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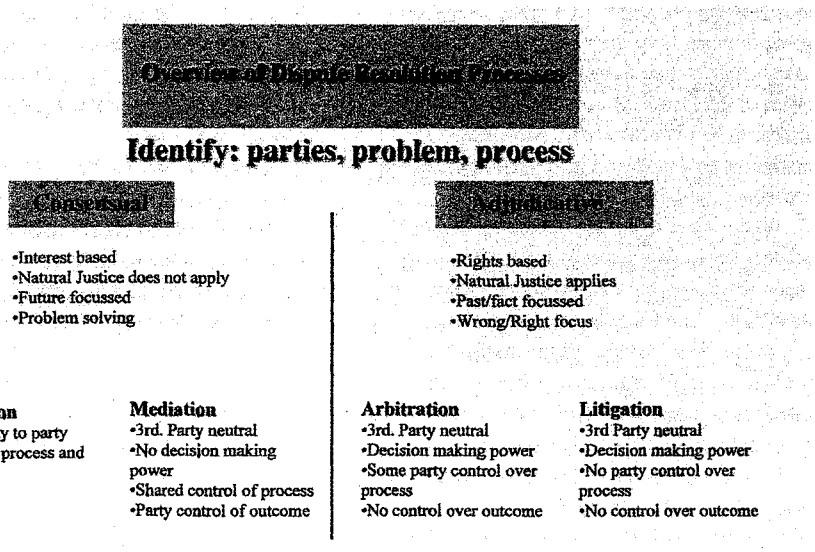
RESOLVING ENVIRONMENTAL DISPUTES BY MEDIATION

SOME INSIGHTS INTO MEDIATION AND THE MEDIATION PROCESS AS A METHOD OF DISPUTE RESOLUTION

The existence of disputes is indisputable. Disputes arise frequently and their subject matter is diverse, with the legal basis of the dispute ranging from contract and commercial issues, to family law, employment law, and environmental issues, to name but a few. As disputes are generally negative to any relationship, their resolution should be expeditious. Furthermore, disputes that are pursued but not resolved undoubtedly have the potential to escalate to a level where they will involve the disputants in court proceedings, which in addition to financial and time costs, can result in irreparable damage to the relationship between the parties. Where parties have a dispute which, for reasons of the nature and complexity of the problem itself and/or the position taken by the parties, cannot be resolved by negotiation then, as an alternative to pursuing an action through the courts, they should consider other approaches to dispute resolution.

Indeed, the use of mediation to resolve environmental disputes is promulgated by s268 of the Resource Management Act 1991 which states:

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.



WHAT IS MEDIATION?

Mediation has been 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 settlement that will accommodate their needs" (Folberg J and Taylor A 1984, 7).

For mediation to be successful, the prerequisites are first, a considered and genuine willingness on the part of the disputants to commit to the mediation process and, second, the use in that process of a qualified, neutral third party chosen by the parties to act as mediator. Unlike litigation or arbitration, where the third party's judgement is binding on the parties, in mediation the mediator is not a decision maker and has no power to impose a solution on the parties. Indeed, one of the hallmark characteristics of mediation is the empowerment the process gives to the disputants. It is the parties themselves who control the dispute and make any ultimate decision. Whilst the mediator manages the process of mediation by assisting the parties in identifying the essence of the dispute and by facilitating and enhancing communication and negotiation between them, he/she has no binding authority in the process. However, in helping the parties to find a solution, the mediator can assist in generating and exploring various options for resolution of the dispute.

THE ADVANTAGES

The advantages of mediation as a form of dispute resolution are numerous. According to David J and Cavangh P, in terms of financial costs, time costs and relationship costs the costs of a successful mediation are significantly less than the expense of litigation, and as a dispute

resolution process, mediation is non-adversarial which is less traumatic for the parties than litigation. As a consensual process, control of the dispute, the process to resolve it and its outcome remains with the parties throughout, even to the extent that they can abandon the mediation at any time.

The high level of flexibility throughout the process is another advantage, with the parties able to control the pace of the process and determine their own procedure by adapting it to suit their needs and interests. This extends to the appointed mediator who may be chosen because of his/her relevant expertise in the subject matter of the dispute.

