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ALTERNATIVE DISPUTE  
RESOLUTION OPPORTUNITIES  
WITHIN THE RESOURCE  
MANAGEMENT ACT 1991

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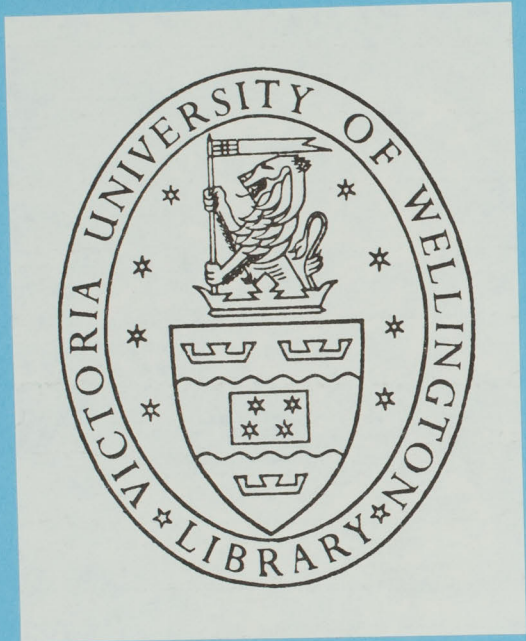
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**ALTERNATIVE DISPUTE RESOLUTION  
OPPORTUNITIES WITHIN THE RESOURCE  
MANAGEMENT ACT 1991**

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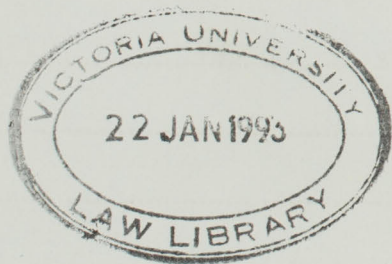
## ABSTRACT

The object of this paper is to examine the opportunities for alternative dispute resolution (particularly negotiation, facilitation, mediation and conciliation) within the Resource Management Act 1991. The four sections which deal specifically with types of alternative dispute resolution (sections 99, 267, 268 and 356) are reviewed and suggestions made for amendment to change what is a good idea into a workable one.

The Resource Management Act provides other opportunities for alternative dispute resolution although not specifically stated. This paper proposes that use of such techniques in the development of national policy statements and water conservation orders in particular. Other examples of the potential use of alternative dispute resolution methods are given for both policy matters and site specific resource consent disputes.

The paper concludes that there are plenty of opportunities to use alternatives to the courts provided people are prepared to grasp them.

The text of this paper (excluding contents page, footnotes, bibliography, and appendix) comprises approximately 14,560 words.



## INTRODUCTION

The purpose of this paper is to look at what has been called "alternative dispute resolution" (ADR) processes and the opportunity for the use of such processes under the Resource Management Act 1991 (RMA).

The use of the word "alternative" does raise the question of alternative to what? Although to some people it no doubt "conjures up notions of esoteric and eccentric pastimes"<sup>1</sup> what is meant is an alternative to the court system. ADR is "a process of solving problems without the assistance of the courts".<sup>2</sup>

This does not mean that one process does not have links with the other. Sir Laurence Street has described the relationship between mediation and judicial determination as linear:

"that is to say the disputants agree to participate in a properly structured mediation as a step towards achieving resolution which, if unsuccessful, can be followed by litigation ... Mediation is, in short, a step along the way — hopefully the last step — but certainly not a step alternative to the ultimate availability of recourse to sovereign judicial power as the dispute-resolving entity."<sup>3</sup>

Use of ADR has evolved from what was essentially private dispute settlement into the public arena. For over a century negotiation/conciliation/arbitration has been used in the industrial relations field. Marital disputes,<sup>4</sup> neighbourhood disagreements and small claims have been assisted by ADR for some time.

Gradually ADR has moved into the mainstream. Over the last two to three decades the commercial world has made greater use of such

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1 W Pengilly "Alternative Dispute Resolution: The Philosophy and the Need" (May 1990) 1 Australian Dispute Resolution Journal, 82.

Pengilly also notes, at page 83, that alternative dispute resolution works through mediation, not conflict. "It is, however, important to note that it is mediation not meditation which is the process employed!"

2 Above n1, 87.

3 Sir Laurence Street "The Court System and Alternative Dispute Resolution Procedures" (February 1990) 1 Australian Dispute Resolution Journal, 9.

4 It is interesting to note that in 1970 Lon Fuller, in the Southern California Law Review, 330, considered that marital problems could be resolved by mediation because they were a dyadic relation but that "the tangled affairs of a harem" could not.

techniques partly to preserve relationships between trading partners. 5

Environmental disputes have been a late comer to the litigation sphere. It has really only been since the Second World War that individuals have been concerned about what happens to the natural world around them. For most New Zealanders the controversy over Lake Manapouri was the event which raised an environmental consciousness. Thus any form of environmental dispute resolution, inside or outside the court, is relatively new.

*Resolving Environmental Disputes* 6 reviews the first decade of environmental dispute resolution in America. Bingham commences her study in 1973 when the governor of the state of Washington invited two mediators "to help settle a long-standing dispute over a proposed flood-control dam on the Snoqualmie River." 7 She notes that by mid-1984 over 160 environmental disputes had been assisted by mediators and facilitators in the United States, that at least 15 states had organisations or individuals which could offer environmental dispute resolution services and that some statutes were providing for negotiation and mediation procedures for environmental matters. 8

Although there is no detailed study of environmental dispute resolution in New Zealand, there are examples of where disputes have been assisted, where mediators and facilitators exist and now the RMA has placed in statute alternative procedures for resolving environmental disputes.

Use of ADR techniques has also expanded beyond specific disputes. There has been a move to cover policy development. Negotiating policies and rules is something which has not occurred in New Zealand, although there has been a move toward greater consultation. Consultation could be taken a step further to include negotiation and

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5 Above n 3, 10.

6 G Bingham *Resolving Environmental Disputes* (The Conservation Foundation, Washington D.C. 1986)

7 Above n 6, 14

8 Above n 6, xvii

mediation. This is a new frontier for ADR.

The balance of this paper will look at the techniques which are covered by the term "alternative dispute resolution" and are relevant to the RMA. The point is made that although terms such as negotiation and mediation are used generically, that, for the purposes of this paper, they will be constrained to their more specific meaning. A brief comment is also made on the fact that ADR is not a complete solution. There are circumstances where use of the court structure is of more use to achieve particular goals.

The writer outlines the RMA so that the provisions relating to ADR can be set in context. The writer then considers the four provisions in the RMA which specifically provide for types of ADR.

The paper concentrates on sections 99 and 268 and comments on sections 267 and 356 of the RMA. The purpose of the discussion, besides detailing the sections, is to look at some of the problems with the RMA provisions. Amendments are suggested to take what is a good idea to a level where it is workable. The implications of the idea need to be dealt with.

Other opportunities for ADR are also provided for in the RMA although not specifically stated. The writer has concentrated on national policy statements to consider how the new frontier of negotiating policies could be addressed. This carries over to local authorities' policy statements and plans. National environmental standards also provide for such possibilities.

At a more specific level ADR can be used for designations, heritage orders and water conservation orders. These are a mix of policy and site-specific concerns. The writer has concentrated on national water conservation orders to illustrate the use of ADR.

Finally, opportunities for ADR in resource consents is looked at. This starts with scoping before an application is made, the notification of the application and, having discussed hearings earlier, concludes with a look at the potential use of ADR when an abatement notice or enforcement order is used.

The paper concludes with the view that the potential for ADR has only just been tapped and that the future is positive provided we are all prepared to grasp it.

### TECHNIQUES OF ALTERNATIVE DISPUTE RESOLUTION

This section considers some of the techniques of ADR, or more particularly environmental dispute resolution. Bingham defines the later term to refer:

"collectively to a variety of approaches that allow the parties to meet face to face in an effort to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation. Although there are significant differences among environmental dispute resolution approaches, all are voluntary processes that involve some form of consensus building, joint problem solving, or negotiation ...

"Environmental dispute resolution processes can occur with or without assistance of a neutral "third party". The term *negotiation* is used ... to refer to direct interactions among the parties. *Mediation* is the assistance of a neutral "third party" to a "negotiation." 9

Mediation and negotiation are two of the formalised processes of dispute resolution. Pengilley also lists "expert appraisal and/or determination, mini-trials, Rent-a-Judge, hybrid forms of arbitration, and conciliation." 10 Another common form, which Bingham includes with mediation, is facilitation. She considers that "the distinctions are very blurred in practice." 11

Although those processes recognised by Pengilley are relevant to ADR generally, the writer submits that they are not as relevant for environmental disputes. This is partly because of the multi-party aspect of most environmental disputes. In commercial transactions the two disputing parties may want an interpretation of a contract

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9 Above n 6, 5

10 Above n 1, 87

11 Above n 6, 5



but do not wish to go to court. In these cases getting an indication from a mini-trial or a Rent-a-Judge situation which is not binding (unless agreed beforehand) may resolve a problem while maintaining a relationship. The issues in dispute are often just legal interpretations (although personal emotional needs may be below the surface). If the issues are more of a factual, scientific nature then an expert appraisal may be appropriate.

This is not to say that any of these processes could not be used for environmental disputes, but it is more unlikely. Nor is use of ADR restricted to one process throughout a resolution. As noted above, mediation and facilitation can be blurred. It is quite feasible that in order to resolve a scientific matter within an environmental dispute an expert may be brought in to appraise the evidence and even make a determination on some aspect of the dispute. This paper will however concentrate on negotiation, mediation, facilitation and conciliation. Unless the context otherwise requires, ADR, in this paper, is generally referring to these four techniques.

Definitions of the terms abound. Mediation and negotiation are often used interchangeably. Bingham, as noted earlier, distinguishes negotiation from mediation by the intervention of a third party. Others take a broad approach and see:

“mediation as a process of goal-directed, problem-solving interventions .... It may be assisted by a neutral third party, or be unassisted, and can be applied to disputes (or potential disputes) about the *process* whereby decisions are made as well as the *substance* of the final decision.”<sup>12</sup>

Sir Laurence Street subsumes all forms of ADR such as senior executive appraisal and mini-trial under the term mediation. He describes mediation as:

“a structured process which is chosen by the parties as the means through which to reach agreement for the resolution of their dispute. As with ordinary domestic arbitration, the

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12 B Boer, D Craig, J Handmer, H Ross *The Use of Mediation in the Resource Assessment Commission Enquiry Process* (Resource Assessment Commission, Canberra, Australia, 1991) 3.

