PUBLIC PARTICIPATION UNDER THE RESOURCE MANAGEMENT ACT 1991

THE MANAGEMENT OF CONFLICT

Office of the
PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT
Te Kaitiaki Taiao a Te Whare Pāremata

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PREFACE

The Resource Management Act 1991 ushered in a new era in which it was expected that the public would have a far greater say in decisions affecting the environment. The reality has been somewhat different.

I have been increasingly concerned to be told by members of the public of the barriers they encounter and the disincentives they face in participating in the statutory planning process. Many members of the public believe they have inadequate information, and inadequate time to evaluate information. They are also concerned about the potentially high costs of litigation. Disincentives to participate in council hearings include an imbalance in the way information is presented, adversarial approaches and unfriendly attitudes and venues. Local government on the other hand is faced with a public with little knowledge of the Resource Management Act. This may result in submissions which are not well focussed and which waste council time. Many councils are also concerned about the potentially high costs they may face if their decisions are referred to the Environment Court.

While recognising that the option of litigation must remain available to members of the public, there is a growing impetus in New Zealand and in other jurisdictions to develop alternatives to litigation through conflict management procedures such as mediation. Some councils have begun to develop these initiatives with a high degree of success. However conflict management procedures have in general not been given a high priority by local government. This is partly due to a lack of guidance. There is an urgent need to provide suitable guidelines for all local government and to encourage formal mediation training for chairpersons of pre-hearing meetings.

Councils should regard the use of conflict management techniques as a wise investment. These techniques can: increase cost effectiveness, improve relationships between councils and their residents and ratepayers, and assist the public to participate effectively in the planning process.

This report identifies a number of actions councils can take now. By improving public awareness of the Resource Management Act and ensuring that good information on environmental effects and their mitigation is made available, local government will improve public participation in environmental decision making. It will also assist in building trust between a council and members of the public.

Helen R. Hughes

Helen R Hughes
Parliamentary Commissioner for the Environment.

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1 INTRODUCTION

1.1 Background to the investigation

In February 1996, the Parliamentary Commissioner for the Environment (PCE) released a discussion document, *Public participation in environmental decision making* (see Appendix 1). The paper was released in response to a wide range of complaints and information about the ability of tangata whenua and the public in general to participate in public authority decision-making under various environmental statutes. The PCE's paper sought to clarify:

1. The nature and extent of problems faced by the tangata whenua and the public in participating in environmental decision-making;

2. The most appropriate area for an investigation;

3. Terms of reference for an investigation.

Over 120 responses to the paper were received. These helped to identify a range of barriers faced by the public in participating in environmental decision-making. More information about the responses and a summary of the views expressed is contained in Appendix 2.

Almost all submitters' concerns focused on participation within the decision-making framework of the Resource Management Act 1991 (RMA). These concerns broadly fall into four areas:

- the public's lack of awareness of RMA procedures and failure to recognise the importance of becoming involved as early as possible in the planning process;
- inappropriate council management of decision-making processes (including pre-hearing meetings and hearings which are not user-friendly);
- lack of resources (people, skills, funding) for the public to participate;
- the nature of statutory procedures (including time available and the adversarial nature of hearings).

Initiatives outlined by some submitters suggest that many of the barriers faced by the public could be overcome through good practice by councils, including:

- improved consultation methods;
- better training of councillors and staff in RMA procedures;
- better, and more "user friendly" management of hearings;
- funding of community advocates; and

- the development of guidelines for choosing whether to notify consent applications. (The PCE notes that the Ministry for the Environment has commenced further research into council practice of notifying consent applications under s 94 of the RMA.)

The respondents also raised questions about matters relating to the resolution of resource management disputes, including:

- the extent to which the RMA encourages parties to seek solutions to environmental disputes themselves rather than to seek resolution in the courts;
- the extent to which the use of informal procedures by councils (such as pre-hearing meetings) ensures that full information is shared in good faith by parties to decisions;
- the extent to which the use of such procedures assists in redressing any "imbalance of power" between parties, such as disparity of access to technical and other information;
- the kinds of dispute resolution procedures which are appropriate to different circumstances;
- who funds dispute resolution processes;
- the extent to which such procedures encourage sound environmental decisions.

The above factors largely relate to the provision and use of formal and informal dispute resolution methods to overcome barriers to public participation in RMA decision-making. In the PCE's view, the contribution of alternative dispute resolution procedures (ie non-judicial procedures) to decision-making under the RMA, including their use to overcome barriers to participation, warranted further investigation.

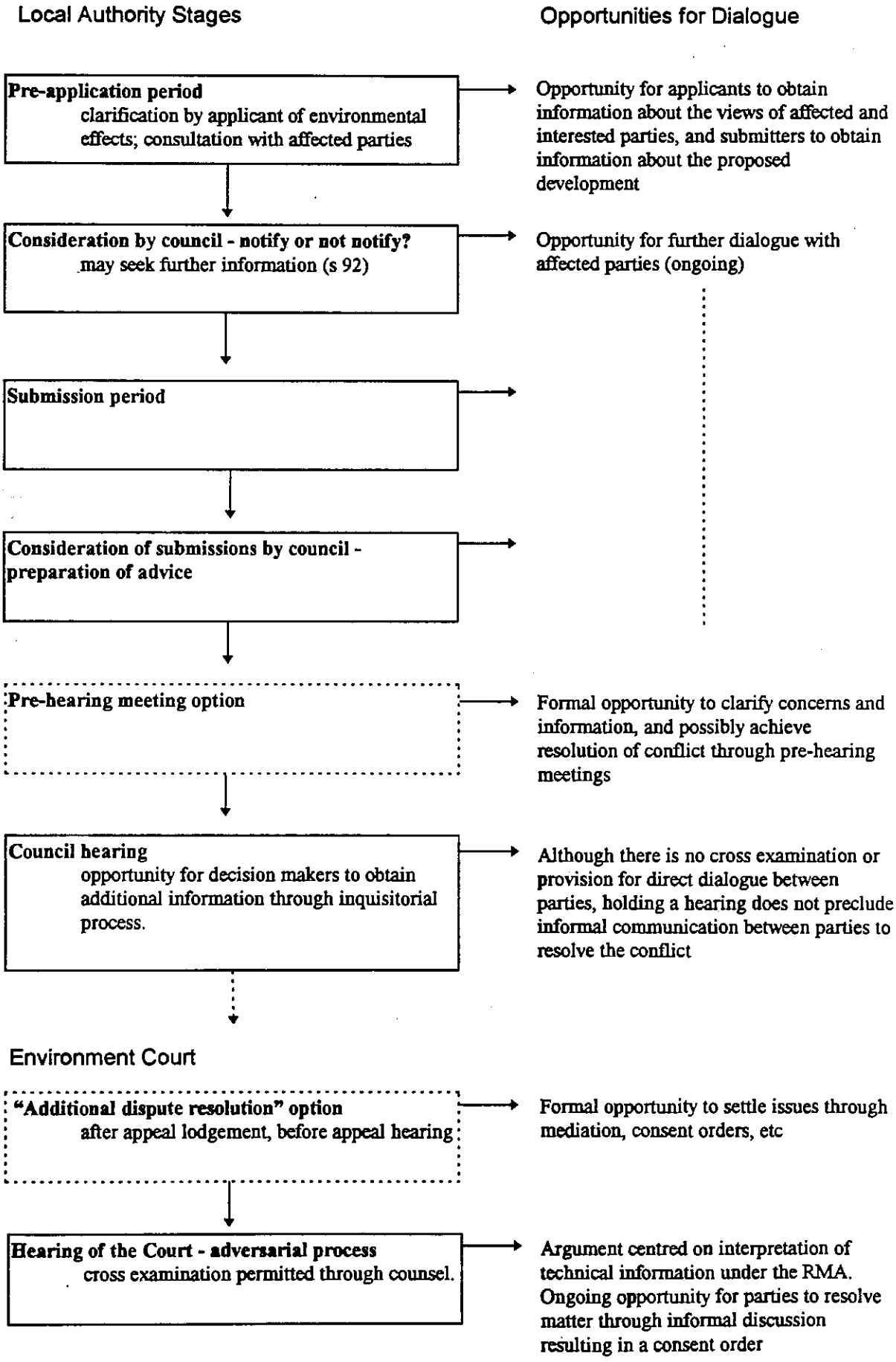
While the focus of this investigation is on conflict management in the resource consent process, the conclusions drawn should be useful in the context of policy development where public participation is also a significant factor.

1.2 Dispute resolution under the Resource Management Act 1991

Decision-making under the RMA involves a series of "public participation steps", some optional, some mandatory (see Figure 1.1). Each step represents an opportunity for information to be provided to the decision-making process and for potential conflicts to be avoided or resolved, either by the parties involved (with or without the involvement of a third party) or by a consent authority or the Environment Court.[1] In the RMA, non-judicial methods of resolving disputes over consent applications are provided for as a means of

[1] The Planning Tribunal was renamed the Environment Court as of 2/9/96 by s 6 of the Resource Management Amendment Act 1996. The term "Environment Court" is used throughout this report.

Figure 1.1 Opportunities for dialogue in the consent decision process



assisting interested parties to identify issues of concern and, where possible, to seek solutions. These provisions include pre-hearing meetings called by councils (s 99) and additional dispute resolution by the Environment Court (s 268).

Most of the regional councils and some of the territorial authorities that responded to the PCE's discussion document claimed to have had some success in the use of pre-hearing meetings, indicating that they can be a useful way of addressing issues to the satisfaction of all parties. For example, one company confirmed that the Canterbury Regional Council makes extensive use of pre-hearing meetings to good effect and the Taranaki Regional Council states that it has great success in the use of pre-hearing meetings. Some territorial authorities, for example the Gore District Council, identified examples of the successful use of pre-hearing meetings. Despite this indication that the use of pre-hearing meetings is resulting in some successful outcomes, the Ministry for the Environment noted in its response to the discussion paper that, as yet, their use is not common practice.

Given the benefits that are assumed to result from greater use of non-judicial dispute resolution mechanisms, including pre-hearing meetings, the question arises as to why these methods are not being used more extensively.

Some territorial authorities identified the following problems in the use of pre-hearing meetings:

- costs to council of pre-hearing meetings and facilitation;
- pre-hearing meetings can be hijacked;
- time and resource constraints generally preclude much effort going into alternative means of resolving disagreements;
- the presence of lawyers at pre-hearing meetings can hinder free discussion;
- intransigence on the part of some submitters.

Comments from members of the public included:

- independent facilitation is necessary for pre-hearing meetings;
- parties seem reluctant to agree to anything, so a pre-hearing meeting is a waste of time;
- problems arise where there are a large number of submitters or where there is a reluctance to attend because of suspicion about the applicant's motives.

National and local interest groups expressed some reservations about the use of pre-hearing meetings and raised the following additional concerns:

- applicants can bring an overwhelming level of expertise;

- difficulties in managing large numbers of vocal people;
- the need for a good facilitator.

Other submitters suggested that some issues cannot be resolved by using non-judicial dispute resolution processes. These could include cases where a precedent is necessary in order to clarify the law, or where a matter is of such public interest that compromise is not considered to be appropriate. Such issues are considered in Chapter 4 of this report.

1.3 Terms of Reference

With the purpose of clarifying the potential contribution that alternative dispute resolution methods can make to decision-making under the Resource Management Act 1991, the terms of reference for this investigation are:

1. To identify factors necessary for the successful use of such methods under the Act by drawing on both New Zealand and overseas experience;

2. To provide advice on remedial action as appropriate;

3. To report to the House of Representatives on the findings of the investigation before 20 December 1996.

1.4 Methodology

The investigation team conducted interviews with staff of the following six councils: Auckland Regional Council; Manukau City Council; Taranaki Regional Council; New Plymouth District Council; Wellington City Council; and South Wairarapa District Council. Interviews were also conducted with a range of interested parties including resource consent applicants and submitters, tangata whenua groups, local and national interest groups, individuals and companies (see Appendix 3).

Interviews with interested parties covered their perspective and experiences of council management of pre-hearing meetings. Interviews were also held with members of the Environment Court.

To complement the more detailed information obtained about council practice, the investigation team also drew upon information available about overseas experience in the use of alternative methods of resolving disputes. Use was also made of the material accumulated by the office on the PCE's involvement with, and experience of, resource management conflicts.

1.5 Terminology

In the course of the investigation, it became apparent that the use of the term "dispute resolution" was not the most appropriate in the New Zealand environmental context. Much of the overseas and New Zealand literature refers to "dispute resolution" or particularly to "mediation" so these terms will be used when discussing or citing such literature, however, the term "conflict management" is considered to be more apt. The distinction between dispute resolution and conflict management is discussed in more detail in Chapter 2.1 and Appendix 5, however, for the purpose of clarification some terminology as used in this report is briefly explained below.

Dispute resolution: the generic term for all methods of attempting to resolve disputes from consultation to litigation, whether or not resolution is actually achieved.

Alternative dispute resolution or ADR: those third party-assisted mechanisms employed to resolve a dispute, but not including litigation. Also referred to as **non-judicial dispute resolution**.

Conflict management: broader than alternative dispute resolution, but again not including litigation. Includes non-facilitated information sharing as well as those situations where the parties may not be able to make the final decision, as this rests with a judicial or quasi-judicial body that may or may not endorse the agreement made by the parties. Examples are pre-application consultation, pre-hearing meetings (s 99 RMA) and additional dispute resolution (s 268 RMA).

Mediation: one form of conflict management in which parties come together with an independent person of their choice to communicate, with a view to reaching their own settlement, or until an impasse occurs. The mediator helps to dispel antagonism, clarify issues, explore alternatives and solutions, and facilitate discussion, but does not advise the parties.

The nature of some other conflict management mechanisms are also set out and discussed in Appendix 5.

Throughout this report, the word "council" is used to refer to regional councils, territorial authorities and/or unitary authorities in all their roles, including as processors of resource consents and consent authorities (see Chapter 2.4).

2 LEGAL CONTEXT

2.1 Environmental disputes in New Zealand: characteristics and causes

2.1.1 Environmental disputes

The purpose of the Resource Management Act 1991 (RMA) is to promote the sustainable management of natural and physical resources. Natural and physical resources constitute one aspect of the "environment" as that term is defined in the Act. The definition of "environment" in s 2 of the RMA is very broad:

> 'Environment' includes–
>
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) Natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic and cultural conditions affecting the matters stated in paragraphs (a) to (c)...

Thus, environmental disputes in New Zealand can include disputes relating to a range of environments, including the built and urban environment, and both public and private disputes. Environmental disputes range from those where few people are directly affected by the activity proposed or undertaken to those where the level of effects of an activity are significant enough to be of public interest. In this chapter, the term "environmental dispute" is restricted to disputes which affect the public interest.

Roberts summarises Susskind and Weinstein's[2] four major characteristics of environmental disputes as follows:

(a) Irreversible ecological effects may be involved;
(b) The nature, boundaries, participants and costs are often indeterminate (the nature and boundaries of the dispute may be fluid, the issues may be scientific or values-based, multiple parties are common);
(c) One or more parties to most environmental disputes may claim to represent the broader "public interest";
(d) Implementation of agreements may pose special problems, partly due to the difficulty in identifying all the parties.[3]

In the PCE's experience, environmental disputes arise when all or some of the parties involved in a decision-making situation:

- do not trust each other;
- do not have access to the fullest possible information about

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2 L Susskind and A Weinstein p 311.
3 Jim Roberts p 151.

  - the decision-making process;
  - the implications and detail of proposals;
- perceive the significance and/or conclusiveness of the information differently;
- do not share the same views as to what should be done as a result of the information. These views may be based upon different beliefs and values.

Each of these conditions may work in conjunction with another to intensify the conflict if not addressed. Examples of the way the PCE has assisted in the resolution of environmental disputes are discussed in Chapter 4.

Similar views are expressed in overseas studies. For example, Harashina contends that environmental disputes are basically caused by different values among the relevant groups and that an information gap (as to quantity and quality of information) between applicants and residents greatly increases the likelihood of an environmental dispute.[4]

As Susskind and Weinstein observe, environmental disputes tend to involve more and a broader range of people than private disputes. They may extend over a long time frame, especially as not all parties involved may be subject to time pressures, and delay favours those who want to stop a proposal proceeding. In addition, there are often complex scientific and technical issues involved and a dispute may arise because of scientific uncertainties about the effects of a proposal. Commonly, as Harashina points out, there will be an imbalance of power among the parties, characterised by an information gap. Often a well-resourced applicant is opposed by concerned individuals who have little or no experience of the process and issues, and lack the resources to review the information provided by the applicant adequately or to obtain their own information. Conversely, sometimes an individual applicant is opposed by a large and relatively powerful national public-interest organisation.

The nature of disputes relating to the RMA reflects the effects-based approach used in that Act. "Effects-based" means that activities themselves are not regulated but, rather, provision is made for policy makers to set limits on, or prohibit, adverse environmental effects. In principle, any activity could be allowed provided certain limits are not exceeded or particular effects do not result. The RMA differentiates between activities with minor effects and those with effects that are more than minor. This distinction affects whether or not an application for resource consent is publicly notified or not, and therefore whether or not interested parties have an opportunity to make submissions. The number of people who are likely to be interested in, and perhaps

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[4] Sachihiko Harashina p 70.

object to, the activity is likely to be greater where the effects are more significant.

2.1.2 Resource management

The promotion of the sustainable management of natural and physical resources means managing resources to enable people to provide for their physical, social and cultural needs, while sustaining the potential of those resources to meet the needs of future generations, protecting the life-supporting capacity of resources, and "avoiding, remedying, or mitigating any adverse effects on the environment". Environmental legislation in New Zealand also embodies the philosophy of considering all values before a decision is made. A broad range of matters and interests should therefore be understood by the decision-makers, and this is, in part, why public participation is provided for by the RMA.

Councils and the Environment Court are the final decision-makers on applications for resource consents and appeals respectively.[5] As "persons exercising functions and powers" under the RMA, they are charged with achieving the purpose of the Act. In doing so, they are required to recognise and provide for the matters of national importance in s 6, have particular regard to the matters set out in s 7, and take into account the Treaty of Waitangi under s 8. Councils are not restricted to considering only the matters and evidence put before them by applicants and submitters; they may call for further information and commission reports in order to ensure that they have all the necessary information before making a decision.

In relation to environmental disputes, a number of commentators have referred to the alternative or additional forms of dispute resolution as conflict "management" rather than "resolution". Roberts argues that environmental mediation is not dispute resolution, but dispute (or conflict) management since, regardless of the agreement reached by the parties, the resolution of a dispute as to the effects of an activity on the natural environment is not a private issue in many cases and therefore not open to resolution by private agreement. [6] This conflict management approach is in keeping with the philosophy of the RMA.

2.2 Conflict management under the RMA

The RMA provides opportunities and makes formal provision for conflicts to be addressed outside the judicial system. Opportunities revolve around the use of consultation and other conflict management mechanisms before an application is lodged with a council. In addition, there are two main statutory provisions: pre-hearing meetings which may be held before council hearings (s 99); and, additional dispute resolution (usually mediation) once an appeal has been lodged with the

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5 There is provision for appeals from decisions of the Environment Court on matters of law only: s 299.

6 Jim Roberts p 150.

Environment Court (s 268). The intention behind the RMA provisions was to reduce or avoid unnecessary litigation. Figure 1.1 illustrates these opportunities.

Under the RMA, the opportunities for addressing conflict will not always result in the resolution of a dispute, because the council, not the parties, has responsibility for deciding the outcome of a consent application and must take into account the matters set out in Part II and have regard to those set out in s 104 of the Act. Should the parties be dissatisfied with the council's decision, they may not agree between them to vary that decision but must appeal to the Environment Court. Once an appeal is lodged, any agreement resolving the dispute must be approved by the Environment Court, unless the resolution entails the withdrawal of the appeal and the acceptance of the council's decision. The approval of the Environment Court is expressed in a consent order, which must be complied with by the parties and cannot be amended by them as it is an order of the Court.

