Resolving Conflict by Consensus:

Environmental Mediation under the Resource Management Act 1991

Vernon JC Rive*

A rising number of environmental disputes, both domestic and international, involving conflicting claims to a range of diminishing environmental resources emphasises the need for new approaches to resolve environmental conflicts. Environmental mediation is one approach which has proved successful overseas in resolving these conflicts. The article examines the use of mediation as a method of dispute resolution available under the Resource Management Act 1991. Although section 268 of the Act provides for a variety of alternative dispute resolution (ADR) processes to be used, the article focuses on mediation as the ADR method which has received most recognition and use under the Act. The limits to mediation are discussed, including the matter of compulsory mediation. The article concludes with a consideration of the benefits of mediation and the relevance of a refusal to mediate on the question of costs awards.

I: INTRODUCTION

The first article of the Appendix to the Brundtland Report affirms that:

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* BA, LLB *Auckland*. Completing LLM (Envir) at the University of Auckland. Currently practising in the areas of environmental and resource management law with Chapman Tripp at their Auckland office.

> All human beings have the fundamental right to an environment adequate for their health and well-being.[1]

Against the backdrop of this lofty ideal is a reality characterised by a rising number of environmental disputes, both domestic and international, involving conflicting claims to a range of diminishing environmental resources.

The World Commission on Environment and Development has emphasised the need for new approaches to resolve environmental conflicts.[2] Environmental mediation is one approach which has proved successful overseas in resolving these conflicts.

This article examines the use of mediation as a method of dispute resolution available to environmental disputants under the Resource Management Act 1991 (RMA, the Act). Although section 268 provides for a variety of alternative dispute resolution (ADR) processes to be used, this article focuses on mediation as the ADR method which has received most recognition and use under the Act.

The article commences with an introduction to mediation generally in comparison to the traditional adversarial processes, followed by an examination of dispute resolution mechanisms in place prior to the enactment of the RMA and the limits which provoked an awareness of the need for alternative ways of resolving disputes.

The particular provisions of the RMA relevant to ADR are examined with a focus on s 268 - Additional Dispute Resolution.

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1 UN World Commission on Environment and Development, *Our Common Future* (1987).

2 Ibid, 9, cited by Atherton and Atherton, "Mediating Disputes over Tourism in Sensitive Areas, Part I - Advantages of Alternative Dispute Resolution Techniques" (1994) *Australian Dispute Resolution Journal* 7.

The limits to mediation under the RMA are then discussed. Recognising that the nature of environmental disputes may render them incapable of mediation in certain circumstances, a consideration and discussion of the advantages and disadvantages of compulsory mediation follows, with the position taken that while compulsory mediation under the RMA would be undesirable, it may be desirable to require parties at least to *consider* mediation.

The article concludes with firstly, a brief consideration of the costs and benefits of mediation compared with litigation and secondly, the relevance of agreement or refusal to mediate to the question of costs where disputes have proceeded to adjudication. Examining a number of decisions on costs, the writer suggests that despite statements to the contrary by the Environment Court, a refusal to mediate does have costs implications which (rightly) may influence parties to mediate where appropriate.

II: ENVIRONMENTAL MEDIATION - AN INTRODUCTION

Before discussing the nature of environmental mediation it is helpful to consider the nature of mediation itself. What is it and how is it different from other forms of dispute resolution?

In a classic definition Folberg and Taylor describe mediation as:[3]

> 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 settlement that will accommodate their needs.

Key elements of the mediation process described above which

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3 Mediation - *A Comprehensive Guide to Resolving Disputes Without Litigation* (1986) 2.

distinguish mediation from other non-consensual forms of dispute resolution are that (with the assistance of the mediator), it is driven by the *participants;* and that the settlement is *consensual.*

1. Environmental mediation

Environmental mediation, Blackford notes, has been emerging since the 1970's for both the resolution of disputes over land and environmental resources and in environmental policy-making. In the United States environmental mediation has been widely used in disputes over water use, mining, siting of nuclear plants and hazardous waste facilities, dam construction, routing of highways, flood protection, native fishing rights, licensing under clean air legislation and rule-making under a variety of statutes.[4]

Jacobs and Rubino describe environmental mediation as:

> A process whereby existing or potentially conflicting parties concerned with an environmental and/or land resource get together with a neutral third party to discuss positions with regard to the resource. It involves bargaining, sharing of information, and ultimately compromising on original positions so as to achieve a solution "acceptable" to all parties involved.[5]

Environmental mediation has thus developed as conventional mediation techniques have been applied to disputes in the environmental/ land use context. While some commentators have criticised the use of mediation in environmental disputes[6] its use appears to be widespread in

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4 Blackford, C., *A Review of Environmental Mediation: Theory and Practice* (1992) Lincoln University Information Paper No. 34, 2.

5 Jacobs, H. and Rubino, R., *Environmental Mediation, An Annotated Bibliography* (1987), cited in Roberts, J., "Environmental Mediation: Dispute Resolution or Dispute Management" (1993) *Australian Dispute Resolution Journal* 150, 152.

the United States,[7] and growing in both Australia and New Zealand.

2. Success of environmental mediation - a US Study

In what has been described as "the principal study" on the success of environmental mediation, Gail Bingham identifies two separate indicators of "success": firstly whether agreement is reached (the conventional measure of success, and the measure that appears to have been used in the Reports of the Planning Tribunal in reporting on the success of mediations conducted under its auspices[8]), and secondly whether communications have been improved as a result of the mediation process.[9]

Of 165 cases studied in all, Bingham found that agreement was reached in 78% of the cases, with little difference in the success rate in site specific disputes (79%) as opposed to those involving disputes over policy (76%). Of the cases reaching agreement, implementation of the settlement (another important measure of success) was carried out in full in 70% of the cases with 14% achieving partial implementation and 15% failing to proceed to implementation at all.

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6 Jeffery, M.I., "Accommodating Negotiation in Environmental Impact Assessment and Project Approval Processes" (1987) EPLJ 244, cited in Roberts, 1993, ibid.

