Speech to Arbitrators and Mediators Institute of NZ, by Environment Commissioner Anne Leijnen

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1. Introduction to Environment Court Commissioners

The Environment Court is a single national Court, which has three Registries: Auckland, Wellington and Christchurch. As a circuit Court it is required to conduct its business as near to the locality of the subject matter as is convenient unless the parties otherwise agree. So although the Court has administrative offices in the three Registries it travels throughout the Country. This is the same for Court assisted mediations, which I will come to shortly.

The Court is a specialist court and as such, sits outside the pyramid for courts of general jurisdiction. Appeals from the Environment Court can be made (on a point of a law only) to the High Court.

Most of the Court's work involves issues arising under the Resource Management Act, largely dealing with appeals about the contents of regional and district statements and plans; and appeals arising out of applications for resource consent. The consents applied for may be for a land use, for a subdivision, a coastal permit, a water permit, a discharge permit, or a combination of these.

The Court is made up of Environment Judges and Environment Commissioners. Commissioners have knowledge and experience in areas such as local government, resource management, environmental science and the Treaty of Waitangi. An Environment Court sitting usually consists of one Environment Judge and generally two Environment Commissioners.

Part of the fun of the job if you like, is the huge variety of work and the fact that this court is required to look into the future. This is somewhat unusual in legal decision-making, which generally revolves around things that have happened.

In our decisions we are asked to make value judgements based on facts, the applicable law, risk predictions - assessing probabilities of likely adverse effects and their consequences. There is an overall assessment/balancing that forms the judgement. The composition of the Court is particularly helpful when this type of judgement is required.

Also Commissioners can take on a sole hearing role if the Principal Environment Judge authorises a Commissioner(s) to hear and decide proceedings.

2. Mediation in the context of Environment Court work.

a. Why does the Environment Court involve itself with mediation?

ADR through mediation is specifically included in the RMA. It provides for conflicts to be addressed *informally* through mediation as a way of reducing or avoiding unnecessary litigation. All parties to proceedings before the Environment Court are entitled to take the option of mediation in the first instance.

b. When does the mediation take place?

Nowadays, the Judges tend to direct the parties to mediate or at least consider mediation as a preliminary step to addressing an appeal. The option is voluntary but a little direction from the Judge does go a long way!

c. Where do these mediations take place?

Each registry has mediation facilities. The Auckland Registry has one dedicated mediation suite which is well equipped with break out rooms. It is not large so other venues are found if there are a large number of parties. Generally we can accommodate about 6 to10 parties depending on how many people each party brings along.

We are provided with technology to make the job easier – in the form of a smart board and wireless technology.

However, many cases are mediated locally, which requires the Commissioner to travel to the parties. So we find ourselves mediating in motel meeting rooms, hotels, village halls and for example, in the case of Thames recently the St John's Ambulance meeting room. The objective is to find neutral ground. We do travel with an overhead projector and laptop, which assists in local situations.

d. Court Practice Note

The Court has a Practice Note that is updated from time to time. It amongst other things, provides the guidelines for Court assisted mediation.

3. The character of our mediations:

I will discuss the most frequent areas of our mediation work. There are also mediations around Public Works matters but these are less common. The three most common types of mediations are: those pertaining to *Plans* and *Plan Changes*, those relating to *Resource Consents* and lastly those relating to *enforcement*.

a. Plan changes

Plan changes (e.g.: to District Plans and Regional Plans), are regulatory instruments promulgated under the RMA which guide sustainable management of resources in accordance with the Acts purpose. Their introduction must follow a public notification phase which provides for the lodgement of submissions in support or opposition which then leads to formal hearings and decision making at the Council level. There is then an appeal right from that decision to the Environment Court.

Plan Changes are generally map based (i.e. zones or other forms of overlay and locational identification). They involve objective and policy statements of intent and then the rules to deliver these statements. So there are many parts to a single plan change that might attract a submission.

Management of these types of appeals for mediation is complex. The technical skills and experience of the Commissioner as a member of the Court comes into play.