While resolution by private agreement may be inappropriate for some disputes under the RMA, conflict management mechanisms may be able to assist in identifying and narrowing the issues in dispute, may resolve some of the concerns of objectors, and help to achieve agreement on certain undisputed facts.

The options provided by the RMA do not preclude other initiatives by councils or others to forestall confrontation over a proposal, such as wide consultation with public groups before or after an application is lodged.

2.2.1 Conflict management mechanisms

Pre-application consultation

The good sense of an applicant consulting with potentially affected or interested parties before lodging an application for consent has become well-recognised and such consultation now forms part of the strategy of many large organisations which apply for consents on a regular basis.[7]

In the Australian context, Roberts[8] notes that in the environmental area, there is a trend to prevent disputes before they arise. Typically, an applicant will identify potential objectors at an early stage and invite them to participate in discussions. This type of initiative addresses disputes which arise due to misunderstandings or misinformation. According to Smith,[9] 60-70% of environmental conflict is caused by misinformation, so the better informed the interested parties the less likely they are to pursue their objections.

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7 Refer to Philip H Mitchell. This paper sets out three case studies where pre-application consultation has been undertaken.

8 Jim Roberts p 155.

9 ET Smith in D Sandole et al (eds). Cited in Roberts p 151.

The RMA does not expressly require applicants to consult. However, it is a wise step, as where an applicant fails to consult adequately, the council may delay dealing with the application until it is satisfied that it has the information it requires (s 92(3)).[10] Under s 92(2)(a)(ii) a council may require an applicant to explain the consultation undertaken where the council is of the opinion that significant adverse effects on the environment may result from the activity for which consent is sought.

Section 88 requires an applicant to provide with the application an assessment of environmental effects (AEE). Clause 1(h) of the Fourth Schedule requires the applicant to identify in the AEE "those persons interested or affected by the proposal, the consultation undertaken, and any response to the views of those consulted". Although this does not make it obligatory for the applicant to consult, if consultation does take place there must be more than just the giving of notice of the application and seeking comment; there must also be a response from those consulted.[11] The PCE has discussed the nature of consultation under the RMA in Chapter 6 of her report *Assessment of Environmental Effects (AEE): Administration by Three Territorial Authorities.*

Pre-hearing meetings
Section 99 provides:

> **Pre-hearing meetings**–(1) For the purpose of clarifying, mediating, or facilitating resolution of any matter or issue, a consent authority may, upon request or of its own motion, invite anyone who has made a submission on an application to meet with each other or such other persons as the authority thinks fit.
> (2) A member, delegate, or officer of the consent authority who attends a meeting under subsection (1) and who is empowered to make the decision on the application which is the subject of the meeting, shall not be disqualified from participating in the meeting if–
> (a) The parties attending the meeting so agree; and
> (b) The consent authority is satisfied that the person should not be so disqualified.
> (3) The outcome of the meeting may be reported to the consent authority, and that report–
> (a) Shall be circulated to all parties before the hearing; and

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10 *Greensill v Waikato Regional Council* W17/95 Judge Treadwell 6/3/95.
11 *Aqua King Ltd v Marlborough District Council* [1995] NZRMA 314

(b) Shall be part of the information which the consent authority shall have regard to in its consideration of the application.

The process provided for in s 99 is aimed at resolving conflicts among the parties and not, necessarily, at deciding the outcome of the consent application. It is not intended that parties at a pre-hearing meeting should usurp the decision-making role of the council (in its capacity of consent authority), although the council in its decision may ratify the solution arrived at by the parties. The process is voluntary; a council may "invite" anyone to take part and there is no obligation on a council to hold a pre-hearing meeting even if one is requested.[12]

As any conflict management process is time-consuming, the RMA enables the council, with the consent of the applicant, to extend the time frame within which some specific action must be taken. Flexibility of time periods is necessary to enable a pre-hearing meeting to run its course. This was recognised by the amendment to s 37 enacted in 1993, inserting subs (5A), which provides:

> (5A) Notwithstanding subsection (5), in the case of an application for a resource consent, a consent authority or hearing committee under section 117–
> a) Upon the request of, or with the consent of, the applicant; and
> b) If it considers it reasonable to do so, having taken into account the matters in subsection (4),–
> may extend the period within which any person must do something in connection with the application for such period as the authority or committee thinks fit.

The outcome of a pre-hearing meeting (but by implication not its proceedings) may be reported to the council. If this is done, the report must also be circulated among all the parties to the meeting before the hearing if there is one.[13] Any reported outcome forms part of the information upon which the council will decide on the application, although it should be noted that councils vary in how much information about pre-hearing meetings they report.

Although the RMA does not specifically restrict the application of s 99 to notified applications for consent, it is unclear whether the pre-hearing process is available under s 99 if an application is not notified. In theory, when an application is not notified, contentious issues that would warrant a pre-hearing meeting should not arise. However, this does not appear to happen in practice. Where an application is not

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12 *Ngatiwai Trust Board v Whangarei District Council* A80/95 Judge Sheppard, 28/8/95.

13 A hearing need not be held if no party wishes to be heard: s 100 RMA.

notified, a council has little incentive to invite persons other than the applicant to participate, since only the applicant would be able to appeal the council's decision.

Additional dispute resolution in the Environment Court s 268
Section 268 provides for "additional dispute resolution" once an appeal has been lodged with the Environment Court.

To encourage settlement, the Environment Court may, at the request of the parties or on its own motion, ask one of its members or another person to conduct mediation, conciliation or other procedures designed to facilitate the resolution of a dispute before the Court. The RMA allows the member of the Environment Court who conducts the alternative dispute resolution process (usually mediation) to resume her or his role as a decision-maker if the parties to the dispute agree and the Environment Court and the member are satisfied that that course of action is appropriate.

As with pre-hearing meetings, there is no requirement for the mediator to be a person completely independent of the decision-maker. A corollary of this is that the process could not be conducted completely without prejudice if the same person acted first as mediator and then as decision-maker. The Environment Court recognises this deficiency in the statutory process and in practice no commissioner who conducts a mediation acts as a decision-maker at a later stage. Thus, the process conducted by the commissioners for the Court is without prejudice and no details of the mediation are made available to the Court.

Arbitration
The RMA also provides for reference of a dispute to arbitration under s 356. Arbitration is an adjudicative process whereby the parties agree to refer their dispute to an independent person who has the power to make a binding decision.

2.3 Who can participate?

In New Zealand there are broad rights of participation in local authority planning, consent processes and appeals against decisions of local authorities under the Resource Management Act 1991.

Any person may make a submission on a proposed policy statement or plan, and if dissatisfied with the council's decision on their submission, that person may refer the relevant provision to the Environment Court. Any person who made a submission on a resource consent application may appeal the decision of the council to the Environment Court. In addition, any person may apply to the Environment Court for an enforcement order requiring any other person to comply with the terms of their resource consent.

By contrast, no person has standing (that is, the legal right) to challenge a decision of a council to deal with a resource consent on a non-notified basis, although the public have an opportunity to challenge plan provisions providing for certain consents not to be notified at the plan preparation stage.[14] If an application for consent is not notified, the decision not to notify can be challenged only by bringing judicial review proceedings against the council. However, such proceedings are expensive and time-consuming and there is no certainty of achieving the desired outcome. Standing to bring judicial review proceedings is not as broad as under the RMA and depends on the applicant having a "sufficient interest" in the decision of the council.

2.4 Roles and responsibilities of the parties

The RMA allocates roles and responsibilities in relation to the provision of information when a resource consent has been applied for. In some cases participants in the resource consent process would not be able to perform their functions adequately under the RMA if the information provided were not sufficient.

The applicant

The applicant has the initial responsibility to provide information. Section 88 RMA requires an applicant to provide an assessment of environmental effects (AEE) with the application for consent. The more significant the likely effects, the more information is likely to be required. The Fourth Schedule to the RMA sets out in greater detail the requirements for the AEE. The Environment Court has held that an AEE ought to describe the anticipated effects of an activity with "sufficient particularity" so that the functions which depend on it can be performed, and so that[15]

> Advisers to consent authorities and would-be submitters should not themselves have to engage in detailed investigations to enable them to assess the effects. It is an applicant's responsibility to provide all the details and information about the proposal that are necessary to enable that to be done.

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14 This is the ideal; however, it appears that there is little understanding by the public of how to participate most effectively under the RMA and of the importance of public involvement at the plan preparation stage. The complexity and size of proposed plans are in themselves further barriers to participation.

15 Those functions are the provision for persons making submissions about applications to state reasons and the general nature of conditions sought (s 96), the duty imposed on the council to have regard to the effects of allowing the activity (s 104), and the power conferred on a council to impose conditions on a consent (s 105): *AFFCO NZ Ltd v Far North District Council (No 2)* [1994] NZRMA 224, 235 and PCE 1995, 36.

At any reasonable time before the hearing of an application, the council may require an applicant to provide further information relating to the application (s 92(1)).

The council as consent authority

The council is responsible for checking that the proposal falls within the relevant RMA policy framework, and that it has received adequate information on the effects of the proposal. It must also ensure that any adverse effects on the environment are avoided, remedied or mitigated. Where the council considers that the activity may have a significant adverse effect on the environment, it may, among other options, commission a report on any matters raised in relation to the application, including a review of the AEE or the further information provided by the applicant (s 92(2)(c)). Before deciding whether or not to notify the application, the council must be satisfied that it has received adequate information (s 93).

The Environment Court has confirmed that the council, along with submitters and ultimately the Court itself, has the role of auditing the adequacy of the AEE.[16]

Affected parties / submitters

Submitters provide information on the significance of environmental effects, especially effects likely to impact on them directly. They may also suggest options to avoid, remedy or mitigate environmental effects, including conditions that would address their concerns. Members of the public may have a moral obligation as good citizens to participate in the process and provide information, but there is no legal obligation on them to do so. Submitters often obtain their own expert advice on the nature of the proposal and its effects because they distrust the information supplied by the applicant and doubt the ability of the councils to assess such information adequately. An imbalance in the ability to evaluate the information supplied, or inadequate information, can lead to conflict and a need for conflict management.

The following chapter discusses the practicalities of conflict management under the RMA, based upon the approaches and experience of six councils.

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16 *Hubbard v Tasman District Council* W1/95, 14 February 1995, Judge Kenderdine.

3 OBSERVATIONS ON CURRENT PRACTICE

3.1 Introduction

This chapter examines practices of conflict management under the Resource Management Act (RMA). It begins with an outline of the framework established by the case study councils within which conflict is managed in the resource consent process. It then identifies issues affecting the management of pre-hearing meetings. Policies and practice on the use of additional dispute resolution by the Environment Court are also summarised.

3.2 Councils consulted

Councils consulted in the course of this investigation were the Auckland Regional Council (ARC), Manukau City Council (MCC), Taranaki Regional Council (TRC), New Plymouth District Council (NPDC), South Wairarapa District Council (SWDC) and Wellington City Council (WCC). These councils represent a mix of territorial authorities and regional councils, urban and rural councils, and councils which vary in terms of population and physical area. Contextual information about demographics, expenditure, resource consent statistics, staffing levels and district plan, consent and liaison processes are set out in Tables 3.1 and 3.2.

3.3 Policy framework established by councils

3.3.1 Policies on conflict management

Arrangements affecting the management of conflict vary between the councils. TRC is the only council that has a clear conflict resolution policy. Like the other councils, TRC encourages applicants to consult with affected parties before lodging an application. However, it also has a formal policy of holding pre-hearing meetings for all its notified resource consents. TRC advises that as a result of this approach, it is able to process 80% of applications that attract submissions without a formal hearing. When asked why it developed this approach, TRC said it wanted to find a better and less confrontational way of resolving issues. The approach has been refined through experience and through careful reading of literature when it has become available.

None of the other councils has specific policies on conflict management. NPDC and MCC noted that more regular use could be made of pre-hearing meetings. ARC and WCC noted that pre-hearing meetings provide a positive means of resolving conflict, and that officers encourage them where some benefit seems possible. WCC has no set policy, but is presently assessing the role of mediation in resource management disputes. ARC has published a set of eleven resource consent information pamphlets covering different aspects of the process. One of these pamphlets gives detailed information on pre-

Table 3.1 Council structures

	Auckland Regional council	Manukau City Council	Taranaki Regional Council	New Plymouth District Council	South Wairarapa District Council	Wellington City Council
Population *	1,073,200	over 254,600	105,300	67,000	8,700	158,300
Status of planning documents	Regional Policy Statement operative. Coastal Plan notified.	District Plan notified.	Regional Policy Statement (adopted 24 August 1994); Regional Air Quality Plan (adopted 14 August 1996 - subject to one appeal); Regional Coastal Plan (December 1996); transitional plans for water and coast currently in force.	5 transitional district plans. New District Plan not yet notified.	4 transitional plans. Proposed plan notified in February 1994. Six outstanding appeals.	6 transitional plans. Proposed plan notified July 1994. Hearings continuing.
Structure - committee	Hearings committee of at least 2 councillors and additional experts if necessary	Hearings committee and Environmental Management Committee.	Two major council committees: Policy and Planning Committee and Consents and Regulatory Committee Hearings committees constituted as required. Consent hearings committees usually consist of three councillors. For plans, the committee usually comprises the full Policy and Planning Committee.	Planning and Environmental Services Committee.	Hearings committee includes community board and Maori representatives.	Regulatory committee hears notified applications. Community Boards involved in relevant hearings.
-division, department (manager)	Environmental Management Division consists of 4 departments: • land resources • coastal resources • water resources • resource quality Divisional Services includes Resource Services department - provides information about applications, eg through "Enviroline".	Environmental Management Group and Service Delivery Group. Environmental Management Group carries out policy work and consent processing.	Council consists of three divisions: Operations, Policy and Planning and Corporate Services. Operations division includes consent processing and monitoring department.	Planning and Environmental Services Department includes: • District Planning • Building consents • Environmental Health.	Planning and consents dealt with by one planner. Staff: • 1 corporate planning manager; • 1 commissioned Resource Management adviser.	Physical Urban and Natural Commissioning Unit deals with environmental policy and the district plan. Environmental Control Business Unit deals with Resource Consent applications.

Delegated powers on final decisions	Specified group of council officers delegated to make decisions on consent applications (and appropriate conditions) except where the proposed activity is non-complying and notified under s 93, or an applicant or submitter wishes to be heard, or a hearing is necessary. Results to be reported to the appropriate council committee.	Delegated decisions to team leader level where no hearing necessary.	Delegation : decisions about the need for further information, the need for notification, the need to engage in pre-hearing negotiation and the need to go to hearing are made by the Operations Manager and reported to the full Council.	officers deal with non-notified applications, notified applicationss without objections or applications in which submissions are withdrawn .	Subcommittee made up of mayor, manager and planner to deal with simple applications.	Staff (with peer review) decide non-notified consents. Processing handled by self managing teams.
Iwi liaison structures	Council has iwi-policy staff. Various arrangements with different iwi. Two formal Agreements of Understanding.	Operates a corporate Treaty of Waitangi Work Team (council officers) plus project teams which pick up work from a Tangata Whenua Liaison Group. Memorandum of Understanding with Huakina Development Trust. Pay for services when provided by particular iwi. Developing relationships with other iwi.	Te Putahitanga o Taranaki (full committee); comprised of two representatives from each of the eight recognised iwi of the region. Council also employs an Iwi Liaison person.	Contact hapu on a case by case basis.	Maori Standing Committee.	Case by case. Deal with contacts within iwi. Encouragement of early consultation by applicants.

* Source: provisional results of the 1996 census. Figures have been rounded to the nearest 100.

Table 3.2 Resource consent processing: statistical information 1994/95 and 1995/96

	Auckland Regional Council[1]	Manukau City Council	Taranaki Regional Council	New Plymouth District Council	South Wairarapa District Council	Wellington City Council
Total applications	1,238 in 1995/96[2]	815 land use consents in 1994/95 4200[3] in 1995/96	392 in 1994/95 355 in 1995/96	412 in 1995/96 (67 notifiable; 114 non-notified, 231 subdivisions)[4]	450 subdivisions and 350 land use consents since RMA.	estimates for 1995/96: 1550 (1090 land use consents; 460 subdivisions)
Notified consent applications	12%	22 in 1994/95 32 in 1995/96	133 in 1994/95 131 in 1995/96	43 (an additional 24 notifiable applications were not notified as they obtained written consents)	40% (a general estimate of normal rate)	estimate 10%
Number attracting submissions (notified applications)	85		72 in 1994/95 31 in 1995/96	80% of notified		estimate 10%
Pre-hearing meetings	no statistics available[5]	1		6-8		3 during 1996
Hearings	2%	32 in 1995/96	4 in 1994/95; 5 in 1995/96	17		most notified applications go to a hearing.
% applications not requiring a hearing	98%		83% 1994/95 80% 1995/96	96% (of total)		
Appeals to planning tribunal	11		4 in 1994/95	3-4		estimate less than 10 per year
Processing in statutory time frame	non-hearing consents in excess of 85%.	72% in 1994/5 (non-notified)	68% notified; 76% non-notified in 1994/95; 81% notified; 83% non-notified in 1995/96	80.8%	80%	aim for 90%
Staff (resource consents)	58[6]	24[7]	4	3.5 (including subdivision (1))	1	21 in both processing and monitoring. Represents 13 Full time equivalents in processing and 2 in monitoring.
Staff (monitoring and compliance)	8	6	15	1.5		
Cost recovery	full	partial	full	partial	partial	partial, move to full 1997

1 A new data base is to be introduced by mid 1997 which will allow easier access to performance monitoring data.

2 ARC staff also note that in the year to 30 April 1996, it processed 850 consents for new activities. Of these, 10% were notified and 2% went to a hearing.

3 1400 land use; 2000 subdivision; 800 land modification

4 Subdivisions are rarely notified unless inconsistent with council policies and objectives.

5 95%-100% of notified consents which attracted submissions had some sort of pre-hearing meeting. ARC did not organise all, nor did staff attend all. Council staff note they would have advocated all. Formal pre-hearing meetings under s 99 of RMA varied between sections of the council. Coastal Resources and Water Resources reported 20%-30% rates.

6 staff involved in consents and monitoring and compliance are interchangeable.

7 As at 19 August 1996 (formation of Building Resource Services Unit).

hearing meetings and hearings. Aside from pre-hearing meetings, ARC staff noted that other approaches provide positive opportunities to manage conflict. They gave examples of initiatives supported by the council including a Landcare group at Awhitu Peninsula, a stormwater liaison group with territorial authorities, a harbour users committee, and beach care groups. They commented that such groups provide a cooperative context within which specific consent applications can be considered.

All councils stated that, when the opportunity arises, they encourage applicants to consult before lodging an application, in order to identify issues and potential environmental effects, and to avoid delay once the consent has been lodged. While the approaches are largely informal and ad hoc, staff generally use these opportunities to resolve issues before a hearing is held.

While the SWDC does not have a policy on the use of pre-hearing meetings, it encourages pre-application consultation and makes frequent use of informal council-brokered meetings between parties on an ad hoc basis. The council's approach to conflict management reflects the low population of the area. Meetings are informal, and are usually held in the planner's office or on site. In addition, the planner generally knows what proposals are imminent and can therefore identify affected parties early, before the statutory consent process begins.

3.3.2 Performance objectives

As with council policy, performance objectives in relation to the processing of consent applications vary. TRC has a performance objective in its 1996/97 Annual Plan for its officers to "resolve 90% of all submissions received through the pre-hearing process".[17] The council notes that this objective motivates it to assist conflict resolution. Although a time limit is set, priority is given to meeting the conflict resolution objective as the benefits of that process are deemed to outweigh the benefits of keeping to a strict time frame. TRC note that when they do exceed the RMA time frame, they first seek the endorsement of the applicant.