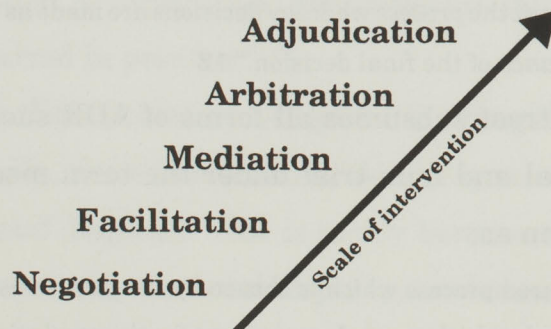
initiation of these procedures described by the global word "mediation", is essentially the agreement between the parties to meet or exchange views in the hope of achieving a settlement. It is throughout, an entirely voluntary, without-prejudice process. Either party is free to walk away from the negotiations at any stage. Of course if it results in an agreed settlement, then that is documented and becomes contractually binding. The mediator, as such, does not decide any aspect of the dispute or purport to impose any determination on the parties. Inherent within the personal dynamics of a structured mediation is a significantly enhanced prospect of satisfactory resolution of the dispute." 13

Sir Laurence Street incorporates the term negotiation within the meaning of mediation, which suggests the terms are interchangeable. Where negotiation and mediation are separated out then facilitation is often seen as the intermediary point.

"Facilitation is the simplest form of assisted negotiation. The facilitator focuses almost entirely on the process, makes sure meeting places and times are agreed upon ... He or she sometimes acts as a moderator, usually when many parties are involved.

"Even in a moderator's role, however, facilitators rarely volunteer their own ideas. Instead, they monitor the quality of the dialogue, and intervene with questions designed to enhance understanding." 14

Thus although the terms can be interchanged they can also be used as a hierarchy as shown in Figure 1. 15



13 Above n 3, 9

14 L Susskind, J Cruikshank *Breaking the Impasse* (Basic Books, Inc, New York, 1987) 152.

15 J Chart, G Pavelka *Managing Resource Use Disputes* (Centre for Resolving Environmental Disputes, Lincoln University, 1992) 23.

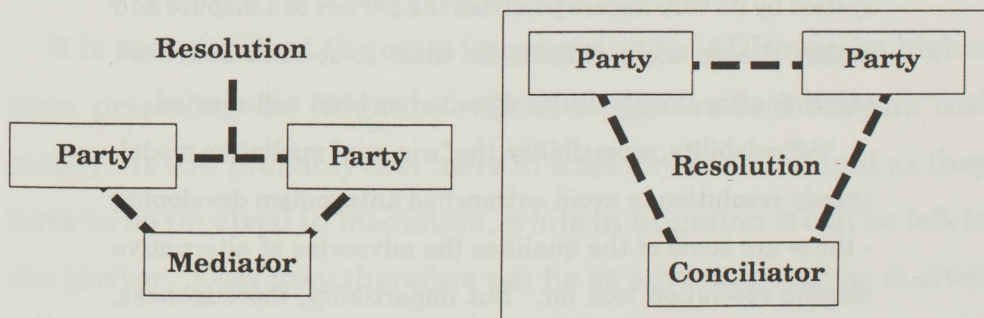
Where mediation is separated out, it has been described as:

“the intervention of an impartial third party who assists disputing parties to negotiate. The mediator manages the process and looks for strategies which will promote effective communication and agreement. Decision-making control on substantive issues remains with the parties involved in discussions.” 16

The final term the writer wishes to consider is “conciliation”. On the intervention options diagram conciliation would be between mediation and arbitration. Conciliation is a term which is more often used in the industrial relations field. “A conciliator acts as a neutral third party and assists the disputes by guiding, exploring, interpreting, advising and cajoling to settle their own disputes and to reach their own agreement.” 17

It has also been described as “conciliation is mediation within a legal framework ... The conciliator is an advocate for the law while remaining impartial to the parties.” 18

The difference between mediation and conciliation is that a resolution in mediation arises from interaction between the parties while in conciliation the resolution comes from the combined interaction of the parties and the conciliator. This is illustrated in diagram 2. 19



16 Above n15, 22

17 C Blackford *Guidelines for monitoring additional dispute resolution processes within the Resource Management Act* (Centre for Resource Management, Lincoln University, 1992) 2

18 D Bryson “Mediator and Advocate: Conciliatory Human Rights Complaints” (August 1990) 1 *Australian Dispute Resolution Journal*, 137.

19 Above n18, 137

The writer concludes that ADR covers a range of techniques to provide resolution of problems outside of the court structure. In the environmental dispute resolution field the main focus is on negotiation and mediation. For some commentators these mean different things, for others they are the same. For the purposes of this paper negotiation relates to where there is no intervention by third parties, facilitation is a midpoint which provides for a third party who is responsible for the process, while mediation provides for fuller intervention by third parties so they can assist with the substance of the dispute. Conciliation is not usually considered in environmental disputes but it is done so here as it is a term used in the RMA. The third party has an active role in considering the resolution to ensure it is within the legal framework.

#### **ALTERNATIVE DISPUTE RESOLUTION v THE COURTS**

The question must be asked of why ADR should be used in environmental disputes. Her Excellency Dame Catherine Tizard, in opening the Auckland Law School, made the following comments:

“For those, however, whose budget more easily accommodates the legal equivalent of fish and chips or a Chinese takeaway, more affordable dispute resolution has to be provided ... And the cost of common law litigation is not financial only. The adversary system by its very nature polarises the parties to a dispute and makes it even more difficult for them to co-exist and work together after the particular dispute has been adjudicated...

“Affordability, accessibility, the “win-win” mediation model, speedy resolution to avoid entrenched antagonism developing - these are some of the qualities the advocates of alternative dispute resolution look for. But impartiality, thoroughness, independence from pressure by either a powerful party to the dispute or by a public authority - these are essential if the credibility of the alternative system is to be maintained.”<sup>20</sup>

These comments not only outline why ADR is supported but also why principled, as opposed to positional, negotiating is important.

<sup>20</sup> Dame Catherine Tizard “Speech to open the Auckland Law School” (June 1992) *New Zealand Law Journal*, 198-199.

Focusing on a preferred solution instead of looking to the needs which underline stated positions means that the benefits promised by ADR are only partly met. The supposed benefits of lower costs and time may be achieved but it is doubtful that the so called "win-win" solution will arise. This non-adversarial approach to dispute resolution has been articulated in the best seller *Getting to Yes* 21, and no further comments will be made in this paper as the writer accepts that this is the approach to use.

Environmental dispute resolution may be more affordable - at least it provides the opportunity for the spreading of costs to be negotiated. This may be particularly important for the preparation of scientific reports. If each party produces reports not only is this costly but it can disintegrate into a battle of the experts. By agreeing on what is required, who will produce it, how it is to be done, by when and what each party will contribute the overall cost may be reduced and a net gain in information may occur.

Similarly, costs of those involved may be negotiated so that a poorer party may provide a venue while the wealthier parties pay the travel costs. Even if parties can only afford to keep a watching brief they can at least be involved at crucial stages where in a court structure they may be shut out completely or at least shunted out as the dispute climbs the spiral to the Privy Council.

It is accepted that the costs in preparing for ADR may be higher than preparing for litigation. Both mediators and lawyers cost money. It will probably cost more in time for the individual as they have to be involved in mediation, while in litigation it can be left to the lawyer. Cost may therefore not be as advantageous as is often claimed.

The costs of damage to a relationship are often not recognised in a court system. Once parties have fought it out in court it is harder for them to have a constructive relationship when they met again. In contrast, ADR techniques allow for trust to build between the parties

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21 R Fisher, W Ury *Getting to Yes Negotiating Agreement Without Giving In* (Penguin Books, New York 1983).

so once a dispute is resolved they may be able to look for solutions to future issues without the escalation to judicial processes.

The “win-win” model is perhaps a misnomer as it suggests parties will get what they want. However there is the potential for all-gain so that the underlying needs are satisfied. This contrasts with most court decisions where there is a win-lose result. In some cases the decision handed down may not be to the satisfaction of any party.

Dame Catherine also acknowledged speedy resolution as one of the main claims for ADR. It is true that litigation, including environmental disputes take time. The Wanganui River minimum flow appeals are a case in point with over 80 sitting days before the Planning Tribunal, and then the decision was appealed. However, there is no way of knowing how long a negotiated/mediated settlement would have taken. Bingham provides a comparison between time for litigation and mediation and concludes that it “is likely, therefore, that it is the *threat* of protracted litigation, not the length of the standard case, the creates the popular conception that mediation is faster than litigation.”<sup>22</sup>

ADR has other advantages including the fact that it is not bound by the rules of evidence. This may mean that evidence which would be excluded or given very little weight may have greater value in a mediation context. The courts have had problems dealing with evidence of Maori spirituality which may be more readily accepted as a need to be acknowledged in mediation.

Although the Planning Tribunal does have lay members with expertise, ADR does allow other experts to be included in the process. As indicated earlier an expert appraisal could be made on scientific evidence during mediation.

Public participation can be enhanced with environmental dispute resolution techniques. Not only do parties have an opportunity to be heard but they also partake of the decision-making process. As such they get to own the agreement and will work for its implementation.

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<sup>22</sup> Above n 6, xxvi

If a decision goes against a party in the court process they may be more inclined to try and undermine it. Thus disputes resolved through agreement are more likely to be long term solutions. If for some reason the solution does not remain valid, the parties are more likely to get together to try and find an acceptable remedy. There is a much greater degree of certainty.

This consideration of advantages does not mean that all environmental disputes should be subjects for ADR. There are times when the court is the appropriate body. The court has the ability to set a legal precedent. This may be important so that similar disputes have a guide to follow. Techniques such as mediation are not bound by precedent as the parties seek their own solutions. Those who are in a weak economic situation but have a strong legal case may consider that the courts are more likely to protect them against the economically powerful or government agencies. Entering ADR may be seen as subjecting oneself to those more powerful forces. The validity of this concern can perhaps be questioned as the "third party" should be able to assist those in a less powerful position without over stepping the neutral role. The court system, with its numerous appeals, may in the end prove too much for the economically weak.

A court decision is official and can provide a basis for enforcement. A negotiated agreement may not have the same base although if written it can be prepared as a contract or can be "legitimised" by the courts through a memorandum of consent.

