

THE USES AND BENEFITS OF ADR AND ENVIRONMENTAL CASES

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The RMLA conducted a successful joint seminar with LEADR last year. The purpose of this article is to discuss ADR in environmental cases for those members who were unable to attend the seminar.

Recent focus on ADR (alternative or additional dispute resolution) may have led people to believe that it is a new process instigated to resolve disputes. In fact this is not the case. Forms of ADR have been used both in New Zealand and abroad for resolving certain types of disputes for a considerable time. What has changed is the awareness of the community, and in particular the commercial sector, of the benefits of ADR.

Before discussing utilising ADR in environmental cases, it is appropriate to address the subject generally.

WHAT IS ADR?

ADR offers a full range of means of resolving disputes which can be offered to parties to a dispute in addition to the existing traditional routes of litigation (through the courts) and arbitration.

ADR is an umbrella under which a number of processes fall. The processes include negotiation, mediation, conciliation, early neutral evaluation, expert appraisal, expert determination and mini trials. The use of ADR processes is flexible and any combination of processes may be used to resolve an appropriate dispute. Mediation, in particular, has become a popular form of resolving disputes in the United States and Australia and is increasingly being used with success in New Zealand. Mediators who practice in New Zealand are reporting success rates of 90-95%.

WHAT IS MEDIATION?

Mediation is:

"The process by which the

participants together with the assistance of a neutral person or persons, systematically isolate disputes issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs."

"Mediation in Commercial Practice"
Folberg and Taylor, 1986.

FLEXIBILITY OF OUTCOME

The mediation process enables the parties to view the dispute as a problem which must be solved by their joint and mutual efforts. It enables the parties to explore solutions to the problem which they would not necessarily be able to obtain in the court system. Accordingly the solution can include matters such as apologies, recognition of effort, continuing business relationships and contra-deals as part of a negotiated package, which is entirely flexible according to the needs of the parties and the elements of the problem. The solution to the problem is agreed upon by the parties themselves and as such is far more likely to be satisfactory to each of the parties. Agreements reached are usually final and binding contractual agreements.

ROLE OF THE MEDIATOR

Mediation is an entirely consensual process. The mediation process is managed by a mediator who will assist the parties to look at the dispute between them afresh and to identify what are really the issues and ways in which each party's concerns about those issues can be addressed. While the mediator takes control of the process, the dispute and its resolution are completely in the hands of the parties themselves. The mediator has no power or authority to make a decision.

VOLUNTARY PROCESS

The mediation process is voluntary and the parties are able to walk out at any time up until a signed agreement has been concluded. The process takes place on a without prejudice basis which means that it will not affect the parties' legal rights and will not be binding on the parties unless and until they have reached a binding agreement. Once agreement is reached it is usually recorded in written form, by the parties' legal counsel, and is executed before the mediation is concluded. In this way successful mediations conclude with a binding and enforceable agreement which records the solution upon which the parties themselves have agreed.

CURRENT USES OF ADR IN NEW ZEALAND

The benefits of mediation and other alternative dispute resolution processes have been recognised for some time. Mediation and conciliation processes are offered as part of the dispute resolution process in a number of legal forums including the Disputes Tribunal, the Planning Tribunal, the Employment Tribunal and disputes arising in the Family Court arena. Recent projects to increase the use of ADR in commercial disputes which have been referred to litigation include a pilot project being operated out of the High Courts in Auckland and Napier and an early neutral evaluation/mediation project which offers mediation to appropriate disputes where one of the disputants is legally aided. In addition the business community is recognising the benefits of ADR and this has led to schemes being set up for specific business purposes. For example, the Auckland Regional Chamber of Commerce (ARCC) and LEADR offers a mediation scheme to ARCC members who are involved in disputes where the sum of

money is relatively small.

There are three major organisations in New Zealand which represent the interests of ADR. These are LEADR, the Mediators Institute of New Zealand (MINZ), and the Arbitrators Institute of New Zealand Inc.

LEADR is an Australasian non-profit organisation established in 1989 to promote the use and awareness of alternative dispute resolution. The New Zealand chapter was formed in 1991 and is administered by a National Committee and an Executive Officer.

OPPORTUNITIES FOR ADR UNDER THE RESOURCE MANAGEMENT ACT

The Resource Management Act, while retaining the adversarial model, has taken a number of steps to soften or modify the rigid adversarial system.