With the other councils, performance measures relating to the processing of resource consent applications (from receipt to decision) focus on processing consents within the statutory time frame, and no specific objective for conflict management has been developed. As a result, officers have less incentive to pursue pre-hearing meetings, which tend to be time consuming. For example, the performance objectives for WCC's Environmental Control Business Unit include a target of reaching decisions on resource consents applications within the time limits set by the Act" in 90% of cases and, where the time

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[17] 1995 p 25.

limit is exceeded, all parties are notified of the reasons for delay.[18] The only other performance objective relevant to the processing of consents is a target of 75% "customer satisfaction with the quality of service provided". "Customers" are defined as those who pay a direct charge for a service.

3.3.3 Cost structures

To some degree, all councils have a policy of recovering from applicants the cost of processing consent applications. TRC, ARC and SWDC have policies of full cost recovery. TRC normally provides an applicant with a quote for the likely cost of processing an application, with and without a formal hearing. While TRC notes that the true cost of processing a resource consent application, inclusive of a hearing, may act as an incentive for applicants to resolve conflict, this is not the objective of the council's cost structure. Indeed, sometimes the costs of an ongoing, pre-hearing reconciliation process may equal those that would be incurred with a hearing. Nevertheless, between 5% and 90% of the cost of the full hearing is usually incurred when the pre-hearing meeting approach is adopted. Where the cost is higher than that quoted, the council keeps the applicant informed of the difference between the original estimate and the likely emerging cost.

TRC's costs of applications fees for consents range from non-notified resource consent applications at $175 to notified consent applications with no submissions at $375. The additional costs of notified applications with submissions vary, for example:

- Petrocorp Exploration Limited (Mangahewa-A wellsite) (considered at a hearing) – $7,500.
- Petrocorp Exploration Limited (Mangorei-A wellsite) involving 10 submitters (resolved through a pre-hearing process) – $4,500.
- Renewal of New Plymouth City Carousel Treatment Plant discharge to water consent (resolved through pre-hearing process) – $12,500.
- Take for pasture irrigation (resolved through pre-hearing process) – $2,500.
- Discharge partially treated dairy shed effluent (resolved through pre-hearing process) – $550.
- Discharge of treated water and stormwater to land (resolved through pre-hearing process) – $553.

The SWDC charges a deposit of $850 for a notified application and $450 for a non-notified application. If the costs are less, the applicant is given a refund; if more, a new charge is negotiated.

ARC has proposed that a $2,000 per day hearings fee be instituted. Council staff estimate that a hearing costs about $1,600 minimum and $2,000 per full day, and that this method of charging reduces uncertainty for the applicant. The vast majority of hearings take one

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18 WCC 1995 p 51

day or less. At ARC, the fee paid to councillors serving as commissioners and to independent commissioners is the same. TRC has not used external commissioners on a frequent basis and has insufficient data to make generalisations about the cost of hearings involving councillors as opposed to independent commissioners.

Staff at both TRC and ARC noted that a policy of full cost recovery is an incentive for applicants to consult directly with affected parties as early as possible; that is, before council staff become involved in checking the assessment of environmental effects (AEE). Early consultation usually means less work is required after the application is lodged, thereby reducing the council's charge for consent processing. A further incentive concerns the additional costs such as the commissioning of reports on the proposal or hiring of independent mediators, which are usually charged back to the applicant.

The other territorial authorities recover a portion of costs, but do not operate a full cost recovery regime.

3.3.4 Who makes the final decisions?

The extent to which formal hearings are required is affected by the level of delegation within councils. There appears to be no uniformity in how delegations are made, nor any consistent principles to guide councils on how delegation decisions should be made.[19]

At TRC, all notified consents are decided by the Consents and Regulatory Committee. Consent decisions negotiated by council officers as a result of a pre-hearing meeting are generally supported by the committee. Non-notified consents are delegated to council officers.

At ARC council officers in the position of manager can convene meetings under section 99. The general manager of ARC Environment and group managers are delegated the power to grant or refuse consent and determine conditions except where the application has been notified, and submitters have not withdrawn their wish to be heard, or a hearing is necessary.

At MCC, delegations are such that for some categories of activity the officers do not have the authority to make a decision, so hearings are routinely held in these cases. However, pre-hearing meetings and the provision of information can still assist in resolving conflict before the hearing. When this happens, the hearing is usually dealt with quickly.

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19 Delegations must be made by council through the chief executive or group of senior executives in accordance with the Local Government Act 1974: s 34(5) RMA.

At the SWDC, council hearings are always held because the sole planner considers that it is inappropriate to make final decisions without peer review. As the sole planner, he also plays an important role in advising both applicants and submitters in interpreting the district plan. Given the multiple functions the planner fulfils, the referral of final decisions to a consent committee prevents him from having a conflict of interest and provides a form of quality assurance.

At WCC, delegated council officers make decisions on non-notified applications, and on notified applications where there are no objections or no one wishes to be heard. Otherwise, decisions are made by a consents committee made up of councillors.

At NPDC council officers are delegated to make decisions on all non-notified applications, all notified applications with no objections and applications where submitters withdraw at pre-hearing meetings. Applications that a council officer recommends be declined go to a committee of the council.

3.4 Issues relevant to the management of pre-hearing meetings

Councils, submitters, applicants, public interest groups and mediation specialists identified the following issues, which they consider affect both the process and success of pre-hearing meetings.

3.4.1 Clarity of planning documents

It was noted that many transitional district plans do not reflect the current social and legislative environment. A number of examples were given of issues which have yet to be dealt with through the district planning process, along with other examples where the opportunity to process applications with minor effects through provisions of a new district plan has yet to be fully realised. For instance, the NPDC still administers five transitional district plans, with its new plan yet to be notified. The council notes that the transitional plans vary in their provisions for the activities of the petrochemical industry. However, during the time the council has worked with oil exploration issues, its knowledge of the effects of the industry has increased and it expects to be able to address issues relating to the oil exploration industry through provisions in the new district plan.

Staff at TRC noted that its plans lay down clear, community-based "bottom lines" and expectations for environmental performance and, in many instances, establish criteria to assist with decision-making. TRC staff also raised the issue of developing planning documents and the benefits of good scoping. It was suggested that, where councils emphasise consultation and conflict resolution in the development of planning documents, the incidence of conflict in the consent process is likely to be reduced.

3.4.2 Degree of pre-application consultation

Councils agreed unanimously that pre-application consultation by applicants effectively reduces delay and conflict later in the consent process.[20]

Councils normally encourage applicants to undertake pre-application consultation, giving guidance on how to go about consulting, and identifying affected parties with whom the applicant should consult. Some councils provide brochures that explain the process.

Applicants who routinely make consent applications acknowledged the benefits of pre-application consultation. They indicated that a high level of consultation helps the applicant identify problems at a stage at when changes can more readily be made. Information transfer before an application is lodged may also help to reduce suspicion on the part of the community, and enable the applicant to gather information about the concerns of those affected. Nevertheless, if an applicant's information is incomplete or misleading, suspicion may increase.

The PCE has noted that consent applicants fall into two contrasting groups: individuals and small businesses whose contact with council is likely to be "one-off", and larger businesses who employ specialist staff to help them and who apply frequently for consents.[21] In general, the first group requires detailed guidance from the council about the process, whereas the second is well aware of council requirements.

Pre-application consultation is usually well received by the public interest groups consulted during this investigation, but can be a problem for tangata whenua and poorly-resourced individuals or community groups. As with all consultation, time and money are needed to participate. Some applicants provide funding for participation, but this is uncommon. Iwi groups mentioned the pressure of time and resources when being consulted in this manner. One noted that applicants need to listen to what people have to say and to allow them to have genuine input into the process. From the applicants' perspective, concern was expressed at the amount of information which may be requested of individual applicants by the council, and the degree to which they may have to contract experts to assist in providing information. Another applicant noted that there needed to be clearer requirements as to further information requests, otherwise councils can abuse this process. This issue may be addressed to some extent by the proposed amendment to s 92 of the Resource Management Act, which would allow an applicant to object to or appeal against a council's request for further information.[22]

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20 The PCE has commented extensively on this issue; see 1995a and b.

21 1995a p 29

22 Resource Management Amendment Bill (No 3), clause 18.

Many of those involved in an application by WaterCare Services Ltd[23] to upgrade its sewage treatment facilities at Mangere (Auckland) noted that the company's pre-application consultation process ultimately provides a positive example of what can be achieved (see Box 1). In particular, it was noted that parties need to be willing to be part of a true negotiation process, that WaterCare took note of what all parties had to say, and included that information in their final consent application.

Some tangata whenua representatives had clear views about the necessity for applicants to consult with them before lodging applications. For example, Ngaati Te Ata have a policy statement which sets out a consultation process, including details of meeting times, how to make appointments, and so on. Huakina Development Trust suggested that to date, better consultation processes have saved them from having to go to the Environment Court since 1989. Both indicated that pre-hearing meetings are a good thing.

Councils have the discretion to decide who is adversely affected. This is a key point[24] since it often determines whether an application is notified or not. If an application is not notified, groups or individuals who see themselves as acting "in the public interest," but who are not directly affected by a proposal, are prevented from participating. If an applicant has not consulted all the persons the council considers may be adversely affected, the council may delay dealing with the application until it has the information it requires.[25] Some parties suggested that councils were not always successful at directing applicants to the appropriate parties. For example some considered that they had not always been directed to the appropriate tangata whenua representatives. One applicant noted that councils may require applicants to obtain a "sign-off" from tangata whenua. However, it is the council's duty to consult with the tangata whenua under s 8 RMA, not the applicant's, and this duty may not be passed on to the applicant.[26] Further, the tangata whenua's right to be consulted is not a power to veto a proposal.[27] The development of agreed procedures between councils and tangata whenua should assist in this area (see also Chapter 3.4.9).

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23 WaterCare Services is a Local Authority Trading Enterprise.

24 Confirmed by Appendix 1.

25 See also Chapter 2.2.1.

26 *Aqua King Ltd v Marlborough District Council* [1995] NZRMA 314.

27 *Ngai Tahu Maori Trust Board v Director-General of Conservation* Neazor J, HC Wellington, CP 841/92. This accords with the view of the Minister for the Environment expressed in relation to the demand by Ngati Kahu for payment in return for waiver of their right of veto: Press release 17/9/96.

Box 1: Wastewater 2000

This example relates to conflict management for resource consent applications for the upgrading of Auckland's main waste water treatment plant at Mangere. This process was cited by several groups as a good example of pre-application consultation.

The Wastewater 2000 project commenced in April 1993 when the applicant, WaterCare Services Limited (an ARC local authority trading enterprise), began a series of public meetings and workshops to involve interested parties in the development of the proposal and to fulfil consultation obligations under the RMA. Interested groups were brought together before any plans were prepared, with the intention of letting the parties find an acceptable solution. The process, including the provision for a facilitator, was funded by the company. One participant noted that on that basis, they had some initial doubts about the neutrality of the facilitator.

It was noted by one participant that it took almost two years of working together before WaterCare and the environmental groups developed a sense of mutual trust. However, a number of issues had had to be addressed to reach that point. An important constraint for the environmental groups had been their lack of resources and their feeling that their views were not being taken seriously. WaterCare had responded to the concern about resources by funding participants, by paying a meeting fee to representatives, and by paying for a coordinator for the environmental groups. The matter had to be revisited after the first year of funding and the provision of further resources addressed. One party noted that progress was only really made once trust was established.

Generally, it was acknowledged that the process was time consuming and exhausting for many involved. Not all the environmental groups stayed with the process, and some expressed the view that Maori interests were not as involved as they could have been. Tangata whenua indicated a preference for meeting with WaterCare separately and have been involved in the preparation of a cultural impact assessment for the proposal. Matters to be considered include the cultural effects of discharging effluent into the Manukau Harbour and any potential alternatives, and it is possible that further debate on this issue will take place.

Taking over three years, the process was very long and very costly. However, in terms of achieving consensus on most issues it is seen to have been successful. As the coordinator for the environmental groups noted, "We can not emphasise enough how much we appreciated the opportunity afforded us to participate as stakeholders from the outset".

The result of the process was an agreement between the parties on most issues including water quality limits and other environmental standards. Application was lodged with the Auckland Regional Council for consent in early 1996, and in August, after requesting additional information about some aspects of the proposal, the council officer's report was released. The parties noted that, in the report, some of the conditions recommended by the council officer varied from those agreed to by the parties, with some being less stringent. Council staff noted, however, that the conditions which the council finally agree to must fall within the council's jurisdiction under the RMA and relevant planning documents. The standing of the agreement between the company and those it consulted raises questions about the role of the consent authority in guiding conflict management processes, so that whatever agreement is reached falls strictly within the legal framework of the RMA. Although council officers were involved in some meetings and workshops, their involvement was restricted to technical input and listening to the other parties.

This example illustrates a number of issues. First, the need for trust to be developed between the parties so information can be and is shared in good faith. Second, the need for adequate time to be allowed for the process so, among other things, trust can be developed, issues clarified, and information shared on a very complex issue. Third is the issue of the provision of resources to assist participants. Funding by the applicant enabled the environmental groups and tangata whenua to be involved. Finally, the issue of the role of the council in conflict management is highlighted. In this example, the council had little involvement, but it can be seen as an interested party to the consultation and it certainly has an interest in the outcome.

3.4.3 Clarity of purpose

Councils indicated that parties sometimes enter the pre-hearing meeting process with varied and sometimes contradictory intentions and objectives. In such circumstances, it is less likely that an agreement will be reached. Mediation practitioners emphasised the need to outline the process, goals, objectives and ground rules before the meeting begins. For example, is the purpose to share information and reach some form of consensus, or is more formal mediation required to resolve an impasse situation? It was noted that whoever runs pre-hearing meetings needs to explain the reason for the process, the procedure and the objectives.

Objectives for pre-hearing meetings identified by councils include:

(a) provision of an opportunity to establish a relationship between the parties;
(b) information sharing between parties;
(c) identification of issues and concerns of submitters by councils and applicants;
(d) provision of an opportunity to focus on the issues in contention;
(e) resolution of minor issues before a formal hearing;
(f) provision of grounds for resolving issues in an informal environment.

Clarity about the purpose and objectives of pre-hearing meetings can increase understanding of resource management processes. Full appreciation of resource management processes can empower people to participate. Indeed, lack of this type of knowledge has been cited by several parties as preventing them from being effective participants (see Appendix 2). One council officer noted that people are generally unaware of the process and as a result have unrealistic expectations, or try to address issues that are outside the scope of the process or the jurisdiction of the council. These people are often not aware of their options in relation to dispute resolution and other avenues, and are therefore often disappointed by the outcome.

3.4.4 Neutrality and skills of mediator / facilitator

Those consulted generally agreed that the person or persons who run pre-hearing meetings have a significant impact on the process, and hence on the outcome. In most cases, staff from the council act as facilitators for pre-hearing meetings and other informal meetings that involve the council. In most instances, staff are not trained specifically for this role and training is not given a high priority. ARC staff confirm that courses on mediation and conflict resolution have been run by the Environment Division but not in a systematic way, although, they are being included in the training plan now being developed. TRC confirm that senior consents staff have attended facilitation, mediation and negotiation skills enhancement workshops and seminars on several occasions, as well as conflict resolution courses. They note, however, that the best training for facilitation and mediation occurs on the job.

The skills of the person running the meeting were questioned by some submitters, who complained of technical experts taking over the process, abusive meetings, and officers letting one party dominate the proceedings. Mediation practitioners consulted said that mediators must be fully trained in order to be effective.

Some councils have used outside, independent mediators. This happens mostly where the issue is particularly controversial, where the council has a direct interest in the application, where the issue is long-running, or where council feels that more expert mediation or facilitation is required. TRC note that they have not yet needed to use independent mediators.

The neutrality and independence of the person running a meeting is another major issue raised by some of those who have experienced pre-hearing meetings. Several expressed disquiet about whether council officers could be neutral. One mediation practitioner suggested that staff from a consent authority can never be neutral as the council has an interest in the outcome, contradicting a fundamental principle of mediation. On the other hand, the TRC uses council officers who are not the decision-makers as facilitators at pre-hearing meetings and almost all the applicants and submitters consulted in that region confirmed that the council officers were effective and neutral in that role[28]. As TRC staff note, there is no question that the council has an interest in the RMA, and in the successful resolution of issues of concern. They also note that council staff understand the Act's requirements and are in the best position to mediate resolution, thereby raising questions about the role of independent mediators with no knowledge of the RMA.

A problem can arise if parties see the council as interested or biased in some way. In some instances councils are perceived as regarding applicants as their "clients" or "customers" without acknowledging a duty to other members of the public including ratepayers. One residents' group indicated that they consider that the local council is pro-development and therefore biased towards applicants. The group expressed the view that in pre-hearing meetings they "don't stand a chance." Submitters on a consent application at another council reported a pre-hearing meeting at which the council officer facilitating the meeting actually said he was there to aid the applicant. An applicant noted, however, that council officers can "bend over backwards" in order to accommodate submitters' concerns, irrespective of how unreasonable they may be. Whether justified or not, such allegations appear particularly relevant to district councils,

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28 As noted in Chapter 2, s 99 (2) of the RMA means that the council decision-maker may not be present at the pre-hearing unless all the parties agree.

which are both the suppliers of services and regulators of activities. The council must not only be independent but must also be perceived as such by all parties. If the facilitator is not trusted the process will fail. (The role of council officers as mediators is explored further in Chapter 4.)

3.4.5 Nature of the issues and the parties involved

Councils contacted did not identify any particular differences in the kinds of issues that could be the subject of a pre-hearing meeting, and none have formal criteria for identifying the kinds of cases and issues that should be referred to a pre-hearing meeting. Rather, factors affecting the use and process of pre-hearings were identified as:

- the number of submitters;
- the degree to which parties' views are entrenched;
- the extent to which there is a philosophical difference between the parties;
- the history of the dispute and extent of ill feeling;
- the extent to which parties differ in their views;
- the extent to which the issues involved signal a lack of local or central government policy.

Where there are many submitters, logistics can be a problem. Some councils noted that where large numbers attend, pre-hearing meetings need to be run more formally, so losing the advantage of informal discussion. A number of mediation practitioners, including council staff, suggested, however, that there are no disputes that cannot be mediated given time with a good mediator, even if the views do appear to be far apart and the parties antagonistic. This notwithstanding, the nature of the dispute will affect the ease with which a non-judicial and informal approach can be used to resolve the conflict

The nature of issues and parties involved varies between territorial authorities and regional councils. Territorial authorities process more consents for one-off, local impact activities such as subdivisions. These tend to have more immediate and obvious effects on a small number of people. As noted by those consulted, conflicts relating to these consents often arise from personal disagreements between neighbours. Regional councils tend to have more renewable consents, consents requiring ongoing monitoring, and consents with wider impacts such as discharges into the environment. In these instances, interested parties are more likely to include community groups representing the environment and the public good, as well as larger numbers of affected "neighbours". Since many of the consents handled by regional councils are renewals, good monitoring can help a council and the parties to the application understand the environmental effects of the activity, thus assisting decision-making.

One of the main constraints identified by councils is the "vexatious" or "intransigent" party. Several of those consulted noted that some parties are not prepared to compromise and will not be satisfied until they have had "their day in court" which, as one mediation practitioner put it, means that "they have their decision made for them." Often lack of understanding and misunderstanding underpin the dealings that lead to intransigence. For example, several councils observed that lack of familiarity with the process meant that some focus on matters that are not pertinent to the case or outside the jurisdiction of the council. Some parties insist on presenting their case in a judicial setting, sometimes, it would seem, due to distrust of the council or council officer involved. As one mediation practitioner noted, many people are unwilling to negotiate because they are focusing on grievances that are not actually related to the conflict, often not appreciating the limits of the process and the issues it can address. Aspects of this issue are illustrated in Box 2.

Intransigent applicants can also be a problem. In an example given, applicants pressured submitters quite blatantly by threatening to sue for costs should the matter go to the Environment Court. Conversely, there may be pressure for the applicant to compromise in order to avoid a hearing, for example where the process is drawn out and the applicant wants to commence work without further delay. Consent conditions may then be more readily accepted by the applicant than they would ordinarily be.

