EFFECTIVE MEDIATION

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An address for a one day workshop arranged by the Environmental Defence Society on Saturday 29 October 2011 at the Headingly Centre, Nelson.

Thank you for inviting me to talk to you about mediation. I cannot claim to be the world's best mediator and there are many other Environment Commissioners who have more experience than me. Nevertheless I have had the benefit of training, discussions on the topic with my colleagues and probably 20 – 30 mediations, maybe more. So I will try to bring the results of this experience to bear in what I have to say.

I am also pleased to be able to contribute to this worthwhile workshop organised by the Environmental Defence Society. I first encountered EDS in 1972 in Hamilton. They challenged a water right issued for the proposed Huntly Power Station. I was the author of the resource consent as it is known these days and we locked horns before the Planning Tribunal presided over by Judge Turner. David Williams and Mike Holm led the charge supported by a bunch of planners and university types from Auckland. It was a memorable experience and I remember it didn't seem to worry them that the electricity to be generated was needed mostly for Auckland.

Mediation is a voluntary process for parties in dispute to sort out a solution in the presence of a facilitator.

Let's first consider some thoughts on conflict:

One can't go straight from intense conflict to resolution. A pathway is needed.
Conflict means a party is not ready to give something up. Willingness is needed.
To begin anew one needs to know the present position.
If one is listened to they experience empowerment.
People in conflict go into stereotypes, take thin positions, show no vulnerability and defend their identity.
The aim is to improve relationships rather than resolve the conflict.

I have borrowed these from a course on conflict resolution by LEADR.

Mediation in Environment Court proceedings is based on section 268 of the Resource Management Act.

It is a section that is short and to the point, unlike some other provisions in the Act.

The Court with the consent of the parties can get one of its members to conduct a mediation to facilitate a resolution.

Other similar processes such as expert caucusing may also be undertaken.
Collectively they are referred to as alternative dispute resolution processes.

It is a practice of Environment Court Judges to include a mediation stage in the case management of most appeals made to the Court.

But it is not compulsory and a party can refuse to agree to a mediation meeting.

That would not count against the party in a subsequent hearing before the Court or in any assessment of costs.

Mediation is a voluntary process aimed at seeking a resolution of the matters under dispute.

Sometimes that is not achieved but then a mediation usually will identify the particular issues outstanding between the parties and those that are not in dispute.

The result is either resolution without the need for a Court hearing or a Court hearing that is focussed on just the outstanding issues.

The Environment Court invites the parties to take part in a mediation. If they agree the Court will issue to all the parties a Notice of Mediation that states the place and time for the mediation. The Court will also appoint an Environment Commissioner to conduct the mediation.

Environment Commissioners are trained to conduct mediations. Their role is not to settle arguments but to facilitate the parties to settle or at least identify the particular issues that are agreed and those that keep them apart.

The process that usually occurs is that there is a fair head of steam present at the beginning and initial discussion is wide ranging. That is to be encouraged but without over-talking one another or being rude. The issues emerge and the discussion widens. Each party in turn is given a chance to state their concerns and that opportunity is repeated until all the issues are identified.

Then each of the issues is considered to see if some solution is possible. It might mean some design modification, a compensatory action or an acceptance, after explanation, that the concern is satisfied. Or it might remain in dispute.

The areas of dispute and discussion narrow down during this process. A focus emerges on the fundamental outstanding issues.

At this stage a party might want to meet privately to review the matters outstanding and adjust their position. That is encouraged and the Environment Commissioner will offer to contribute to that private discussion. Any outcome reached can be brought back to the mediation by the party – the Environment Commissioner will not report any discussion back.

And so the process continues until either the issues are settled or some are settled and some remain for determination by the Environment Court.

Matters discussed during a mediation are confidential to the parties. Only the outcome from a mediation can be reported to the Environment Court. It will not

accept any comment, document prepared for the mediation or other information prepared specifically for the mediation other than the agreed outcome.

This confidentiality is important for the process. It means a party can make offers or suggestions aimed at resolving the matters without fear of being saddled with them later if they do not prove to be acceptable. A party cannot come along to the Environment Court later and say a party in mediation offered such and such a solution but now will not.

Confidentiality is enforceable in most situations but I make it a practice to ask the parties to agree that what is said in mediation stays in the room; that there is no media reporting and the only outcome is any that is finally agreed between the parties.

That outcome can be of two forms.

If agreement on all matters is reached then a Consent Memorandum is drawn up either at the mediation or afterwards by one of the counsel present, often for the Council involved. Once the wording of that is agreed by all the parties and signed off it is sent to the Environment Court requesting that a Consent Order be made.

That then modifies the resource consent or plan change in accordance with the agreed Consent Memorandum. In considering a consent order the Court will ensure that the result conforms to the requirements of the Resource Management Act.

The outcome may also include an agreement between the parties that does not require action by the Environment Court. It becomes in effect a contract between the parties. It is a side agreement and can cover any matter that parties decide to address.

The other form of outcome occurs when some matters are settled and others are not. In this case an agreed statement signed by the parties is presented to the Environment Court. It usually states the matters on which agreement is reached and those not agreed. Again it is often counsel for the Council who prepares the paperwork.

In this case the statement is received by the Court at the hearing which then concentrates on the matters that are still unresolved.

On reasonably rare occasions there may be no outcome from a mediation.

In these later two cases the Environment Court will set the matter down for hearing and a Notice of Hearing will be issued to the parties.

A mediation may require more than one meeting. Some issues or options might require further investigation or design. In that case a timetable is agreed between the parties and milestones established including the future mediation date for which a new Notice of Mediation will often be issued. It is over to the parties to stick to the timetable – the Environment Court does not manage that.

