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MEDIATION AND THE ENVIRONMENT COURT – TEN YEARS ON.

Submitted for the LLB (Honours) Degree at Victoria University of Wellington

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MEDIATION AND THE ENVIRONMENT COURT - TEN YEARS ON

I INTRODUCTION

The exceptional growth[1] in the use of mediation[2] as a form of dispute resolution under the auspices of the Environment Court raises the question as to whether the current structure and framework of the existing statute is appropriate. This paper explores issues associated with this increased use and suggests that ten years on it may be time to review the relevant provisions in the Resource Management Act 1991, (the RMA).[3] While acknowledging that the current practice operating within the Court appears to be working adequately, the present statutory framework is inadequate there is the potential for unsatisfactory practices to occur. Matters such as Commissioners undertaking adjudicative functions as well as acting as mediator, the lack of monitoring and evaluation, as well as the inherent difficulties associated in mediating issues of public interest are all issues that the current provisions fail to address.

The paper commences with a statutory overview, exploring the positioning of mediation within the framework of the RMA. It then reflects on whether Court-annexed mediation is the appropriate model for environmental dispute resolution. Arising from this discussion is consideration of the dual role played by Environment Commissioners

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[1] See Part V Current Statistics.

[2] See definition in Part IV Statutory Provision for Mediation and ADR within the Environment Court.

[3] The Resource Management Act was enacted in 1991, reforms in 1996 saw the Planning Tribunal replaced with the Environment Court and an increased emphasis on the use of mediation.

who have the tasks of being adjudicators in the Court as well as mediators.

The present training, evaluating and monitoring of commissioners is discussed including the need for improvement in this area in order for the Court and the public to be assured of quality performance.

The importance of protecting the "bottom line" of the Act, sustainability of the environment, and the possible effect that mediation could have on this is then considered. This is followed by a discussion relating to the potentially difficult area of confidentiality versus the public right to know fully about decisions that may affect them and future generations is discussed.

Finally the issue of timing is examined. This includes whether more emphasis should be placed on mediation occurring at an earlier stage of a dispute and the impact of delays that currently exist.

II THE RESOURCE MANAGEMENT ACT 1991 (The RMA)

This Act was passed in 1991, after a lengthy reform process that was formally launched in 1987 and involved wide consultation and participation with numerous position papers from government agencies and public submissions.[4] It gained notoriety as the largest single item of new legislation ever enacted by the New Zealand Parliament and it was promoted as a blueprint for environmental management based on "sustainable management".[5] In undertaking such promotion, a central

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[4] Robert McLean and Trecia Smith *The Crown and Flora and Fauna: Legislation, Policies and Practices 1983-1998*. Waitangi Tribunal Publications 2001.

[5] Simon Upton *Purpose and Principle in the Resource Management Act*" Stace Hammond Grace Lecture 1995, p.5.

Grant Malcom *Sustainable management: a sustainable ethic*? A paper presented to the annual conference of New Zealand Resource Management Law Association, October 1995.

concern is to "avoid, remedy or mitigate" any adverse effects of activities on the environment[6]. It has an effects based emphasis.

The Environment Court was created in 1996, when it replaced the former Planning Tribunal. It is a Court of record and has its own specialist judges and a team of Commissioners. It has jurisdiction in respect of a variety of matters that may be brought before it under the provisions of the Resource Management Act 1991. The majority of the matters come by way of appeal or by reference from a decision of a planning or regulatory authority. For example appeals against decisions concerning resource consents,[7] appeals against decisions of requirement authorities,[8] and appeals against decisions of heritage protection authorities[9] all come within the jurisdiction of the Environment Court. It can also hear appeals against certain acts and decisions of the New Zealand Historic Places Trust.[10] The Court's jurisdiction is largely exclusive, but proceedings for interim endorsement orders may be heard in a District Court, but the matter must be heard by a District Court Judge who is also an Environment Court Judge, unless the Chief District Court Judge directs otherwise.[11]

III CONSTITUTION OF THE ENVIRONMENT COURT

The Environment Court consists of not more than eight Environment Judges[12] and any number of Environment Commissioners or Deputy Environment Commissioners.[13] The Minister of Justice appoints commissioners for period not exceeding five years who are required to

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[6] As widely defined by ss 2 and 3 of the RMA.

[7] The RMA 1991, s120.

[8] Resource Management Act 1991. Ss 174 and 179.

[9] Resource Management Act 1991, ss192, 195.

[10] New Zealand Historic Places Act 193, s 20.

[11] Resource Management Act 1991, (RMA) s309 (2)(b) and 3(b).

[12] RMA ss 248(a) and 250(3)(a).

[13] RMA ss 248(b) and 254(3)

take an oath of office.[14] There are presently 13 Commissioners and 3 deputies.[15]

Commissioners and Deputy Environment Commissioners are full members of the Environment Court and come from a variety of backgrounds reflecting the requirements specified in the Act.[16]

A quorum of the Court depends generally on the issues involved but is generally one Judge and a Commissioner sitting together.

IV STATUTORY PROVISION FOR MEDIATION AND ADR WITHIN THE ENVIRONMENT COURT

Mediation can be defined as

> *"the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs"*[17]

The Environment Court actively encourages parties, where appropriate, to pursue dispute resolution. This reflects various provisions within the statute[18] and may occur at any time after the proceedings have been

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[14] RMA s 254(1).

[15] http://courts.govt.nz/environment_courts.htm last accessed 23/07/02.

[16] The Minister of Justice when appointing Commissioners is required to ensure that the Court possesses a mix of knowledge and experience in matters coming before the Court, including (a) economic, commercial and business affairs, local government and management affairs; (b) planning resource management and heritage protection; (c) environmental science, including the physical and social sciences; (d) architecture, engineering, surveying, minerals, technology, and building construction; (da) alternative dispute resolution processes (inserted 1996) (e) matters in relation to the Treaty of Waitangi and kaupapa Maori. (RMA s253).

[17] Folberg and Taylor cited in *Mediation as a Process between Community Groups*. A paper prepared by Jenny Rowan, Commissioner Environment Court 1997.

[18] For example s99 of the RMA provides for pre-hearing meetings, which allows consent authorities, upon request or on its own motion for the purpose of clarifying mediating or facilitating resolution of any matter or issue to invite parties to meet. Section 356 enables the Environment Court with agreement of interested parties to order that disputed matters be determined by arbitration on appropriate terms and conditions, This power is not exercisable in certain cases having a strong public interest element. (s 356 (2).

lodged.[19] The focus of this paper is the implementation and use of section 268. This provides that the Court may, with the consent of the parties, of its own motion, or upon request, ask one of its members or another person to conduct mediation, conciliation or other procedures designed to facilitate the resolution of the matter.[20]

A member of the Court who takes part in this is not disqualified by statute from resuming a function on the Court if parties agree and the Court members consider it is appropriate for the person to continue in that function.[21] However as discussed below,[22] the agreed practice is not to do so. Where the matter is resolved by mediation or another consent procedure the Environment Court retains its discretion relating to approval of the agreed solution to ensure that the broader matters of resource management and the public interest are properly addressed and observed.[23] The service is free if you use an Environment Court Commissioner, however parties are also permitted to hire a private mediator in which parties are responsible for the costs.