For example, under section 39, Local Authorities, Consent Authorities, Call in Boards and Tribunals considering conservation orders are all obliged to avoid unnecessary formality in hearings and not to permit cross examination. Moreover, there is a statutory emphasis on trying to achieve consensus or consent in resource consent applications. This comes through very strongly in section 99 which authorises pre-hearing meetings for the purpose of clarifying, mediating or facilitating resolution of any matters in issue before a consent authority. The provisions for pre-hearing meetings are extended into other areas of the Act. For example:

- restricted coastal activities, (section 117(6)(b));
- hearings reviewing consent, (section 130);
- designation and heritage orders, (section 168 and 169);
- water conservation orders, (section 206).

There is no obligation to hold a hearing unless the consent authority considers that a hearing is necessary or if some party requests one.

These two provisions represent a statutory policy to encourage compromise and consent. There are undoubtedly efficiency reasons for supporting such a policy but the

statutory policy may also reflect common argument in favour of mediation, namely if the parties themselves create a solution they will become committed to it and it is likely to be more enduring than an imposed solution.

More explicit additional dispute resolution techniques are to be found in the sections dealing with arbitration (section 356) and additional dispute resolution (section 268).

These provisions make it clear that the three major forms of dispute resolution, namely adjudication, mediation and arbitration, are all envisaged by this Act.

Appropriate safeguards are tied to each. Thus, matters of special significance in a policy sense must remain to be determined by the Planning Tribunal.

Section 268 of the Act enables the Tribunal, at the request of the parties, or of its own volition to refer the dispute to mediation, conciliation or another form of ADR.

Distinctive features of this section are as follows:

- There is no specific requirement of confidentiality, (although the decision in *M v. Independent Newspapers* would apply, where the Court upheld a confidentiality agreement in a mediation despite strong public policy reasons to disclose the fact of sexual harassment in a public body or university).
- The section requires the consent of the parties. It avoids the treacherous waters of mandatory mediation, which is inherently contradictory of the principle of mediation being a voluntary process.

The Act also allows the possibility of what the jargon calls "med arb" - mediation first and then adjudication later - there are dangers here as the role of a mediator is as a non-adjudicator and requires the confidence of parties, particularly regarding confidentiality, for the process to work. It is therefore difficult to have the role of mediator and arbitrator carried out by the same individual and a member of the Planning Tribunal should be very wary of ever doing this. In the private sessions, which will presumably occur,

a party may think the mediator is on side and agree to have them give the decision but then find that the decision goes against them.

BENEFITS OF ADR GENERALLY

There are a number of benefits in using ADR processes which include:

- It is an opportunity for the parties to explain their perspective;
- It is a means of negotiating a solution which is entirely in the control of the parties themselves;
- It gives the parties the opportunity to understand the other party's perspective;
- It provides a forum for exploring all of the issues relevant to the problem, not just the legal issues;
- It provides a broad spectrum of possible solutions which can be as creative as the parties and their needs require;
- It is completely confidential which avoids undesirable publicity and attention;
- It enables commercial and other relationships to be maintained and can have the effect of improving those relationships;
- The parties create their own solution and are thereby committed to it and more likely to comply with it;
- It is generally quicker and less costly than arbitration or litigation;
- It focuses on the future rather than difficulties in the past.

BENEFITS OF ADR IN ENVIRONMENTAL CASES

A number of the general benefits listed above apply to environmental mediators, but there are additional advantages:

- **Cost saving for consent for parties and consent authorities:** For example, when ECNZ sought to renew its water rights on the Wanganui River, the result was extensive hearings before the Planning Tribunal and another lengthy hearing in the High Court. By comparison, in respect of the Waitaki River water rights, a consultative approach was adopted which was less expensive and worked well.
- **Enhancing community participation:** Most local authorities are anxious to ensure that full and

proper consultation takes place with all interested parties in environmental matters. ADR processes are supportive of such policies.

- **Remove the decision-making from the political sphere:** Political issues vary according to the political climate at the time and may be influenced by powerful parties. The political influence can be removed in a situation where there is no decision-maker and decision is reached following an ADR process.

- **Enables issues to be addressed which are not capable of decision by the Court:** ADR processes remove the element of imposing a decision upon parties and enable parties to address all issues which are relevant to those parties, irrespective of whether they are matters which a court was empowered to determine.

- **Offers an alternative to the win/lose solution:** Where applications are made to a decision-making body such as a court or tribunal, the likely outcome is a win for some parties and a loss for other parties. Negotiated solutions through an ADR process enable a solution which can offer a win/win outcome or an outcome which addresses all of the issues for all of the parties.

Further enquiries about alternative dispute resolution or LEADR should be made to:

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