The court does provide a decision. If one or more parties refuse to participate in ADR it may be difficult or impossible to reach a solution. The court can impose a decision even if all parties did not attend, and that decision can have effect.

The writer submits that although there may be no time or cost benefit, as is often claimed for ADR, there are a number of other advantages for most environmental disputes. It is now appropriate to consider the legislation which rules environmental disputes.

## THE RESOURCE MANAGEMENT ACT — GENERAL

The RMA has been hailed as a world leader. Its stated purpose is “to promote the sustainable management of natural and physical resources” (subsection 5(1)).

Sustainable management is defined in subsection 5(2). Although there is some dispute on how it should be interpreted the intention was that provided the potential of resources were sustained for future generations; the bio-physical bottom line was safeguarded; and adverse effects on the environment were avoided, mitigated or remedied, then resources could be managed, used or developed to enable people to provide for their social, economic and cultural well-being. It is to be noted that environment includes people, communities and amenity values. Amenity values relate to people’s appreciation of pleasantness, aesthetic coherence, and cultural and recreational attributes (section 2). It is therefore anticipated that people will be on all sides of the sustainable management equation.

The RMA drew together over 50 enactments. Where water, soil, land use, clean air and noise were all controlled by separate Acts they are now under one regime.

Very briefly, the RMA provides that local authorities have the main responsibility for administering natural and physical resources. There is however an overview by central government. Sections 30 and 31 set out the functions of regional councils and territorial authorities. At the district level territorial authorities are responsible for land use and subdivision. Regional councils main functions relate to water and discharge of contaminants. In conjunction with the Minister of Conservation, regional councils are also concerned about the coastal region. There is some overlap of functions such as hazardous substance control for which both local authorities have similar functions. Regional councils have responsibility for soil conservation while territorial authorities regulate land use.

To sort out responsibilities there is a hierarchy of plans and policies. The lower levels can not be inconsistent with the higher



levels.

The Minister of Conservation is responsible to ensure there is a New Zealand coastal policy statement (NZCPS) at all times. There is a grace period while the first NZCPS is prepared, but this must be publicly notified by 1 October 1992.

The Minister for the Environment may state policies on matters of national significance. These national policy statements are voluntary but, if made, must be given recognition by local authorities. The Minister also has the power to prescribe regulations called national environmental standards. These set technical standards and the methods for implementing them.

Regional councils must produce regional policy statements which provide "an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region." (Section 59). They may also produce regional plans. There must be a regional coastal plan but other plans are not mandatory. The plans can cover particular areas or functions. Plans contain rules specifying whether activities are permitted, controlled, discretionary, non-complying or prohibited.

Territorial authorities must produce district plans which likewise contain rules. The classification of an activity gives an indication of the ease of obtaining a resource consent. If an activity is permitted no consent is required, and if it is prohibited the activity will not be allowed. In between, the consent for an activity will depend on the criteria imposed. There are also restricted coastal activities which are identified in a regional coastal plan. A regional committee, with a Minister of Conservation appointee, makes a recommendation to the Minister. The Minister of Conservation is the consent authority.

Processes are provided for the preparation of and changes to local authorities' plans and policy statements including new provisions (Part II of the First Schedule) which provide for private plan changes.

During the formation of plans and policies the RMA provides for

public consultation. Notification requirements for resource consent applications have been strengthened and the standing rule has been relaxed so that the general public should be able to be heard.

There are a few anomalies to the hierarchy of plans and policies. National water conservation orders can be applied for and, if made, will over ride anything in the plan which is contrary to it. Designations and heritage orders can have a similar effect.

The RMA also provides for the Planning Tribunal, enforcement and a large transitional Part XV. The relevant sections for the purpose of this paper will be discussed in detail in the following material.

### **SPECIFIC REFERENCES**

The RMA specifically provides for use of alternatives to the court process in four sections.<sup>23</sup> These generally relate to applications for resource consents. Assuming that a resource consent is required for an activity, a person will apply to the appropriate consent authority pursuant to section 88. The consent authority has the power to request further information. This information may assist in deciding if the application is to be notified or not. If it is notified then any person may make a submission. It is at this stage the first specified opportunity for use of environmental dispute resolution techniques arises.

#### *Section 99*

Section 99 is headed "Pre-hearing meetings". This section provides that a consent authority may invite an applicant, or anyone who made a submission, to meet with each other or any other person. The purpose of such a meeting is for "clarifying, mediating or facilitating resolution of any matter or issue".

None of these terms are defined in the RMA. Clarifying is presumed to apply to understanding what is actually meant. Often a dispute is

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<sup>23</sup> Sections 99, 267, 268 and 356 have been set out in the appendix to this paper.

caused over no more than a difference in understanding and once the facts are clarified there is no problem.

Given that the literature suggests that mediation can be used as an umbrella term or a specific term there may be some cause for confusion here. The writer submits that, as the term facilitation is also used that in this section, mediation should relate to the specific, that is structured third party intervention in both the process and substance.

Section 99 contemplates that a pre-hearing meeting can deal with the complete application and resolve any dispute relating to it, or the meeting may deal only with certain issues. The preference in the legislation is that a hearing is not held. Section 100 starts with a negative approach to hearings:

“A hearing need not be held in accordance with this Act in respect of an application for a resource consent ... unless —  
(a) The consent authority considers that a hearing is necessary; or....”

The writer submits that the hope implied in the RMA is that the pre-hearing meeting will resolve all issues relating to an application so that a hearing need not be held. If this is not possible it is hoped that a pre-hearing meeting will at least reduce the issues in dispute.

Some questions do arise from section 99. Who would be the “third party”? As subsection 99(1) contemplates that the consent authority can invite the parties to meet with “any such other person as the authorities think fit”, there appears to be the ability for the consent authority to invite an outside mediator or facilitator to the pre-hearing meeting. One of the first questions a consent authority is therefore going to have to ask is whether the consent authority’s staff or an outsider will be used in the pre-hearing meeting.

The answer will no doubt depend on the nature of the matter in dispute. If the consent authority has no stake in the outcome it may be appropriate for the consent authority staff to be the “third party”. This is contemplated by the RMA in subsection 99(2) which provides that if a member of the consent authority attends the meeting they

are not automatically disqualified from making the decision. A member, delegate or officer of the consent authority could attend for two reasons. The first is as a "third party". Secondly the consent authority may have an interest in the matter and be a party itself.

It is submitted that it would be very unwise for any consent authority official to try and facilitate, let alone mediate, a dispute and then change hats and become a decision maker if the pre-hearing meeting does not resolve all issues. Facilitators, and more likely mediators, are liable to be told things in confidence. During pre-hearing meeting things are said on a without prejudice basis. It would be hard for any person to separate what went on at the pre-hearing meeting from the evidence presented at a hearing and, even if they could, the parties appearing may be unable to accept such separations. Being at both the pre-hearing meeting and the hearing could bring both processes into disrepute.

If the consent authority does have an interest it would be preferable to bring in an outsider. It will be difficult for an official of a consent authority to present their own views on an issue and mediate or facilitate at the same time. To have the confidence of the other parties an official would need to be up front about their interest and because they are running the process it will be harder for them to look for elegant solutions. Even if the consent authority provides two members to a pre-hearing conference, one to present the consent authority's view and one to look after the process, other parties may have trouble accepting that there will be no bias.

Local authorities at the hearing stage often run into difficulties with possible accusations of bias. To overcome this commissioners have been appointed. It is therefore to be expected that local authorities will take a similar approach to pre-hearing meetings and, at least where there is a conflict of interest, invite a "third party" to attend.

It is to be hoped that consent authorities will exercise good judgment on this matter. If an officer facilitates or mediates the meeting there are process problems if that person then goes on to

make the decision. The writer submits that there is no need to amend the legislation to make specific requirements for separation at this stage, but this is a matter which may need monitoring with a view to refinements.

This leads to the question of how the "third party" is appointed. The easiest way would be for the consent authority to appoint someone but this may give rise to problems. How are the other parties to be satisfied that although appearing neutral the "third party" is not in fact biased, especially if they are being paid by the consent authority? What if the person proves not to be competent for the job?

One of the first actions that may need to be discussed at a pre-hearing meeting is who should be mediator. As mediators have differing approaches to mediation Susskind and Cruikshank<sup>24</sup> suggest that it is not uncommon for disputants to collect information and hold interviews of potential "helpers". They suggest the way to overcome the problems of neutrality and competence is to provide all parties, including parties which join the proceedings later, with the power of veto. Such matters as background, affiliation, record and reputation will all play a part in the acceptability of a mediator.

As suggested above there is a possibility that other parties may join a pre-hearing meeting outside of those originally invited. This may be because once discussions have started between the parties it is clear that some essential party is missing and has the power to sabotage any agreement reached. The invitation to join can then be extended.

There does appear to be a problem with pre-hearing meetings as envisaged in the RMA. It seems the consent authority has, through the power of invitation, control over who will attend. Hearings however are public meetings. The Local Government Official Information and Meetings Act 1987 presumes that local authority meetings will be open to the public. If a person who made a submission

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<sup>24</sup> Above n 14, 139-140

and was not invited hears of a pre-hearing meeting, then they would have every right to attend even if not invited. In fact someone who does not make a submission and just wants a seat out of the rain would have every right to be there. This later case is probably unlikely, but if invitations are limited to only a few of the people who made submissions there may well be problems in keeping the others out. Without clearly setting down ground rules it may be impossible to operate through "shuttle diplomacy" as each caucus may need to be open to the public.

Section 39 requires that hearings for an application for a resource consent be held in public. It may be possible to argue that a pre-hearing meeting is not a hearing and therefore section 39 does not apply. The writer submits that this may not be enough and that to avoid any dispute the RMA should be amended to clarify that a pre-hearing meeting is to be held in private, unless the parties to the meeting agree otherwise.

Another problem with section 99 pre-hearing meetings is lack of time. The date for the commencement of the hearing shall not be more than 25 working days from the close of submissions (subsection 101(2)). This period can be doubled to 50 working days under section 37 but it is unlikely that any major disputes could be settled within 10 weeks. The applicant should have produced all reports that the consent authority considered necessary, and if not produced it is possible under section 92 to seek further information or for the authority to commission its own report. Although the use of section 92 stops the clock before notification it would not do so at the pre-hearing meeting stage.

This problem of time lines being set firmly has been recognised in other areas of the RMA. The RMA is presently under review and it is likely that greater flexibility will be introduced. If not the timing problem could kill the use of mediation or facilitation in anything but minor disputes.