There is no power for the Court to force parties to mediate.

V CURRENT STATISTICS

The Environment Court now recognises the value of Court assisted dispute resolution and there has been a continuous and quite dramatic increase in the number of cases being referred to the mediation.[24] It is still however the minority of cases that are being referred for mediation. Although statistics are not as accurate as one would like,

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[19] See appendix 1 as to the process.

[20] Resource Management Act 1991, s268

[21] Resource Management Act 1991 s268 (2).

[22] See part VII Commissioners as Mediators –Their Dual role.

[23] RMA 1991 ss247 and 279.

[24] Registrar of the Environment Court Report of the for the 12 Months ended 30 June 2001, presented to the House of Representative, pursuant to s 264(1) of the RMA 1991. http://www.courts.govt.nz/environment_court/news.html last accessed 20/08/02.

and there has not been any sophisticated analysis undertaken,[25] figures for the past 5 years give a good indication of the trend towards the increased of use of the mediation process. These statistics also indicate the pressure of the continual growth of cases awaiting determination despite the increase in decisions issued. Judge Allin, the Principal Environment Court Judge, has determined to continue this trend in attempt to reduce this backlog.[26]

	Year ended 30/6/97	Year ended 30/6/98	Year ended 30//6/99	Year ended 30/6/00	Year ended 30/6/01
Appeal applications registered	1224	1373	2263	1270	1395
Referred to ADR	64	121	188	188	334
Awaiting Determination	1840	1999	2869	2940	3016

Table 1:
Statistics for the past 5 years, indicating growth in mediation

Although no official statistics are available for the year ended 30/06/02 it appears that the increase in mediations has continued. The other interesting aspect is that there appears (this is based on observation rather than empirical research) to be an increase in the success of the process.

[25] Interview with Jenny Rowan Commissioner for the Environment (the author, Wellington 8 July 2002)

[26] Allin J, Principle Environment Court Judge, speech to The New Zealand Planning Institute Conference April 2002, http://www.nzplanning.co.nz/impact2002conference_governanFce.html.

For example in 1998 121 mediations resulted in 46 consent orders, with the remaining 75 led to a narrowing of issues, and a reduction of Court hearing time.[27] In 2001 334 mediations resulted in 270 being settled and only 64 failed to result in agreement.[28]

Informal statistics indicate further improvement this year with one Commissioner reporting only three out of 50 mediations undertaken this year proceeding to Court.[29] Other mediators have been undertaking similar numbers of mediations indicating that a further increase in its use should be expected this year.

Whether this reflects the improved skill and experience of the mediators, the intention of parties and their awareness of the process or both is difficult to determine.

The statistics relating to the continually increasing Court backlog should also provide a reminder that the motive for Court-annexed ADR and mediation should not be purely to reduce the Court's workloads. This may lead to measuring the success of the process by the rate or timing of settlement alone leading to Court mediators permitting settlements to dominate their processes resulting in manipulation of parties and pressure on parties to settle.[30] This may also result in the undermining of the trust in the judiciary and simultaneously reduce the likelihood that parties will understand and take advantage of all the opportunities ADR can offer.[31] The purpose of providing a Court

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[27] Registrar of the Environment Court Report above, p 9.

[28] Registrar of the Environment Court Report above, p12.

[29] Interview with Jenny Rowan Commissioner for the Environment (the author, Wellington 8 July 2002)

[30] Dorothy Nelson Wright J. ADR in the Federal Courts –One Judges Perspective: Issues and Challenges facing lawyers, Court Administrators and the Public. Ohio St. J. on Disp. Res. 2001 1, 10.

[31] Wayne D. Brazil, Continuing the Conversation About the Current Status and the Future of ADR: A View from The Courts, 24 2000 J Disp. Resol. 11.

annexed mediation service is to provide tools that really give parties an opportunity, whether successful or not, to try and solve their disputes with some help from, a neutral third party provided by the Court.[32]

VI COURT-ANNEXED MEDIAITON – IS IT APPROPRIATE?

A Undermining Our Legal System?

New Zealand has implemented a Court-annexed form of mediation, where, although voluntary, the Court can offer, recommend and encourage parties to seek mediation from within the Court system and agreements are then signed and sealed by the Court. Although it is now widely accepted as a valuable option,[33] it has been considered contentious by many commentators who argue that there is no role for the Court in this process and that mediation should remain a private matter between parties without Court sanction.[34] Fiss, exhorted the legal community not to subordinate what he considered the primary function of the judiciary, - the articulation of public values through the application of legal principles - to its ancillary role of resolving private disputes.[35] He also argued that Court-annexed mediation stifles the development of the law, and disadvantaged those with less resources and power.[36]

Others argue that when a mediation is conducted under the rubric of the Court system and by one of its officers, if that mediation is

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[32] Wright, above 11.

[33] RJ Bollard and SE Wooler Court –annexed Mediation and other Environmental Dispute Resolution (1998) New Zealand Law Review 707, 710.

[34] See for example Simon Roberts, ADR and the Civil Justice System: An unresolved Relationship, M. L Rev. 56 (1993) 50.

Robert Fowler J Environmental Dispute Resolution Techniques – What Role in Australia? April 1992 EPLJ

[35] Owen M. Fiss, Against Settlement 93 Yale LJ 1073, 1085-87 (1984).

[36] Owen M. Fiss, Against Settlement 93 Yale LJ 1073, 1085-87 (1984).

Charlene Stukenborg, The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts, 19 U. Dayton L. Rev 1305,1336 also discusses the fear of suppressing the growth of law, and states that in order to be accepted ADR

unsuccessful and the dispute proceeds to Court some witnesses, parties, objectors and observers may feel that the Court decision was influenced by knowledge or information obtained in confidence by the Court officer during the mediation.[37] This may put the independence of the Court at risk. It is suggested that developments such as this will mean that the Court will develop roles beyond their conventional roles and is forsaking a fundamental concept upon which public confidence in the integrity and impartiality of the Court system is founded.[38]

Others have expressed concern that ADR falls too far on the private law side of the public/private quandary threatening the rights-based jurisprudence and the rule of law, and public accountability.[39]

Mediation includes "private sessions" where the individual parties may meet with the Commissioner/mediator in private and confidence.[40] This equates to private access to a representative of the Court in which the dispute is discussed and views expressed in the absence of the other party and is a repudiation of the basic principles of fairness. Naughton[41] suggests that it is not enough for the Court to arrange its internal working so that whoever has mediated will have no further connection with the case of it is not settled. He suggests that the public sees the Court as an integrated institution, and that this perception

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mechanisms must be characterised as a supplement to traditional litigation not a substitute.