In addition to mediation training, new Commissioners are *buddied up* and more complex mediations may be co-mediated.

Plan Change appeals can involve a large number of parties. Careful management of the mediation process is critical to successful outcomes in these types of appeals. We have found that a significant proportion of appeals on Plan Change and Plan reviews are resolved through mediation.

b. Resource consents

Resource consent applications are both large and small; simple and complex.

Generally speaking there is a more focused group involved in a resource consent appeal. There is the proponent and the submitters opposing it. The Council is also present in defence of its decision.

Hearings before the Environment Court are de novo (which means “anew” or starting over). This means that the Court may hear evidence that the Council did not receive.

By the time a matter proceeds to appeal some parties may have up skilled in terms of their presentation of their case and brought in expert assistance that they did not have at the Council hearing.

They may also have modified their position on the basis of information they have learnt from the first instance hearing. So the parties' positions may have evolved through the process.

The role of the mediator at the outset can be quite administrative in extracting the issues and then sorting out the order for consideration, as there will be some parties who have a single and simple issue and others that are involved in a more complex manner covering a number of issues.

In a way, resource consent appeals are more likely to be resolved through mediation than plan changes because refinements through agreement and conditions can be added to a consent agreed between the parties to resolve issues.

There can be side agreements (Memorandum of Understanding) which might not appear in the Consent Order document but which resolve the appeal. These fall outside the tools available under the RMA, but serve to resolve an issue to the parties' satisfaction. These memorandums are confidential. The consent order is the only public document and is the document that is eventually put before the Judge to settle an appeal.

I should mention that while parties may agree a settlement this still must be put before a Judge for approval. In most cases this is straight forward but in the odd case, the Judge may not approve a settlement agreement if it is not consistent with the purposes and principles of the the RMA.

For example, the Judge might be concerned if a consent order deals with part of a wider issue, the outcome of which is still subject to another appeal and the consent order would have a material impact upon the other appeal. In that case, the Judge is likely to put the consent order on hold. There are also examples where the agreement reached by the parties may not be lawful under the RMA or authorised by it.

Thus the outcome of mediation even if all the parties agree, is technically not a forgone conclusion. The mediator needs to be cognisant of this issue in overseeing the parties formulating their agreement.

c. Enforcement.

The third area of the Courts work that leads to mediation is the area of enforcement.

Prosecutions are almost always brought by Council's / Local Authorities although it is possible for individuals to bring a prosecution. A significant number relate to the agricultural sector concerning illegal discharges to land or water. Others for example, concern the illegal use of land or buildings such as buildings being used for residential purposes that have not been approved for that purpose. These types of cases tend only to involve a couple of parties (the Council and the defendant) and in many instances an agreement can be reached at mediation. This usually involves a timetabled plan of action and this sees the parties agree a satisfactory outcome.

4. Parties:

As I have alluded to, a wide range of parties and people with a range of skills are involved in our mediations. Very often parties will bring their experts with them (e.g. Traffic Engineer, noise expert, Planner and Lawyer). The Council / Local Authority is always present and usually represented by a lawyer as well as technical staff.

Commercial interests or Companies are often the proponents of a development. It used to be common that there would be opposing commercial interests participating in appeals. The legislation now prevents trade competitors to engage at least on trade competition grounds. This has had some impact on the *supermarket* and *service station* wars.

The third category of participant are individuals / lay people.

Lay people, often the neighbours to a development project (for instance a wind farm, quarry or just a residential project where consent is required) are generally less empowered at a mediation. Due to costs, many people prefer to represent themselves.

In the case of the larger project for instance, there can be several 100 submitters and mediation assists in managing those submitters to focus their areas of concern. Focused issues often lead to changes in the project that will satisfy submitters.

At the very least the mediation can focus areas of concern and evidence requirement towards a hearing. This ensures parties can focus on getting the correct technical expertise on board and avoid a scattergun approach to

preparation for a hearing. The benefits are obvious in terms of both time and cost savings.