This possibility of pre-hearing meeting should not be seen as

anything new. A number of councils under the previous legislative regime attempted to resolve disputes before they got to hearing. Taranaki Regional Council has claimed that it did not have one application go to appeal for a period of over three years because any problems were resolved either before the hearing or during the period before any appeal was heard. The RMA therefore codifies what already occurred. It does give legitimacy to what was done and may encourage others to try. Section 99 provides that the invitation to meet may be made by the consent authority on its own motion or upon request. Thus section 99 may indicate to other parties that there is a possibility that a hearing could be avoided through them asking the consent authority to arrange a pre-hearing meeting. Such a request could be made confidentially to avoid any concerns that seeking such a meeting may be interpreted by the other parties as a sign of weakness. If the consent authority refuses to arrange such a meeting there is nothing in the Act which would prevent parties arranging their own meeting, with or without the consent authority, and try and reach agreement before the hearing.

Once a decision is made by the consent authority, either through the pre-hearing meeting or at a hearing, the decision must be notified. Any person who made a submission and the applicant can appeal that decision (Section 120). Appeals are normally heard by the Planning Tribunal. Besides the parties to the proceedings, the Minister for the Environment, any local authority and any person having an interest greater than the public generally may appear at the appeal.

#### *Section 267*

The RMA provides for two opportunities for resolution of disputes before the appeal commences. Section 267 is entitled "Conferences" and is similar to regulation 62A of the Town and Country Planning Act Regulations 1978. It requires the parties to be present at a

conference presided over by a member of the Planning Tribunal. The purpose of such a conference is generally to resolve house-keeping matters such as fixing dates, directing the order of presentation and determining questions of admissibility. However there is some room for recognition of environmental dispute resolution practices. Section 267(3)(1) (for which there was no equivalent in regulation 62A) provides that the conference may be adjourned "to allow for consultations among the parties". Thus there is specific recognition that the parties may be able to consult over (and implicitly resolve) issues before they are heard by the Planning Tribunal.

### *Section 268*

Section 268 is entitled "Additional dispute resolution". This terminology is somewhat at variance with the usual term of "alternative dispute resolution". However given Sir Laurence Street's comments quoted earlier it is perhaps a more accurate term in that these processes are an addition to, and not a replacement for, the court system.

This section provides that for the purposes of encouraging settlement the Planning Tribunal can arrange for "mediation, conciliation or other procedures designed to facilitate the resolution of any matter." As stated earlier this reference to conciliation in environmental disputes is unusual. The legislation may contemplate the active involvement of either a Planning Tribunal member or some other appointed person as a conciliator as opposed to a mediator. This would mean that the "third party" would have a more active role than a mediator in that they can cajole the parties to settle the dispute. This is done within the framework of the law which may possibly be a brake on the creative solutions which may come from mediation. The alternative way at looking at the phrase quoted above is that section 268 "reflects an attempt to empower whatever concept or form of consensus decision making the parties wish to use rather than imposing technical distinctions."<sup>25</sup>

<sup>25</sup> Above n 17, 2



The writer submits that the later is the correct approach. The use of the very general "or other procedures" is in marked contrast to section 99 where the techniques appear to be limited to mediation and facilitation. The meaning of these is not absolute but there are technical distinctions. In section 268 there is a more general approach giving the Planning Tribunal a wide choice of dispute resolution processes that may be used.

It is to be noted that the techniques in section 268 are "for the purpose of encouraging settlement" which differs from section 99. The reason for this would appear to be the "clarifying" function of section 99. Clarification could relate to housekeeping matters as much as to matters of substance. In the provisions relating to the Planning Tribunal these are covered by the conferences in section 267, while for a consent authority these aspects are lumped together with dispute resolution.

Like section 99, section 268 provides that the commencement of the process can be upon request (presumably by one of the parties) or "of its own motion". There is a distinction however in that the Planning Tribunal can only act on its own motion with the consent of the parties. This may be because the action that is performed differs. Instead of inviting others to attend a meeting, the Planning Tribunal may ask one of its own members or another person to conduct the resolution process.

It is unclear what the consent of the parties is to. It may be that the consent is only to the Planning Tribunal asking. However given the concerns expressed in section 99 about the suitability of the "third party" to the disputants the writer submits that the consent should be broader and cover not just the asking but who should be asked.

Section 268 provides that a member of the Planning Tribunal may be asked to perform the role of "third party". The member is not however disqualified from resuming their role as decider if the parties agree and the member and Planning Tribunal are satisfied

it is appropriate for the member to do so.

This raises some major problems and could bring into question the whole credibility of the process. As discussed in relation to section 99 it is difficult, however one tries, to completely divorce oneself from the knowledge obtained earlier. A judicial decision by the Planning Tribunal should however be based on the evidence placed before it with no possible suggestion that the decision was influenced by earlier encounters. Some safeguards have been provided in subsection 268(2) but it may be difficult for a party to refuse to have a member of the Planning Tribunal decide the case after they mediated it. Some litigants appear many times before the Planning Tribunal and they may consider a particular refusal may offend and have later repercussions.

There may also be a difficulty for a party in mediation if they are sure that the "third party" is likely also to judge the case if it is not settled. They may feel compelled to agree to something they are not happy with because of the pressure of the mediator also being a judge. This could perhaps be seen as "disguised arbitration" and will be likely to result in quite different behaviour than what would occur if the process was mediation with no power for the "third party" to make a decision.

It is submitted therefore that a member of the Planning Tribunal assisting a case through dispute resolution should be disqualified from then sitting on a hearing if the dispute is not resolved. The parties should not be placed in a position where they are asked to agree or not to a member sitting on the Planning Tribunal.

This raises the question of whether Planning Tribunal members should be conducting ADR at all. There appears to be an assumption in this section that because a person has the ability to be on the Tribunal they are appropriate to be "third parties".

Additional dispute resolution is an area fraught with difficulties. We are all involved in negotiation throughout our lives but most of us muddle through as opposed to manage the process. In some ways

members of a judicial body may be at a greater disadvantage than others to take on a mediation-type role because the nature of their work is generally judgmental. This is not to say that members of the Planning Tribunal would not have the ability to become mediators — but it requires training.

Environmental disputes are some of the hardest disputes to resolve partly because of the number of parties which may be included and partly because of the nature of the dispute where the issues are often expressed as supporting or opposing completely a development. At first glance there often appears to be no middle ground. The effects of a dispute are often wide ranging. A bungled marital disagreement may result in further bitter fighting between a couple and pressure on their children, a bungled commercial dispute may cost millions of dollars but a bungled environmental dispute will not only affect the parties but may also affect future generations and even the continued existence of some species. Training is therefore essential.

It is submitted however that even if Planning Tribunal members are properly trained it would still not be appropriate for them to mediate disputes. It was indicated above that even with the safeguards in subsection 268(2), it would be unfortunate if a Tribunal member acted as mediator and then heard the case. It is submitted that no Tribunal member should mediate any dispute even if the case would not be heard by them. Members of the general public will have great difficulty in separating in their own mind the difference between a Tribunal member acting as mediator and participating at the hearing. This will be especially so if that member is a Planning Judge. Regardless of the information given the public will perceive that person as firstly a judge. If assistance is given by the judge as mediator the parties may interpret it more as a direction.

For the public there may also be confusion in roles especially if “shuttle diplomacy” is employed. Sir Laurence Street considers that courts which provide mediation:

"represent a real threat to the very foundation of public confidence in the courts.

"At the heart of a mediation process is the caucus - a private discussion between the mediator and the disputants ...

"A court that makes available a judge or registrar to conduct a true mediation is forsaking a fundamental concept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of the court by one party, in which the dispute is discussed and views expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the court observe." 26

To avoid any of these problems it is submitted that the Planning Tribunal would be better to ask "another person" to conduct the additional dispute resolution process. The RMA does not provide for any qualifications or criteria to measure that person against, although one must presume that they should have the skills to conduct the process. There is however the unfortunate possibility that people with suitable status instead of expertise may be seen as appropriate for the job. Assuming the parties must consent to the person asked, this will hopefully ensure that the people with appropriate background, affiliation, record and reputation are used.

This does raise a number of questions about funding and the availability of such mediators. Should the Justice Department, for example, have a pool of trained mediators available? This paper does not consider this issue but it will need to be dealt with by Government if section 268 is to have any real effect.

It should be noted that section 268 is purely voluntary, in that there is no requirement for the Planning Tribunal to turn its mind to whether additional dispute resolution is appropriate. The Planning Tribunal has been ready to grant adjournments if the parties indicate that negotiations are going on between the parties which may resolve the dispute. If a party requests an additional dispute

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26 Sir Laurence Street "The Courts and Mediation - A Warning" (November 1991 2 Australian Dispute Resolution Journal) 203-204.

resolution process it is likely that the Planning Tribunal will look at such a request positively. Any possibility that a hearing may be avoided is positively encouraged. However with questions of funding of "third parties" not resolved in the legislation it may be that the Planning Tribunal may be reluctant to act on "its own motion." The writer doubts if there would be any positive gains from requiring the Planning Tribunal (or for that matter the consent authority under section 99) to consider in each case if additional dispute resolution is appropriate. The desire to get cases out of the Planning Tribunal and amicably resolved is probably incentive enough at present.

Section 268 raises some other issues. Unlike section 99 which enables a consent authority to invite "such other persons as the authority thinks fit", this section appears to limit the additional dispute resolution procedures to the parties involved. This is not however clear. As the purpose of the section is to encourage settlement it may well be agreed that if settlement cannot be enforced without the inclusion of others who are not parties then this may be sufficient to invite others to attend. It could also be argued that ADR inherently provides that where a disputant is recognised they should be included in the process where possible.

Section 274 deals with representation at proceedings but there is a question of whether additional dispute resolution are "proceedings before the Planning Tribunal under this Act" especially if the mediation is conducted by "another person". It would make little sense if people with an interest greater than the public generally could appear at the appeal but not be allowed, by the legislation, to attend a mediation conference. It is submitted that additional dispute resolution should involve all those who have an interest (even if not greater than the public generally), but, at the very least, those covered by subsection 274(1) should be included. Given that section 268 has not been tested it is probably appropriate to leave the issue to commonsense. If monitoring shows that there are problems specific amendments can be made later.

Another issue discussed in relation to section 99, was the privacy of the additional dispute resolution process. Section 277 requires that all Planning Tribunal hearing be held in public except that some evidence may be heard in private and publication of some evidence may be restricted. This exemption clearly does not apply to ADR as evidence as such does not arise. The question really is whether the additional dispute resolution meetings are hearings?