[37] T. F. M Naughton Q.C Mediation and the Land and Environment Court of New South Wales, June 1992, Environmental and Planning Journal, 219, 222.

[38] T. F. M Naughton Q.C Mediation and the Land and Environment Court of New South Wales, June 1992, Environmental and Planning Journal, 219, 222.

[39] See for example Harry T Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L.Rev 688, 671 (1986).

Jonathan D Mester The Administrative Dispute Resolution Act 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of the Public Accountability., 13 Ohio St. J. on Disp. Resol. 167.

[40] John Mills and Jenny Rowan . "*Mediation; Practice and Principles*". Workshop presented to the Nelson-Marlborough branch of the NZ Planning Institute, March 2000.

[41] Naughton above at 12.

should be encouraged.[42] He argues that the public may perceive that Court as an institution may have been prejudiced by what occurred during a private session. He also suggests further that if it becomes known that a litigant can have private access to an officer of the Court in one situation this may become to be perceived as part of the normal expectation and procedure of the Court. He perceives that the provision of mediation services by the Court is in its very substance antithetical to the maintenance of public confidence in the integrity, and inaccessibility to external influence of the Court system.

Another criticism of Court-annexed mediators is that it can be perceived as "pressure to settle".[43] The closer the connection between the mediator and the Court the more likely the risk is that parties will perceive the mediator as the Court, and then react to the mediator as if they are in fact the Court. This could have serious repercussions; leading to greater procedural formality, caution and playing of cards closer to the chest. More serious is the possibility that parties may feel (perhaps subconsciously) pressure to settle when none is applied, or to make decisions distorted by fears of displeasing the mediator.[44]

B Enhancing Our Legal System?

The alternative and prevailing view to this is that the Court has a role in our society to promote the settlement of disputes in the manner that is most appropriate for the case and that the Court has a responsibility in providing services other than the traditional litigation process.[45]

The Court by directly involving itself only with the traditional adversary litigation model can be perceived as making a value

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[42] Naughton above 12.

[43]Wayne D. Brazil, Comparing Structures of the Delivery of ADR Services by Courts: Critical Values and Concerns, 14 Ohio St. J. on Disp. Resol. 715, 767. (1999).

Naughton above 13.

[44]Wayne D. Brazil, above 767.

[45] Wayne D Brazil above 767.

judgment about approaches to problem solving and implying that the most important and most highly valued procedures for resolving disputes are those that are combative and competitive. The closer and more visible the connection between the Court and the mediator the clearer the Court's signal that it identifies with the programme and endorses its quality, militating against the inference that it is a "second class" form of justice.[46] The public is more likely to have confidence with a Court designed process than a private provider, dependent on "repeat" business and large companies.[47] The Court is clearly indicating that traditional adversarial litigation is not always the most appropriate or the most effective way to resolve disputes and has the opportunity to promote new models to the community that can help establish and maintain important norms for behaviour of citizens.[48] Alternative models can teach co-operation rather than emphasising conflict, and openness rather than secrecy.[49]

In discussing the different "models" that Courts might use for delivering ADR services, Judge Wayne D. Brazil describes five possible options.[50] These range from full–time, in-house Court mediators available at no cost to litigants through to a system of user pays, private operators. He concludes that publicly funded, full time, in-house Court mediators, are the most likely model that will inspire confidence in the motives that drive the Court to establish an ADR process. It is the least likely to communicate to the public that it is a second rate process and the most likely to communicate to the public

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[46] Wayne D Brazil above, 753.

[47] Dorothy Wight Nelson ADR in the Federal Courts – One Judges Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and The Public Ohio St J. on Disp. Resol. 1 (2001).

[48] Donna Steinstra & Thomas E Willgang, Alternatives to Litigation: Do they have a place in the Federal District Courts? 16 (Federal Judicial Centre 1995) cited in Wright above 3.

[49] Donna Steinstra & Thomas E Willgang, above cited in Wright above 4.

[50] Wayne D. Brazil Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns, 14 Ohio St. J. on Disp. Resol. 715, 718 (1999).

that the Court is a service –orientated institution.[51] It is also the model that has the lowest economic and social barriers to participation and superior in developing quality training, specialised skills and performance quality control.[52] On the other hand it is also a model that provides only a small pool of mediators, that limits the capacity to provide a mediators with specific expertise, and increases the risk of inappropriate communications between the mediator and the Judge in the event of the case proceeding to trial.[53] Naughton, in a later article,[54] also concedes that Court-annexed mediation plays a valuable educative role in keeping parties aware of the mediation option, enables the Court to exercise quality control, and has added element of enforceability if made a consent judgment.

Bollard and Wooler[55] suggest that the scheme of the RMA with its "effects based" inquisitorial basis, with few procedural and evidential constraints make much of the international discussion on litigation, ADR and EDR not readily translatable to the RMA's 268 mediations.

Although a review of the mediation provisions within the RMA appears necessary, and despite some reservations by those that may be described as "legal fundamentalists,"[56] the opportunities and advantages offered by the provision of Court-annexed mediation and the apparent success according to the statistics support its continued development.

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[51] Brazil above, 808.

[52] Brazil above 809.

[53] Nelson W Dorothy J. ADR in the Federal Courts- One Judge's perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators and the Public. Ohio St J. on Disp. Resol. 1, 11 (2001).

[54] Terry Naughton QC, Court- Related Alternative Dispute Resolution in New South Wales Environmental and Planning Law Journal 373 1995.

[55] RJ Bollard and SE Wooler Court–annexed Mediation and other Environmental Dispute Resolution (1998) New Zealand Law Review 707, 710.

[56] Robert Fowler, Environmental Dispute Resolution Techniques – What Role in Australia April 1992 Environmental and Planning Law Journal, 123.

VII COMMISSIONERS AS MEDIATORS – THE DUAL ROLE.

A Their Current Status

As noted above, Environment Commissioners are full members of the Environment Court. The original role of Commissioners was akin to that of a Jury, the idea being that lay Commissioners could bring their experience from every day life and balance any unduly legalistic view which a judge might take if sitting alone. The idea that they should represent different community interests has not been totally lost but has been overtaken by the need to bring specialist knowledge to the Court and to allow it to function in its multi-disciplinary jurisdiction. Commissioners are entitled to play a full part in proceedings, and while a Judge presides over the proceedings and decision-making process, it is normal for Commissioners to ask questions and to participate subject to the Judge's Chairmanship.[57]

The Commissioner's other major role is that of Court – annexed mediator under s268 of the RMA. There arises therefore the contentious issue as to whether this dual role is appropriate. The current practice is that Commissioners have determined between themselves that, despite having the statutory ability to do so, they will not sit on the Court adjudicating on a matter that they have unsuccessfully attempted to, or have partially mediated.[58] Although this appears to be the only ethical choice available to the commissioners under the present regime, is questionable whether this is in fact adequate in terms of maintaining the integrity of both the Court process and the mediation process.

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[57] Environmental Court Project Final Report to the Office of the Deputy Prime Minister http://www.planning.odpm.gov.uk/court/04.htm last accessed 21/07/02.