7 An Internet search using the search term "environmental mediation" using the Yahoo Search Engine on 18 October 1996 produced over 29,000 "hits", including advertisements for a number of US firms specialising entirely in offering environmental mediation services.

8 Annual Reports of the Planning Tribunal/Environment Court presented to the House of Representatives pursuant to s 264(1) RMA.

9 Bingham, (1986) 78 quoted in Roberts, "Environmental Mediation: Dispute Resolution or Dispute Management?" (1993) *Australian Dispute Resolution Journal* 150, 152.

This high success rate would appear to be in accord with empirical and anecdotal reports of the success of mediation in New Zealand. One Environment Commissioner has professed achieving an approximately 80% success rate.[10] In the 12 months ended 30 June 1996, of 41 mediations conducted by Planning Commissioners, 29 (70%) were settled by consent.[11] Salmon refers to a "90 per cent or better chance of success" in mediation.[12]

III: THE PRE-RMA SITUATION IN NEW ZEALAND

Prior to the coming into force of the RMA, the Planning Tribunal had jurisdiction to hear and determine a variety of cases arising out of the operation of a number of statutes including the Local Government Act 1974 (land subdivision appeals), Public Works Act 1981, Water and Soil Conservation Act 1967 (water right appeals, water classification appeals, conservation orders), Historic Places Act 1980, Mining Act 1971, Fisheries Act 1983 and the National Development Act 1979. Apart from a limited right for certain bodies to have a matter referred to arbitration under s 165 TCPA 77, the previous legislation contained no provisions for ADR.

The adversarial approach that tended to dominate most Tribunal hearings was a source of concern to many who felt that this method of dispute resolution was often inappropriate and not conducive to an efficient or just method of determining many planning and environmental disputes.

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10 Ian McIntyre -personal comment, 23 September 1996.

11 1996 Annual Report of the Registrar of the Planning Tribunal.

12 Salmon, P., "Why Choose Mediation?" [1996] *New Zealand Law Journal* 7.

1. Limitations of the adversarial approach

Limitations of the adversarial approach considered by Blackford[13] include:

(i) The environmental dispute is reduced to a conflict of positions rather than on the underlying concerns or interests of the parties. "As more attention is paid to positions, less attention is devoted to meeting the underlying concerns or interests of the parties."[14]

(ii) The adversarial approach frequently produces a win/lose result. While Blackford's statement that the adversarial model "does not offer opportunities for compromise that could result in gains and losses for both sides"[15] does not acknowledge the many instances where the Environment Court has imposed conditions resulting in gains for both sides, it is likely that the creative search for mutual gains is less a feature of the adjudicative process than a consensual approach.

(iii) The adjudicative approach tends to encourage a restriction of access to information where a sounder result and a result possibly more beneficial to all parties could be achieved by the more generous information exchange that is an essential aspect of ADR processes.

A further and significant limitation on the adversarial approach noted by Blackford is the time delays in resolving disputes through traditional adversarial means. Blackford's prediction in 1992 that "Substantial time delays could be expected, particularly as the resources of the Tribunal have

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13 Blackford, C., *A Review of Environmental Mediation: Theory and Practice* (1992) Lincoln University Information Paper No. 34, 9-11.

14 Fisher and Ury, *Getting to Yes* (1981) 5.

15 Blackford, supra, note 13.

not been significantly increased under the Act" has proved to be correct. While the recent Amendment to the Act[16] provides for the appointment of more Judges and Commissioners, and an increased scope for issues to be dealt with by Judges standing alone, there is still a large number of cases awaiting hearing in the Environment Court.

IV: ALTERNATIVE DISPUTE RESOLUTION UNDER THE RESOURCE MANAGEMENT ACT 1991

During the Resource Management Law Reform ("RMLR") consultation process the option of incorporating mediation or other ADR processes in the proposed legislation was discussed with a large number of submissions in support of such a move.[17]

The coming into force of the Resource Management Act 1991 brought with it a statutory recognition of the appropriateness of employing techniques other than the traditional adversarial model to the resolution of disputes coming before Consent Authorities and the Planning Tribunal.

Two key additions to the dispute resolution process were added with the 1991 Act: the pre-hearing meeting and the option of referring a matter to alternative dispute resolution once it has proceeded to the Environment Court stage. The Act has further attempted to "soften" the adversarial nature of proceedings conducted under it by providing in s 39 that decision-makers (other than judicial decision-makers) are obliged to avoid unnecessary formality in hearings and not to permit cross-examination.

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16 Resource Management Amendment Act 1996.

17 RMLR Working Paper 32: *Public Submissions on "People, Environment and Decision Making".*

1. Section 268 - Additional Dispute Resolution

This section provides:

> **S 268. Additional Dispute Resolution** - (1) At any time after lodgement of any proceedings, for the purpose of encouraging settlement, the Environment Court, 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 Environment Court 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 Court are satisfied that it is appropriate for him or her to do so.

When considering the role of the Environment Court in referring matters to ADR, s 268 should be read in conjunction with other provisions contained in Part XI dealing with the powers and procedure of the Environment Court. Section 251 provides that the Principal Environment Judge:

> [S]hall be responsible for the orderly and expeditious discharge of business of the Court and accordingly may, subject to the provisions of this or any other Act and to such consultation with the Environment Judges as is appropriate and practicable, make arrangements as to the Environment Judges and member or members who is or are to exercise the Court's jurisdiction in particular matters.

2. Prehearing Conferences - s 267

Additional dispute resolution under s 268 should also be distinguished from pre-hearing conferences under s 267 which deal with a variety of procedural matters such as amendments to pleadings, admissibility of

evidence, the order in which the parties shall present their cases etc. It is conceivable however that the matters covered in a s 268 mediation may overlap with those that are dealt with in a pre-hearing conference, particularly with regard to defining issues to be tried (s 267(3)(c)), a point noted in the Report of the Parliamentary Commissioner for the Environment on Public Participation under the Resource Management Act 1991.[18]

3. Flexibility of procedure

The s 269 Court Procedure enables the Court to make allowances for circumstances which might call for a different venue or procedure to the traditional Court practice. Subsection (2) provides that "Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency." Under subsection (3) the Court should recognise "tikanga Maori" where appropriate.