This Part of the RMA differentiates between proceedings and hearings. Section 274 for example refers to "proceedings". Section 277 refers to "hearings", and taking the usual meaning of that term it can be readily confined to the hearing of evidence, the judicial process of the Planning Tribunal. The writer submits that the requirement for hearings to be in public would not relate to the additional dispute resolution process. That does not however answer the question of whether such meetings can be in private. As there are no rules on this matter in the RMA it is submitted that the normal process rules of the procedure used in the additional dispute resolution would apply. These are not legal rules, but rules of common practice. Given the nature of mediation with its confidential disclosure, brainstorming sessions, creative thinking to extend the pie it is the norm that such matters are in private. Public involvement leads to grandstanding and playing to the gallery. The parties may of course agree to having meetings open to the public and allow the media to be present, but this would be unusual. It is submitted that safeguards on privacy and confidentiality may be required in the legislation to overcome any possible problems. Without the power to exclude the public and, probably more importantly, the media it is unlikely that the additional dispute resolution process will be successful.

The final matter to be considered in relation to section 268 is, what happens if agreement is reached? Under section 99 the report of the meeting may be reported to the consent authority. If so it is circulated and forms part of the information which is to be considered by the consent authority. There is no similar provision in section 268,

however the issues raised below could also relate to a report circulated under section 99.

If all parties agree then it may be possible for them to withdraw their appeals and abide by the agreement reached. It is common however that when parties manage to negotiate an agreement between themselves that the Planning Tribunal makes a consent order. Such orders have been made even though the Planning Judges have at times expressed concern about the vires of some of the provisions and indicated they should not be taken as precedents for later Tribunal decisions. It follows that where people have agreed through an additional dispute resolution process then they too may seek a consent order to "legalise" the agreement that has been reached. This may be as straight forward as a consent order.

The Planning Tribunal, as with all other persons exercising powers and functions under the RMA, has to take into account the principles, and through them the purpose, in Part II of the Act. It is conceivable that although the parties in dispute are in agreement the Planning Tribunal may not consider, for example, that the reasonably foreseeable needs of future generations has been accounted for. Does the Planning Tribunal have the authority to refuse to grant the consent order sought and send the matter back for further resolution? Aspects of the agreement might be clearly ultra vires. Can the Planning Tribunal omit those aspects without reference back to the parties?

What evidence does the Planning Tribunal require on how the agreement was reached? A signed memorandum should normally be sufficient but what if one of the parties decides at the last minute that they could do better by denying the agreement or some part of it? Should the "third party" be asked to give evidence on the agreement? In some cases evidence on the process may be useful but given the confidentiality of the information which passes between parties and a "third party" it may be that some legal protection or privilege rule should apply to the substance of the process.

It is also possible that some issues are resolved but not all. An agreed statement on the evidence which is accepted by all parties may assist the Planning Tribunal. What is the status of such a statement? The agreement may go further and not only agree on the facts but also on how some issues should be decided, leaving other issues for the Planning Tribunal. Does the Tribunal have the power to review those issues which the parties have already agreed upon, to check the assumptions made?

For most of these questions subsection 269(1) may provide the answers:

“Except as expressly provided in this Act, the Planning Tribunal may regulate its own proceedings in such manner as it thinks fit.”

The Planning Tribunal may therefore review agreements reached if that is appropriate, accept as evidence a report of any additional dispute resolution process or deal with any of the other issues. Provided the Planning Tribunal has some knowledge of how the procedure works it is submitted that there is no need to specify any rules in the RMA on how the Planning Tribunal should deal with agreements reached under additional dispute resolution.

The rules of evidence and privilege are however developed outside of the Planning Tribunal forum. To safeguard those who undertake such additional dispute resolution processes the writer submits that some amendment may be required to provide for the protection of privileged information on the substance, but not the process, of the procedure. Such privilege should apply not only to the initial case but to any subsequent disputes about the agreement.

### *Section 356*

The final section which specifically deals with some form of ADR is section 356. This provides that some matters can be determined by arbitration. It is a somewhat unusual section and it is questionable when it would be used. Where people are unable to agree and they have a right of appeal then, if every person who has such a right



agrees, they may apply to the Planning Tribunal for an order authorising that the matter be determined by arbitration. This does not apply to requirements, designations, heritage orders, where the Minister for the Environment calls in a resource consent application because of its national significance or to any proposed regional plan. The list should probably include restricted coastal activities where a recommendation is made by a committee but decided by the Minister of Conservation. It should be noted that no such restrictions apply to the additional dispute resolution processes under section 268 and that arbitration would be another "procedure designed to facilitate the resolution of any matter." There appears therefore to be a potential for conflict between the processes in section 268 and 356. Arbitration is however a step further up the intervention options than this paper is intending to cover. The writer only wishes to note that this provision exists but its practical effect is questioned.

#### *History of sections*

Before leaving these four specific sections of the RMA it should be noted that all, except section 365, were included in the Resource Management Bill as introduced. Section 267, introduced as clause 314, remained identical throughout the process. Section 268 (clause 315) was altered only by the addition of the words "designed to facilitate the resolution of any matter" in subsection (1). This was done in Supplementary Order Paper (SOP) 22 in May 1991. This SOP was developed after the review group headed by barrister Anthony Randerson reported back to the then Minister for the Environment Hon Simon Upton. No comment was made in the review group's report on this change.

Section 99 was altered from the clause 85 which was introduced after the Bill was reported back from the Select Committee. The changes were not substantive. They remained through the review although the requirement that the outcome *shall* be reported to the consent authority was changed late in the process to *may*.

There was no equivalent to section 365 when the Bill was introduced. At the end of the second reading a clause 389C was included. This was based on section 165 of the Town and Country Planning Act 1977 and was entitled "Matters may be determined by arbitration instead of by Tribunal". This clause was struck out by SOP 22 and replaced with a clause identical to the present section 365. Again, no explanation was provided in the review group's report, so it would appear to be a departmental proposal.

Thus, right from the start, the RMA contemplated the use of alternatives to the court process.

### OTHER OPPORTUNITIES

The RMA provides a number of opportunities for the use of environmental dispute resolution processes. Those mentioned above are the specific references and relate generally to site-specific cases. However environmental disputes do not just concern a particular development. A number of policy issues also result in disputes which can be handled by these alternative processes.

#### *National Policy Statements*

As noted in the brief outline of the RMA, the Minister for the Environment may produce national policy statements (NPS). The effect of such statements permeate down the layers so that regional and district plans can not be inconsistent with such statements. So far no NPS have been made or even proposed. It is clear from the Ministry for the Environment's corporate plan that none is expected in this financial year. Calls have been made for statements on indigenous forest, energy conservation and papakainga housing but have so far been resisted. Thought can however be given to the process which could be used.

The RMA provides the bones on which the process can be hung. Section 45 specifies the purpose. The Minister may consider certain matters to decide if an NPS is desirable — but all or none of these

matters may be relevant. If it is considered desirable, the Minister may define the issue and give notice of the Minister's intention to prepare a proposed NPS. This provision, section 46(a), is purely voluntary and appears to have no real effect. The Minister shall then notify a proposed NPS and appoint a board of inquiry.

The board is composed of between 3 to 5 members. The board is responsible for notifying the inquiry and shall seek submissions. Any person can make a submission in writing and should indicate if they wish to be heard. A summary of the submissions are to be published and an opportunity for further submissions in support or opposition to the original submissions is to be provided.

The board of inquiry is to then conduct a public hearing without undue formality. The Minister and every person who made a submission has the right to be heard.

Upon completion of its inquiry, the board prepares a written report for the Minister and makes recommendations. The Minister has to publish the report. After consideration of the report the Minister may (but need not) make changes to the proposed NPS and then seek its approval by the Governor-General in Council. The statement will then be published and the local authorities are to give recognition to it.

A similar process is followed if the statement is to be altered or revoked and for the preparation of a New Zealand coastal policy statement but, in the later case, the Minister of Conservation takes the lead role.

The interesting and important aspect that the RMA does not comment on is how the proposed policy statement is made. Once the proposed statement is publicised the RMA provides for a hearing process which includes submissions. There may be opportunities for facilitation under section 50 by the board of inquiry but the writer would first like to explore the opportunities for use of some form of ADR before the Minister notifies a proposed NPS.

If a statement is to be made on anything of national significance

which is going to be effective there will undoubtedly be disputes. Indigenous forest policy is a prime example of a matter which required resolution but no action was publicly taken for three years after it was indicated that some form of land use control would be introduced. In the end the controls proposed are on the sawmills not the land owners but there is no guarantee that the present Forests Amendment Bill will protect the forests as desired by the conservationists or allow cutting on a sustainable basis as sought by foresters. The development of this policy may help to refute the claims that mediation takes too much time.

CO<sup>2</sup> reductions are another example of where policy statements have been made but have caused disputes. It is a case where negotiations may have been able to resolve what was actually possible and a timetable produced that would have been supported by all parties. Instead a political statement was made prior to the 1990 election and changes have been made since.

As indicated above, section 46(a) provides that the Minister may notify the Minister's intention to prepare a proposed NPS. Such a notification will alert those who are particularly interested in the subject that something is afoot. The Minister could use this positively to seek out those people and arrange for meetings to prepare a proposed NPS for notification and consideration by a board of inquiry.

There is no doubt that if the Minister did notify and then did nothing more while officials prepared a proposed statement for notification that both the Minister and the departments involved would be subject to intensive lobbying.

What is therefore proposed is to turn the lobbying into a more constructive process. One method is consultation, but this involves separate discussions with the various interested groups. What is needed is "holding discussions among the same parties in a meeting format."<sup>27</sup>

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<sup>27</sup> Above n 12, 59

The Minister for the Environment could convene a meeting to discuss the issue for which the Minister considers a proposed NPS should be notified. If public notice is given under section 46(a) it is of the intention to prepare a proposed NPS and not the defined issue. This is a separate matter in section 46(a). The defining of the issue is something which should be left to the ADR meeting.

The Minister could run the meeting him or herself or arrange for a facilitator. This could be someone from the Ministry or an independent person. Consideration will need to be given to matters such as venue, reimbursement of expenses of representatives, time needed, training or briefing of those who will participate as well as to the substance itself.

One of the primary matters is to identify the key players. Notification of the intention may assist but established networks should identify most of the interested parties. One of the major issues for government departments will be the nature of their involvement. There is a view that it is not appropriate for the various arms of government to be seen to be "fighting" in public.