[58] Interview with Jenny Rowan, Environment Commissioner (author, Wellington 8 July 2002).

Jenny Rowan *"Equity of Alternative Dispute Resolution"* A paper presented for a workshop on Equity in the Environment, Victoria University of Wellington. However

B Public Confusion and Perception

It is essential to the mediation process as well as to the legitimacy of the Court that the processes are separate. A mediator must work from a position of confidence and trust. Information, views and positions revealed during mediation, which does not have the procedural safeguards, rules of evidence and so forth must be able to be expressed in an environment of utter confidentiality. There is no viable way that effective mediation can occur if there is an underlying possibility that the mediator may in fact be in a position of adjudicating the matter at a later date if the mediation is unsuccessful. Further it is important that the public understand and perceive the roles to be clearly different Although the practice is that commissioners do not participate in both processes the blurring of roles diminishes the significance of the mediation process, and may cause public confusion.

The Law Commission review,[59] of Family Court Dispute Resolution considers similar issues. Under the present Family Proceedings Act 1980[60] a mediation conference chaired by a Family Court Judge can be called. The review acknowledges that this creates difficulties, with parties likely to view comments made by the judge, who is perceived as an ultimate decision maker and authority figure, as indicative of the likely determination of the dispute if it proceeds to adjudication.[61] The paper suggests that this role would be better served by providing a separate mediation service with trained mediators, which would be an alternative and adjunct to the present counselling services, rather than a substitute for judge–led conferences which would be re-named "settlement conferences".[62]

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this does not appear to have been incorporated officially into any practice note or the like.

[59] New Zealand Law Commission *Family Court Dispute Resolution*, (NZ LC PP47 January 2002) http://www.lawcom.govt.nz/perlimpapers.htm last accessed 19/08/02.

[60] Family Proceedings Act 1980 ss13-18.

[61] New Zealand Law Commission above page 75.

[62] New Zealand Law Commission above page 79, 78, para 446, 455

Although not "Judges" Commissioners have a similar adjudicative role and similar public perceptions and confusion may arise from these conflicting roles. There is a need for both truly impartial but also appropriately qualified mediators. The current position requires that the Commissioners play too many roles within the system, leading to potential conflicts of interests and a public perception that could diminish their effectiveness as both mediators and adjudicators.

The skills required by environmental mediators are specialist, requiring knowledge of environmental law and mediation skills.

A statutory review should consider having an entire separate position/role of Environmental Mediators. Having a unique and separate position of Environmental mediators would allow the Courts to remain in the adjudicative role, with the Commissioners sitting in the Court taking an active part in that process as determined by statute, while mediators having a separate and unique position within the system. Arguments against the Court-annexed mediation appear to be outweighed by the positive aspects it brings, yet the existing system operating in the Environment Court does not have the required degree of separation to be considered appropriate.

VIII ENVIRONMENTAL MEDIATOR –A COMPLEX ROLE

The role of the Environmental Court mediator requires specialist skills and knowledge: knowledge of the law, the Resource Management Act and highly tuned and focused mediation skills. Environment Court mediators presently may be faced with a room of 25 different people with issues varying from Maori spiritual values, ecological concerns, to the developer with his/her multi million dollar budget[63]. It is different from other mediations in that there can be hugely complex and varied issues and perspectives on a single decision.

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[63] Interview with Jenny Rowan, Environment Commissioner , (author, Wellington 8 July 2002)

The Act also requires that the "bottom line" principles of sustainability are adhered to and mediators must mediate with that always in the background.[64] Specifically the law relating to sub-divisions, and coastal development, is complex and restrictive, so mediators are required to have an understanding of all these matters plus deal with the wide-ranging issues inherent in them.

This "Bargaining in the shadow of the law"[65] occurs in other areas of law.[66] Mnooken and Kornhauser, suggest that parties to Court-annexed bargaining do not bargain in a vacuum, but under the framework of the governing legal rules.[67] These legal rules create a "bargaining endowment,"- that is what each party would receive if the matter was settled in Court – and this impacts on negotiations. When legal outcomes are less certain (as in complex RMA cases), the effect on "bargaining" is less certain, and will depend on the attitudes of parties towards "risk."[68]

The effect of bargaining within a complex statutory framework that may often involve matters of public importance is further discussed below in relation to the protection of the "bottom line" and

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[64] The Act includes complex and varied purposes, issues to be considered and matters that people exercising powers must have regard to. For example s5 of the Act states that for the purpose of the RMA to be the sustainable management of natural and physical resources in a way that enables people and their communities to provide for their social, economic and cultural well being and for their health and safety. Section seven contains others matters which those exercising powers and functions under the RMA must have regard to. These include the maintenance and enhancement of amenity values, kaitiakitanga, efficient use and development of natural and physical resources, intrinsic values of ecosystems and various other matters. Finally section eight also states that in achieving the purpose of the RMA all those exercising powers and function under it in relation to the managing the use, development and the protection of natural and physical resources shall take in to account the principles of the Treaty of Waitangi.

[65] Robert Mnookin, Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce 88 Yale L. J. 950, (1979).

[66] See for example The Family Proceedings Act 1980.

[67] Robert Mnookin and Lewis Kornhauser, above, 968.

confidentiality.[69] This complex role also supports the conclusion that there is a need for specialised environmental mediators who have specific and unique training.

IX CURRENT TRAINING AND SELECTION – IS IT ADEQUATE?

The dual nature of the Environment Commissioners' role, requires many differing attributes and skills. Currently one of the many attributes that are sought when appointing Commissioners are skills in the area of mediation.[70] All new Commissioners must now complete a LEADR training course[71] and this year the Environment Court introduced a new in-house package for Commissioners.[72] This package reflected the more specialised needs of the Environment Court and was received positively. Further training is planned for in this year including specialist training relating to tikanga Māori and the RMA.[73] The skills needed by mediators in this complex and very broad and varied environment include all the ADR tools- negotiation, mediation, conciliation,[74] as well as expertise or competence in the subject matter, impartiality, confidentiality, investigative ability creativity and tactfulness.[75] A high level of competency is required for success.[76]

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[68] Robert Mnookin, Lewis Kornhauser above 969.

[69] See part XII Who Protects the Public Interest and the "Bottom line"? and part XIII Confidentiality.

[70] The RMA s253 (da) requires that one of skills to needed by Commissioners is knowledge of alternative dispute resolution processes (inserted 1996).

[71] Interview with Jenny Rowan, Environment Commissioner (author, Wellington 8 July 2002). LEADR (Leading Experts in Alternative Disputes Resolution) is one of the Professional Organisations that ADR specialist belong to and is one of the recognised specialist training providers in this area.

[72] Interview with Jenny Rowan Environment Commissioner (author, Wellington 8 July 2002).

[73] Interview with Jenny Rowan Environment Commissioner (author, Wellington 8 July 2002).

[74] Interview with Jenny Rowan, Environment Commissioner (author, Wellington 8 July 2002). She states that she needs all the tools available to her to keep the "conversation" going between parties.