Another constraint on the use of pre-hearing meetings is where there are policy gaps. TRC noted that it was not able to resolve issues surrounding the application by ECNZ for the Stratford combined cycle power station because there was no government policy on greenhouse gas emissions. Submitters wished to "send a message through the hearing process to Government and so have required CO_2 reduction conditions on consents." TRC noted that:

> ... national and global environmental issues are more appropriately addressed at the central government level, via national policy statements or national environmental standards, rather than in consents. A clear statement of the intentions of government with respect to the preparation of national policy statements and standards must be made.[29]

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[29] McLay 1994 p 11.

Box 2: Petrocorp Stormwater Discharge Application

This example relates to an application by Petrocorp Exploration Limited (Petrocorp) for consent to discharge treated stormwater to a river from an oil exploration site adjacent to a site considered waahi tapu by the Otaraua hapu. The Taranaki Regional Council (TRC) advised the applicant to consult with the hapu. The applicant approached the hapu, asking them to give their approval. The hapu refused the request, saying that the protocol for consultation needed to be discussed first. A submission on the application was also made by the hapu.

In keeping with TRC policy, a pre-hearing meeting was arranged by the Regional Council. At this meeting, the AEE prepared by the applicant was discussed. The hapu was not satisfied that the AEE reflected the information that they had provided about the waahi tapu, or their unwillingness to enter into discussions about the proposal without first agreeing on the nature of the consultation process.

The officer's report noted that the applicant apologised for having written the AEE before the hapu had been formally approached about the proposal, due to time constraints, and that the applicant agreed to amend the report. It also noted that the parties agreed to a consultation process for use in the future. Hapu concerns about consultation and wider resource ownership and management issues were also identified. The hapu representatives, however, expressed concern that they had wanted to confirm the discussion with their hapu before finalising any arrangements and they felt that the applicant and the council had not made provision for their wishes. TRC however thought that it had allowed for sufficient time.

At a hearing, consent was granted to Petrocorp for the proposal, with conditions requiring the company to have hapu representatives on site during some of the work. The hapu, however, still considered that they had not been consulted appropriately. An appeal was lodged with the Planning Tribunal[30] on the grounds that inadequate consultation had taken place.

The regional council was concerned that the hapu was trying to raise issues, particularly those relating to consultation, beyond those that could be considered by the council under the RMA. The hapu, on the other hand, indicated frustration with the process and their apparent lack of power to make the applicant respect their wishes and protocol. Issues of mana and the preservation of dignity were raised by hapu representatives. In addition, the hapu considered that the regional council sided with the applicant.

This appeal was dismissed by the Environment Court. The Court noted that Petrocorp intended to be more proactive in consulting with Maori and that a rapport had been built between the two parties. Neither the Regional Council nor the applicant have applied for costs.

While this example is unusual given the high level of success achieved by TRC in its conflict resolution, it serves to highlight some issues that are relevant to conflict management under the RMA. The first is the issue of access to independent information by parties about the process – in this example, lack of knowledge by the hapu about the options available and about what was possible for the council to address may well have contributed to the drawn out nature of the case. The second issue is that of communication. Not only did the applicant and the council have difficulty contacting the hapu in the first place, but differing philosophies and understandings meant that the parties seem to have talked past one another. Third, the issue of the time available for conflict resolution is highlighted. The need for the hapu representatives to discuss the matter with the hapu emphasises the importance of there being enough time for information to be shared with all those affected by a proposal. The final issue is that of mandate. The hapu representatives considered they were not in a position to make a decision at the pre-hearing meeting. In these situations, several meetings may be needed, with time between them to allow representatives the opportunity to consult with those for whom they speak. The development by TRC and the hapu of an agreed process for handling applications which affect the interests of the hapu (as provided for under the RMA) should help to address these issues.

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30 Now called the Environment Court

3.4.6 Relationship between parties

All parties noted that trust is essential for constructive pre-hearing meetings. This applies not only to the "conflicting" parties, but also to the council. TRC notes that if a council is seen to be fair and trustworthy, then parties will be more willing to accept a mediation process under that council's guidance.[31] TRC noted that its commitment to monitoring and enforcement, together with the use of monitoring information in pre-hearing meetings, is crucial to the development of trust. However, trust takes time to build. Participants in the Wastewater 2000 exercise noted that it took almost two years for the parties to reach a point at which information was freely shared and a sense of common purpose developed (see Box 1). This is a problem where there are time constraints, and confirms the advisability of consultation prior to application so that delays and the need to make changes to the proposal later on, are avoided.

3.4.7 Time

Time was seen as crucial to the success of conflict management initiatives. Several of those consulted noted that pressure to make a decision within a strict time frame is not conducive to finding a negotiated solution. The pressure of time constraints for consent processing was cited by several councils as a reason for not making more use of pre-hearing meetings. Indeed, successful pre-hearing meetings often occur where councils are willing to extend the time limits allowing for several meetings over several weeks. Where affected parties do not have sufficient time to respond to a proposal, they can feel pressured to respond inadequately. As a result they may view the applicant and the council with some suspicion. One group suggested that if an applicant wants to push an application through, the information relating to the case is presented at the last minute and submitters are pressured to respond in a short time, thereby restricting their input. One applicant noted that while this can be a valid criticism submitters tend to use it even when the information has been available for some time. This raises the issue of communication between council and submitters. Section 93(2) requires the notice of the application to state the place where the application and accompanying information may be viewed.

Another issue is that of the timing of meetings and workshops, etc, which, as one public interest group noted, can hinder the process. Poor timing can preclude people attending if meetings conflict with work commitments, or if attendance results in loss of pay. The process needs to be made accessible to all interested parties and this may mean holding meetings in the evening or at the weekend.

The issue of time is reflected in the examples set out in Boxes 1 and 2.

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31 ibid.

3.4.8 Meeting venues

Venues for pre-hearing meetings were noted by some parties as an important consideration. Neutral venues, which are comfortable for all parties, were particularly mentioned. There were different opinions about the use of meetings on site. For example, they can be a problem where the site is an office or building belonging to the applicant. On the other hand, meetings held on site can be useful for explaining to submitters what is proposed.

Choice of location is a useful mechanism for reducing cultural and or social barriers to participation. A representative of an applicant confirmed that marae meetings are more appropriate for iwi involvement. However a mediation practitioner noted that some parties do not consider that a marae is neutral.

3.4.9 Involvement of all relevant parties

In order for all information to be on the table for mediation or negotiation, all interests need to be party to the process. This enables those involved to be sure that the outcome is acceptable to all parties, makes the implementation of any resolution more likely, and reduces the possibility of one party appealing a decision. An exception is where there are a large number of submitters. One council noted that in this case, individuals or groups of submitters sometimes meet with the applicant (with or without a council facilitator) to identify issues and options before group mediation is held. This approach ensures that all views are heard by the applicant. However, identification of interested and affected parties can be difficult. If a consent application is notified, then interested parties identify themselves to some extent. In pre-application consultation, it is up to the applicant to find the right people to consult, although the council can give guidance. In the case of large applications, public meetings and working groups help to publicise the process and, as in the WaterCare example, interested parties can hear about it and become involved (see Box 1).

Opinions differ as to whether those present at pre-hearing meetings need to have power to make decisions for any group they represent. One mediation practitioner states that it should be a prerequisite. If parties to pre-hearing meetings have to check with other members before an agreement can be reached, it delays the process significantly. On the other hand, if sufficient time has been allocated, the requirement to report with represented groups could be built into the time frame. This is particularly pertinent for Maori whose representatives attend meetings on behalf of the whanau, hapu or iwi, and also for residents' groups.

Where there are issues of interest to the tangata whenua, debate between iwi and/or hapu about mandate issues can make it difficult for those seeking to involve the tangata whenua in pre-hearing meetings (see also Chapter 3.4.2). Conflict between tangata whenua over mandate issues or policy approaches is difficult to address unless

tangata whenua have the opportunity to resolve the issue among themselves. If the issue is not resolved until after an application is lodged, tangata whenua groups may find themselves opposing each other through the statutory planning process.

Tangata whenua representatives note that lack of resources (including people, skills and funding) makes it difficult for them to participate in all stages of the decision-making process. Issues which remain to be clarified include the degree to which local authorities budget for tangata whenua involvement in decision-making (particularly where the council is applicant for a consent), and what procedures are developed for councils to ensure that they have adequate information from applicants about the effects of proposals on matters of concern to tangata whenua (as affected persons).

Relationships between tangata whenua and councils are evolving (see Table 3.1). The experience of tangata whenua in the Auckland Region is that councils vary in the way they provide for and resource the involvement of tangata whenua. For example the Auckland Regional Council has entered into a Memorandum of Understanding with two of the iwi in its region. In relation to resource consents, the Memorandum provides, amongst other things, for the council to supply a list of notified resource consents to representatives of the iwi so that they may assess which are of interest to them. In turn, the iwi are invited to

> ... identify appropriate contact persons who will receive information, disseminate it and ensure that Council is kept adequately informed.[32]

Provision is also made for the council to agree to resource the iwi in certain circumstances, for example in the preparation, change and review of management policies and plans, and input into the processing of resource consents.[33]

The PCE has developed guidelines for councils to assist them to develop consultation procedures with tangata whenua.[34] Such procedures should assist tangata whenua to participate in dispute resolution when necessary.

3.4.10 Conduct of meetings

Informality was considered an important means of encouraging discussion between parties. One applicant noted that pre-hearing meetings she had attended were not conducive to seeking solutions as the council ran them just like formal hearings. It is also important to

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32 Memorandum of Understanding between iwi and the ARC p 9.

33 ibid. p 10.

34 PCE 1992

focus on sharing information and understanding issues and options, rather than expecting or pressuring parties to alter their position or reach an early decision.

Other key factors identified included:

- Flexibility – capability of the facilitator to modify the process to suit the situation.
- Issue-focused – facilitator should ensure that the focus is on issues not people.
- Non-threatening – no party should dominate the proceedings or be allowed to intimidate others.
- Ground rules – should be clearly stated before the process begins.
- Informal – to allow discussion.
- Confidential – without prejudice to any subsequent legal proceedings.

The presence of lawyers at pre-hearing meetings is also considered to be significant. One mediation practitioner thought that legal professionals should not be actively involved in mediation until the time comes to draw up an agreement. Both submitters and applicants noted that pre-hearing meetings progress much more smoothly when the parties discuss the issues without lawyers present. Examples were given of situations in which paid representatives disrupted the process by taking over the proceedings, and threatening other parties. Another problem is that lawyers may not be able to agree to a proposal if it is outside their brief. The key point is that those negotiating should be the people who have an interest in the outcome and who have the capacity to make a decision.

3.4.11 Confidentiality

Principles derived from the mediation literature (see Appendix 5) suggest that the process should be without prejudice: whatever happens in a mediation is confidential and the only information that emerges is the outcome. This allows parties to express views that they wish to keep out of the public arena, and reduces the possibility of information revealed being used against parties in future hearings. This issue was emphasised by the mediation practitioners interviewed, one of whom pointed out that most mediation agreements specifically preclude material being used at a later date.

The need for confidentiality may depend to some extent on the objectives of the pre-hearing meeting and whether or not there is an impasse which requires a mediated response. TRC staff indicated that the proceedings of pre-hearing meetings are not normally confidential. At both TRC and MCC a summary report of the meeting is produced by the officer involved. This is sent to all the parties to the meeting and is used at any hearings. Such an approach is useful provided that parties have the opportunity to correct the report if their views are

misrepresented, and that parties are made aware of the process before mediation begins. The key point is that the parties involved in pre-hearing meetings should be confident that they will not harm their future prospects by being open and free with information. Some parties spoken to indicated that this is not always so.

A distinction may be drawn between information about environmental effects on the one hand, and information of a commercial or personal nature on the other. Under the RMA, information concerning the actual or potential effects of a proposal is public information as it should be included in the assessment of environmental effects that the applicant provides with the application for consent (s 88(4)(b) and Fourth Schedule, RMA). The publication of other information considered at the pre-hearing meeting will not necessarily be required in the public interest and should be kept confidential unless otherwise agreed.

The example of WaterCare's process set out in Box 1 involves the sharing of information between parties. There are different views as to whether it would be more difficult to carry out such a process in a fully competitive environment, as a business competitor may be unwilling to disclose information that gives it a commercial advantage. Commercial advantage in keeping information confidential must be balanced against the requirements of a true public consultation process, which may require that the applicant publish information other than the assessment of environmental effects in order to gain public support.

3.4.12 Other issues relevant to conflict management

The investigation of conflict management has raised other issues which are relevant, but which are not directly within the control of councils.

Approval purchasing

In a previous report, the PCE noted that there have been cases of applicants buying the consent of affected parties.[35] An applicant can potentially avoid the notification of a consent by purchasing agreement to a proposal which may not be appropriate in environmental terms. In this respect, councils, as required under s 94(2)(a) and (3)(b), must still carefully assess the environmental effects of the proposal in order to be satisfied that they are minor. In determining whether or not the effects are minor, councils are directed not to take account of the effect on any person who has given their written approval (s 94(4)).

Aspects of this so called "chequebook diplomacy" cause concern. For example:

- affected parties may feel pressured into consenting to a proposal;

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35 1995a p 51

- affected parties may not have received sufficient information to assess fully the effects of the proposal on them;
- the council may not have the benefit of information from directly affected parties who have consented to a proposal and who have surrendered their rights to make a submission;
- adverse effects may not receive adequate consideration;
- inequities between parties can split communities; and
- there is potential for consideration of wider effects or public interest to be neglected.

Councils consulted generally acknowledged that "approval purchasing" does occur and most seemed to consider that it is a private matter between parties. It was acknowledged that in some circumstances the practice provides a means for affected parties to be compensated for adverse effects. The PCE[36] has noted that the Environment Court does not see the issue of approvals obtained by unconscionable means as its concern under the RMA as that course of action is open to applicants under that Act.[37] It is likely that the responsibility falls on the affected persons to ensure that they have all the relevant information before they give their approval. The PCE has also developed guidelines for applicants and councils on the preparation of AEEs, some of which are relevant in this area. For example, councils were recommended to provide forms for affected parties granting approval to applications which:

- make clear the legal implications of signing and the right of the affected parties to withdraw consent;
- include a summary of the AEE; and
- have a place to note whether the signing party has sighted the full and final proposal, including plans and the finalised AEE.[38]

Conduct of hearings

Some participants in this investigation have noted that hearings are also a valid forum for resolving conflict and sharing information and that hearings commissioners enable all relevant issues to be canvassed, and ensure that all parties' concerns are considered and acknowledged. Many of the respondents to the PCE's discussion document raised questions about the inability of parties at hearings to cross-examine witnesses (see Appendix 2). Hearings committees could take a break when necessary and request that further discussion take place between participants. The council's staff report, if there is one, has to be circulated only two days before the hearing which is also insufficient time for the parties to take in the considered view. Staff and councillor

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36 1995a p 51.

37 See also *BP Oil Ltd v Palmerston North City Council* W64/95 Judge Treadwell, Palmerston North 24/5/95.

38 PCE 1995a p76.

training, both for chairing and speaking before hearings committees, may also be necessary.

3.5 The Environment Court

Section 268 of the RMA provides for Court assisted dispute resolution (or "additional dispute resolution"). This means that the process of resolving conflict takes place under the auspices of the Environment Court. This type of conflict resolution (usually mediation) is frequently used and has generally been well received by participants.

The procedure used by the Environment Court is as follows:

1. A judge of the Environment Court reads the notice of appeal and makes an assessment of whether mediation could be useful in that case.
2. If the judge considers that mediation could be useful, the Court staff contact the parties and suggest mediation.
3. If the parties agree to mediation, a request is made to the judge.
4. The file goes to one or more of the environment commissioners.
5. The environment commissioner who will act as mediator generally visits the site in contention with the agreement of all the parties.
6. The mediation meeting opens with the mediator introducing him or herself and laying some ground rules – such as stressing the need for an open mind; and that no information leaves the mediation room.
7. Every party has the opportunity to put their point of view on the issues without interruption and without the involvement of their lawyers (although they may be present).
8. The next stages are tailored very much to the number and type of people who are involved – business people, individuals unfamiliar with the RMA process, Maori, people of other cultural backgrounds – and to the "feel" of the meeting.
9. The mediator attempts to draw out the points of agreement between the parties.
10. The mediator may advise the parties of the possible outcomes and the potential costs if they choose to proceed to litigation.
11. The mediator may explain technical matters for the benefit of participants who do not have access to expert advice; and may explain the relative legal positions of the parties.
12. Where there is no agreement the parties may proceed to litigation. The judge who hears the case will not be apprised of any details of the mediation and no blame will attach to any party for the failure to reach an agreement.
13. Where agreement is reached, depending on the nature of the issues and the solution arrived at, the appeal may be withdrawn or a consent order[39] sought from the Environment Court.

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[39] A consent order is an order of the Environment Court which endorses the agreement reached by the parties. There is no obligation on the

14. In addition to the consent order, or where the appeal is withdrawn, there may be a private contract entered into by the parties to provide for any aspects of the solution which may not be enforceable under the RMA.

Although mediation is not thought to be a viable option in all cases presented to the Environment Court, it is likely to be of benefit where the issues are planning issues rather than legal issues, as the mediators are not legally trained and do not have the jurisdiction to make legal rulings.[40] Even where intransigent parties are involved, an offer of mediation is often worthwhile, as attitudes may change in the process.

As with all non-judicial conflict management techniques, there is no way of guaranteeing a resolution from mediation; however, the following factors are useful in promoting this outcome:[41]

- The conduct of the mediation is without prejudice to any later hearing before the Court. This means that the details of the mediated proceedings may not be disclosed and that any information presented by a party at the mediation may not be used by any other party at the later hearing.
- Commissioners who acts as mediators will not (as a matter of policy) sit on the Environment Court if the matter goes to a hearing, notwithstanding that the RMA permits them to do so with the agreement of the parties.
- Language is to be kept simple; there should be no jargon.
- There should be opportunities for the parties to take time out from the mediation.
- The parties carry their own costs for mediation in the interests of promoting good will.

3.6 The level of success of conflict management initiatives

Generally, all councils consulted as part of this investigation considered that pre-hearing meetings and pre-application consultation help to reduce the cost of the consent process in the long term by making hearings shorter and less onerous, if not avoiding them altogether. Most councils noted that the informal procedure of pre-hearing meetings is less threatening to the parties involved and more conducive to productive information sharing and issue resolution.

Data about the success rate of pre-hearing meetings at council level is not extensive. TRC has an 80% success rate by its own measure of resolving disputes without a hearing. It is harder to measure success

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Environment Court to grant a consent order, as the Court has the power and responsibility to ensure that a consent order is consistent with the purpose of the RMA, or relevant policy statement and plan.

40 However, note the recent amendment to s 280 RMA by s 15 Resource Management Amendment Act 1996.

41 Ian McIntyre, Environment Commissioner, pers. comm. 1996.

rates for the other councils since none of them have a specific conflict management performance objective. However, most councils noted that pre-hearing meetings and pre-application consultation help to reduce the number of issues to be addressed at a hearing and most felt that the process has a valuable part to play in resolving issues surrounding resource consent applications. It is significant that the number of failed pre-hearing meetings mentioned by interest groups was limited, and that the same problem cases tended to be mentioned by a wide range of people; this suggests that these are notable exceptions rather than the rule.

At the Environment Court level, additional dispute resolution can remove the need for a hearing or resolve side issues so a hearing is more focused. A pilot study carried out by the Environment Court involving a range of issues, including subdivision consents, neighbours' disputes and plan references was undertaken in Nelson over a three-week period. This project resulted in 16 out of 30 cases being resolved without a hearing, a success rate of approximately 50 percent.

4 FACTORS IN SUCCESSFUL PARTICIPATION

4.1 Introduction

The experience of councils and the Environment Court, as outlined in Chapter 3, indicates that there is wide scope for cooperative information sharing and decision-making through the use of conflict management mechanisms under the Resource Management Act (RMA) but that the full potential of such mechanisms has yet to be realised.