Such a view may have been appropriate in the "good old days" of the Ministry of Works and Development where the Crown spoke with one voice at planning hearings. The MWD drew together the evidence and concerns of the other departments and presented a single face to the Planning Tribunal. Since the demise of the MWD and the raise of the philosophy that each department is responsible for its own sphere of interest with chief executives having individual contracts with their Ministers, it is difficult to see any justification for one Crown view.

It is acknowledged that the present administration has been more concerned that departments try to resolve their differences before presenting advice to Cabinet, but it is accepted by Ministers that departments do have different views on issues. Even between departments as supposedly similar as the Department of Conservation and the Ministry for the Environment differences are seen in public.

The High Court hearing on the Wanganui River minimum flow saw the Department argue for a conservation primacy, which was not supported by the Ministry.

The public do not assume or expect various departments to have the same views. It is submitted therefore that if a meeting is to be held then along with industrial interests, conservation groups, local authorities, iwi representatives and particular interest groups, individual government departments should also be present to partake in the process.

Clearly this may lead to a huge number of representatives and some prior negotiation between similar interest groups may be useful to reduce numbers. Given that what is being proposed to resolve is the defining of the issue and the content of the proposed NPS, it may be easier to get parties to join together because there still remains an opportunity to be heard individually before the board of inquiry.

This limited nature of the dispute may also assist parties in coming to the table as whatever is agreed is a *proposed* statement. This may not be so threatening or final for some groups which may consider it more appropriate to be taking a stand, refusing to accept a policy which provides for the felling of some trees or the damming of some rivers for the protection of others.

As there has not yet been a NPS it is likely that discussion will need to centre on what such an animal looks like before any matters of substance can be raised. The RMA provides no clues to its final form, although it must include enough for local authorities to judge their own policies and plans for inconsistency.

Depending on the definition of the issue a number of sub-issues of a reasonable magnitude may arise. These may require sub-meetings to negotiate on the contents of them for the proposed NPS.

Besides looking at the proposed NPS itself, a meeting may also be used to consider the process for the public inquiry (in line with what is provided in RMA), the information which is required and how it is

to be made available, and the members of the board of inquiry.

It is up to the Minister to appoint the members of the board but no details are given on who they should be. Unlike the appointment of a special tribunal for a water conservation order, there is not even a requirement that the Minister need consult other Ministers. Mana may accrue to the board if its members have been nominated by a meeting of all the key players.

Information and reports are always essential to assist decision making. Government departments have often produced discussion papers as a basis for public comment. Releasing a proposed NPS may not be enough to give the public the full flavour of what is intended and how the decisions were made to include various matters in the proposed statement. A meeting may therefore need to cover what else should be released, what else needs to be commissioned and investigated, and who should pay. These concerns may well look into the process used for the notification and hearing of the proposed NPS.

There is no getting away from the fact that such a process will take time and effort. The rewards may be :

“ability to tap the specialised and local knowledge of participants, leading to efficient [definition of the issue and the most workable proposed national policy statement];

“higher probability of participants’ views being heeded, hence greater value in the participation;

“ability to reconcile inconsistencies among parties suggestions jointly, to the greater satisfaction of all;

“greater likelihood of identifying key stakeholders, especially at [regional and district] levels (this would also aid implementation):

“increased sense of control of the process by parties and so greater commitment to remain in the process.” 28

As a result of the meeting process the Minister could then be more confident that the proposed NPS that was publicly notified would be more acceptable, at least to the key players. There will no doubt be

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28 Above n 12, 59

individuals who are opposed to aspects of it and key players may take the opportunity before a board of inquiry to push for further advances. It is to be hoped that most of the departmental differences may have been resolved so that those concerned about public displays of difference may be comforted by the fact that such displays only occurred in the less public ADR meetings.

The RMA process for the board of inquiry is very like a hearing on policy statements and plans. The language of "submissions" and the reference back to section 39 indicate that a board will hear submissions in a way similar to that of a consent authority hearing evidence. However there is no specified reason why a board could not move out of this judicial-type role and take on a more mediatory approach.

Section 39 provides that the board shall "establish a procedure that is appropriate and fair in the circumstances." The procedure must avoid unnecessary formality, recognise tikanga Maori, only permit questioning by the board and not allow for cross-examination. The inquiry must be conducted in public unless sensitive information either of a cultural or commercial nature is involved. This limit may impose constraints on any mediation-style process unless it can be argued that the board is suspending the inquiry in an attempt to mediate conflicting views. The board, by suspending, may then lack authority for its actions.

Even if the board did have authority, given the concerns expressed earlier about the Planning Tribunal members being involved in both ADR and decision making it may not be appropriate for the board to so act. However there is nothing in the RMA which would stop a board adjourning while some other party, such as the Minister, sought to mediate an issue. The board could also call for reports if not enough information was available and may consider producing draft reports for further public comment. None of these are specified but the board has a wide mandate under section 51. The same process would be equally appropriate for a New Zealand coastal policy statement.



To summarise, the process for an NPS recommended by the writer is that the Minister floats an idea and key parties are drawn together to agree on the defining of the issue, the process and the contents of the proposed NPS. To reach such agreement some form of ADR will be required. A proposed NPS can then be notified and a public inquiry held. The RMA does not stop dispute resolution processes being used by other parties. It is submitted that the board of inquiry's powers are restricted by section 39 but others, including the Minister, could use such processes. There may be a need to explicitly provide for facilitation and mediation as part of the NPS process, but it is something that should be monitored before being amended. The RMA is, in theory, an empowering Act and process rules are meant to be kept to a minimum.

The Minister still has the final power under section 52 to consider the board's report. It should be noted that a section 32 analysis of benefits and costs is required at this stage (see section 32(2)(a)(i)).

#### *National Environmental Standards*

Sections 43 and 44 provide for national environmental standards. These regulations prescribe technical standards and the methods for implementing them. They can not be made unless the Minister for the Environment considers the process to establish them "gives the public adequate time and opportunity to comment on the proposed subject-matter of the regulations". This is partly a recognition of the section 32 benefits and costs analysis in that regulatory authorities must be able to justify the costs imposed on others. This differs markedly from most regulations which, as secondary legislation, have no formal public input.

So far no such standards have been promulgated. Instead the Ministry for the Environment have produced guidelines. These are seen to be the forerunners to standards.

There is an underlying threat that if the guidelines are not followed the Ministry will develop regulations which others will be

forced to abide with. The guidelines were developed through a process of consultation and workshops with those directly involved. They have not been subject to general public review.

This process may be appropriate for guidelines which have no legal effect but clearly some other process will be required if they are to become regulations in terms of the RMA. A section 32 benefit and cost analysis is required before the regulations are made. This will no doubt require consultation to decide on the need and if regulations are the best solution.

Given that the regulations are of a technical nature it is probably appropriate that the detailed work, which will include some form of dispute resolution, is done by those who use them. However given the requirement of public involvement they are going to have to be readily understood so that public comment can be made. Being a regulation they will also need to be translated into "legalese". This suggests disputes not only on the subject matter but also on the process. The opportunity for some form of ADR is likely. Identification of the key parties may cause some initial conflict which will require resolutions with concerns about the need for public involvement compared with scientific and technical purity.

#### *Preparation of Policy Statements and Plans*

The RMA provides for regional policy statements and regional and district plans. The process for preparation and review is set out in the First Schedule to the RMA. There are specific requirements for consultation but no reference to ADR processes. Briefly, the process is the preparation of a proposed policy statement or plan, consultation on the proposal with identified parties including the Minister for the Environment, local authorities and iwi. Public notice must be given inviting designations and heritage orders. Advised requirements are to be included in the proposed plan. The policy statement or plan is then publicly notified. Submissions can be made and further submissions can be made in response. A hearing is held, decisions

and recommendations made with the opportunity to appeal to the Planning Tribunal.

As with all areas where there is an appeal, ADR methods can be tried by the parties involved or the Planning Tribunal can act under section 268, additional dispute resolution. This is however later in the process. The ideal would be to have parties agree to the plan or policy statement when first made. The consultation process does provide this opportunity.

Consultation is different from mediation or other similar process.

“In consultation people are informed about proposals that may affect them and have the opportunity to express their views and concerns prior to final decisions being taken... The decision-making authority retains the discretion to heed or ignore the views expressed.” 29

In Air New Zealand Limited v Wellington International Airport Ltd McGechan J considered what was required by statutory consultation. Specifically it requires an open mind, provision of sufficient information and time for appraisal, opportunity for response and bona fide consideration of the response. 30

Consultation is therefore different from mediation in that the decision-making power does not transfer. It is also generally done on a one to one basis. There is however no reason why the consultation requirements of clause 3 of the First Schedule could not be expanded to cover ADR. Clause 3(2) provides that the local authority may consult with anyone else during the preparation of the proposed policy statement or plan. If the local authority may consult, it may also widen the process to mediate if, during its consultation, it discovers there are problems with the proposal. This may delay the process at the beginning but could shorten the process at the end if appeals are avoided.

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29 Above n 12, 4

30 Air New Zealand Limited, Qantas Airways Limited, Bilmans Management Limited and Board of Airline Representative New Zealand (Inc) v Wellington International Airport Limited, the Attorney General and the Wellington City Council (High Court, Wellington, 6 January 1992 (CP 403/91) McGechan J.)

Regional policy statements and coastal plans have to be notified by 1 October 1993 (section 432). The consultation requirement is before notification so the timeliness may be getting short for ADR in this round. This however does not mean that consultation could not occur later in the process. As with section 99 pre-hearing meetings, this could occur between the end of the period to make submissions (and further submissions) and before the hearing commences. Unlike a resource consent application no time is specified for how quickly after the close of submissions a hearing is to be held, except that 10 working days notice is required. The time constraints which may cause problems for resolution of resource consents do not occur here.

There is no reason why ADR techniques can not occur several times throughout the process - at consultation, before a hearing and, pursuant to section 268, before a Planning Tribunal hearing.

Part II of the First Schedule relates to private plan changes. A number of concerns have been identified with this Part and amendments are proposed. However the same possibilities for use of ADR processes will exist here. Likewise changes and variations of policy statements and plans open up the same possibilities.

#### *Designation and Heritage Orders*

The RMA does provide other possible areas for environmental dispute resolution. Designations and heritage orders impose restraints on private land use. With heritage orders the Planning Tribunal can order the taking of land if the restraints imposed render the land incapable of reasonable use. Long before it gets to that stage a heritage protection authority and a person whose property is affected would have the opportunity to negotiate.