[75] RJ Bollard and SE Wooler Court–annexed Mediation and other Environmental Dispute Resolution (1998) New Zealand Law Review 707, 708.

[76] Interview with Jenny Rowan, Environment Commissioner, (Author, Wellington 8 July 2002).

There is a need to continue to develop this specialist training and to establish some system of assessment, and supervision for mediators. Currently assessment and monitoring is done on an informal "peer support" basis. The mediation process is still relatively new, and currently only 6 of the 13 Commissioners are doing mediations.[77]

If Commissioners are to continue in the role of mediators, as new Commissions are trained there is a need to develop a selection system, which assesses their competence levels, identifies development areas, and offers a peer support system on a formal basis. This process needs to be on going and thorough so that the integrity of the process is upheld. Additionally there needs to be a system where feedback from all parties to a mediation are able to give feedback and comments on the process. The reputation of the mediation process needs to remains high so that the public can rely on the competency of the mediators and the service gain recognition as a valid method of dispute resolution.

It is interesting to note that the Law Commission's report on Family Court Dispute Resolution identifies similar needs for mediators in the family law area[78]. It notes that if the proposed mediation system[79] is accepted, issues relating to appointment, qualification, training and monitoring would need to be addressed and there would is a requirement for additional specific Family Court training.[80] The possibility of an accreditation system for suitably trained persons is also suggested.[81]

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[77] Interview with Jenny Rowan, Environment Commissioner, (Author, Wellington 8 July 2002)

[78] New Zealand Law Commission *Family Court Dispute Resolution*, (NZ LC PP47 January 2002) http://www.lawcom.govt.nz/perlimpapers.htm last accessed 19/08/02.

[79] see above part IX Current training and selection –is it adequate?

[80] Law Commission above 78, 79, para 452,452.

[81] Law Commission Family Court Dispute Resolution page 79, para 454.

New Zealand could well benefit from considering the developments in Australia in this area where the National Alternative Dispute Resolution Advisory Council, (NADRAC) has been established. The Council's role is to advise the Attorney General in matters related to ADR and to establish minimum standards for the provision of dispute resolution services and minimum training, qualification, registration, accreditation as well as professional disciplinary mechanisms.[82] This could help to establish consistency and standards across all forms of Court-annexed mediations and may resolve some of the issues discussed above.

The need for such highly skilled mediators in this area is yet another argument for the creation of a specialist Court-annexed "Environmental Mediator" rather than the present dual role undertaken by the current Commissioners. Court annexed mediators offer the best opportunity to maintain a quality service, but it must be "quality" and must not only be independent, but be seen to be independent from the adjudicative process.

X THE IMPORTANCE OF QUALITY PERFORMANCE AND QUAILTY CONTROL

When disputing parties take their conflict to mediation they must be met by a neutral (mediator) who has the appropriate expertise in a programme monitored for quality.[83] Brazil,[84] suggests that there is inadequate empirical research as to the importance of the skill of the mediator versus the importance of mediation having simply occurred. However he quotes research that found:

> *" on every measure we have examined ... attorney's responses varied by the quality of the neutral (mediator) who conducted*

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[82] For more information see http://www.law.gov.au/aghome/advisory/nadrac/nadrac/.htm last accessed 23/08/02.

[83] The Paths of Civil Litigation 113 Harv. L.Rev.1851.

[84] Wayne D. Brazil Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns, 14 Ohio St. J. .Disp Resol, 715, 803. (1999).

> *the ADR session ... Attorneys who ranked the neutral near or at the excellent end of the scale were significantly more likely to report that the ADR process reduced litigation cost and time, that their case settled through the ADR process; that the outcome was satisfactory and the process fair; that the benefits of using ADR outweighed the costs and that they would volunteer a case for this form of ADR in the future,"*[85]

In New Zealand there is inadequate research undertaken as to the importance of and the actual skills of the present Environmental mediators yet current practitioners recognise the high degree of competence that is required.[86]

"Performance quality control" of Court annexed mediations is important.[87] Courts must have some control over what is being done in its name. Brazil[88] also suggests that Courts that sponsor ADR processes should be driven to preserve, at least, if not increase the people's respect of and confidence in and gratitude toward the system of justice. Courts can do this by adopting a tight selection procedure, and providing adequate training and evaluation. Established protocols and procedures are required so that parties can predict and rely on the process that they are entering into. There are several major components of an effective system for maintaining a high level of performance quality control: attracting and selecting high quality people to the job; training them well; monitoring their work; establishing systems to acquire feedback; (primarily from parties and their lawyers, but also from other mediators, from programme managers or Court registrars and trainers) about the performance of mediators; funnelling that evaluative feedback to the mediators; and re-educating or disciplining those whose performance falls short of

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[85] Steinstra and others, Report to the Judicial Conference Committee on Court Administration and Case Management- A Study of Five Demonstration Programs Established under the Civil Reform Act 1990 at 713-214 cited by Wayne Brazil above at735.

[86] Interview with Jenny Rowan, Environment Commissioner (Author, Wellington 8 July 2002).

[87] Brazil, above, 803.

established standards.[89] Training also is needed in "due process norms" to protect both the rights of participants and the integrity of the process.[90]

The New South Wales Law Commission report, *Training and Accreditation of Mediators*,[91] also emphasised the importance of Court-annexed mediations operating in accordance with clear guidelines, adequate resources to ensure integrity of the process and quality of the services.

It is evident that presently the Environment Court mediation process is lacking in this area. There is presently no established system for acquiring feedback - mediators rely on "how people feel when they leave the room".[92] Monitoring appears non-existent, and until recently little specialised training was offered. There appears to have been reliance and trust placed on the integrity and relationships between Commissioners and their informal support network. This requires addressing both so the Court can rely on the work that is done its name and so the public can better assess whether they wish to participate in a mediation process. Again consideration of a system similar to the NADRAC is appropriate and may offer relevant guidelines.

XI WHO PROTECTS THE PUBLIC INTEREST AND THE "BOTTOM LINE?"

As already stated, environmental disputes are not like other disputes in that there can be many people affected by decisions. People and entities who are not parties to the lawsuit can have significant interest in the

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[88] Brazil, above, 738

[89] Brazil, above, 804.

[90] The Paths of Civil Litigation 113 Harv. L.Rev.1851.

[91] *LRC 67* (1991) by The Hon RM Hope QC, Associate Professor David Weisbrot and Professor Helen Gamble.

[92] Interview with Jenny Rowan Environment Commissioner (author Wellington 8 July 2002).

conflict or present barriers to implementing solutions.[93] This may include iwi, private entities, environmentalists, industry, commercial, and sports fishing industries and others. Others can be affected through property devaluation, impact on health and life style.