To make mediation successful the parties need to enter the process hopeful for a solution.

It is certainly much less expensive than preparing for a court argument, with witness expenses, legal costs and the risk of an award of costs by the Court. I have on one occasion, when a party got so frustrated that they prepared to walk out, reminded them that at the mediation they were in a canvas tent but the next step would be a gold tent! Funnily enough they returned to the table and a little while later reached agreement.

It is a process that also offers opportunity for a wider range of solutions than are possible in a Court decision. Side agreements between parties are always available and they can cover matters not relevant under the Act but of particular interest to the parties. They do not require consideration by the Court.

Parties to a mediation need to come well prepared to argue their point of view but with authority to yield to some matters and to insist on others.

They can represent themselves and often do. They can bring supporters within reason and who can contribute and they can bring an expert or two and even their counsel.

Lawyers coming with their clients need to remember they are in a mediation. Their usual duty to their clients needs to be tempered by the objective of the parties to a mediation, which is to seek a solution often involving compromise. I have found lawyers with that attitude greatly assist the process. The Environment Commissioner presiding will ensure a fair informal hearing without one party dominating.

If one party does not have authority to agree to suggested solutions then the other party becomes reluctant to offer solutions and the process is impaired.

At the beginning of a mediation the Environment Commissioner will usually ask each of the parties if they have authority to settle and what the limits, if any, are to that authority. Sometimes officers from the Council need to check with say the chairman of the planning committee in which case that should be possible by telephone at the appropriate time during a mediation.

When preparing for a mediation the registrar will ask the parties how many people are expected to come and if particular technical matters are to be debated, including any experts that are to attend. If experts are required for particular issues it is important that all the parties know that, and can bring an expert of their own if they wish. Sometimes if an expert attends alone the debate in the mediation can be stymied with little progress.

That brings me on to mention another form of dispute resolution; a caucus of experts.

This not a mediation but a meeting between the experts in a field that are to be called by the parties to give expert evidence to the Environment Court. Sometimes the meeting is chaired by an Environment Commissioner. These experts are not there to advocate for the party that is calling them. They must address the issues each as an independent expert. The result is a statement from them that lists the issues they agree are relevant, those that they agree about, those that they disagree about and the brief reasons for the disagreement.

The outcome of an experts caucus can affect the way a mediation might proceed although more often expert caucusing occurs after periods of mediation when full agreement has not been reached.

A mediation is successful when it achieves an agreed outcome that avoids the need for a Court hearing, especially at its first or second sitting. It is still successful when it settles some of the issues and narrows the outstanding matters that need to be decided by the Environment Court. Even when no agreement is reached a mediation often permits a frank discussion between the parties in a supervised and structured forum and helps make the evidence to a subsequent Court hearing more focussed.

In 2009/10 the Environment Court held 516 mediations. 60% reached agreement in full or in part while 13% were vacated or did not reach an agreement.

The Court's investment in mediations in that year totalled close to $1M. That cost included venue, travel and staff costs. It is a service offered by the Court in the belief that the savings in Court time and the parties costs are well made. It is also a process that allows the parties a chance to sort out their differences themselves with a wide range of options rather than having a decision imposed on them by the Court within the constraints of the legal provisions.

I was given the subject of effective mediation so I suppose I should offer some comment on making a mediation effective.

Firstly of course is the dispute itself. If the parties are truly fixated and polarised the best course maybe to proceed to a hearing and get the Court to rule. It is an all or nothing approach with a winner and a loser. The decision identifies the fallacy in the losers position.

Or it might be a legal argument primarily in which case the Court is the place to go.

So a mediation attempt in these cases is unlikely to be effective.

But there would be few other examples of Environment Court disputes that are inherently unsuitable for mediation.

There are probably five bits in a mediation; the party promoting something, the party opposing it, the respondent council, the mediator and the process.

Each can make or break a mediation.

Primarily a mediation is voluntary so the intentions, manners and openness of the parties predominate. They control how effective a mediation might be. Solutions to a dispute require compromise. Seldom is one party completely right. The trick is to determine accurately the issues in dispute and then to seek a position on each issue that the parties could live with even though it might not be their preferred position.

How much compromise by each party is it worth to avoid the next step?
If I hold out am I likely to win the next time?
Are there side agreements possible that wont be available in the next step?

What altered design could I accept?
What are my costs if I have to go to the next step?
Are there conditions possible that relieve the impacts?
Are there steps that could be offered that might soften the opposition?

These are some of the reality checks that need to be addressed by the parties during a mediation. Often the Environment Commissioner will use them to coerce some movement towards agreement.

An Environment Commissioner has been trained to help the accurate definition of the issues, their subsequent consideration and to encourage objective consideration by the parties. A full and fair opportunity to express and discuss the issues and possible solutions is the aim of the commissioner.

The way this is undertaken obviously has an important effect on the effectiveness of the mediation. A light hand on the tiller, sails trimmed and running nicely before the breeze will give a smooth journey and when the odd gust comes through a firm hand to keep stability and course is needed.

Then there is the process; informal, orderly, fair, not threatening, constructive with timely reality checks. Sometimes the initial stages seem to get broader and broader with some despairing that a solution will ever emerge. That is the time when the issues and feelings, some underlying, are identified. After that is completed the process becomes rather more focussed being able to deal with the matters that have arisen. Reality checks on each of these can help to find solutions that can be accepted.

Two good reference places for mediation practice are to be found in a publication produced by MfE called “You, Mediation and the Environment Court (An Everyday Guide to the RMA)”, and in the Environment Court Practice Note “Mediation protocol: Court-assisted mediations” to be found on the Court’s website.

Thank you for this opportunity to introduce a discussion on mediation.