If barriers to participation are reduced by having a consistent approach to the management of conflict under the RMA, and if such an approach is to be more widely practised, then some broader issues need to be considered. This chapter discusses these issues more fully.

4.2 Clarifying the contribution of non-judicial dispute resolution mechanisms

Mediation practitioners have suggested that there is no issue that cannot be approached through the use of pre-hearing meetings, as long as the techniques used are flexible enough to suit the circumstances. As noted in Chapter 2, s 99 of the RMA provides for the use of techniques such as facilitation and mediation. However, there is little guidance as to what these techniques mean and how and when they should be applied. In developing an approach to applying these techniques, it is useful to draw, not only on the examples of council practice, but also on information from other commentators and overseas experience.

Non-judicial methods should be regarded as useful conflict management tools which help to ensure that:

- the issues in contention are identified;
- all possible information is made available to the parties and the decision-maker; and
- any misinformation or wrong perceptions are corrected.

While dispute resolution mechanisms other than litigation are becoming increasingly common in managing conflict, it is sometimes argued that they do not suit all disputes, including environmental disputes. This may apply where:

(a) The decision affects so many people that settlement by agreement is unwise, such as in constitutional or environmental issues.[42]

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[42] Michael Dawson p 173.

Dawson's argument that non-judicial dispute resolution is unsuitable derives from the assumption that where many people are involved, it may not be easy to identify all those affected; this leaves any agreement open to challenge by someone who was not identified and therefore not party to the agreement. However, other commentators argue that mediation is particularly appropriate in disputes involving many parties with wide disparities of resources and power.[43] A variety of dispute resolution mechanisms (see Appendix 5) may be adapted to the particular characteristics of a dispute, such as the involvement of many people. Facilitation is particularly useful where large numbers are involved.

Other factors can also make non-judicial dispute resolution inappropriate in particular cases, if:[44]

(b) The purpose of dispute resolution is to establish a societal norm or legal precedent;
(c) One of the disputants does not want to take responsibility for any ultimate decision and wants to deflect blame or guilt;
(d) The decision requires official recognition where one party's status changes such as divorce and bankruptcy;
(e) Where one party sees a benefit in continuing the conflict, eg delay or publicity may suit the objectives of one party;
(f) There are fundamental conflicts of values where a judicial determination is required;
(g) There are severe and irremediable power imbalances between the parties. However, there are different views on this. Fiss argues that litigation is better able to protect relatively powerless parties, [45] but Astor and Chinkin counter that litigation has not been conspicuously successful at redressing power imbalances.[46] Davis and Salem claim that mediation is especially good at redressing power imbalances because it is voluntary and because a skilled mediator will model appropriate behaviour.[47]
(h) The parties need state sanctions, eg an injunction to prevent particular conduct, especially where one party is not acting in good faith in the mediation;
(i) There has been a breach of a statute and enforcement is the issue.[48]

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43 Bingham and Haygood, 3 at 6, as cited in Sommerville.

44 As to (b) to (d) Dawson p 175. As to (e) to (h) *Lawtalk* 415

45 O Fiss, pp 1073-1090 cited in Astor and Chinkin. From a New Zealand perspective one environmental group has commented that it agrees with Fiss as it has found the Planning Tribunal fair and helpful in contrast to its experience with its district council.

46 Hilary Astor and Christine M pp 54-55.

47 A Davis and R Salem "Dealing with Power Imbalances in the Mediation of Interpersonal Disputes" 1984 *Mediation Quarterly* No 6, 17-26 cited in Astor and Chinkin at 107.

48 Bronwyn H Arthur p 47.

As noted in Chapter 2.1, the resolution of a dispute where an activity may affect the natural environment is not usually a private issue, and therefore resolution by private agreement is not appropriate. Yet, while non-judicial dispute resolution methods may not completely resolve disputes in certain circumstances, they can usefully clarify and narrow the issues.

4.3 Developing principles for the management of conflict under the RMA

Over recent years a number of principles on the practice of "alternative dispute resolution" have been derived from overseas studies. These principles (set out in Appendix 5) are not immutable rules, as dispute resolution mechanisms are intended to be adaptable to any dispute and its participants. The principles most applicable to the New Zealand situation are those that ensure the process:

- is voluntary - parties must be willing to participate;
- is driven by the parties;
- involves an independent facilitator;
- is inclusive of all parties;
- is fair to all parties, including providing equal access to information;
- provides for confidentiality.

The RMA pre-hearing meeting process differs from what is commonly regarded as mediation in the following ways:

- there is no provision for a binding outcome, although this is not precluded if the parties come to an agreement.
- there is no indication as to who should facilitate, although meetings are called by a council.
- there is no specific requirement for an independent (ie neutral) mediator or facilitator to run the meeting.
- there is no provision for a mediation agreement; and
- information is not confidential, although it is implicit in s 99 that only the outcome of the meeting should be reported to the decision-maker.

The Environment Court process under s 268, as it operates in practice, does comply with the principles of mediation.

In developing principles for the New Zealand situation several issues need to be addressed. These are discussed in the following sections. Underlying the application of these principles is the requirement for the facilitator to be trained and skilled in conflict management.

4.4 Encouraging parties to participate

Despite the open standing provisions for participation under the RMA (for most purposes), this alone does not encourage or enable people to participate. As shown in Appendix 2, rights of standing cannot be

utilised effectively without knowledge of what the RMA provides for or the resources to participate. Parties require an understanding of the decision-making process and the options available to them to clarify how they can best contribute, and particularly whether it is worth their while becoming involved in initiatives such as pre-hearing meetings. Resources are needed for gathering and interpreting information, obtaining advice, and travelling to meetings.

The RMA attempts to address potential imbalances of resources by requiring applicants to include an assessment of environmental effects (AEE) with their applications for resource consent and by providing councils with the power to require an applicant to provide further information (s 92). AEEs should reflect the scale of the activity and its potential environmental effects.[49] Any further information supplied must be made available to submitters.

The RMA assumes that public participation leads to better outcomes for the environment. Therefore, the environment is the loser if the public is deterred or hindered from participating in the decision-making process. This section explores further matters to be addressed if parties are to participate willingly. It also looks at what information is required for the process to contribute positively to sound decisions, and what costs are involved.

4.4.1 Costs of the process

To understand the mechanism of conflict management (which includes incentives, benefits and costs), the questions of where costs fall, what the costs are, and who bears them need to be addressed.

Councils

Councils can charge applicants for the costs of the conflict management and consent processes, including the costs of hearings and the appointment of hearings commissioners. By contrast, in the Environment Court the costs of the commissioner who acts as mediator are covered by the Crown. In some other jurisdictions the costs of the mediation services are covered by the council. This raises questions about who should fund the pre-hearing process. For example, it has been suggested that a mediation service, funded by central government, could be established to address the issue of who should fund the pre-hearing process.[50]

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49 See PCE 1995a. The report contains a good practice guide.

50 Ian Macduff, letter to the PCE, 20/11/96.

Applicants

Any pre-application consultation is paid for by the applicant. Applicants also bear the cost of providing information in an AEE. If the council wants additional information, or commissions an independent report, the applicant may be charged for that too. If councils have a practice of full cost recovery, the applicant bears the cost of the pre-hearing meeting, the council officer's time, any independent mediators time, etc.

Submitters

Submitters generally bear their own costs. These may be small if the issue is local and the information provided by the applicant and the council officer's report is clear and authoritative. However, costs can be significant if submitters have to travel to a hearing, and if they wish to employ experts or commission independent reports to check the information provided. In addition, like some applicants, some submitters have to take time off work to participate and the result can be a substantial loss in earnings.

Although it is possible to identify where costs fall to each party, it is harder to determine exactly what those costs are. There is surprisingly little concrete data to support the widely held view that non-judicial mechanisms for resolving conflict are cheaper than proceeding directly to adversarial decision-making, especially in the long run. While conflict management processes may reduce the likelihood of a decision being appealed, the actual cost to parties in the process has not been quantified. Social costs also need to be recognised. Successful conflict management can result in win-win situations for all, while litigation can end in win-lose or loss situations and consequent ill will.

It is unclear who should bear costs. If it is accepted that participatory decision-making leads to better, more sustainable decisions which are less likely to be appealed, then there is a strong argument for ensuring that all parties can participate fully. Outcomes would be better for the environment, and the process would be cheaper, as it would not extend to the Environment Court or beyond. However, there is a distinction between disputes between neighbours and disputes which affect the environment and the public good. These need to be considered separately.

Where the beneficiaries are individuals rather than the environment or community as a whole, it is more appropriate that the parties bear their own costs, and that the applicant bears the cost of the process from which she or he reaps the return. Councils and the public generally have little to lose or gain from the resolution of a dispute between these parties except the avoidance of ongoing effort and possible

expense born by the Government should the matter be appealed to the Environment Court.

Where the matter affects the community or has wider environmental impacts, the ability of parties to participate has wider implications. Community advocates and individuals involved may represent a public good and, if they are unable to represent those interests, the environment and community could suffer. It is therefore important to ensure that parties are able to participate. If the costs relating to information, advice, and involvement are too high to allow this to occur, it stands to reason that, in the public interest, the costs should be met from another source.

Questions about the nature of costs involved in the decision-making process, and on whom they fall, are further explored in the following sections.

4.4.2 Incentives to resolve disputes

The process of managing conflict should be undertaken in a way that minimises the barriers to successful conflict resolution and which emphasises the benefits of participating. Some of the factors identified in Chapter 3 may assist in fostering a positive approach. However, other aspects affecting the success of conflict management are more complex. Of particular importance are the incentives for parties to participate in good faith.

Incentives and disincentives are not always clear, but understanding their impact can help to create a system that encourages non-judicial and non-adversarial conflict management.

Councils

For councils, the incentives and disincentives in relation to non-judicial conflict management vary.

- Councils generally consider that pre-hearing meetings and pre-application consultation result in better outcomes in environmental terms. In keeping with the councils' responsibilities under the RMA, conflict management presents a positive step towards sustainability.

- Conflict management can reduce the cost to the applicant, especially in the longer term. Since many councils view the applicant as a client or customer they are conscious of the need to keep costs down.

- The statutory time frames in the RMA are a disincentive to the use of conflict management mechanisms. Generally, pre-hearing meetings require additional time, especially if the issue is complicated or particularly acrimonious. There is provision

for time periods to be extended as necessary with the consent of the applicant (s 37(5A)). However, the lengthened time frames create delays for the applicant, and delay may be a cost that the applicant cannot afford.

- The performance objectives developed during the Annual Plan process play an important role in determining incentives for councils to undertake conflict management, as noted in Chapter 3. Performance objectives vary between councils. Examples are: to process a certain proportion of resource consent applications within the statutory time frame; to notify only a certain proportion of applications; and to resolve disputes before or without hearings. The timeliness objective is a disincentive to resolving disputes through the conflict management process because additional time is often required to process the consent. On the other hand, emphasis on resolving conflicts without resort to a hearing is an incentive to use that process.

Applicants

The primary objective for applicants is to obtain a resource consent. In this respect, the incentive for them to participate in conflict management is a trade-off. On the one hand, forcing a hearing may result in a quick decision in their favour, and is thus an incentive not to undertake conflict management. On the other hand, such action may result in submitters appealing a decision and imposing additional costs and delay on the applicant or otherwise attempting to obstruct and frustrate the applicant and the project.

- Applicants can see conflict management processes as reducing the long-term costs by reducing the likelihood of an appeal. In addition, early consultation can help to identify issues and concerns so that the proposal can be changed to avoid problems in future. For example, the willingness of WaterCare Services Limited to spend millions of dollars on pre-application consultation for a major waste management project worth some hundreds of millions of dollars suggests that the company sees the process as beneficial.[51]

- A need to develop a positive, long-term relationship with an interest group gives the applicant an incentive to spend time in conflict management. The need for an ongoing relationship between an applicant and tangata whenua is a good example of

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[51] The company notes that the exact cost is difficult to quantify as both process and technical costs are closely intertwined. In addition, there are benefits to the process which are also difficult to quantify including the development of good will (C McIlroy, WaterCare Services Limited, pers comm. November 1996).

this. In the case of WaterCare, the company is understood to value the good will generated through the pre-application consultation process.

- Knowledge and perception of the council affects an applicant's approach to non-judicial conflict management. If the council is seen to be pro-development, it is more likely that the application would be granted, so the need to compromise or negotiate is reduced. Conversely, if the council is known to listen to community concerns, it may well be in the applicant's interests to accept compromise prior to a hearing. If the proposed development will be long term and dependent on community support, it is also in the applicant's interests to agree to conflict management procedures.

Submitters

The purpose of submitters' involvement in consent decision-making processes is usually to protect their own (or the community or public) interest or to obtain more information so they can determine the likely effects of the proposal.

- Submitters often perceive a formal hearing as being very negative and adversarial, and sometimes as biased. Their desire to avoid a formal hearing can prompt them to enter into a conflict management process.

- The prospect of having costs awarded against them by the Environment Court can also spur submitters on to resolution at the pre-hearing stage. In this respect, it is important for submitters to clarify how sound a case they would have if they were to refer a council's decision to the Environment Court. It has been suggested that independent legal advice on this matter early in the consent process would ensure that parties are fully aware of their options, and discourage parties who do not have a sound case from taking an appeal.

- Submitters may be willing to negotiate at a pre-hearing meeting where lawyers are not present in the knowledge that at a formal hearing the resource imbalance between submitters and the applicant would make a ruling in the submitters' favour unlikely. On the other hand, an applicant (or a well-resourced submitter) may prefer to go to court.

- Lack of resources can be an incentive or disincentive. Parties often have to travel some distance to take part in conflict management processes and spend time becoming familiar with a new aspect of the process, all with no guarantee that the dispute will be resolved. If the dispute goes to a council

hearing, the party may, by that time, have exhausted its resources. On the other hand, there may be an incentive for submitters who cannot afford to take part in a hearing or appeal on an equal basis to pursue a more favourable outcome through conflict management processes.

- Lack of knowledge about the RMA process may also be a disincentive. Some parties feel the hearing system, both at council level and at the Environment Court, is fairer and want to have the opportunity to appear before the decision-making body.

Despite the many reasons for negotiating a solution in a discursive situation, councils attest that many parties are still unwilling to do so in good faith. Several council officers noted that some parties appear at pre-hearings but say nothing, while still others simply do not attend. This may, however, reflect the skill of the person running the pre-hearing meeting and how the meeting is conducted.

The lack of will to enter "mediation" raises the issue of "compulsion". In Australia, it has been argued that if mediation were compulsory, there would be a substantial increase in the number of cases settled through mediation, as parties and their lawyers are likely to be more used to litigation and may need more than a little encouragement to try mediation.[52] This does not appear to be a valid argument for New Zealand, where mediation is becoming increasingly popular and is being promoted by the New Zealand Law Society.[53] In an article on dispute resolution, the President of the New Zealand Law Society recently commented that compulsory mediation is "potentially a contradiction in terms", although he did not rule it out as an option which could be explored in the future.[54]

However, there is some support amongst commentators for "process compulsion",[55] which makes it compulsory to provide parties to a dispute with information and advice about options for resolving their dispute. An example of this approach is seen in High Court proceedings the United Kingdom where counsel are required to "consider attempting" to resolve disputes by alternative dispute resolution.[56]

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52 Michael Dawson p 173.

53 Among other initiatives, the New Zealand Law Society organised a Mediation Week in October 1996. A study of public awareness of mediation prior to Mediation Week indicated a relatively high degree of awareness of mediation ("Study shows mediation awareness high.") *Council Brief* 224.

54 Austin Forbes p 418.

55 Austin Forbes p 417.

56 Austin Forbes p 417.

There is a fine line between establishing incentives and using compulsion to encourage parties to share information and clarify each others' perceptions in good faith. While an experienced facilitator may be able to encourage dialogue, there may be situations in which the incentives are not strong enough to make all parties willing to participate. When this happens, participation should not be forced. Instead, educating the parties about the benefits of the process may lead to a more positive approach.

4.4.3 The importance of trust

Literature on the use of alternative dispute resolution techniques emphasises the independence and neutrality of the facilitator. The question of the role of council officers has been addressed in a variety of ways. At the Newcastle City Council, in New South Wales, Australia, where a mediation process for building and development applications is well established, independent mediators are always used. As the council notes:

> It is important that staff do not become involved in the mediation process and that they remain non-committal on Council's position in final determination of the application. Clearly, at the mediation stage, Council's assessment of the application cannot have been carried out and it would be inappropriate to influence the outcome of negotiations. Any statement by staff on the likely outcome of the application will be seized on by the parties and may compromise the mediation.
>
> Newcastle's approach is to limit the involvement of technical support staff at mediation by only responding to questions from the mediator and only responding to questions on policy interpretation.[57]

The Maclean Shire Council, also in New South Wales, has adopted a similar programme and uses independent mediators from outside the locality.[58] In both cases, the importance of using mediators with no vested interest in the outcome of a mediation is stressed.

As already noted, RMA pre-hearing meetings are often run or facilitated by a council officer, and the Act permits the council decision-maker to be present at the meeting if all the participants agree. The Environment Court has also commented that it is significant that s 99:

> ... expressly recognises that a member of a consent authority who is empowered to make a decision would, in the normal course of events, be disqualified from participating in the final

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57 Winston 1994 p 3.

58 *Daily Examiner* 22/1/95.

> decision making process if involved in s 99 procedures. The section has specific provision setting forth the circumstances which need to apply if he or she is not to be disqualified.[59]

As noted in Chapter 3, whether or not the council itself and the council officer are seen as independent will be crucial to the success of the meeting. Examples identified in Chapter 3 show that council officers are able to fulfil the role of facilitator or mediator successfully. Much of their success depends on the level of respect and trust that the council has established in its community.[60] Without trust, it is inappropriate for the council officer to act in this capacity. To ensure that the process is not open to allegations of bias, the participants must have the opportunity to accept or reject the council officer as facilitator/mediator.

Clearly there is a potential for conflicts of interest where councils are both decision-maker and applicant and there is limited guidance in the RMA about councils' separating their functions. Where councils are also applicants, they need to give special attention to their own departments' procedures for consent applications so as to ensure that they receive independent scrutiny from the regulatory department and are seen to be fair:

> Public perception is frequently that a council will get its way over individuals. To forestall any such criticism, a council as applicant needs to use all available opportunities to fully acquaint the public at large and the affected parties with the project, its environmental effects and the council's reasons for decisions on the project.[61]

There are a number of approaches that can be taken to overcome conflicts of interest including the appointment of hearings commissioners, independent experts and panels. For example the PCE has been asked to assist in disputes involving councils on a number of occasions. The case study on the Moa Point Sewage Treatment Plant dispute is one example of how an independent body or person can assist in resolving a dispute between a council, an applicant and the community (see Box 3).

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59 *Otaraua Hapu v Taranaki Regional Council* W 129/96, Judge Treadwell, 20 September 1996.

60 Public confidence in councils contributes greatly to councils' ability to manage conflict effectively. The PCE (1995b p 28) has commented on this issue in relation to the processing of resource consent applications, noting that many members of the public perceive that their councils are "pro-development". Councils can take steps to ensure that a balance between development and environmental protection occurs.

61 PCE 1995a p 46.

Box 3: Moa Point Sewage Treatment Plant Dispute

Background
Construction of sewage treatment and disposal facilities to service Wellington City commenced in early 1995. The facilities are located near a residential community characterised by low rental housing. The community strongly opposed the site chosen for the treatment plant. Protracted statutory approval proceedings resulted in the Environment Court requiring, as a condition of the approval granted, the establishment by the Wellington City Council (WCC) of a community liaison committee (CLC) "to work with the Council staff and consultants to establish ways to minimise any adverse effects of the plant (including construction) on the adjacent communities". The Court also required WCC to appoint a facilitator to service the committee.