Mediations are confidential whereas Court hearings are matters of public record and decided on the basis of a reasoned decision based on the law, or legal principles. Court hearings carry the right of appeal or may lead to judicial review and are clearly within administrative law principles. Court-annexed mediations can only be brought under review in exceptional circumstances for example the discovery of some critical factor post-mediation, information of a kind and in circumstances sufficient to justify quashing the mediated agreement and any consequential order of the Environment Court.[94] Presently there appears to be no reliable evidence as to how often or if ever this has occurred.[95] The amenability of Court-annexed mediation should however be contrasted to mediation conducted independently of the Environment Court where, review would not be available.[96]

Additionally when consents have been obtained and not withdrawn (whether in the course of mediation or by other negotiation) from people in the vicinity of a proposed development, the Court may not have regard to the adverse effects on those people.[97]

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[93] Brown Jennifer Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions, 34 VAL.U.L. REV. 403, 406 (2000).

[94] RJ Bollard and SE Wooler Court–annexed Mediation and other Environmental Dispute Resolution (1998) New Zealand Law Review 707, 715.

Jenny Rowan, NZ Institute For Dispute Resolution Colloquium, Victoria University June 1999 *Equity of Alternative Dispute Resolution*

[95] But note *Mortimer v Whangarei District Council* (EC Christchurch C23/97, 21 April 1997), where there was an unsuccessful attempt to obtain discovery of a mediator's notes.

[96] RJ Bollard and SE Wooler Court–annexed Mediation and other Environmental Dispute Resolution (1998) New Zealand Law Review 707, 716.

[97] The RMA s104(6).

Mediations can result in agreements way and beyond anything a Court could order produce. Memorandum of understandings, and "side agreements" can sit alongside a resource consent all intrinsically linked yet running along side. There is the risk that the principles in the Act of sustainable management, and the needs of the environment and others not involved in the discussions could be endangered. The main checks on this discussed below include be the reliance on the mediator and their obligation to act in good faith,[98] the requirement for consent orders to be endorsed by the Court, and the emphases on public participation in the process.

A Dependence on the "Nouse" Factor

Commissioners have an obligation to act in good faith.[99] Rowan,[100] refers to the "nouse" factor. This appears to be a reference to the reliance presently placed on the Commissioner's ability to sense when the "bottom line," or the principles of sustainability are threatened, or to know when it is appropriate to cease mediation and to set the appeal down for a Court hearing. This "nouse" factor obviously varies from Commissioner to Commissioner,[101] and requires a certain degree of experience and knowledge. Mediators therefore need to have a good understanding of what position the Court may currently be taking on these issues. This has been suggested as a reason for maintaining the Commissioners' dual role as it is by sitting in Court hearings that they

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[98] The RMA s 261.

[99] The RMA s 261.

[100] Jenny Rowan, *"NZ Institute For Dispute Resolution Colloquium"*, Victoria University June 1999. Jenny Rowan *"Equity of Alternative Dispute Resolution"* A paper presented for a workshop on Equity in the Environment, Victoria University of Wellington.

John Mills, and Jenny Rowan *"Mediation; Practice and Principles"* Workshop presented to Nelson – Marlborough NZ Planning Institute March 2000.

[101] Jenny Rowan, *"NZ Institute For Dispute Resolution Colloquium"*, Victoria University June 1999.

Jenny Rowan *"Equity of Alternative Dispute Resolution"* A paper presented for a workshop on Equity in the Environment, Victoria University of Wellington.

are able to gain experience as to when to make this call.[102] However this does not seem to offer the public much satisfaction in terms of guaranteeing that unnecessary concessions or agreements to speed things up or "payments" for consent do not occur.

B Dependence on Court Endorsement

The more effective mechanism is the requirement that consent orders be accepted and signed of by a Judge. The Court retains discretion in relation to approval of the agreed solution to ensure that the broader matters of resource management and the public interest are properly addressed and observed or if they consider it to be unenforceable.[103] They can also send back the agreement to the parties to be amended if they are uncomfortable with any of the conditions. This is an essential and very important backstop in the system however again it is of concern that no studies have been done to investigate how often this occurs, and the pressure on judges to consent to mediated orders must be quite significant. Unofficially it appears that this does not occur very often.[104] Nevertheless keeping the mediation within the Court system as opposed to a private separate system, means that the "law" as such is not by-passed completely and legal principles continue to provide a framework within which bargaining occurs.[105]

Unfortunately this does not address the issue of "side agreements" that do not need to form part of the consent orders, and are not subject to judicial scrutiny. These may relate to whole raft of issues including

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[102]RJ Bollard and SE Wooler Court–annexed Mediation and other Environmental Dispute Resolution (1998) New Zealand Law Review 707, 713.

Jenny Rowan, *"NZ Institute For Dispute Resolution Colloquium"*, Victoria University June 1999.

[103] The RMA ss 247, 279.

[104] Interview with Jenny Rowan, Environment Commissioner (Author, Wellington 8 July 2002). She suggests that it has only happened once in a "minor way" out of all the mediations she has undertaken.

[105] See previous discussion on Robert Mnookin and Lewis Kornhauser Bargaining in the Shadow of the Law: The Case of Divorce above part VIII Environmental Mediator – a complex role.

payment of cash and could be perceived as or be an abuse of process. It appears that is an area which requires further work and development so as to ensure that these concerns are adequately met.

C Public Participation - Parties to the Mediation

The other feature of the RMA that partially addresses this concern is the focus on public participation. The Act does provide for a range of opportunities to be heard, either as a primary party, or as someone who originally made submissions in reference to the subject matter (s271A), or who otherwise has a qualifying interest under s274. This provides for "any person having any interest in the proceedings greater that the public generally"[106] as well as applicant and any "submitter". This may go some way to reassuring those with "public interest" concerns, as it allows for a broad range of people with affected interests to be part of the process.

Unless all parties to the mediation are comfortable with the outcome, mediation will not proceed and the matter will go to Court. This is a very powerful backstop on three accounts.[107] Firstly the hearing in the Court is de novo. Secondly, the judge has remained completely independent to the matters and therefore is still available within their jurisdiction to hear the dispute and thirdly the "threat" of Court with all its costs and stress can motivate people to reach an agreement. However if a party is not represented at a mediation, the desire to reach a settlement, may mean that their interests, or those they represent are not protected or considered in the process.

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[106] The RMA, s 274 (1).

[107] Jenny Rowan *"Equity of Alternative Dispute Resolution"* A paper presented for a workshop on Equity in the Environment, Victoria University of Wellington.

Jenny Rowan, *"NZ Institute For Dispute Resolution Colloquium"*, Victoria University June 1999.

In recognition of the importance in maintaining the "bottom line" and the significant public interest at stake in environmental disputes any statutory review should consider improving methods to protect these within the context of mediation. This may include clearer guidelines as to what disputes are suited to the mediation process, recognising those characterised by gross imbalances of power between the parties, improved training and guidance to mediators as well as considering the ease of reviewablility of mediated decisions.