In this regard mediation assists in identifying, clarifying and narrowing the substantive issue(s) in dispute, yet at the same time permits wider issues to be taken into account and dealt with in the forum of the mediation. As mediation is non-adversarial, should they wish to do so, a party is able to control the flow of information which they choose to reveal, thereby enabling them to protect intimate or commercially sensitive evidence. Another main advantage is in the area of remedies. Unlike judicial remedies which are often perceived as being too narrow and reactive, mediation offers total flexibility in terms of remedies with no prior agreement as to outcome. This absence of restrictions, whereby the parties can explore any possibility to find a mutually acceptable solution to their dispute, helps to promote a win/win situation for the parties.

This is seen as being particularly advantageous where the parties have an on-going relationship which it is important to preserve. It is in this way that notwithstanding the initial dispute, mediation fosters a more constructive approach to solving disputes which can enhance the parties' relationship, reinforcing their ability to negotiate and deal with each other in the future, in a non-confrontational manner. The mediation and any mediated agreement should be entered into in the spirit of good faith to promote confidentiality, thereby ensuring no adverse publicity for the parties.

THE PROCESS

Whilst the parties control the dispute and its outcome, control of the process of the mediation is shared with the mediator. Preliminary matters will need to be covered by the mediator with the parties, in which the mediator will explain the process and ground rules emphasising the mediator's role in the process, the power of the parties to control their dispute, their right to terminate the mediation at any time and the need for confidentiality.

This is the stage where the mediator seeks a commitment to the process from the parties and establishes rapport with them. Each party will get the opportunity to tell their side of the story and to identify the issues from their perspective.

A period for information gathering and analysis, the issue identification phase, then takes place, with the mediator assisting the parties to make preparation for the next phase of the process which is the "problem solving" phase. At this stage the parties may well have a joint meeting.

However, the mediator can still meet separately with the parties with the aim of identifying areas of common interest and assisting them to explore and consider possible options for settlement. At the conclusion of successful mediation activity, the parties with the mediator's assistance, will have reached their own agreed resolution.

Within the process three forms of agreement are relevant. First, and as a preliminary, the disputing parties must agree to mediate. This "Agreement to Mediate" should, as a matter of good practice be in writing and whilst acknowledging the existence of a dispute, represents a statement of the parties' joint intention to seek resolution of their dispute. In this regard it is of paramount importance that those attending the mediation have the requisite power to settle the dispute.

Second, the "Mediation Agreement" (which should also be in writing) is between the parties and their chosen mediator who accepts the appointment. [This may also incorporate the parties' agreement to mediate where the parties have not entered into a separate agreement.]

The Mediation Agreement should set out clearly the terms and ground rules of the mediation. Finally, the "Mediated Agreement" which represents the outcome of the mediation should record the terms of the settlement reached by the parties and include, where appropriate, methods for implementation and compliance.

Mediation is suitable for two party or multi-party disputes and is appropriate for a wide spectrum of disputes.

Should you wish to contact the Dispute Resolution Centre for further information on qualifying as a mediator, you can do so by contacting the Centre on Wgtn (04) 8012794, P.N. (06) 3505799, Auck (09) 4439799 in all instances extn 2392.

REFERENCES

References available on request from the NZPI office. Tel 09-815-2086.

WHERE TO FIND TRAINED MEDIATORS

The Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) is the professional body for people working in the area of arbitration, mediation and other forms of dispute resolution outside of the Courts.

A successful outcome can be aided for the parties when they select a mediator who has skill, knowledge and experience in the mediation process.

Mediation in the area of the RMA can sometimes involve special issues, or a diverse range of parties, and the skill and experience of the mediator may be heavily relied upon during the mediation.

AMINZ maintains a panel list of members who are qualified and experienced to act as mediators. AMINZ also offers mediation training and qualification to its members.

This is by recognition of the diploma course in dispute resolution with the Dispute Resolution Centre at Massey University for associate membership and with its own fellowship qualification and continuing professional development programme.

All members are bound by the Institute's rules and codes of ethics and disciplinary procedures exist for dealing with complaints of professional misconduct against members.

The AMINZ office also provides a public service for those wanting to know more about dispute resolution including standard agreements to mediate, protocols for mediation, professional standards of conduct and suitable people for selection as mediators.

If you would like to know more about mediation, or how to become a qualified mediator, then please contact the AMINZ office at P O Box 1477, Wellington, Telephone 04 4999 384, Facsimile 04 4999 387, email institute@aminz.org.nz or website www.aminz.org.nz