#### *Esplanade Reserves and Strips*

The Minister for the Environment has publicly stated that changes will occur to the esplanade reserve provisions of the RMA. Where subdivision occurs land may be taken along the banks of rivers, lakes

and the sea to protect public access, recreational use or conservation. The usual width of such reserves is 20 metres but in certain circumstances more or less can be taken, or esplanade strips of any width can be taken instead. The amendments propose including conditions on the use of the esplanade strip. There will also be provision for the acquiring of land voluntarily where subdivision does not occur. The taking of land for public use is a highly-emotive subject. It is unfortunate that policy development in New Zealand does not yet allow for use of ADR generally. Instead the various lobby groups are pressurising the Minister and staff. Whatever the end policy result is there will be plenty of opportunity for the use of environmental dispute resolution techniques in the area of esplanade reserves and strips.

#### *Water Conservation Orders*

The purpose of a water conservation order is to:

“recognise and sustain —

(a) Outstanding amenity or intrinsic values which are afforded by waters in their natural state:

(b) Where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.”

(subsection 199(1))

The provisions in Part IX of the RMA are very similar to those in the Water and Soil Conservation Act 1967. Any person can now apply to the Minister for the making of an order. The Minister will then, based on the information in the application and the Minister's inquiry, decide whether a special tribunal should be established to hear and report on the order. The special tribunal, of three to five members, shall notify the applicant. Any person can make a submission and a hearing by the special tribunal is to be held. The special tribunal must have regard to the submissions, the application, the needs of industry and the community and relevant policy statements and plans, as well as the purpose of the order and the

matters which can be provided for in the legislation.

The special tribunal reports to and makes recommendations to the Minister. Within 15 working days of the decision being made persons can make a submission to the Planning Tribunal which will hold its own inquiry and report to the Minister. The Minister is obliged to act in terms of the report but can reject a recommendation to make an order. In doing so the Minister must lay a statement specifying the reasons for the rejection before the House.

If an order is made it is done so by Order in Council. It cannot be revoked or varied for two years. The same process is followed to change an order. An order means existing lawful uses can continue but that future permits cannot be issued if they do not comply with the order.

Unlike other provisions of the Act, no section 32 analysis is required. It is quite possible that the first the Minister knows of a potential order is when the application arrives. Experience with the Mohaka River application suggests however that some prior discussion is needed. When the (then) acclimatisation society applied for the order the society assumed that the local iwi would be fully in support because an order would protect the spirituality and cultural aspects of the river. The iwi however objected to the order throughout the process on the basis of rangitiratanga. One plank of the objection was the lack of consultation beforehand. A facilitated meeting prior to the application being made may have resolved a number of problems that have arisen since. It may have built an atmosphere of trust instead of antagonism. Both the iwi and the (now) fish and game council may have come to an understanding of the others' concerns. It is submitted therefore that there is room for a potential applicant to use negotiation and facilitation techniques to obtain support before making the application.

Such prior work will assist the Minister with the Minister's decision pursuant to section 202 in deciding whether to accept or reject the application. If it is not done, the Minister may, as part of

his or her inquiry process, feel obliged to undertake such a meeting of key parties.

Appointment of members to the special tribunal may also call for some use of ADR. In the past Ministry staff have sought through personal contacts to find people who have an interest but would not be seen as biased. The RMA requires the Minister to consult with the Minister of Maori Affairs and the Minister of Conservation where appropriate. An indication of who key players support as tribunal members may be of assistance to making any decision. Consultation may be sufficient, but negotiation with identified key parties could help.

The process under which the special tribunal works is clearly set out in the RMA. It is similar to the board of inquiry's process for national policy statements. Again section 39 is relevant to the hearing with its informal but public requirements. However section 206 provides that section 99 applies with all necessary modifications. It is clearly open to the special tribunal to arrange for a pre-hearing conference.

The issues discussed earlier on whether a member of a consent authority should be a facilitator or mediator applies equally to the special tribunal. The writer would strongly recommend that the members of the special tribunal use another person and keep themselves free for the recommendation role.

As section 101 also applies the time limit is again restrained to 50 working days between the making of submissions and the hearing. The other problems identified with section 99 apply equally here. It again may need to be argued that the pre-hearing conference is not part of the inquiry. Section 204(4) states that "every inquiry shall be held in public" which will not assist ADR.

In the past environmental dispute resolution processes have been most frequently tried in the period between the special tribunal's report being appealed and that appeal being heard. There is no reason why this will not continue under the new legislation.

The lead has generally been taken by the Ministry staff who have arranged a meeting with all of those who have appealed to discuss the issues in conflict. As all of those who made submission to the special tribunal have a right to appear before the Planning Tribunal the original parties have often been added to by this group of people once they are aware meetings are occurring. Their original omission is not a deliberate attempt to keep them out but an effort to limit the group's number by contacting those who have shown the most concern by appealing. It has been noted that after a couple of meetings these people on the edge generally do not return but ask others to keep an eye on the process. As long as they are provided with "minutes" of the meetings this is often sufficient.

The Ministry for the Environment has been classified as the Ministry in the middle. It has tried to tread a line between development and conservation. As such, the Ministry's stance is usually neutral and when it appears at the Planning Tribunal it is to assist with the legal interpretation of the statute, rather than present evidence on the value or otherwise of the river.

Because of its perceived neutral role the Ministry has taken the lead in ADR. It would be true to say that although the process is often called mediation the process is actually facilitation. The Ministry staff have organised the venue, made sure the chocolate biscuits are there, acted as chair if this has been needed and most frequently taken the notes. The meetings are negotiations by the parties with some administrative assistance by the Ministry.

The Ministry has taken on the role of providing notes of the meeting, redrafting the wording of the order, circulating the redrafts, co-ordinating comments and organising (but not paying for) reports.

The Ministry has often taken a lead role once the matter has got to the Planning Tribunal. Even if all parties agree to the wording of the order the Planning Tribunal needs to make its own inquiries to report to the Minister. This may mean that all parties present a joint statement or that the original applicant produces one witness who



presents evidence agreed to by all parties. The planning judges have been amenable to this but need to be assured of the legality of the clauses in the order. The Ministry has therefore assisted with satisfying the judge about any concerns.

As indicated earlier this process has been successful in some cases and there is no reason why it should not continue to be so. The process is far from perfect but as Ministry staff get more training in environmental dispute resolution techniques this should improve. It is also clear that such practices are welcomed by the judges for even if disputes are not resolved at least the number of issues may have been reduced. The other parties are often happier because they have been closely involved in producing a final order which hopefully they can all live with. The alternative is a Planning Tribunal recommendation which may disappoint all parties, or impose a win/lose solution.

### *Scoping*

Resource consents also present opportunities for negotiation outside of section 99. Section 88, making an application, requires an environmental assessment to be done. The Fourth Schedule provides a list of things that should be included in such an assessment and matters that should be considered. This includes in clause 1(h) "An identification of those persons interested in or affected by the proposal, the consultation undertaken, and any response to the views of those consulted". Clause 2(a) requires a consideration of any "effect on those in the neighbourhood and, where relevant, the wider community including any socio-economic and cultural effects". Such an assessment is to be in "such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment" (subsection 88(6)).

If the consent authority is not satisfied with the information received it can require the applicant to provide further information and an explanation of possible alternative locations, the reason for

the proposed choice and the consultation undertaken.

This in effect requires a scoping exercise, at least for the larger projects. Its aim is to identify issues early and work out the priorities of what requires further study. By consulting early with the public concerns can be identified. ADR can be used to deal with the process of scoping and how the environmental impact assessment is to be done. Scoping exercises are often not done behind closed doors as it is the opportunity for the community affected to have its say.

Once again, although the Act provides for consultation, ADR techniques may be equally appropriate and may in fact resolve a potential dispute instead of having it only identified through discussion.

#### *Notification*

The other area where ADR techniques might be useful for the applicant for a resource consent is under section 94. Resource consent applications are usually notified under section 93, but section 94 provides exceptions. If an application is not notified then no hearing is required which may reduce time and cost for the applicant. Subsections (1), (2) and (3) provide that if the written approval of every person who, in the opinion of the consent authority, may be adversely affected is obtained, and other criteria apply, then an application need not be notified. When considering the application the consent authority can not take into account the actual or potential effect on any such person who gave written approval. Negotiation with neighbours may therefore be a very useful device for an applicant.

#### *Enforcement*

Although there are no doubt other possibilities for the use of ADR techniques in the RMA, the final area looked at in this paper is enforcement. Part XII deals with enforcement orders, abatement notices and offences. An enforcement order can be sought by anyone

from the Planning Tribunal against any action or non-action in contravention in any matter under the RMA. Abatement notices are issued by an enforcement officer of a local authority and do not have effect for at least seven days. If an order or notice is not abided with or there has been any other breach of the RMA an offence is committed. These are strict liability offences with limited defences. The penalties are a maximum of \$200,000 fine or a term of two years imprisonment. Principals can be liable for the actions of staff or agents.

The writer is aware of some circumstances where negotiation between the offending party and the enforcement authority has occurred so that court action has not been taken on the basis that the contaminant has been cleared up, the cost of investigation paid and a further lump sum is paid to be used for other environmental work of the local authority's choice.

Clearly such negotiations have benefits for the local authority which does not have to prepare for a defended hearing and can be assured of its costs being met. For the offender, they are saved the embarrassment of media attention and a criminal record.

However, there are grave dangers in this use of ADR. It smacks of back-room deals. The public has an interest in knowing who offends. An offender may feel forced to pay up where they could be found not guilty by a judge.

This is perhaps the area where ADR might be going too far. It may be the frontier over which public comment and information is needed before it becomes an acceptable way of handling offences.

As discussed earlier, there are some circumstances where the courts are more appropriate. The writer would argue that any deliberate breaches of the RMA should be tried in court. Public censure is one of the anticipated results and is seen as part of the punishment. It also provides a warning to other would be offenders.

ADR in enforcement is, in the writer's view, only appropriate where offences are clearly accidental and yet strict liability still catches the activity.

## CONCLUSION

This paper set out to explore the alternative dispute resolution possibilities within the Resource Management Act 1991, both specified and otherwise available. There appears to be ample opportunity to use such possibilities if there are people brave enough to grasp them. The Minister for the Environment could take a lead role in the environmental field, and with policy work generally, by using facilitation and mediation for national policy statements and national environmental standards. Whether the opportunities will be grasped remains to be seen.