XII PRECEDENT EFFECT

Another concern is the impact on the development of law and the potential precedent effect of mediated agreements. Legally mediated agreements have no precedent value but potentially they have a social precedent effect in that they may set up social expectations as to what is possible. People can see mediation as watering down the Act if too much compromise occurs.[108] Again the skills and knowledge of the mediator, knowing when to cease mediation, when too many compromises has occurred is relied on as well as the importance of the Court as a "backstop" to any agreement.

Fear of suppressing the growth of law has also been raised.[109] Both proponents and opponents of mediation acknowledge that ADR techniques can only be used in cases involving well- established principles and when the main dispute involves issues of disputed facts.[110] The fear that environmental mediation and negotiation present the danger that environmental standards will be set by private groups without the democratic checks of governmental institutions is a legitimate concern, yet the statistics indicate that still only a small

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[108] Interview with Jenny Rowan, Environment Commissioner (Author Wellington 8 July 2002).

[109] See for example Owen M. Fiss, Against Settlement 93 Yale LJ 1073, 1085-87 (1984).

[110] Charlene Stukenborg The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts 19 U. Dayton L. Rev. 1305.

Rowan J Mediation as a Process between Community Groups 1997 4. .

proportion of cases go to mediation. However it does mean that work should be done to ensure that the Judges signing consent orders exercise appropriate control.

XIII CONFIDENTIALITY

Mediators claim that confidentiality of the mediation process is fundamental to its success.[111] Having no coercive power, a mediator is dependant upon increasing communication, and trust between disputants, and this requires the promise and protection of confidentiality.[112] Within in this lies of course the potential for abuse, with developers, or corporations choosing mediation to shield themselves from unwanted public disclosure, or to avoid creating a precedent. There are therefore legitimate concerns as to whether or not total confidentiality in the mediation process should be provided. It appears that in New Zealand that extent of confidentiality is undefined, and further that there is no generally understood of code of conduct for Commissioners that is clear to all parities involved.[113]

Mehta[114] in discussing the degree of confidentiality required to foster the mediation process without adversely affecting the interests of underrepresented third parties concludes that despite the drawbacks there should be a rebuttable presumption of confidentiality in mediation of environmental disputes but that disputes of this nature should be brought to the public attention through a filing system. The RMA system with the Court as a backstop, already provides a partial

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[111] John P. McCory, Environmental Mediation Another Piece for the Puzzle, 6 VT. L. REV. 49, 56 (1981) cited in Aseem Mehta Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline doe Confidentiality 10 Geo. Legal Ethics 521. 522.

[112] Alan Kirtley The Mediation Privilege's Transition Form Theory to Implementation: Designing A Mediation Privilege Standard to Protect Mediation Participants, The Process and The Public Interest 1995 J. Disp. Resol.1, 8.

[113] Nancy Borrie, Ali Memon, and Peter Skelton Environmental Mediation under the Jurisdiction of the Environment Court in New Zealand a paper presented at the Ecopolitics XIII Conference University of Canterbury Christchurch Dec 2001.

[114] Aseem Mehta Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline to Confidentiality 10 Geo. J. Legal Ethics 521.

safeguard in that the public are at least able to have some information as to what is being decided, even if they are not fully aware of the facts and issues.

While the increased use of Court-annexed mediation and the confidentiality afforded settlement discussions may cause some concern it must be viewed in light of the mediation process itself.[115] Because mediation promotes the exchange of information and allows parties to view the dispute in broader terms than in traditional litigation, it offers some unique advantages to the parties affected by the decision. These advantages include, allowing parties outside the litigation to directly participate in settlement discussions, increasing the likelihood of disclosure of information and scientific data and increasing the likelihood that settlements represent the interests of parties outside the litigation.

In the United States the issue of confidentiality has been developed in a variety of ways been depending on the context.[116] The existence of over 300 different confidentiality statutes in the US[117] led to the recognition of the need for uniformity reflected by the recently enacted Uniform Mediation Act.

A review of the RMA should clarify the degree and nature of confidentially, especially in light of the dual role the Commissioners currently play within the system. This would need to consider issues including whether to attach the privilege to the mediators as well as the

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[115] Max Eric R. Confidentiality in Environmental Mediation 2 NYU ELJ 210 (1993).

[116] Alan Kirtly The Mediation Privilege's Transition From Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants The Process and the Public Interest, 1995 J. Disp. Resol.1.

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Max Eric R. Confidentiality in Environmental Mediation 2 NYU ELJ 210 (1993).

[117] Prominent mediation academic, Nancy Rogers quoted in Lousie Ellen Teitz, Richard Birke US Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace. 50 Am J. Comp. L. 181,191.

participant, and how it might be waived or qualified by judicial discretion.[118] The Uniform Mediation Act in the US may give some guidelines however there has already been substantial comment and criticism of this statute by commentators.[119] It is a finely balanced line that needs to be found, one which will retain the advantages offered by and retain the effectiveness of mediation without compromising the public's right to know about decisions that affect them and future generations.

XIV TIMING

There are two separate issues relating to timing in the current situation in the Environment Court. Firstly there is the issue of the length of time it currently takes to be heard within the appeal system and the impact of this delay, and secondly whether the mediation process should be occurring prior to the initial decision being made by the local council or decision-making body.

A The Impact of Delays –Ideal Time Frames

Presently the statute provides that the Judge may decide if a case is suitable for mediation at the appeal level and the current time frame means that parties may be waiting up to 12 months from filing an appeal to a decision before a mediation conference is arranged.[120] Judge Allin[121] has worked to introduce a new "case management" system in the Environment Court with intention of tightening up the process, and getting cases to mediation more quickly. Part of this process will mean that the Registrar will make the decision as to

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[118] The Paths of Civil Litigation 113 Harv. L.Rev.1851.

[119] Bernard Phyllis Only Nixon Could go to China: Third Thoughts on the Uniform Mediation Act Marquette Law Review Fall 113, 2001. Lousie Ellen Teitz, Richard Birke US Mediation in 2001: The path that Brought America to Uniform Laws and Mediation in Cyberspace. 50 Am J. Comp. L. 181,191.

[120] Interview with Jenny Rowan Environment Commissioner (Author, Wellington 8 July 2002).

[121] Allin J, Principle Environment Court Judge, speech to The New Zealand Planning Institute Conference April 2002, http://www.nzplanning.co.nz/impact2002conference_governance.html.

whether mediation is a possibility that should be offered when the appeal is first received.[122] The ideal time frame suggested is that parties would receive the "information" the letter inviting them to mediate their disputes within 6 weeks of lodging the appeal and within another 6 weeks the mediation process would occur.[123] The advantage of this two fold. Firstly it increases the chance of resolution as the earlier parties are talking and are got "around the table" the greater the chance of resolution.