4. Annual Reports - some statistics

In a New Zealand Law Society seminar in October 1993,[19] Judge Kenderdine predicted that "It is more likely, at the present pace and type of mediation sought, that only small matters between two parties will continue to be determined under this procedure". While the figures reported by the Environment Court show a steady increase in the number of Court mediations, with the biggest increase in 1995, given the level of cases awaiting hearing, it does seem surprising that a greater number of parties

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18 Office of the Parliamentary Commissioner for the Environment, December 1996 at 67.

19 Judge Kenderdine, et al, *Applications Under the Resource Management Act 1991* New Zealand Law Society Seminar (October - November 1993) 102-103.

have not attempted mediation. The figures should also be considered in light of the fact that there is a high rate of settlement of proceedings in the Environment Court following negotiation, and that some cases which are settled following mediation would also have settled following negotiation, and vice versa.[20] A table showing numbers of mediations conducted by Commissioners from 1992-1996 taken from figures included in the Annual Reports is set out below:

5. Mediations by Commissioners 1992-1996

Year Ended 30 June	Mediations Conducted by Commissioners	Settlements	Percentage Settled	Ongoing
1992	no figures available	no figures available	no figures available	no figures available
1993	6	5	83%	-
1994	5	3	60%	9
1995	30	9	30%	14
1996	41	29	70%	3

Since June 1996, there appears to have been a continued increase in the number of mediations, with Environment Commissioner Ian McIntyre reporting having conducted 30 mediations between April 1996 and September 1996.[21] The figures for 1997 can thus be expected to show a significant increase on those for 1996.

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20 A point made by Principal Environment Judge DFG Sheppard in a letter to the writer 4 March 1997.

21 Ian McIntyre, personal comment, September 1996.

Section 268 mediations do not appear to have been limited to the two-party, minor disputes envisaged by Judge Kenderdine in 1993.[22]

Cases going to mediation have included a dispute between a council and developer over approval of a second subdivision plan;[23] a dispute over conflicting land uses relating to a speedway;[24] hours of operation and noise conditions relating to a landfill site;[25] an application for an enforcement order in respect of noise problems related to a day-care facility;[26] and an appeal against the grant of a consent to clear bush and carry out earthworks in Waitakere.[27]

6. Section 268 mediation - the process

It is apparent that the greater flexibility in process available for s 268 mediations lends itself to an accommodation of the needs, expectations and experiences of the parties which is less possible than in formal hearings. Environment Commissioner McIntyre reports having conducted mediations in venues as diverse as maraes, community halls and living rooms.[28] Meetings are able to be adjourned and reconvened where necessary without as great a pressure to finalise details "on the spot", as may be the case in a hearing directly before the Court.

McIntyre also notes that in the context of a mediation, underlying concerns and interests, often not included in the parameters of the reference

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22 Kenderdine, supra, note 19, at 102-103.

23 *Rural Management Ltd v Banks Peninsula DC* [1994] NZRMA 412.

24 *Wellington Speedway Soc Inc v Upper Hutt City Council,* PT W71/93, 9/9/93.

25 *McDonnell v Manukau City Council,* PT A81/94, 19/9/94.

26 *Grieg v Burrell* 4 NZPTD 171. See also *Waikato DC v Jacobs,* PT C116/94, 16/12/94 for another example of mediation of an application for an enforcement order.

27 *Donald and Wesley v Waitakere City Council* PT W90/94, 28/9/94.

28 McIntyre, personal comment September 1996.

pleadings, are able to be addressed in a way that is not possible in a hearing. He reports instances where two settlement agreements are produced as a result of the mediation: one in the form of a draft consent order to be approved by the Court to dispose of the reference, and the other dealing with other matters, which, although not part of the subject matter of the reference, have much to do with the reason why the parties are in dispute.

V: LIMITS TO MEDIATION UNDER RMA

While the use of mediation under the RMA appears to be increasing in a wide variety of disputes, and with a reasonably high "success" rate, it is also clear that mediation, and the other ADR processes provided for in the Act are not appropriate in all cases.

An early critique of the mediation process in the context of New Zealand's Resource Management Law is contained in Jane Chart's 1988 paper on Mediation, prepared as part of the RMLR consultation.[29]

On page 7 of her report, under the heading "Mediation is NOT a Panacea: Some Limitations", Chart outlines the type of disputes which in her view are inappropriate for mediation. These include:

(i) disputes involving "systemic grievances" - where the "underlying legality" of conduct is being questioned. "Courts play a vital role in fashioning norms and articulating values for the wider society in the form of legal precedents for future, like cases. (Contrast disputes where principles are needed only for the particular, local situation). This work of the adversary system

29 Chart, J., (1988) *Resource Management Disputes: Part B: Mediation,* a paper published by the Ministry for the Environment - RMLR Working Paper No. 22, 7.

may be more appropriate than mediation."

(ii) disputes of "national significance". Chart notes that court disposition of disputes serves an important function of "aggregating" disputes. In such matters she suggests mediation would be inappropriate.

(iii) prosecutions for offences, where mediation "lacks the procedural safeguards of the adversary process" such as the protection from self-incrimination.

(iv) disputes where interests or values are non-negotiable. Chart suggests that "some disputes are only amenable to win/lose procedures".