The Dispute
In September 1995, CLC representatives sought help from the PCE to stop the WCC and its agents proceeding with work, which, it was claimed, did not comply with plans approved by the Environment Court. The CLC felt that a certificate of compliance issued by WCC for works that varied from the approved plans, had been issued without consultation with the committee. Subsequent inquiries made by PCE staff indicated that consultation between WCC (and its agents) and CLC had been problematic since the construction work had started.

Resolution
The process initiated by the PCE to resolve the dispute involved the following actions and agreements:

1. A meeting by PCE, WCC, contractors and the CLC facilitator at which contentious issues and a process for addressing the issues was identified.
2. A meeting of WCC, contractor and CLC representatives with a mediator appointed by the PCE at which agreement was reached on 18 points including:

    - works that could proceed;
    - strengthened consultation process (including participation of WCC environment control staff in CLC/contractor liaison meetings, and procedures for reporting by the CLC facilitator to senior WCC staff, contractor personnel and the PCE; and
    - appointment of a technical adviser to service the CLC, with expenses met by WCC.

Resolution Outcome
Since the above agreement was reached, another dispute has arisen involving an agreement for the establishment of an education trust, entered into by WCC, contractors and a section of the Moa Point community, without consultation with the CLC. The CLC complained when it learnt of the agreement. In response, the WCC immediately acknowledged that it had breached the terms of its agreement with the CLC and apologised. Subsequently, a formal WCC Protocol for Council Interaction with Community Liaison Groups was created and, at the same time, CLC reviewed and strengthened its terms of reference.

4.4.4 Obtaining agreement on the process

It is fundamental to the success of a pre-hearing meeting or any attempt to resolve issues before a consent hearing that the participants first agree on, and commit to, the objective of the meeting, the process to be followed, and the ground rules to be applied. Participants need to be clear about what they are seeking to achieve, and be seeking to achieve the same thing. It should also be made clear to the participants what can and cannot be dealt with by agreement among them and what will require a decision of the council.

4.4.5 Confidentiality

Because of the broad standing for the public to participate in resource management decision-making under the RMA, there may be a large number of people involved in a public interest environmental dispute. As discussed earlier (Chapter 2.1), in public interest environmental disputes it is more difficult to identify all the interested parties. It is also more difficult to maintain the confidentiality of information disclosed to other parties during conflict management processes. Business organisations commonly wish to restrict access to their commercially sensitive information because they fear that the principle of confidentiality will not be respected by all parties. Conversely, submitters are likely to be suspicious of any reluctance by an applicant to provide information.

The purpose of confidentiality in conflict resolution processes is to encourage parties to share all relevant information to dispel any misunderstandings which may underlie or aggravate the dispute. If the applicant is not comfortable that the other parties will respect the need for confidentiality, he or she is unlikely to share information openly. A party's need for confidentiality may be addressed through various means, such as confidentiality agreements which ensure that information disclosed at a conflict resolution meeting does not leave the room, and caucuses (that is, where the mediator meets separately with each party).

It is important to the success of pre-hearing meetings that discussions take place without prejudice to the decision on the application for consent. Section 99 RMA reflects this situation by providing for only the outcome of such meetings to be reported to the decision-maker. However, the outcome report should be able to be verified by all participants.

Some information should be publicly available. Information on the actual and potential environmental effects of a proposal should be included in the assessment of effects which is part of the application for consent and therefore public information (refer 3.4.11).

4.4.6 Time

Public participation takes time. For members of the public interested in a proposal, time must be taken from other activities, including work, in order to inform themselves about the proposal, obtain advice, make inquiries of council, and prepare and present submissions.

The RMA specifies time periods within which certain tasks must be performed. The council may extend these times up to double their length, or for longer if the applicant agrees. However, allowing a process to drag on, especially where submitters are not kept informed of the length of the delay and the reasons for it, can cause stress and inconvenience to all parties.

The PCE is aware of instances of some councils not complying with statutory time frames and delaying the hearing of consent applications without informing submitters. This undermines faith in the ability of councils to process consents neutrally. It also raises questions as to whether it is fair for applicants and councils, provided they are in agreement, to seek extensions of time (under s 37(5A)) with no provision for submitters to have the same opportunity, particularly when submitters have to work to the original submission deadlines. A performance objective contained in Wellington City Council's draft Annual Plan is designed to ensure that "all others are notified of the reasons for the delay".[62] This goes some way towards ensuring equitable treatment depending, of course, upon who the "others" are considered to be.

4.4.7 Information

Access to information is a key factor affecting the use and success of conflict management techniques. The issues of who has information, who pays for it, and who checks it are all important.

One of the purposes of non-judicial conflict management is to avoid the adversarial situation. Information, both about the process itself and the proposal under consideration, should be freely shared and understood by all participants. If one party has the resources to pay for detailed information and others are unable to buy information or pay for the information to be checked and explained, the parties will be unable to negotiate on equal terms.

In such situations, the power that the less resourced party has is confined to resistance and delay rather than constructive solution negotiation. As Mayer points out, "sometimes the only perceived source of power that a weaker party has is to refuse to agree to anything."[63]

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62 Wellington City Council 1994 p 51.

63 Mayer, B p 78.

Under the RMA, the inability to access information, for whatever reason, is a very real barrier to participation, in the decision-making process.

Process Information

Information about the process of conflict management and resource management decision-making is required for parties to be able to participate. Access to such information affects the choices that parties are able to make, and full information and understanding is required for parties to make informed decisions about their involvement. Situations where inadequate information may lead to poor outcomes include people failing to make submissions on matters affecting them and poorly considered appeals to the Environment Court. Submissions to the PCE discussion document (see Appendix 2) and persons consulted in this investigation suggest that levels of knowledge and understanding are still low, representing a significant barrier to effective participation in all resource management processes.

There are a number of examples of initiatives in New Zealand designed to provide accessible information about RMA procedures to members of the public. Councils presently play some part in providing process information to the public. Most councils produce brochures explaining the resource management decision-making process and the opportunities available under this regime. An innovative example is the ARC "Enviroline", a toll-free information line that the public can use to obtain information and advice about procedures independently of the regulatory sections of the council.

The Queenstown Lakes Community Advocate and Christchurch Community Law Centre are two examples of services which provide independent advice to the public. The Queenstown Community Advocate assists any public interest groups which are "members". However, the advocate does answer many queries from individuals and advises them to approach their local ratepayer group or other interest groups. The membership fee is $15 per annum and costs of using the advocate are charged out to groups at $5 per hour (to cover administration). A regular monthly newsletter keeps members informed.[64]

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[64] Because of development pressure in Queenstown, some of the 30-40 ratepayer and other interest groups in the area approached the council to fund the appointment of a community advocate. The council agreed to make a grant of $30,000 plus GST from its 1993/4 budget. A small committee was elected to carry out a feasibility study which was presented to the groups who agreed to form an incorporated society to appoint a community advocate. Similar grants have been made by the council for 1994/5 and 1995/6.

The Christchurch Community Law Centre provides a free resource management advice service for individuals and community and residents' groups, who are often at a disadvantage in dealing with councils and developers because of the cost of paying for legal and technical expertise and the complexity of the issues. The service is funded from grants from some of the city's community boards.[65] The goals of the organisation are to:

- Compile and maintain a comprehensive and comprehensible information base on the Act and associated legislation available to all community organisations and clients;
- Provide free advice and information on the key elements of the Act and on the application and objection procedures contained in it to meet the needs of specific objectors and applicants;
- Provide training and support seminars on the working of the Act, capable of delivery to specific organisations or wider networks of groups and individuals;
- Liaise closely with complementary services run by local bodies and non-profit organisations, ensuring parallel and not overlapping operation.[66]

The service offers legal and planning advice on resource management issues; assistance with submissions in relation to applications, and regional and district plans; assistance with applications; referral to qualified professionals if needed, and seminars and training events on resource management and planning law.[67] The service relies primarily on the involvement of resource management professionals who provide services on a voluntary basis.

These initiatives by councils are a wise investment. Advice and assistance to interested parties and submitters reduces the number of inappropriate submissions and increases their relevance and clarity, thereby reducing the time and money that councils must spend assessing this information.

The PCE has also had a role in providing information and advice on decision-making processes, primarily in response to requests from the public. It should be noted, however, that the PCE is unable to provide

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65 The Legal Services Board is the primary funder of community law centres. It funds the infrastructure such as rent, capital equipment and library as well as a centre's core activities. These activities are considered to be generalist service legal advice, information and law-related education services. The areas the centres mostly handle are family, criminal, consumer and welfare law. Advice and advocacy in environmental law is considered a specialist project rather than a core service and for such projects centres are strongly encouraged to seek separate funding.

66 Christchurch Community Law Centre 1995.

67 Christchurch Community Law Centre paper, undated.

an extensive information service, as this is not the primary role of the office.

In addition to process information, information about the legal parameters of an issue subject to a dispute must also be made clear to the parties. The process can then be managed in such a way that the outcome, whether it be at pre-application or pre-hearing stage, is acceptable under the RMA. If the legal framework for conflict management is clearly defined by the facilitator, the outcome of the process is more likely to be environmentally acceptable. Concise plans and policy statements also help by outlining the limits within which decisions can be made and agreements reached. Judges of Environment Court set out the legal framework for a mediation. In a similar way a council solicitor could inform the parties to a pre-hearing meeting of the legal boundaries of any potential agreement.

In the Newcastle City Council mediation process noted earlier, the council set in place procedures to encourage potential objectors to a proposal to discuss the matter with council staff before lodging objections. It is understood that council staff, in turn, provide adequate information during the "public exhibition period" (the time during which the AEE and details of a proposal are available for public scrutiny) in order to increase understanding of the application and the assessment process.[68]

The Environmental Defenders Office (EDO) in Sydney, and more recently in other Australian states, also provide process information similar to that provided by the Queenstown and Christchurch services (see Appendix 4). In summary, the functions of the EDO are:

- provision of legal advice;
- casework and litigation;
- law reform;
- community legal education.

The litigation work of the EDO is assisted by the provision of legal aid.

Legal Aid in New Zealand

There has been much criticism recently of the cost of participation and, in particular, of the high cost of court proceedings, costs which increase the longer the dispute lasts, and the lack of legal assistance.

The issue of the availability of legal aid arises once parties have moved into the adversarial stage. Legal aid is meant to be available for Environment Court proceedings in some circumstances. The general rule is that legal aid is available to individuals but not to corporate or

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[68] Newcastle City Council paper, p 3.

unicorporate bodies (s 27(1) Legal Services Act).[69] However, notwithstanding the Legal Services Act 1991, a lack of funds means that legal aid for resource management proceedings exists largely "on paper" only.[70]

Debate about the provision of legal aid in environmental decision-making, especially for public interest groups, has continued since the RMA was enacted. Recently, it was suggested that the provision of legal aid to parties to resource management proceedings would benefit everyone by enabling participants who cannot afford representation to be properly advised, therefore reducing the number of cases brought unnecessarily.[71] There is merit in this suggestion, especially as it serves to highlight the negative impact that lack of resources of one party has on all parties to a dispute. Rather than funding to enable parties to pursue their cases, access to good advice and information early in the process would go a long way to overcoming the barriers to participation.

The Christchurch Community Law Centre is carrying out a study of legal aid as a mechanism to assist public participation. The study aims to include an evaluation of the usefulness of the Australian Environmental Defenders Office as a model for New Zealand. The study is expected to be complete early in 1997.

Substantive Information

Substantive information about the nature and effects of a specific proposal is another prerequisite to effective participation in conflict resolution. Full disclosure of information at the pre-application or pre-hearing stage of a consent application process may reveal to the parties that there is no real dispute between them, or that the dispute is really about something different, perhaps a particular aspect of the larger issue. Zillessen has commented that the level of tension corresponds to the complexity of the matter in hand, and that the disclosure of relevant information has been found to reduce prejudices and help parties to understand each other's interests.[72]

Sharing information, or joint fact-finding, has benefits for all parties, namely:

- it encourages trust and the development of a constructive relationship;
- it eliminates fear of the unknown - fear can lead to an objector being labelled intransigent;
- it dispels misconceptions about a proposal or its effects;

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69 The two limited exceptions are not relevant to RMA proceedings.
70 Kenneth Palmer p 251.
71 Philip H Mitchell p 21.
72 Horst Zillessen p 12.

- it helps the parties identify the issues on which they agree and those where they differ so that even if the dispute does progress to the Environment Court, the issues in dispute have been narrowed and focused.

The disadvantages of not sharing information include:

- a longer, drawn-out process;
- loss of trust and alienation of the parties from each other;
- more expense is incurred the longer the dispute goes on;
- fear and desperation of submitters may manifest as intransigence, so that they refuse to agree to anything;
- an imbalance of power between the parties.

Many submitters to the PCE's discussion document expressed concern about councils relying on the AEE information supplied by an applicant without providing for independent verification of that information. Concerns were also expressed that the burden of providing a review of AEE information can then fall on submitters, who are, in most cases, not resourced to fulfil that role. One environmental group comments that the small council in its district has no staff member qualified to make a landscape assessment, or a recommendation on the value of an ecological area, or the vulnerability of a fragile coastline. Such a council is not in a position to audit an applicant's AEE without purchasing advice from outside the council.

In her report *Assessment of Environmental Effects (AEE): Administration by Three Territorial Authorities*, the PCE provided advice to local authorities on the need to apply effective means of checking the accuracy of AEE information and the adequacy of consultation carried out by applicants:

> ... applicants will naturally emphasise the positive aspects of their proposed activity, but a balanced assessment is required by decision-makers. Staff expertise will not cover all technical issues, and an independent assessment may need to be commissioned. Reliance on public submissions may not be sufficient as not all interested parties may sight the notification or have the time or skills to present their concerns in writing. Nor will they be involved with non-notified applications.[73]

Where councils do not ensure that independent verification of an AEE is provided, their own independence and credibility as a key player in the management of a dispute may be undermined, particularly if there are serious objections to a proposal.

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[73] PCE 1995a p 5.

While the responsibility of councils to check the accuracy of AEE information is clear, other issues associated with the provision of this information are less obvious, particularly the boundary between information that should be provided and funded by an applicant, and that which should be provided and potentially funded by councils or by other public agencies. The PCE has identified this issue in a previous report in relation to the assessment of cumulative effects:

> ... an individual applicant is often not in a position to adequately assess the effect of one proposed activity in relation to other activities, but this aspect of the assessment is something that in the public interest must be attempted in the council's evaluation.[74]

The boundaries between the responsibilities of applicants and the responsibilities of local authorities in this area require clarification, particularly in light of full cost recovery policies.

In the absence of council information provision and audit, the question of equitable negotiation remains. Whose responsibility is it to ensure that all information is "on the table" and who, if anyone, should correct any information imbalance between the parties? As with the judicial system, equity imbalances can reduce the potential of non-judicial conflict management techniques to lead to a sustainable and unanimous settlement. Consent authorities, particularly smaller councils, do not have the resources to address equity imbalances unless they can justify commissioning a report under s 92 of the RMA.

Another issue was identified in the PCE's report on the siting of cell-phone transmitters: *Public Authority Planning for Cellphone Transmission Facilities (1996)*. Here, the PCE noted that many local authorities are handling applications from communication companies for cellphone transmission facilities. However, as the PCE comments:

> ... there has been a clear message from smaller local authorities surveyed during this investigation that they do not have the resources to evaluate the technical and legal information of the applicant companies on this issue. The companies themselves want a degree of certainty, which at present does not exist, and would prefer legislative certainty. [75]

The PCE recommended in this case that a national guideline be developed jointly by the Ministry for the Environment and the Ministry of Health upon which policies and rules in district plans could be based.

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74 ibid, p 43

75 PCE 1996b p 53

Present practice can be contrasted with what used to happen when any proposal put forward or authorised by the Government was subject to the *Environmental Protection and Enhancement Procedures*.[76] Under those procedures, which still exist, complex technical information was audited by the former Commissioner for the Environment through a public submission process.

In managing conflict, ensuring all information is available to parties is essential. Identifying or verifying information can be carried out by council staff or independent reviewers or experts. Where information is incomplete, this needs to be recognised. Submitters are particularly at a disadvantage when an applicant is presenting detailed or complex technical information. It may be in the council's interest to assist a community by providing a technical expert to assist them (see Box 3). In this way, many of the benefits identified above would be realised.

This chapter has raised a number of questions for councils to consider in the management of conflict. Some of these questions are set out in Figure 4.1.

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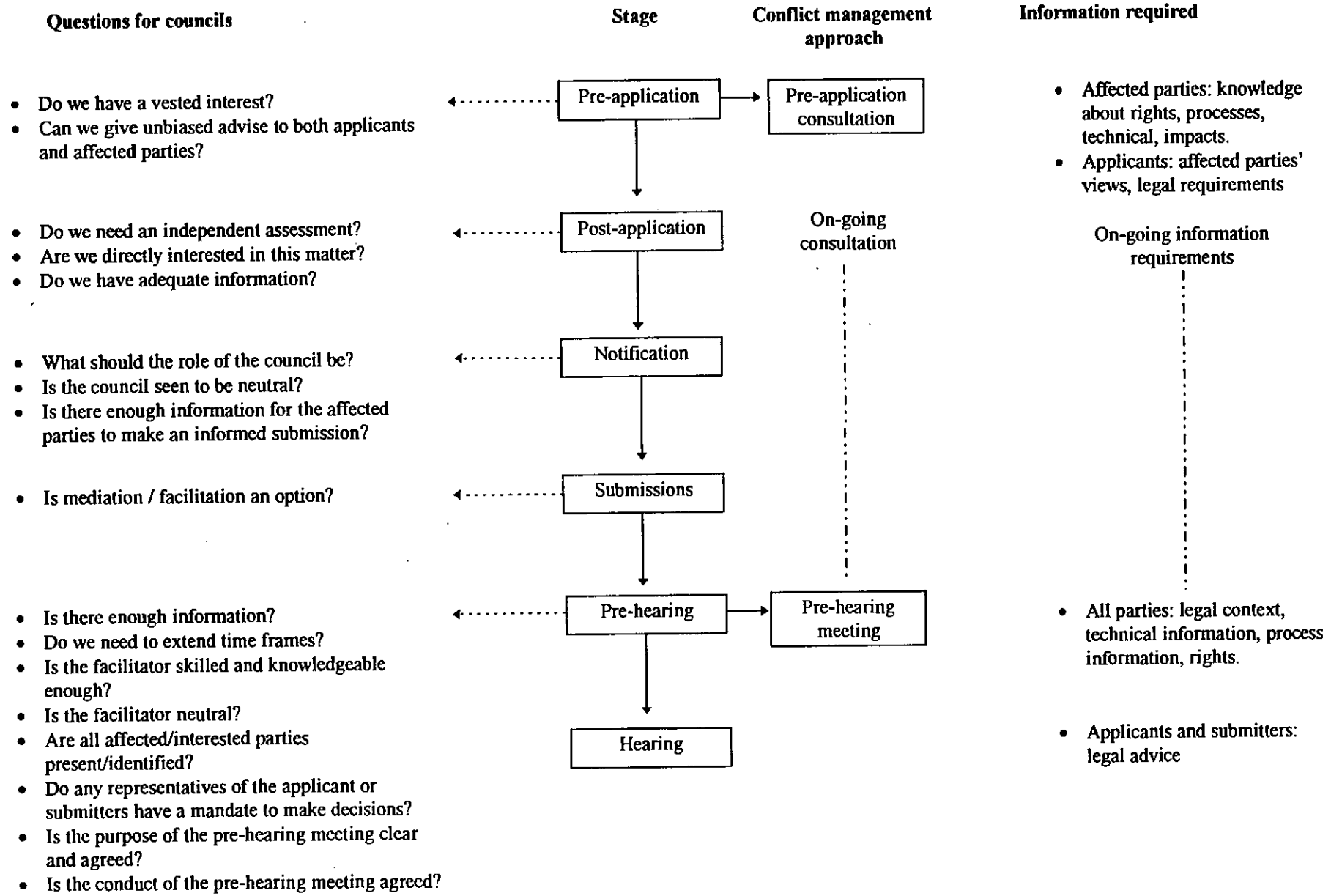
[76] Ministry for the Environment 1987.

