=81R&Bill=HB2539;
b. Cal Ins Code 10089.70-10089.78
c. G.S. 58-44-70 (North Carolina)
d. Patterson, n69 p37 (Louisiana)