Iwi

The Treaty has a special place in the RMA including obligations to consult.

Maori and their culture and traditions etc. are considered nationally important.

Section 6 of the RMA

> ***6 Matters of national importance***
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> *(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.*

And other sections relating to the purposes and principles of the Act include:

> ***7 Other matters***
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*
> *(a) Kaitiakitanga:*
> *[(aa) The ethic of stewardship:]*
>
> ***8 Treaty of Waitangi***
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

Mediations including iwi will, in accordance with tikanga Maori usually begin and end with a karakia (prayer) and may involve a welcome mihi (speech of greeting). It is my experience that the mediation accommodating these traditions provides a very helpful environment for open and safe discussion.

Mediations including iwi can often involve a large number of people representing a single group or different hapu from a single iwi. Management of these kinds of mediations takes time as people work through their issues. I find that these are the mediations where people often talk past each other. Co-mediation can assist in this type of large mediation.

5. A little of an inside view:

Plan Change mediation:

As I have said, much of our mediation work revolves around plan changes. These are generally Council initiatives, reviewing rules and district and regional plan provisions either as issues arise or as required by statute.

Some are fairly focused being a tweak here and there; and others are wholesale changes to a whole plan (review) or a whole part of the Plan – for instance the provision for subdivision in the rural zones in Franklin.

Due to the complex nature of plan changes they can require more than one mediation and involve many parties with a variety of interests.

The first job of the mediator is to get some order and method for mediation. Remembering that if an Environment Court mediator mediates an appeal they are generally precluded from sitting should the matter go to hearing. So we can't just throw people at the problem because this will reduce our pool of Commissioners– it will generally require careful management of a single Commissioner. Such management is also beneficial in maintaining a single overview as mediations progress. It should be remembered that the mediations are confidential so the Judge is hands off during this process and Commissioners take on a closer management role.

The Court is getting better, with cooperation from Councils, at organising appeals of this kind into topics, which provides the first cut attempt at some order.

Thus we employ a topic approach and set a clear agenda. If we can, we ask parties to agree an agenda beforehand to make the best use of time but with larger groups this may not be possible.

I am not sure how familiar people are with the RMA but the Plans, which are generated under it, provide guidance through maps, objectives, policies and then rules.

Thus mediation of plan changes tends to adopt a top down approach – get the Os and Ps right and hopefully resolution of the rules is made simpler.

Thus the tools of the trade require visual material. As I have mentioned we employ a *smart board* in the Auckland mediation suite that hooks up to a computer. Parties can then put material up for all to see. The smart board allows drawing over say a map with an electronic marker and this can be printed off as a single image. These tools are really helpful. Our goal is to get the agreement documented and signed there and then. The material generated via the smart board can be appended to an agreement.

As you can imagine, the successful mediation does rely on the knowledge of the mediator in this arena particularly with regard to process and knowledge of the Court practice.

We get parties who are familiar with mediation (i.e. regular players) such as Federated Farmers, The Environmental Defence Society, and Horticulture NZ. There are also lay people and community groups. Thus there are power imbalances that we must deal with and the dynamics can be rather interesting. Keeping the playing field fair for all can be a challenge!

From what we can tell, (and our tracking system is not ideal) more than half of plan change appeal topics are resolved through mediation. Often there is also a falling away of topics because one resolution might mean that other matters no longer need to be pursued.

The result then if anything is left unresolved, is a focused set of topics which can be set down for a hearing.

Lessons learnt:

Timeliness

A firm hand is required to keep parties on pace with mediations. The process can be used to procrastinate and that is inappropriate and costly to parties.

Our mediation work is derived from an appeal being lodged with the Court. Thus mediation can impact upon the timeliness of consideration of an appeal.

There has been much Press recently criticising the length of time appeals take to be dealt with by the Court. In my opinion this criticism is mostly misdirected.

In my experience the cases which take a long time to resolve are usually the complex Plan Change cases where there are many parties and many topics. Here the preference as a first step, has been for the parties to try and resolve matters where possible.