Judge Sheppard warns against judging too hastily whether a dispute is susceptible to resolution by mediation or not noting that "the skills and experience of Environment Commissioners as mediators have led to surprising results in cases where mediation might not have been predicted to be successful". Commenting on the types of disputes that may be more amenable to resolution through mediation he states:

> However, if there are only two or three parties involved in a dispute, and only one or a few issues, those cases might be thought particularly suitable for mediation. Conversely disputes which involve many parties, many issues, issues of principle, or questions of law, might be thought less suitable for mediation. Even so, if all the parties in such cases desire to try mediation, the Court would certainly respond to their wishes.[30]

30 Sheppard, D.F.G., Principal Environment Court Judge, in a letter to the writer dated 16 October 1996.

1. Who will represent the "public interest"?

That environmental disputes frequently involve matters of "public interest" as well as the private interests of the parties to the dispute was recognised by the Planning Tribunal in *Wood v Selwyn District Council.*[31]

One argument against making available a process for mediating environmental disputes is that "unrepresented interests" will be cut out of the equation when negotiators come to the bargaining table in a mediation. Chart[32] refers to North American examples of "hard pressed environmental groups trading conservation values for immediate monetary gain" and considers the question as to whether the public interest is served by settlements forged without effective input from a range of significant interests. Of course this argument assumes that the "unrepresented interests" will be represented in other forms of dispute resolution, such as judicial determination, which, it is suggested, is not always a certainty.

Three responses to the question above are considered by Chart: the first, an argument put forward by Susskind[33] that mediators should be held accountable for the impact of a settlement on unrepresented parties (and thus could be sued if they failed to ensure that such interests were adequately catered for). Chart, it is suggested rightly, discounts this option as impractical and undesirable.

The second response is to provide for an independent review of the mediation process by a judicial body such as the Environment Court to ensure that the agreement "is not inconsistent with important public interests." While Chart anticipated that such a power of "veto" would have

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31 C73/94.

32 Chart, J., (1988) *Resource Management Disputes: Part B Mediation,* a paper published by the Ministry for the Environment - RMLR Working Paper No. 22, 16.

33 Susskind, L., "Environmental Mediation and the Accountability Problem" (1981) 6 *Vermont Law Review* 1, cited by Chart (1988) ibid, at 16.

a "chilling effect" on the mediation process, the requirement that consent orders produced as a result of a mediation be approved by the Court does not appear to have been a significant impediment to mediation. It is suggested that this requirement, emphasised by the Tribunal in *Wood,* goes some way towards ensuring that the "unrepresented interests" are not cut out in the mediation process and are catered for at least insofar as they are catered for at all in judicial proceedings.

The third response to the issue of unrepresented interests discussed by Chart is ensuring that if appropriate, public agencies, such as the Department of Conservation, are involved as parties to the mediation as "guardians" or "advocates" for those interests. In the context of a s 268 mediation, if such an agency has filed an appearance, it is likely that a representative would be present at a mediation. If no appearance had been filed, one would not expect that an adjudicated result would take into account the unrepresented interests any more than a mediated result.

Commenting on the risk that parties to a mediation will represent their own interests but not those of the public at large, Principal Environment Judge Sheppard notes:[34]

> ...
> In cases before the Environment Court there is usually at least one party which is a public authority which can be taken to represent the general public interest. Furthermore settlements of the outcome of mediation frequently need to be put to the Court for endorsement and in considering disposition of cases the Court will be alert to particular aspects of the public interest that may transcend the interests of the parties to the mediation process.

The Court has a supervisory role in ensuring that mediations are conducted fairly and that the settlement is in accordance with sound resource

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34 Judge Sheppard, (1996) supra, note 30.

management principles and with the principles of the Act. While its scope to be involved in the disposal of a case is limited where the result of negotiations or mediation results in the *withdrawing* of an appeal or reference, where the case is settled by way of conditions contained in a consent order, the requirement for these to be "endorsed" by the Court provides a "safety net", which, it is suggested, reduces the possibility of mediated settlements that are not in accordance with the Act.

2. Huakina - not a case for mediation

A New Zealand example of a dispute that contained a number of characteristics rendering it inappropriate for mediation cited by Blackford[35] is the *Huakina Development Trust v Waikato Valley Authority* case[36] where the issue of whether Maori cultural and spiritual values were relevant to water right applications required judicial determination and no less. Blackford notes:

> Justice Chilwell's findings not only applied to the site-specific case on the Waikato river, but also served to act as a national precedent. His decision had a far-reaching effect that mediation could not have achieved.

A more recent example of a dispute in which mediation was declined, despite this having been suggested by the Planning Tribunal, and which would appear to conform to the analysis noted above concerned the level of effluent discharged from the Ravensdown's Ravensbourne Fertiliser Plant, reported in the 26 June edition of the Otago Daily Times.

The article reports that Judge Skelton asked residents and the fertiliser

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35 Blackford, (1992) supra, note 13, at 17.

36 [1987] 2 NZLR 188, (1987) 12 NZTPA 129.

company to consider mediation in order to avoid a possible two-week hearing on the issue. While both residents and the fertiliser company were prepared to consider mediation, despite a number pre-hearing meetings at which "no progress at all" was made, the company considered it had its hands tied by the Otago Regional Council's refusal to accede to the company's request for flexibility for its effluent disposal, mixing zone and monitoring conditions, which, according to the Regional Council's director of Resource Management were "fundamental to the [council hearing] panel's decision."

The issue of discharge conditions apparently being non-negotiable from the Regional Council's perspective resulted in the matter requiring judicial determination, the article concluding: "The Planning Tribunal will be notified of the failure to organise mediation and a hearing date is likely to be set for later this year."

3. Logistical problems in mediating disputes involving many parties

In a 1996 article published in LawTalk[37] Somerville sets out a number of reasons why he believes compulsory mediation of environmental disputes would be inappropriate. One of these is the logistical problem in ensuring that each party to a multi-party dispute is represented at the mediation table and the related difficulty in negotiating an agreement between a large number of positions in a way that each party is satisfied with the result.