At a site-specific level there is more hope that greater use of environmental dispute resolution techniques will occur. They have been used in the past and there is an expectation that it will continue.

The specific framework in RMA is a start. It could certainly be improved. This paper has identified areas for amendment including sufficient time periods to allow ADR to have effect, privilege protection for "third parties" and, most importantly, the ability to hold meetings in private. In the policy making area especially ADR needs to be supported. However, the opportunity is there, it just requires careful development.

To reinforce the reasons why alternative dispute resolution should be considered the following conclusion to a paper which discusses the Montana State (USA) water planning process is provided:

"Dispute resolution systems can increase the participation of all affected interests in developing and implementing public policy. This, in turn, should increase their ownership of the final decision and in seeing that it is implemented. A dispute resolution system may not decrease the volume of conflicts, per se, but it should reduce the high cost of conflict and realize the benefits of conflict more efficiently.

"The use of dispute resolution systems to address complex multi-party public policy issues also provides other benefits, including the consideration of diverse perspectives and interests; the co-operative and systematic analysis of technical and scientific information; the formation of more pragmatic,

equitable and mutually acceptable goals and alternatives; and the improvement of relationships among diverse, often competitive interests, government agencies, and policymakers.”

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31 M McKinney "Designing a Dispute Resolution System for Water Policy and Management" (April 1992) *Negotiation Journal*, 163.

## APPENDIX

The following are the relevant provisions from the Resource Management Act 1991 referred to in the paper.

### *Pre-hearing Meetings*

**99. Pre-hearing meetings-**(1) For the purpose of clarifying, mediating, or facilitating resolution of any matter or issue, a consent authority may, upon request or of its own motion, invite anyone who has made an application for a resource consent or a submission on an application to meet with each other or such other persons as the authority thinks fit.

(2) A member, delegate, or officer of the consent authority who attends a meeting under subsection (1) and who is empowered to make the decision on the application which is the subject of the meeting, shall not be disqualified from participating in the meeting if-

- (a) The parties attending the meeting so agree; and
- (b) The consent authority is satisfied that the person should not be so disqualified.

(3) The outcome of the meeting may be reported to the consent authority, and that report-

- (a) Shall be circulated to all parties before the hearing; and
- (b) Shall be part of the information which the consent authority shall have regard to in its consideration of the application.

*Conferences and Additional Dispute Resolution*

267. **Conferences-**(1) A Planning Judge may at any time after the lodging of proceedings require the parties, or any Minister, local authority, or other person which or who has given notice of intention to appear under section 274 to be present in person or by representative at a conference presided over by a member of the Tribunal.

(2) Any party may request a Planning Judge to convene a conference under subsection (1).

(3) The member of the Tribunal presiding at any conference under subsection (1) may, after giving the parties an opportunity to be heard, do all or any of the following things:

- (a) Direct that such amendments to pleadings be made as appear to the member to be necessary:
- (b) Direct that any admissions which have been made by any party and which do not appear in the pleadings, be recorded in such a manner as the member thinks fit:
- (c) Define the issues to be tried:
- (d) Direct that any issue, whether of fact or of law or of both, be tried before any other issue:
- (e) Fix the dates by which the respective parties shall deliver to the Tribunal and to the other parties, statements of the evidence to be given on behalf of the respective parties:
- (f) Direct the order in which the parties shall present their respective cases:
- (g) Direct the order in which a party may cross-examine witnesses called on behalf of any other party:

- (h) Limit the number of addresses and cross-examinations of witnesses by parties having the same interest:
- (i) Direct that the evidence, or the evidence of any particular witness or witnesses, shall be given orally in open hearing, or by affidavit, or by pre-recorded statement or report duly sworn by the witness before or at the hearing, or partly by one and partly by another or other of such modes of testifying; except that in every case any opposite party shall (if that party so requires) have the opportunity of cross-examining any witness:
- (j) Determine any question of admissibility of any evidence proposed to be tendered at the hearing by any party:
- (k) Require further or better particulars of any matters connected with the proceedings:
- (l) Adjourn the conference to allow for consultations among the parties:
- (m) Give such further or other directions as he or she considers necessary.
- (4) The member of the Tribunal presiding at any conference under subsection (1)-
  - (a) Shall ensure that the parties are given an opportunity to make all admissions and all agreements as to the conduct of the proceedings which ought reasonably to be made by them; and
  - (b) With a view to such special order (if any) as to costs as may be just being made at the hearing, may cause a record to be made, in such form as the member may direct, of any refusal to make any admission or agreement.



268. Additional dispute resolution-(1) At any time after lodgment of any proceedings, for the purpose of encouraging settlement, the Planning Tribunal, with the consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing.

(2) A member of the Planning Tribunal is not disqualified from resuming his or her role to decide a matter by reason of the mediation, conciliation, or other procedure under subsection (1) if-

- (a) The parties agree that the member should resume his or her role and decide the matter; and
- (b) The member concerned and the Tribunal are satisfied that it is appropriate for him or her to do so.

356. Matters may be determined by arbitration-

(1) Except as provided in subsection (2), where-

(a) Any persons are unable to agree about any matter in respect of which any of those persons has a right of appeal under this Act; and

(b) Every person who has such a right of appeal agrees-

any of those persons may apply to the Planning Tribunal for an order authorising the matter to be determined by arbitration, under the Arbitration Act 1908, on such terms and conditions as the Tribunal considers appropriate.

(2) No person may apply to the Planning Tribunal for an order under subsection (1) in relation to any of the following matters:

(a) Any matter relating to a requirement, designation, or heritage order:

(b) Any matter relating to an application for a resource consent in respect of which the Minister has made a direction under section 140 (which relates to call-in):

(c) Any matter relating to a proposed regional policy statement or proposed regional coastal plan.

(3) Where an order under subsection (1) is made no person may, in relation to the matter to which the order relates, lodge or proceed with any appeal or make any reference to the Tribunal under clause 14 of the First Schedule, without the leave of the Tribunal.

(4) Subject to the terms of any order made under subsection (1), the arbitrator has the same powers,

duties, and discretions in respect of any decision to which the order relates as the consent authority who made that decision; and may, in his or her award, confirm, amend, or cancel any such decision accordingly.

(5) Except as otherwise expressly provided, nothing in this section shall limit the right of any persons to refer to arbitration any disputed matter arising under this Act.

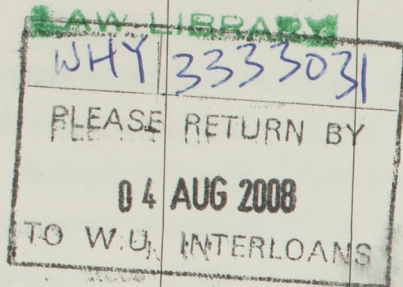
(6) In this section, "right of appeal" includes a right to make a reference to the Planning Tribunal under clause 14 (1) of the First Schedule (other than in respect of a proposed regional policy statement or proposed regional coastal plan).

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Resolution Journal.

Disputes (Centre for  
University, 1992).

New York, 1983).  
(1970) 44 Southern

System for Water  
Journal.

The Philosophy and  
Action Journal.

H Kaitia *The Art and Science of Negotiation* (Harvard University  
Press, Cambridge, Massachusetts, 1982).

Sir Laurence Street "The Court System and Alternative Dispute  
Resolution Procedures" (February 1990) 1 Australian Dispute  
Resolution Journal.

Sir Laurence Street "The Courts and Mediation - A Warning"  
(November 1991) 2 Australian Dispute Resolution Journal.

L Susskind (ed) *The Land Use Controversy in Massachusetts* (The  
MIT Press, Cambridge, Massachusetts, 1975).

L Susskind, L Bacon, M Wheeler (ed) *Resolving Environmental  
Regulatory Disputes* (Schenkman Books, Inc, Cambridge,  
Massachusetts, 1983).

L Susskind, J Cruikshank *Breaking the Impasse* (Basic Books,  
Inc, New York, 1987).

Dame Catherine Tizard "Speech on the opening of the Auckland  
Law School" (June 1992) New Zealand Law Journal.

M Weir "Alternative Dispute Resolution in Queensland  
Environmental Law" (November 1991) 2 Australian Dispute  
Resolution Journal.

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## BIBLIOGRAPHY

G Bingham *Resolving Environmental Disputes* (The Conservation Foundation, Washington, D.C., 1986).

C Blackford *Guidelines for monitoring additional dispute resolution processes within the Resource Management Act* (Centre for Resource Management, Lincoln University, May 1992).

B Boer, D Craig, J Handmer, H Ross *The Use of Mediation in the Resource Assessment Commission Inquiry Process* (Resource Assessment Commission, Canberra, 1991).

D Bryson "Mediator and Advocate: Conciliating Human Rights Complaints" (August 1990) 1 Australian Dispute Resolution Journal.

J Chart, G Pavelka *Managing Resource Use Disputes* (Centre for Resolving Environmental Disputes, Lincoln University, 1992).

R Fisher, W Ury *Getting to Yes* (Penguin Books, New York, 1983).

L Fuller "Mediation - Its forms and Functions" (1970) 44 Southern California Law Review.

M McKinney "Designing a Dispute Resolution System for Water Policy and Management" (April 1992) Negotiation Journal.

W Pengilly "Alternative Dispute Resolution: The Philosophy and the Need" (May 1990) 2 Australian Dispute Resolution Journal.

H Raiffa *The Art and Science of Negotiation* (Harvard University Press, Cambridge, Massachusetts, 1982).

Sir Laurence Street "The Court System and Alternative Dispute Resolution Procedures" (February 1990) 1 Australian Dispute Resolution Journal.

Sir Laurence Street "The Courts and Mediation - A Warning" (November 1991) 2 Australian Dispute Resolution Journal.

L Susskind (ed) *The Land Use Controversy in Massachusetts* (The MIT Press, Cambridge, Massachusetts, 1975).

L Susskind, L Bacon, M Wheeler (ed) *Resolving Environmental Regulatory Disputes* (Schenkman Books, Inc, Cambridge, Massachusetts, 1983).

L Susskind, J Cruikshank *Breaking the Impasse* (Basic Books, Inc, New York, 1987).

Dame Catherine Tizard "Speech on the opening of the Auckland Law School" (June 1992) New Zealand Law Journal.

M Weir "Alternative Dispute Resolution in Queensland Environmental Law" (November 1991) 2 Australian Dispute Resolution Journal.



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