Figure 4.1 Conflict Management: Guidance for Councils



5 CONCLUSIONS AND RECOMMENDATIONS

This investigation was initiated as a result of concerns expressed by members of the public and tangata whenua about their ability to participate in environmental decision-making. An overwhelming number of the responses to the PCE's discussion document *Public participation in environmental decision-making* identified participation under the Resource Management Act (RMA) as an issue of prime concern. Barriers to public participation identified included:

- the public's lack of awareness of RMA procedures and failure to recognise the importance of becoming involved as early as possible in the planning process;
- inappropriate council management of decision-making processes (including pre-hearing meetings and hearings which are not user friendly);
- lack of resources (people, skills, funding) for the public to participate;
- the nature of statutory procedures (including time available and the adversarial nature of hearings).

This investigation set out to clarify the potential contribution that non-judicial dispute resolution methods can make to decision-making under the RMA, including their ability to overcome barriers to public participation. The investigation also identified factors necessary for the successful use of such methods by drawing on New Zealand and overseas experience.

If the barriers to participation are to be overcome, development of a framework for conflict management and guidelines for the management of specific conflict situations are required, as well as a review of some aspects of government policy.

The focus was on the resource consent process, although it is acknowledged that the conflict management techniques discussed are applicable to many other local authority functions including plan and policy preparation.

This chapter summarises the findings and conclusions of the investigation.

The benefits of conflict management

1. Experience of environmental decision making in New Zealand suggests that environmental conflict is generally caused by:

   - lack of trust between interested parties and decision-makers;
   - lack of information about the decision-making process;
   - lack of technical information, or lack of assistance to interpret complex information;
   - structural problems such as statutory time frames and the way decision-making processes are established and managed;
   - different beliefs and values as to how environmental effects should be managed.

   (see Chapter 2.1)

2. The development of policies by councils on the management of conflict and the use of mechanisms such as mediation and facilitation provide a vital means of addressing the causes of conflict as early as possible in the decision-making process, both at the planning and consent level, and improving public participation under the RMA. The benefits include:

   - developing a relationship of trust with members of the public;
   - making the process less threatening;
   - more robust processes and durable decisions;
   - ensuring that full information is available before decisions are made;
   - a likely increase in cost effectiveness;
   - improving the effectiveness of environmental management through the decisions made.

   Policies and practices to assist the management of conflict need to be developed further by both central and local government.

   (see Chapter 3.3, 3.4, 3.6, 4.2, 4.4)

Issues for local government

The development of conflict management policies

3. The councils interviewed for this investigation all identified the positive contribution that the pre-application and pre-hearing process can make to decision-making. They have confirmed that conflict management techniques can, among other things, help councils identify the effects of activities on communities and individuals; reduce the likelihood of appeals to the Environment Court; defuse disputes; and build more cooperative relationships between applicants and the community. However, most of the councils studied do not have specific policies that provide for the use of conflict management techniques.

   (see Chapter 3.3, 3.4)

The need for guidelines

4. While the RMA accommodates a range of conflict management techniques for use in the consent process, including pre-application consultation, pre-hearing meetings and additional dispute resolution at the Environment Court, there are no clear guidelines or criteria to assist councils in their application.

(see Chapter 2.2, 4.3)

5. The development of guidelines for the application of conflict management mechanisms is necessary. The following principles provide a useful starting point.

Principles for the management of conflict

- **Early communication**: The earlier the parties communicate, the better their chances of developing a trusting and respectful relationship which is a pre-requisite of successful conflict management.
- **Full disclosure of information on environmental effects**.
- **Voluntary process**: parties must be willing to participate in pre-hearing meetings and other initiatives for conflict resolution.
- **Agreement of all parties on the process, including purpose and conduct.**
- **Involvement of a trusted and skilled facilitator or mediator**: where a facilitator is involved in assisting parties to share information and concerns, the person(s) must be trusted by and acceptable to all parties.
- **The process is inclusive of all parties**.
- **The process is fair to all parties**..
- **Process provides for confidentiality to ensure that parties have an opportunity to discuss options for resolution without prejudice.**

(see Chapter 4.3, Appendix 5)

6. The nature of the issue in dispute does not determine whether it can be resolved by non-judicial means. Rather, factors such as the attitudes of the parties, their relationships and their values are more likely to determine whether conflict management techniques will be useful. Councils need the expertise to know which conflict management approach is most appropriate in each case. In addition, the skills of the person or people facilitating conflict management have a significant impact on its success. Specialist training on dispute resolution techniques and their use, along the lines of the Environment Court additional dispute resolution practices, is required.

(see Chapter 3.4.5)

7. Hearings are also a valid forum for resolving conflict and sharing information. Hearings commissioners can enable all relevant issues to be canvassed, and ensure that all parties' concerns are considered and acknowledged. Information obtained in this investigation suggests that it is also necessary for hearings commissioners and staff to receive training both in chairing hearings, and in speaking before hearings committees.

(see Chapter 3.4.12)

Recommendation 1: To Local Government New Zealand

In consultation with the Ministry for the Environment, develop guidelines on the conduct of pre-hearing meetings and hearings under the Resource Management Act, and, in doing so, identify those issues which lend themselves to resolution through non-judicial means.

Recommendation 2: To Local Government New Zealand

In consultation with the Ministry for the Environment, establish an environmental dispute resolution training programme (for local authority staff and independent practitioners).

Implementing conflict management procedures

8. The development by councils of a **framework** for managing conflict, including appropriate performance objectives, is necessary for the effective use of conflict management techniques.

(see Chapter 3.3, 4.4)

9. If all parties are to participate in consultation procedures and pre-hearing meetings, the **incentives** for them to do so are important. However, such incentives, which may include cost structures and council performance objectives, are not always obvious and must be carefully considered in the development by councils of any conflict management policy.

(see Chapter 4.4.2)

10. Lack of **trust** in councils and applicants may deter the successful use of dispute resolution techniques. Public perceptions of council "bias" can have a detrimental effect on the ability of councils to assist parties to a dispute to resolve their differences, and may prejudice the ability of council officers to act as facilitators or mediators. Public confidence in councils may be undermined where:

- planning documents are not clearly written;
- the use of language (eg, "client" and "customer" to describe applicants) does not make it clear what the council's responsibility is to members of the public and particularly its residents and ratepayers;

- councils do not provide an adequate evaluation of AEE information;
- councils do not monitor and enforce consent conditions actively;
- the council is the applicant;
- the council is perceived to be "pro-development".

(see Chapter 3.4, 4.4)

11. If the council earns the trust of the public by maintaining a neutral position in respect of applications, proper evaluation of AEEs, and appropriate monitoring and enforcement, the public may in turn not feel the need to scrutinise in detail all information, resource consent hearings may be assisted, and decisions reached in a more cooperative manner.

(see Chapter 4.4.7)

12. As **consultation** is an essential part of any conflict management procedure, councils need to actively encourage pre-application consultation.

(see Chapter 3.4.2)

13. All parties to a dispute require full **information** about the decision-making process and their options before they can fully participate in resolving the dispute. In order to assess the option of seeking a solution to a dispute through judicial or non-judicial means, parties may require preliminary legal advice as to matters which are relevant to the RMA and, ultimately, the likely grounds for success of the referral of a council decision to the Environment Court. There are a number of options for councils to consider to address these issues including the establishment of community advocates; separate public advice services within the council; or formal provision for interested parties to discuss applications with council officers. Separate meetings with council officers prior to pre-hearing meetings may also assist. Councils should regard such initiatives as an important investment in the development of effective decision-making procedures.

(see Chapter 4.4.7)

Recommendation 3: To all local authorities

Establish policies for the management of conflict and, in doing so, ensure that:

- planning documents are clearly written;
- performance objectives are reviewed to ensure they are consistent with effective conflict management;
- criteria for determining how particular disputes will be handled are developed;

- pre-application consultation by applicants is actively encouraged;
- a framework is in place to ensure that councils can identify tangata whenua concerns before decisions are made;
- decisions are delegated in such a way that delegations are fully understood; officers delegated to manage pre-hearing meetings are sufficiently skilled and trained and that officers involved in making the final decision are not involved in pre-hearing meetings unless all parties agree;
- options for the public to have access to information about the decision-making process are assessed and implemented. Access could be by means of community advocates (Queenstown Lakes Community Advocate), community legal services (Christchurch Community Law Centre) and/or information services within councils (Auckland Regional Council Enviroline).

Case specific procedures

14. While standard guidelines on procedures for managing disputes need to be developed, there are a number of procedures that councils can follow in the short term. Important questions for councils to consider in each case are set out in Figure 4.1.

(see Chapter 3.3, 4.4)

Recommendation 4: To all local authorities

Ensure that in the management of dispute resolution procedures:

- the purpose and conduct of the process is agreed to by all interested parties;
- all information on environmental effects is disclosed;
- confidentiality requirements are agreed;
- neutral facilitators manage the process;
- all interested parties are included in the process;
- meeting venues are neutral;
- the benefits of taking extra time to assist parties resolve a dispute are considered (particularly where many parties are involved or where it is unclear who has the mandate to represent interested parties) and that all interested parties are informed of any new time limit and the reason for it.

Issues for central government

The following issues raised in this investigation require further consideration by central government.

15. Public participation requires both standing, (ie the right to participate), and resources, (ie time, money, information and

advice). The RMA provides broad rights of participation, but does not address the problem of resources. The issue of whether legal aid should be available arises once a conflict has escalated and passed into the litigation stage. Resources would be more effectively employed at an earlier stage.

(see Chapter 4.4.1, 4.4.2, 4.4.7)

16. All parties in any potential conflict situation need access to information about the decision-making process, the policy framework within which decisions are to be made, and the options available to them. While examples identified in this investigation show that councils can take initiatives to address this problem, there is no coordinated approach to providing this information and it is not always readily available to members of the public.

(see Chapter 4.4.7)

17. In the consent process, the RMA places most of the burden of obtaining scientific and technical information and of providing effects assessment information on the applicant. The consent authorities, submitters, and the Environment Court rely on the adequacy of the information provided by the applicant in order to fulfil their respective roles under the RMA in the interests of the environment. A failure on the part of the applicant puts consent authorities and submitters to the cost and effort of obtaining independent information. In addition, there is no requirement that evaluation reports be prepared by council staff or independent practitioners. Consideration needs to be given as to how evaluation and verification of AEE information can be built into the consent process under the RMA and who should fund it.

(see Chapter 4.4.1, 4.4.7)

18. Timing of information provision is an important aspect of conflict management. Where an evaluation report is prepared under s 42 A of the RMA, a copy must be received by the applicant and submitters at only two days before the hearing. This is insufficient time when information is complex and highly technical.

(see Chapter 3.4.12)

19. The RMA provides insufficient guidance on the status of the person who manages dispute resolution procedures. Clearer guidance for councils is required.

(see Chapter 4.4.3)

20. The implications of "consent purchasing" need to be further clarified and any negative implications addressed.

(see Chapter 3.4.12)

21. While the costs of the Environment Court's mediators are met by the Crown, it is not clear who should bear the costs of the council's

pre-hearing process. The implications of councils recovering the costs from applicants and the potential disincentives that may be created need to be carefully considered. Since pre-hearing meetings are in the public interest, it may not be appropriate for the applicant to be solely responsible for funding.

(see Chapter 3.5)

Recommendation 5: To the Minister for the Environment

Identify and assess options for funding and providing an information service network (similar to the concept of Community Law Centres, Maori Legal Services or Citizens Advice Bureaux) for tangata whenua and members of the public to assist them to make decisions about their involvement in environmental decision-making.

Recommendation 6: To the Minister for the Environment

Consider whether amendments to the Resource Management Act are required to:

- build independent verification into the environmental assessment process;
- ensure that evaluation reports (either by council staff or an independent person or body) on proposals are required;
- ensure that there is adequate time for evaluation reports to be considered by interested parties;
- clarify who should manage and fund the pre-hearing process;
- address the perceived negative effects of consent purchasing.

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APPENDIX 1

PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING

DISCUSSION PAPER

Office of the
PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT
Te Kaitiaki Taiao a Te Whare Pāremata

PO Box 10-241, Wellington

February 1996

CONTENTS

PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Principle 10, Rio Declaration on Environment and Development
June 1992

1.0 INTRODUCTION

The Parliamentary Commissioner for the Environment (PCE) has received information and complaints about the ability of the tangata whenua and the public in general to participate in public authority decision making as it relates to the environment. The PCE's interest is in the performance of public authorities and the efficiency and effectiveness of systems for managing the environment.

This paper summarises the concerns that have been raised in relation to the role of public authorities, previous public participation investigations by the PCE, and relevant investigations by other parties, and identifies areas for investigation where the PCE might be able to make the most useful contribution.

The purpose of this paper is to provide a basis for discussion with interested parties. It calls for further information to assist the PCE to clarify:

- the nature and extent of the problem;
- the most appropriate area for an investigation;
- terms of reference for such an investigation.

Some principles and assumptions underlying this discussion are set out in Appendix 1.

1.1 Information sought by the Parliamentary Commissioner for the Environment

The area of public participation covers a wide range of public authorities and decision making situations. The PCE recognises that the information contained in this paper may not be comprehensive. Moreover the proposals made for an investigation by the PCE are only intended to act as a guide for further discussion (see section 5).

The PCE would welcome any useful information or insights that you wish to contribute to this information gathering exercise. Answers to the following questions would be particularly helpful:

- have you experienced or are you aware of problems in the area of public participation?
- are you aware of any initiatives which have successfully overcome participation problems?
- are there any areas of concern to you that have not been identified in this paper?
- do you agree with the suggestions made for an investigation, outlined in section 5 of this paper, and if not, what do you consider to be more appropriate?

Any comments on the contents of Appendix 1 would also be welcome.

Information or further enquiries may be directed to:

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2.0 ISSUES RAISED WITH THE PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT

The majority of public participation issues raised with the PCE in recent years can be summarised in the following categories. The PCE does not necessarily wish to restrict discussion to the issues raised here, and welcomes further comment.

Access to information

- Public unaware of legal procedures under the Resource Management Act 1991 (RMA) and how they might be used.
- Inadequacy of environmental assessments by applicants and government agencies (lack of information, inattention to significant effects, failure to explore other options).
- Assistance to interpret technical information unaffordable for community groups.
- Insufficient time before submissions deadline or hearing to consider documents.
- Commercial confidentiality preventing access to information relating to potential effects (eg. where information is submitted to decision-makers on a confidential basis by commercial companies).

Ability to participate

- Non-notification under RMA of applications with potentially significant adverse effects.
- Narrow interpretation of "affected parties".
- In-house decisions not subject to public scrutiny (that is, decisions by ministers, central government agencies and local councils).
- Insufficient community group and iwi/hapu resources to participate (preparation of submissions, understanding technical detail, attending hearings, hiring expertise).
- Tangata whenua representation: public authority consultation structures do not necessarily provide for appropriate representatives to be consulted.

Equitable access to appeal

- Awarding of costs against appellants seen as unfair[1]; fear of large cost awards prevents other environmental and public interest groups from taking appeals.
- Community groups cannot afford to match proponents with legal and technical assistance and do not have access to legal aid.
- Allegations of costs being unfairly imposed on applicants by objectors.

Council decision making procedures

- Failure to explore alternative means of resolving disagreements between parties (eg. by convening pre-hearing meetings as provided for under RMA).
- Inadequate assessment of who might be affected by proposals.
- Allegations of inadequate attention being paid by councils to interested parties who have no legal representation.

Public participation negated or wasted by decision-makers

- Due process followed but the views of certain interested parties are alleged not to have been heeded.
- Due process is followed, the decision is seen as fair, but conditions are not enforced.

3.0 INITIATIVES TAKEN IN THE AREA OF PUBLIC PARTICIPATION

A number of initiatives have come to the PCE's attention which address in part some of these issues. Examples are listed below.

- ***The Ministry for the Environment*** has carried out research on decisions of the Planning Tribunal to award costs against appellants. Results are due to be published in early 1996.

- ***The Queenstown Lakes District Council*** has allocated funding to a community trust to hire professional skills to assist community groups participate under the RMA.

- ***Friends of the Earth*** have pursued conflict resolution processes involving all interested parties in order to avoid the need for appeals to the Planning Tribunal (eg: Kaitaia triboard mill).

- ***The Christchurch Community Law Centre*** is using volunteer case workers (supervised resource management and law students) to assist community groups with RMA problem-solving. A new Maori Legal Service - Te Ture Manaaki O Rehua - has just been established alongside the law centre.[2]

- ***Manaaki Whenua/Landcare Research*** is offering services to coordinate resource management planning involving all interested parties before policy decisions are made and consent applications lodged. It also intends to compile and analyse existing information

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[1] eg. *Peninsula Watchdog Group Inc v Waikato Regional Council* (A26/95) and *Marlborough DC v NZ Rail Ltd* (W137/95).

[2] There are 16 Community Law Centres around the country and 4 Maori Legal Services.

about the use of such community planning processes within New Zealand (timetable for completion uncertain).

- ***The Parliamentary Commissioner for the Environment*** has carried out investigations into the adequacy of assessments of environmental effects under RMA (1995), Treaty of Waitangi claim settlement procedures (1994) and consultation with tangata whenua (1992). The office is presently compiling a list of publicly accessible environmental and public authority information databases (the Ontario Environment Commissioner, Canada manages an environmental register which is publicly accessible).

- ***Victoria University Master of Public Policy thesis*** *(in preparation)*: an evaluation of mediation and other non-judicial means of resolving disputes about environmental risk is being carried out.

The PCE would be interested to hear of other initiatives.

4.0 SOME OPTIONS FOR FURTHER INVESTIGATION BY THE PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT

Some areas where further work could be usefully done include the following:-

a. Consultation methods which include all interested parties

Studies of "good practice" examples of such methods could be carried out and guidelines developed, for example:

- *as part of the planning process:* a study of community planning initiatives which are designed to bring interested parties together to identify and possibly resolve issues prior to the development of district or regional plans under the RMA.

- *as part of RMA consents procedures:* a study of applicant and community liaison groups and the use of pre-hearing meetings (a more comprehensive survey of use, costs, success and resources available).

b. Notification of RMA applications

There have been suggestions that applications with significant potential for adverse effects have not been notified by local councils, which could be seen as subversion of the RMA provisions for public participation. We do not know without further investigation how extensive or serious this practice may be. It could be premature to investigate issues relating to notification while transitional plans are still being updated as the planning process is capable of providing for debate over the circumstances in which notification should occur. However it may be of use to carry out a study which compares trends in the number of consents notified against the number of appeals lodged first under transitional plans, and then following the finalisation of Regional Policy Statements or new Regional or District Plans.

c. **Barriers to participation**
The issues to be investigated could include the costs of participation at various levels of decision making, access to information, timing, and statutory restrictions.

d. **Imposition of unwarranted costs on applicants**
Are allegations that unfair costs are imposed on applicants by objectors justified and is there a need for measures to be introduced to prevent abuse of the system?

e. **Public understanding of RMA opportunities to participate**
Are members of the public prevented from participating in decision making through a lack of information on the opportunities that are available for participation? Would it be useful for the PCE to provide information to the public which sets out how members of the public might make better use of those opportunities?

f. **In-house administrative decision-making**
A study of environmental decision making in central government agencies could be carried out with the aim of assessing the adequacy of statutory and administrative provisions for public participation.

g. **Independent review panels, technical review panels**
Case studies could be carried out to develop guidelines on how best to use these mechanisms to inform the public about proposals, to provide an independent assessment of technical information and to involve the public in the assessment of environmental effects.

h. **Advice update - consultation with tangata whenua**
An update of 1992 report by the PCE could be carried out. The original report provided advice to local authorities on ways of meeting their responsibilities to consult with the tangata whenua under the RMA. How have local authorities progressed in 3 years?

i. **Local authority decision-making procedures**
What measures are taken by local authorities to resolve disagreements between interested parties prior to making final decisions on consent applications, thereby reducing the desire or need for their decisions to be appealed through the Planning Tribunal?