While conducting a mediation involving a large number of parties may present logistical challenges, this is not, it is suggested, a reason why a multi-party dispute that was otherwise suitable for mediation should not be mediated. There are a number of reported successful mediations involving many parties. A Victorian case-study involving a large number of parties

37 Somerville, R., "Mediation and the Planning Tribunal" (1996) 462 *LawTalk* 9.

reported by Turner and Saunders is one example.[38] Another example (albeit not a s 268 mediation) is the mediation/facilitation conducted by David Hollands involving 70 parties in a Prohibited Trade Wastes Workshop which resulted in a complex set of chemical controls for industrial waste in Auckland.[39]

4. Power imbalances

Another point raised by Somerville relates to power imbalances arising from diverse cultural, social and economic interests that exist between the parties. This argument presumes that such power imbalances will, to a certain extent, be "evened out" if the dispute is determined in the Court. Somerville states:[40]

> ...
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> There is often a vast disparity in power in environmental disputes. Often, local authorities or even central government are involved, matched against environmental groups or individuals. The incentive for settlement through mediation would be much less if the party in the position of power thinks that it may not have to ultimately compromise.

While the inequality of bargaining power, it is suggested, is a valid reason for avoiding mediation in certain contexts (for example mediating family disputes in which one party has previously been subject to violence by the other), the writer doubts whether the existence of power imbalances

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38 Turner, B. and Saunders, R., "Mediating a Planning Scheme Amendment: A case study in the co-mediation of a multi party planning dispute" [1995] *Australian Dispute Resolution Journal* 284.

39 Newspaper report, *The Independent* 11 February 1994.

40 Somerville, supra, note 37, at 10.

will be significantly ameliorated if the dispute is judicially determined or significantly exacerbated if it is mediated, at least in a s 268 mediation. It is suggested that the imbalances will be present, whatever the forum, and that a weak party is unlikely to do worse, and may in fact do better out of mediation than adjudication.

It is suggested that unless there was a situation where litigation was publicly funded and mediation not, an indigent party would have more difficulty in fighting a protracted court battle than in taking part in a mediation. In such cases, weak parties, or parties with weak cases, unless they wished to participate in a hearing for other reasons (such as on political or ideological grounds) may well choose to take the crumbs offered to them at mediation rather than risk gaining nothing at the hearing, and being required to pay costs as well.

VI: COMPULSORY MEDIATION

1. Move Toward Compulsory Mediation of Civil Disputes

In a speech to newly admitted barristers and solicitors in the High Court in Dunedin, reported in the New Zealand Herald on 17 September 1996 Justice Tipping is reported as saying:

> I would not be surprised if, before long, a formal requirement to undertake mediation becomes a pre-condition to obtaining a fixture.

In a similar vein Peter Salmon, QC, now Justice Salmon, in a January 1996 article in the New Zealand Law Journal, after stating that he "strongly recommends" the mediation process, predicted:

> ...
> The time will come when mediation - at least as a first (and often as a last) stage in the dispute resolution process - will become the rule rather than the exception.[41]

A recent Practice Note establishing the Case Management Pilots in the Auckland and Napier High Courts includes an express requirement to address the question of whether ADR processes, in particular mediation, should be used in Directions Conferences.

Proposals to formally incorporate ADR within the structure of the High Court and possibly District Court civil jurisdictions contained in the recent discussion paper published by the Courts Consultative Committee[42] indicate the strong likelihood that mediation will become a normal step in the course of civil proceedings. The question arises as to whether there should be some form of compulsory mediation requirement for disputes coming before the Environment Court. Arguments for and against compulsory mediation in the environmental context are examined below, together with a brief consideration of overseas examples of compulsory mediation followed by conclusions regarding the place of compulsory mediation of resource management disputes in New Zealand.

2. Arguments for Compulsory Mediation

(a) It works as well as voluntary mediation

A common argument in support of compulsory mediation is simply

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41 Salmon, supra, note 12, at 8.

42 *Court Referral to Alternative Dispute Resolution, A Proposal to Extend the Use of Alternative Dispute Resolution in Civil Cases*, Courts Consultative Committee January 1997.

that it works at least as well as voluntary mediation. Reference is made in a note in the 1990 Harvard Law Review to three empirical studies carried out in the United States which concluded that cases ordered to mediation settle at about the same rate as those voluntarily mediated.[43]

Another argument in favour of compulsory mediation is that in the absence of widespread acceptance of the legitimacy and benefits of ADR amongst both litigants and litigants' advisers, a *requirement* to participate in mediation (as opposed to a suggestion) is an effective way of "marketing the product" to potential consumers who through lack of experience or knowledge are unaware of the advantages of ADR.[44]

Further benefits of mandatory mediation cited by Boulle include:

(i) It allows for aspects of the mediation process to be regulated - for example, the exchange of documents and the timing of the mediation meeting. It can thus bring a more scientific approach to bear on the practice of mediation.

(ii) It provides for economies of scale where Government agencies or tribunals have to process a great number of files with limited resources.

(iii) It provides more reliable statistics on mediation. Surveys of voluntary mediation are likely to provide unrealistically high evaluations of a process selected by the parties, whereas high evaluations from non-voluntary users would carry greater significance.

(iv) It provides the occasion for negotiated decision making. Even where the parties are initially reluctant to enter into mediation,

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43 "Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes" (1990) *Harvard Law Review* 1086.

44 Boulle, L., *Moving to Mandatory...Evaluating Compulsory in Australia* [1991] DRB 2,4.

the skilled services of a mediator may assist them to make decisions that serve their interests well.[45]

(b) Reducing waiting time in the Environment Court

Warren Sowerby, an Auckland barrister specialising in dispute resolution, in an article in the inaugural issue of the Butterworths Dispute Resolution Bulletin (the publication of which, incidentally, gives an indication of the growing interest in this field) notes "The increased mediator caseloads resulting from Court-ordered mediation may lead to a more cost-effective administration of justice".[46]

At the time of writing, for non-urgent matters, parties are likely to be required to wait up to a year before obtaining a hearing in the Environment Court. The introduction of compulsory mediation would reduce this time as "mediable" matters are settled more quickly, making room for the "un-mediable" matters to be heard and adjudicated earlier. This, it could be argued, is a valid reason in itself for introducing compulsory mediation.