Secondly it means that parties have to decide if they seriously want to follow the process. Money needs to be spent in organising experts and preparing for the mediation, those who are not serious about pursuing appeals are cut out quicker, reducing the overall time for others and the reduces the Court's backlog.[124] Part of the Case Management System being introduced includes increasing the status of mediation process, so that parties are unable to pull out at the last minute. Currently there is concern that it is not viewed with the same respect as the Court and lawyers often appear more willing to "pull out" at the last moment and appear to have little respect for the process.[125] It is interesting to note that currently75% of consent appeals settle and 87% of references settle[126] (not due to Court-annexed mediation) which indicates that Judges may spend time on cases that settle, and that some are using the appeal system with out the necessary integrity. Maintaining an effective and efficient system is a continual struggle for all Court

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[122] Interview with Jenny Rowan Environment Commissioner (Author, Wellington 8 July 2002).

[123] Interview with Jenny Rowan, Environment Commissioner (Author, Wellington 8 July 2002).

[124] Interview with Jenny Rowan Environment Commissioner (Author, Wellington 8 July 2002).

[125] Interview with Jenny Rowan Environment Commissioner (Author, Wellington 8 July 2002).

[126] Allin J, Principle Environment Court Judge, speech to The New Zealand Planning Institute Conference April 2002,, http://www.nzplanning.co.nz/impact2002conference_governance.html.

systems but the present reforms under Judge Allin should help decrease the time it presently takes for a case to come to mediation.

B Earlier Mediation – Should It Occur Prior to the Court

There are mixed opinions in the environmental literature concerning the timing of a mediation effort.[127] Disputes that lay unresolved for long periods often fester and grow so while *Susskind, McMahon* and *Rolley*[128] suggest that that mediation can work at either the early or late stages of conflict, the majority of authors suggest that the earlier disputes are dealt with the greater chance of success.[129] However the issues must also be "ripe," readily apparent and parties must be ready to address them.[130]

The statute provides for various consultations, and other processes to occur at differing stages depending on the issue.[131] Decision-making Authorities are permitted to hold pre-hearing meetings for the purpose of clarifying, mediating and /or facilitating resolution of any matters or issues associated with a submission concerning a resource consent application. From there, there is the opportunity to follow this with

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[127] R O'Leary, *Environmental Mediation and Public Mangers: What Do we know and how do we Know it?* A research paper for the Indiana Conflict resolution Institute, http://www.spea.indiana.edu/ircri/env_medi.htm last accessed 16/07/02.

[128] Susskind, L, McMahon G, and Rolley S Mediating Development Disputes: Some Barriers and Bridges to Successful Negotiation, Environmental Impact Assessment Review, 7 June 1987, 127-138.

[129] See for example the discussion in Terry Naughton QC, Court- Related Alternative Dispute Resolution in New South Wales, Environmental and Planning Law Journal 373, 380 1995.

[130] Harter P & Gusman S, (1987) *Mediating Solutions to Environmental Risks Annual Review of Public* Health (1986) 293-312,

Priscoli J, Conflict Resolution for Water Resource Projects: Using Facilitation and Mediation to Write Section 404 General Permits, Environmental Impact Assessment Review 7 December 1987 3213-326, and other cited in R O'Leary, *Environmental Mediation and Public Mangers: What Do we know and how do we Know it?* A research paper for the Indiana Conflict resolution Institute http://www.spea.indiana.edu/ircri/env_medi.htm last accessed 16/07/02. Above.

[131] For example s99 provides for pre-hearing meetings and permits the consent authority for the purpose of clarifying, mediating or facilitating resolution to invite anyone who has made a consent application or a submission to meet.

further meetings.[132] There is however no provision equivalent to ss267/68 of the RMA that provides for a free mediation service or referral to mediation. Yet it is arguable that the best time to commence the mediation process would be when an application for consent, or a plan change is lodged and it becomes apparent to the decision-making authority that it will be contentious.

Currently local authorities appear to vary greatly in their approach and in the quality and style of services they offer the public.[133] It is apparent that decision-making authorities need to invest in the training and employing of mediators with the necessary skills. If quality and consistent mediation services were offered at this time there would be a considerable reduction in the backlog and the work of the Environment Court. This would require however increased funding and resourcing for local authorities in order for them to provide these services free to the public. Alternatively a fee could be charged for developers to cover the cost of this. The other possibility is that successful mediation processes at this level may save the decision-making authority considerable expense in legal fees, expert witness fees and Court costs at appeal level and this would considerably off set the cost of the provision of mediation services.

The second issue that arises, in relation to who should be the mediators, reflects the similar conflict in roles as seen by Commissioners acting as mediators. If the mediators are council employees they may be seen as acting for or on behalf of the Council in a dispute which the Council may either in fact be a party to or alternatively one in which the Council has the role of being the decision maker. The independence of the mediator in terms of confidentiality of information, free expression of views and the like arises.

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[132] Jenny Rowan, *Mediation as a Process Between Community Groups* 1997 A paper presented at the Local Government Conference October 1997.

Whether this would be best implemented by a statutory provision or by the development of "best practice" guidelines for Councils is open to debate. An advantage of a statutory provision is that it enhances the status of the mediation process, and could also address resource issues related to the employment and training of mediators.

A statutory review should therefore consider whether to implement the option of mediation at the time of the original hearing by the consent authority. This may have the effect of helping to resolve the issue of delay and backlog in the Court process by reducing the number of appeals. However any such provision would also need to address similar concerns to that raised by mediation at the Court level, such as confidentiality, training, and who is the appropriate person to undertake the mediation.

XV CONCLUSION

The increased use of the mediation process within the Environment Court appears to be a continuing trend in New Zealand and elsewhere. There is no doubt that the mediation process has many strengths, being seen as cost effective, timely, less adversarial and based on what little statistics available it appears to achieve considerable success.

This paper has considered the present system and while acknowledging the many benefits mediation has brought to environmental dispute resolution in New Zealand it has attempted to expose some issues that require further consideration.

It is apparent that ten years on there is a need for a statutory review of the provisions in the RMA relating to mediation. Although there appears to be no obvious practical problems with the current practice of the Commissioners, the existing statutory framework does not provide

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[133] Interview with Jenny Rowan Environment Commissioner (Author 8 July 2002).

the necessary safeguards and there is the potential for unsatisfactory practices to occur.

Court-annexed mediation is a positive development, but the present system that gives the Environment Commissioners a dual role is inappropriate both from a practical perspective of recruiting, retaining, and training mediators with the degree of competence the work requires, as well as from the perspective of procedural justice, integrity and honesty. Related to this is the present inadequacy of the monitoring, record keeping, data analysis, evaluation and assessment of those involved as mediators and the experience of those who are parties to the process.

The review should also address the concerns raised by this paper regarding the impact of environmental mediation on the RMA principles and the protection of the public interest with regards to confidentiality. Further investigation is required into the degree and nature of the confidentiality of mediations, in light of the public interest that surrounds them. Attention should be paid to the recent developments in the USA and Australia and analysis to assess the applicability to the New Zealand environment of the Uniform Mediation Act or the NADRAC standards.

Mediation offers a positive alternative to the adversarial winner/loser approach of the adjudicative process but within the context of environmental disputes, quality must be assured, the process used must be appropriate and have clear guidelines, and the underlying principles of the RMA, and the public interest must be protected.

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