The process of negotiation (entered into voluntarily) including mediation, takes place *after* the lodgement of the appeal(s). It can take time. It is generally at the request of the parties that things are prolonged as they ask the Court to defer the setting of a hearing date while they work through their issues. There are a few (now largely historical) instances where this process has been known to take years.

There are also instances of cases which have been essentially *on hold* while further studies are undertaken by either the Council or a proponent of a

development. Such studies have been deemed necessary by the parties to satisfy a gap in information upon which they might rely to potentially resolve an issue.

The Court is not blind to the potential for procrastination in these cases and has developed practices to track appeal progress more closely and to keep a firm hand on the tiller. If things do look to be getting out of hand the Judge has the means to bring the matter to hearing.

ADR is enabled through the provisions of s268 of the RMA for *the purpose of encouraging settlement*. There is a judgement to be made at times as to whether this outcome is likely to be realistic. The point I wish to make however is, that much of the delay is caused by the parties.

Therefore it is not an accurate reflection of Court time spent on an appeal to simply measure from the date of lodgement of an appeal to the date of the Court decision.

What should be borne in mind is that it is only a very small percentage of cases that are referred on to the Court after a Council decision (approx 1.5% of all of - decisions – of which approx 17% proceed to hearing based on the last 7 year figures). Of that more than half settle through mediation. Thus the few that do go through to be determined by the Court are generally complex and often high profile.

When a matter proceeds to a Court hearing the actual delay from conclusion of hearing to issue of decision is generally about 3 months.

We are continually reviewing how we can manage the process better and keep the parties moving.

Honesty

In addition to the required formal communications with the Court as to mediation outcome, it is important to keep the mediator in the loop. This keeps people honest and keeps the pressure on to meet an agreed timetable.

Timetables and task allocation are imperative outcomes of our mediations. As I have indicated, often there are tasks to be completed that will lead to settlement. If the mediator is included in the communications between the parties and the Court then the parties are kept honest.

Authority to settle

Authority to settle at mediation is one of the big issues for us. Some parties (e.g.: large corporate, Councils, iwi), will send a representative to act on their behalf at a mediation.

That person has authority to represent for the purposes of mediation but not to settle – or to agree an outcome. This means in the case of a Council for instance, they need to take a settlement proposal back to a standing committee to have it approved.

Several issues arise when this occurs:

- This will lead to the decision to settle being asked of persons not present at the mediation and not party to the discussions which have taken place through the mediation.
- An agreement made in good faith at mediation can disintegrate when the persons required to provide the authority decide against the proposal agreed at mediation.
- When an agreed outcome collapses and the matter proceeds to hearing the result is a significant waste of resources/ costs on behalf of the other parties participating in the process – or there are further costs incurred through the need for a reconvened mediation.
- The process prolongs the period when the appeal waits around pending outcome or direction to a hearing.

We are working to improve representation at the mediation and have recently canvassed our community in consideration of an amendment to the practice note to tighten the requirements for persons with appropriate authority to be present at the mediation.

6. Times are changing.

I am aware that the government is rethinking both matters concerning the focus of the RMA itself, and matters concerning our mediation work. They are also considering what kind of appeals might be directed to the Court.

This rethink may result in making parties participate in mediation as a first step on a compulsory basis. This concept has been considered for some time. However, there are instances where mediation is just not a realistic option so it could introduce an unnecessary delay and cost to parties. I should say that in pretty much all cases before the Court the parties are encouraged to mediate. The encouragement of a Judge does generally result in mediation being followed and anecdotal feedback has been positive with the process.

7. Conclusion

The mediation scheme offered by the Court, in the sense of encouraging resolution through ADR, is working. It is difficult to quantify the value in $ terms

but it seems obvious that resolution through mediation must be less costly to participants than a fully fledged court hearing with the preparation of witness evidence, and the hearing itself. Even in the case where mediation has failed it nearly always succeeds in defining the issues and thus limiting the scope of evidence and matters that proceed to a hearing and benefits the parties through cost reduction and efficiency and in turn benefits the community.