3. Arguments Against Compulsory Mediation

(a) Mediation should be a voluntary process

A strong argument against compulsory mediation is that it is a contradiction in terms. Mediation is a voluntary process: any attempt to force parties to mediate undermines the ethos of the process at a fundamental level. The result is more akin to arbitration, and if that is the case then the

45 Boulle, ibid, at 4.

46 Sowerby, W., "Mediation in the context of the Case Management Pilot in the High Court" [1996] *Disputes Resolution Bulletin* 18.

process should be named as such and not dressed up in terms that imply voluntariness or consensuality.

The importance of voluntariness in mediations has received judicial support in a number of Planning Tribunal decisions. In *Wood v Selwyn District Council* Judge Skelton, in the context of an application for costs, stated:[47]

> In our view no appellant should feel obliged to agree to mediation simply to avoid costs...It is to be remembered that appeals under this Act involve public law issues and are not to be seen simply as party and party litigation.

In *Waikato District Council v Jacobs* Judge Skelton referred to his earlier decision in *Wood* and reiterated that "Mediation is a process that the parties must freely agree to and costs should not be a factor."[48]

Judge Sheppard similarly believes that a move towards compulsory mediation of disputes coming before the Environment Court would be undesirable:[49]

> I firmly support [Royden Somerville's] reason that [compulsory mediation] would undermine the voluntariness of the mediation ethos. In addition I firmly hold that it would deprive parties of the rights given to them by Parliament to have, if they choose, a fair hearing of their dispute and a decision of it by the adjudicative process. That is the first function of the Court, and in my view parties should not be the objects of any pressure or persuasion by the Court to take part in mediation if their own wish is to exercise their statutory rights to adjudication.

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47 C73/94.

48 C28/95.

49 Judge Sheppard, (1996) supra, note 30.

Commenting on the debate over compulsory mediation Boulle makes what is suggested is a valid distinction between the *entry* into mediation and what occurs *in* mediation.[50] He observes that as regards entry into mediation "it is often difficult to draw a clear line between what is voluntary and what is mandatory", and suggests that in many instances where entry into mediation is apparently "voluntary", the parties have to a greater or lesser extent had their choice "constrained" by, for example the mediation being a precondition of legal aid or an "offer" by a judge that mediation be undertaken, which might easily be perceived as an offer which is difficult to refuse.

However, Boulle is more comfortable with the concept of volition as regards what takes place *in* mediation. According to his reasoning, a mediation can be considered "voluntary" if the assent of the parties is required for any outcome. Even if the parties are forced into the mediation, the process can, to a large extent, still retain its nature of voluntariness as long as the mediator does not have the power to impose an outcome on the parties.

(b) "Offers" to mediate - difficult to refuse?

An example of such an "offer" for mediation which in the circumstances may have been difficult to refuse can be seen in *Rural Management Ltd v Banks Peninsula District Council*[51] where the Tribunal gave directives and appointed a mediator in an attempt to resolve a long standing dispute between the council and developer over a subdivision consent.

This directive to mediate in *Rural Management* has been described by Palmer as "tantamount to arbitration of the differences" while noting

50 Boulle, supra, note 44, at 4.

51 [1994] NZRMA 412.

that "it was clear to the Tribunal that a strong directive relating to mediation was necessary to ensure finality within a short period" and commenting that "the orders were in the best tradition of judicial guidance".[52]

A similarly strongly worded "suggestion" to mediate was given in *McDonnell v Manukau City Council* where the Tribunal referred the issue of noise conditions relating to a landfill to mediation with the words:[53]

> With these guidelines we suggest mediation and require the parties to respond within seven days in respect of that suggestion.

It is the writer's view that the "suggestions" to mediate noted above, while they would clearly appear to have been appropriate in those cases, do not sit easily with other statements of the Tribunal indicating that parties should be free to enter (or refuse) mediation at their will. One wonders what the attitude of the Tribunal would have been on the question of costs if any of the parties in the above cases had refused mediation.

It should be noted that the arguments in favour of compulsory mediation cited above referred to mediation generally and not to the mediation of environmental disputes in particular. Somerville is amongst those critics of compulsory mediation of environmental disputes who believes that the nature of these disputes makes them unsuitable for compulsory mediation, although he would support amending the Act to provide for a compulsory *consideration* of mediation requirement.[54]

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52 Palmer, K., Casenote on *Rural Management Ltd v Banks Peninsula District Council* (1994) 1 *Butterworths Resource Management Bulletin* 56.

53 W63/94 PT.

54 Somerville, supra, note 37, at 9.

(c) Limits to mediation - reasons why compulsory mediation is undesirable

The matters covered in the section on Limits to mediation above (i.e. the unsuitability of attempting to mediate disputes involving deeply set ideological beliefs, need for a legal precedent, need for matters of national significance to be determined judicially) are all additionally strong arguments against a requirement for mandatory mediation in the RMA. For parties to be required to attend a mediation in these situations where there was clearly no possibility of a negotiated settlement would be a waste of their and the (Court -funded) mediator's time and would do little to promote an efficient resolution of the dispute. In such cases however it is suggested an evaluative prehearing conference would most definitely assist in narrowing issues and preparing the matter for heating.

(d) Compulsory Mediation in Australia

While most mediation in Australia is available and promoted on a voluntary basis, a notable exception is Victoria, where parties to civil disputes are required to have attempted mediation prior to obtaining a court fixture.[55] In both Queensland[56] and Victoria[57] judges are able to refer matters for mediation with or *without* the consent of the parties.

(e) Mandatory Mediation - Conclusions

In the writers view the arguments against mandatory mediation are to be preferred over those in favour of introducing such a requirement under

55 Boulle, supra, note 44, at 3.

56 Queensland Courts Legislation Amendment Act 1995.

57 General Rules of Procedure in Civil Proceedings 1996, section 50.07.

the Resource Management Act. It is clear that there are categories of resource management disputes which are patently inappropriate for mediation and a requirement for parties to these disputes to attend mediation prior to obtaining a fixture would be counter-productive to the efficient disposal of disputes and a disservice to the mediation process.

4. Mediation as Conflict Management

However it would also appear that a process of evaluation or diagnosis that attempts to achieve less than a resolution of the dispute would be beneficial in *all* cases, and it is suggested that this method of facilitation, with the aim, in Boulle's words, "to get the dispute into a better shape than it was in the past and decide how it should be handled in the future"[58] should be made a compulsory requirement.

This type of procedure, described by Roberts, of the University of South Queensland, as "scoping" or "convening" would involve the parties negotiating on the issues that require resolution:[59]

> ...
> Scoping represents a modified form of mediation. The element of negotiating the dispute through to resolution is missing and it is possible that no impasse has been reached before the process is undertaken. However, the scoping process may be sufficiently successful for the parties to proceed to a full mediation and therefore is a useful testing ground for mediation in general.

5. Amendments to the Act

To a degree it is likely that this type of scoping is already carried out

58 Supra, note 44, at 5.

59 Roberts, supra, note 5, at 152.

during the course of pre-hearing conferences. These conferences are an ideal opportunity for the question as to whether mediation should be used to be considered, and if it is decided that mediation is not an option, for an evaluation of the issues and preparation for hearing to be carried out. The writer agrees with Somerville's suggestion that an amendment to the Act be made requiring parties to consider mediation and if mediation is not used to provide reasons to the judge at the pre-hearing conference.

In addition, it is suggested that the Act be amended to make pre-hearing conferences mandatory rather than optional. The combination of these two amendments would encourage use of mediation or other ADR processes in appropriate cases while avoiding the pitfalls of the full mandatory requirement in place in some Australian jurisdictions.

VII: COSTS

The issue of costs in relation to the mediation of resource management disputes is relevant in two respects: firstly the question of possible savings in legal and experts' expenses in choosing to mediate rather than litigate and secondly, whether agreeing or refusing to mediate will have any impact on costs awarded if the matter proceeds to a full hearing.

1. Cost/Benefit Analysis of Mediation Compared to Litigation

While an examination of the monetary costs and benefits is an important aspect of the decision whether or not to mediate, Blackford and Smith recognise that parties will have other reasons for choosing to mediate or not to mediate, including, crucially, "how well the party perceives its

interests will be served by the approach chosen."[60]

The need for a legal precedent to be set, desire to gain publicity, whether in the case of environmental or community groups, the Court is perceived to be a "critical line of defence" are all important factors, other than the monetary factor to be considered in choosing the forum.

While the writer is aware of no empirical studies on the comparative costs of litigation and mediation in New Zealand, it is likely that in all but the most exceptional of cases, to mediate will be significantly cheaper than to litigate. While this may have the effect of making the Environment Court more available to litigants/mediants, at least in the absence of compulsory mediation there could be risks in budgeting on a successful mediation when embarking on a referral to the Court without the wherewithal to fund a full hearing. Whether to mediate under s 268 or litigate is often likely to be a decision made at a very late stage in the course of a court proceeding, and the availability of such an option may not have a great influence on the decision of parties to take an appeal to the Court or not.

2. Relevance of Agreement/Refusal to Mediate to Costs Awards

Whether a party's refusal to mediate is relevant to costs where the matter has gone on to a full hearing has been considered in a number of judgments of the Environment Court. It is the writer's observation that while the Court appears reluctant to hold that if a party declines to undergo mediation then this will count against them with regard to costs, in practice the effect of certain costs awards has been to do just that. A number of judgments on costs are considered below.

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60 Blackford, C. and Smith, A., *Cross Cultural Mediation: Guidelines for those who interface with Iwi*, (1993) Lincoln University Information Paper No. 34.

In *Wood v Selwyn District Council,*[61] the appellants (the Woods) sought costs against the respondent Council and the applicant; the applicant sought costs against the appellants and respondent; and the respondent Council resisted all applications for costs in protracted proceedings arising out of an appeal against the respondent's decision granting land use consent to extend two chicken rearing sheds on the applicant's property.

On the question of costs and the appellant's decision not to participate in mediation the Tribunal expressed its view very clearly:[62]

> ...
> [W]e record that the fact that the appellants did not agree to mediation does not, in our view, count against them in the matter of costs. They were entitled to appeal and pursue their appeal, and they should not be penalised for failing to agree to mediation. In our view no appellant should feel obliged to agree to mediation simply to avoid costs. ..It is to be remembered that appeals under this Act involve public law issues and are not to be seen simply as party and party litigation.

A strong statement was also made in *Waikato District Council v Jacobs,*[63] where the Council sought costs which included time involved in mediation with a planning commissioner. The Tribunal made a modest award in favour of the Council but expressly held that this did not take into account time in mediation, stating that "mediation is a process that the party must freely agree to and costs should not be a factor".

In a similar vein the Tribunal in *Campbell and Ors v Southland District Council*[64] referred to its statements in *Wood* in holding that the (successful) appellants were entitled to refuse to attend mediation and that this would

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61 C73/94, Judge Skelton.

62 Ibid, at 7.

63 C28/95, Judge Skelton.

64 W27/95, Judge Kenderdine.

not count against them in the matter of costs. In that case one of the reasons why the appellant had not agreed to mediation was that there were highly technical issues involved and the applicant had not provided the appellants with sufficient information to enable them to participate in any mediation on a "level playing field in terms of information shared". The Tribunal stated that this inadequate sharing of information by the applicant "was no foundation for the mediation process".

In *Duncan v Wanganui District Council,*[65] the unsuccessful appellant responded to an application for costs against her brought by the successful applicant with the submission that as she had offered to submit the dispute to mediation and the applicant had refused, that no costs should be awarded against her.

The Tribunal while acknowledging that an unsuccessful objector can expect an application for costs where the Tribunal reaches the same decision as the Council and that the applicants were not obliged to submit to mediation (at p 3, "although the Resource Management Act encourages alternative dispute resolution: see section 268") agreed "that this was a case that called for attempts to resolve it short of adjudication". The applicants had chosen, as they were entitled to do, to have the matter resolved by the Tribunal and therefore "they [had] some responsibility for the costs that they incurred in counsel's presentation of their case before the Tribunal, even though their case was successful." No order for costs was made.

In *Greig v Burrell*[66] after an application for an enforcement order had been settled by mediation, the Tribunal was faced with an application for costs by the respondent against the applicant. The submissions in support suggested that the respondent's initial refusal to attend meetings

65 A149/92, Judge Sheppard.

66 C10/95, Judge Skelton.

and discuss the problems with them should count against them with respect to costs. The Tribunal noted that although there might be circumstances where the conduct of a party in relation to proceedings can be relevant to the question of costs in those proceedings "this was not the case here" and held that costs would lie where they fell.

Finally, in *Wilbrow Corporation NZ LTD v North Shore City Council & Auckland City Council,*[67] in an appeal concerning subdivision of residentially zoned land in area west of Brown's Bay, part of the decision comprised the awarding of costs against a small number of submitters who had "held out" after the applicant, respondent Councils and majority of the other submitters in opposition had reached agreement.

In an attempt to deal with the remaining objectors, a meeting in chambers was convened "in the hope that we [the Tribunal] might be able to mediate a final settlement of all outstanding matters." This was unsuccessful and the matter proceeded to a seven day hearing.

At the conclusion of the hearing after approving the subdivision proposal the Tribunal invited the parties to make submissions on costs and commented:[68]

> ...
> It is simply unjust to allow submitters in opposition to pursue their more general concerns using as a vehicle a case such as this which ought to have been dealt with on its merits. It is well established that some discipline has to be imposed on the conduct of these expensive proceedings. To that end the use of costs is one way of doing so.

The Tribunal agreed with the observation of the Tribunal in *Entwhistle v Dunedin City Council*[69] and awarded $10,000.00 costs in favour of the

67 W107/95 Judge Willy.

68 Ibid, at 32.

69 C37/95.

successful applicant appellant to be shared by the Taiaotea Reserve Trust Board and the Friends of Sherwood Trust.

3. Penalty or just compensation?

Commenting on the effect of a refusal to mediate on the question of costs, Judge Sheppard draws the distinction between costs awards as a penalty and awards as 'just compensation' for the other party:[70]

> If a party which declined to consent to mediation is ordered to pay costs on the ultimate adjudication, that will not be to penalise the party against whom the order is made for failing to agree to mediation. It is not an appropriate exercise of the Court's authority to penalise a party for exercising a right which Parliament has given. Even so, however, if the way in which that party has conducted its case at the adjudication hearing has required the opposing party to incur unnecessary costs, then an order may be made for payment of costs not as a penalty but as (part) compensation for the additional costs necessarily incurred.

From an ideological perspective this analysis is certainly attractive. It is in accord with a theory of mediation that the decision to enter mediation should be entirely voluntary and also with the idea that the right conferred by Parliament to have a dispute settled by adjudication should not be unduly interfered with by a fear of a costs award if the party chooses not to mediate.

With respect, the writer wonders whether the distinction between costs as a penalty and costs as just compensation is one largely of semantics and of less significance than the effect of the type of costs awards noted above on the decision whether to mediate or not.

If a party who (for the sake of argument unreasonably) refuses to attend mediation is likely to be met with a hefty costs award (if unsuccessful, part of which flows from the unreasonable refusal to mediate, as well as the

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70 Supra, note 30.

fact that the party was unsuccessful), or, as in the *Duncan* case, is likely to lose its entitlement to costs if successful, there is clearly an economic incentive to participate in mediation. The 'voluntariness' is thus influenced by the economics of running the case as well as a genuine desire to explore settlement options in good faith.

On a number of occasions the Court has stated in clear words that it will not hold a party's refusal to mediate against it on the question of costs. Such statements can be found in *Wood, Jacobs,* and *Campbell,* where the Court expressly held that a party's refusal to mediate did not affect the question of costs.

On the other hand, in *Duncan,* the applicant's refusal to mediate in a case which the Tribunal held "called for attempts to resolve it short of adjudication" *does* appear to have counted against it. The Tribunal, after noting that an unsuccessful objector can generally expect an application for costs where the Tribunal reaches the same decision as the Council (as happened in that case), *declined* to make such an award, leaving the successful applicant to bear its own costs "as it had some responsibility for counsel's presentation of their case before the Tribunal".

The Tribunal's acceptance in *Burrell* that "there might be circumstances where the conduct of the party ... can be relevant to the question of costs" would seem to imply that in certain circumstances an unreasonable refusal to mediate would be relevant to costs.

With respect, it is suggested that the approach of the Court in *Duncan, Burrell* and *Wilbrow* is correct, and is to be preferred over an interpretation of the statement in *Wood* that would rule out a party's unreasonable refusal to mediate as ever being relevant to the question of costs. There will, it is suggested, continue to be cases where in its discretion the Court will consider it appropriate to award, or decline to award costs, taking into account an intransigence and unreasonable unwillingness to settle (by a refusal to attend mediation or otherwise). It is thought that this would, on occasion, be entirely appropriate.

The writer's analysis of the decisions noted above, with respect, suggests that despite the Court's statements that parties should be free to enter or refuse mediation without fear of an 'adverse effect' on that party's entitlement to receive, or obligation to pay costs, the economic reality is that there is a strong incentive to mediate contributed to at least in part by the likely costs scenario if the matter does not settle.

This incentive is a positive factor of which is likely to increase the efficiency of the Court in dealing with matters that come before it in an appropriate way. Mediation (which Parliament has also seen fit to make available for disputants alongside adjudication) should thus be encouraged where appropriate. Costs awards recognising the desirability of mediation in appropriate cases are one way of contributing to this efficiency.

VIII: CONCLUSIONS

Mediation as an alternative method of dispute resolution under the Resource Management Act 1991 while increasing in use, has yet to reach its full potential. Its value as an efficient and effective way of facilitating resolutions to appropriate disputes has been recognised by the Court and disputants alike.

As a body of case law on mediation under the Act develops together with the general educative process raising awareness of the process amongst 'consumers' of the Environment Court services, the numbers of disputes going to mediation can be expected to rise. A Practice Note setting out the Court's procedure for mediations would assist in raising this awareness.