Additional suggestions are welcome.

5.0 PRELIMINARY PROPOSAL FOR AN INVESTIGATION

Investigating and reporting on ways of finding solutions to environmental disputes without recourse to the Planning Tribunal would be one particularly useful contribution the PCE could make in this area.

The Planning Tribunal can only decide on matters of law brought before it that it has the power under the Resource Management Act 1991 and Local Government Act 1974 to consider: critical issues of concern to community groups may not be able to be dealt with by the Tribunal. The Tribunal judges are experts in law and are not necessarily experts in the practice of environmental science, practical application of resource management, or community conflict resolution. The process is expensive, adversarial, and not conducive to finding resource management solutions that accommodate the concerns of all interested parties in the host community. In so saying, many parties are deterred from taking matters to appeal because of the potential cost of the process.

It would seem far better to reduce the need or desire for legal appeals (recognising that the option should always remain available).

In considering decision-making at the council level (particularly in relation to consent applications), the relative abilities of applicants, community groups and interested individuals to participate in the process raises some concerns. For example in the case of hearings in which only one of the parties is supported by legal and/or other expertise, there are allegations that councillors pay excessive attention to lawyers and other experts, to the detriment of those parties who are not able to afford such support. In this regard there is a perception that business developers have a distinct advantage over public interest groups such as residents groups.

The PCE could explore the substance of this concern and investigate what measures are taken by councils to ensure that applicants and other interested parties are treated equitably in procedures leading up to and including consent hearings. What can councils do to ensure that interested parties are able to participate in the decision-making process? In doing so, how do councils ensure that particular parties are not "disenfranchised?" What constraints (if any) do councils face in ensuring that the process is equitable? Approaches to an investigation might include the following:

- with the aim of identifying good practice, a study of selected councils could be carried out to identify the procedures they follow up to and including the final council decision. Factors to be looked at could include: the use and management of pre-hearing meetings including use of facilitators; assistance provided by staff to applicants and affected parties, and the management of council hearings; and/or

- a study of council decision making processes followed in the case of three appeals which have been before the Planning Tribunal. Could council procedures have been improved? Good practice guidelines could be developed on the basis of findings.

APPENDIX 1: BASIC PRINCIPLES OF PUBLIC PARTICIPATION

The following principles and assumptions underlie this information gathering exercise:-

Definition of public participation

"Public participation" has been defined as "taking part in the formulation, passage, and implementation of public policies" (Robinson 1993).

In relation to environmental decision making, there are many levels at which public participation may occur or be appropriate: national policies and legislation; regional and district policies, plans and consents; other government administrative decisions or consent; and legal appeals of decisions. Involvement may be by individuals directly, or through representatives or groups.

Public participation should adhere to the McGechan principles of consultation[3], lest it be a mere charade or window-dressing. In summary; *sufficient information*, *sufficient time*, and *genuine consideration* (including an open mind and willingness to change).

Treaty of Waitangi - Te Tiriti o Waitangi

The Courts and Waitangi Tribunal have emphasised the evolving nature of Treaty interpretation, and new legal cases may further clarify interpretation. Two strong themes have emerged in these expressions of Treaty principles: partnership and active protection of resources of importance to Maori in accord with Maori cultural and spiritual values. In order to obtain the information necessary for these principles to be fulfilled, genuine consultation is required. Thus consultation is an essential component of giving effect to the principles of the Treaty rather than an accepted principle of the Treaty itself.[4]

The tangata whenua are not just "another interest group" but have special status by virtue of their long-standing prior inhabitance of the area, the Treaty of Waitangi, and the principles of the Treaty, and as provided for under as the Resource Management Act 1991 and other legislation.

Sustainable conflict resolution

Difference of opinion is a basic feature of human society. Decision-making affecting the environment usually involves resources held in common, and concerns many interested parties.[5] The risk of conflict is high where these decisions relate to resources valued in different ways by different parties.

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[3] *Air New Zealand Ltd v Wellington International Airport Ltd*, High Court, Wellington Registry, CP No. 403/91, McGechan J, 6 January 1992, p.8 .

[4] The PCE report "Guidelines for Local Authority Consultation with Tangata Whenua" (1992) provided advice to local authorities on how they might carry out their responsibilities, as set out under the Resource Management Act, to consult with the tangata whenua.

[5] An interested party is any person or group who by their own definition has an interest in a decision. In addition to resource owners and "affected parties" as defined by statute or public authorities, an interested party can include those who have a spiritual or philosophical connection to a valued

If conflict is not resolved in the decision-making process it will remain, manifesting in such forms as perennial relitigation of issues, public distrust, anger and cynicism, civil disobedience, and political instability.

Generally communities are more supportive of programmes and decisions that they have been involved in developing than those they feel have been imposed without consideration of their concerns. Community "ownership" of environmental problems also helps ensure sustainable solutions.

For decision-makers to chose the option which best contributes to sustainable management of the environment, they need full information on the likely effects of decision options on resources and ecosystems and on people who value them. It is unlikely that any one party will be able to provide full and unbiased information. Information on how a decision may affect any particular party is best obtained from them directly. Involvement of all interested parties is likely to improve information for decision-makers, and encourage decisions which minimise adverse impacts and are environmentally and politically sustainable.

Informed participation

For public participation to be most effective, it must be informed. Interested parties need access to information on an ongoing basis about management of public resources of interest to them, and need access to key documents and data in enough time to prepare submissions to decision-makers.

"Efficiency"

Public participation may not be seen as the quickest and most "efficient" path to follow, but it must be remembered that "efficiency" involves not only speed, but also direction. It is false economy to rush off in one direction only to have to later reverse the decision, or discover too late that there are unexpected, significant and costly effects. Public participation can assist with choosing the best direction from the outset, by providing fuller information on likely implications of decision options.

Timing

The time to involve interested parties is early, so that planning can include their concerns, and cooperative resource management can be designed. Early involvement also allows for a process of regular checking to ensure that the design of a proposal is appropriate and that communication is clear.

Accountability

Decision-makers should make their reasoning clear and public, including the reasons why they have rejected the views of any interested party. Public participation enhances accountability by reminding decision-makers of the potential impacts of decisions, and testing decision processes and the outcomes for appropriateness.

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resource (eg. tangata whenua, conservationists). Interested parties are sometimes described as "stakeholders".

"Inclusive" public participation methods

Democratic societies have mechanisms for allowing citizens' opinions to be heard prior to some decisions being made, but tend to produce decisions that favour the majority or well-resourced parties. For decisions to be sustainable and not worsen inequities or resentments, methods need to be found for addressing the concerns of all interested parties.

While environmental issues often focus on differences, common ground can be found in many cases. Inclusive decision-making methods (eg. negotiation, mediation, pre-hearing meetings, community planning initiatives, joint management, liaison committees) can be more effective in this regard than winner-loser methods (eg. formal hearings, litigation).

Equitable access to appeal and redress

"Inclusive" methods of decision-making are preferred to address concerns in the design of decisions and preclude the need for appeals. However, for alternative conflict resolution methods to work there must be an agreement among interested parties to cooperate, which some parties may find difficult. Even where some agreement has been reached there may not be a full consensus. In the final analysis a decision will be required by statutory authorities, and the option of appeal to the courts will need to be retained for aggrieved parties.

For the opportunity of appeal and redress to be genuine, parties must have genuine access to the appeal process, including the ability to afford not only legal counsel, but expert witnesses. If the system is biased in favour of well-resourced parties, inequitable outcomes may result.

Implementation (monitoring and enforcement)

Once a decision has been made, it is important to check to make sure it has the desired effect. Predictions of environmental effect may prove in practice to be inaccurate, and resource consent decisions that are not enforced may produce unwanted effects and reduce public faith in the system.

Public authorities have limited monitoring resources, and there is scope for public participation in monitoring. Public authorities need to keep a complaints and enforcement register, cross-referenced to consents.

NOTE: the focus of this discussion paper is on decision-making and not what happens once a decision has been made. The PCE is carrying out a separate investigation into local government performance in respect of monitoring and enforcement, which is expected to be completed during 1996.

APPENDIX 2 SUMMARY OF RESPONSES TO THE DISCUSSION DOCUMENT

BARRIERS AND INITIATIVES IDENTIFIED BY RESPONDENTS

1.1 Introduction

This paper summarises responses to the discussion paper *Public participation and environmental decision-making*, released by the Parliamentary Commissioner for the Environment to elicit views on the factors affecting public participation in resource management decision-making. The discussion paper was divided into five headings: access to information; ability to participate; equitable access to appeal; council decision-making procedures; and public participation negated or wasted by decision-makers. Correspondents were invited to comment on these and any other factors they considered important, as well as to note any successful initiatives from their experiences with public participation.

1.2 Responses

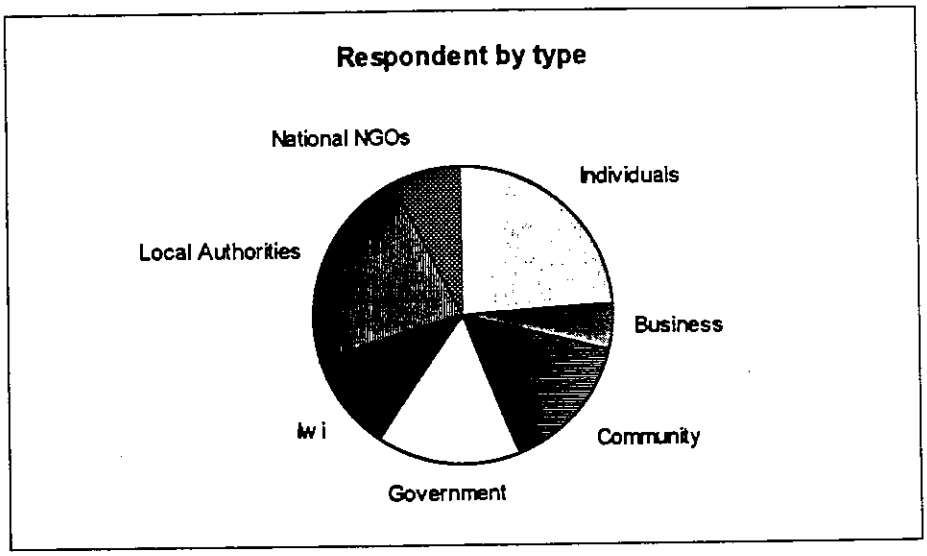
A total of 372 discussion papers were distributed to a range of groups and individuals, including iwi groups, local authorities, industry and MPs. One hundred and twenty-two written responses to the discussion paper were received (33%).

These responses were summarised. Key points from each were noted, collated and grouped according to the following correspondent types:

- individuals
- business
- community groups
- territorial authorities
- regional councils
- nationally based NGOs
- government
- iwi

The grouping of correspondents provides the opportunity to determine whether the different sector groups are facing the same or divergent issues and problems. Figure A1 shows the number of responses from each category.

Figure A1



The responses were also divided according to the region of origin. This provides some indication of the areas where groups are both concerned about participation issues and empowered or motivated to respond to the discussion paper. However, this is purely illustrative and does not give any statistically significant comment on the regions involved. Figure A2 shows the number of responses from each region and the make up of those responses.

1.3 Range of issues identified by correspondents

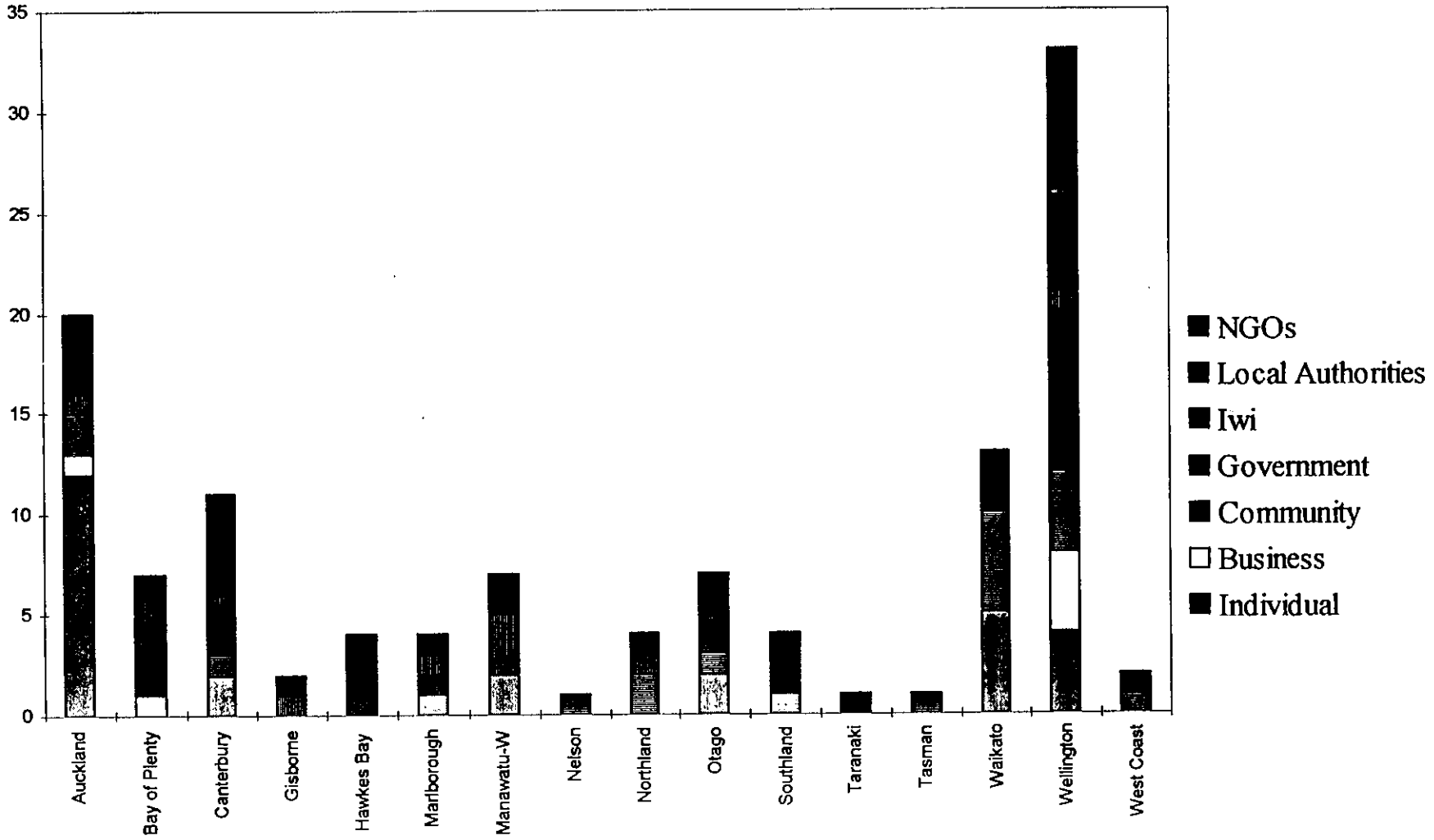
The following sections present a summary of the information provided by respondents. The issues presented here are the main points raised by submitters. It is not intended to be a complete account of all the views expressed, but rather a summary of the issues, problems, and range of experiences and sentiments recounted.

While some correspondents raised issues relating to decision-making by central government agencies and state owned enterprises, most of the issues identified concerned public participation under the Resource Management Act 1991 (RMA). Broadly, the barriers to participation under this statute as identified by the correspondents fall into four areas:

- public awareness of the RMA;
- council decision-making procedures and practice;
- resource constraints;
- statutory processes.

This summary begins with an outline of the range of responses received to each of these areas. Issues raised about decision-making under legislation other than the RMA are then presented.

Figure A2 **Response by Region**



1.4 Public participation under the Resource Management Act

1.4.1 Awareness of RMA provisions

Respondents from all categories agreed that the public is generally unaware of RMA procedures and how decisions made under the Act affect them. One correspondent expressed the view that members of the public do not appreciate the significance of district plans and generally only become involved when an issue directly affects them – usually at the consent level and often when the activity concerned is permitted or controlled under the plan. Some suggested that the general level of public awareness is not as low as under previous legislation. Other correspondents noted that there is a lack of information about the RMA process and what to do when issues arise. In addition, it was noted that the public is generally unfamiliar with the resource management decision-making process and therefore intimidated by it. Another correspondent noted that even those wanting to increase their knowledge of the process were hindered by the language used in guides and other planning documents.

Some initiatives taken to provide information about the RMA process and environmental decision-making were identified. These include a range of publications and pamphlets released by the Ministry for the Environment and non-government organisations such as the Royal Forest and Bird Protection Society. Some correspondents commended these initiatives. Others said they were unable to obtain such information when needed and one correspondent criticised the contents of a pamphlet released by the Ministry[6].

Initiatives taken by local authorities to address the problem of accessing information about RMA processes were also noted. For example, in the process of reviewing the District Plan for Ahuriri, the Napier City Council made use of a number of different mechanisms to encourage public involvement. First, the council prepared a discussion document and video outlining what the council thought were the main resource management issues. Interest groups were then identified and the video used to supply information at public meetings. Additional displays were presented on locations (such as the waterfront) where many of the issues were occurring.

Northland Regional Council has run a series of seven resource management workshops in the last year to raise awareness of the RMA. Initiatives taken by the Dunedin City Council include a quarterly publication delivered to every household, information schedules in the local paper and a regional television programme on council issues. Upper Hutt City Council provides information through circulars, articles and public meetings. It also has a phone "hot-line" for enquiries.

As noted in the discussion paper (PCE 1996), the Queenstown Lakes District Council funds a Community Advocate to supply information to the public about resource management processes, and to assist those wishing to participate. This is a useful mechanism because the position is seen as neutral, rather than closely tied to the council. The Christchurch Community Law Centre also provides a resource management service.

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6 This comment has been passed on to the Ministry for the Environment for their information and action, if necessary.

1.4.2 Council decision-making procedures

The many comments received on council decision-making procedures fall broadly into the following areas:

- development of planning documents;
- council management of notification;
- council attitude to parties to decisions;
- use of alternative methods of conflict resolution;
- council capability.

Development of planning documents
Several submitters were concerned about council procedures for consultation during the development of planning documents. Their comments covered a range of aspects. Some took the view that councils were not making information available to the public so that they could make informed decisions. The high cost of planning documents was also identified as a barrier to public participation. Councils were criticised for making decisions without independent assessment of issues and effects. The availability of time for participating was the focus of numerous responses, most claiming that the time allowed for considering information and preparing submissions is usually inadequate. A small number of respondents, however, felt that the time available is adequate.

Lack of consultation by councils with landowners and occupiers before areas are designated for a particular purpose was also noted.

To address these problems some councils have issued draft planning documents for discussion prior to formal notification. The Canterbury Regional Council maintains a database of those interested in RMA issues. Once on the database, they receive a quarterly pamphlet about council activities and progress on plans and, if they request it, are automatically advised of the public notification of all planning documents, or those they are interested in. Taranaki Regional Council, Wellington Regional Council, Hutt City Council and Waipa District Council advised that they focus on pre-statutory consultation in their planning processes; for example, though draft documents and discussion papers. Hutt City Council initiatives include displays in local libraries, staff being available to discuss matters at major shopping centres, and target group and public meetings.

The Queenstown Lakes District Community Advocate suggested that community planning workshops are a good model for community participation. The council uses such workshops to involve stakeholders. Advantages are said to include acceleration of the planning process, improved design, cost savings, meaningful community input, and acceptance from all sides.

Dunedin City Council has established an iwi liaison committee to assist with the preparation of the proposed district plan.

Council management of notification
Concerns about councils not notifying consent applications were expressed, mainly by individuals, community groups and non-governmental organisations. Their concerns focused on the fact that not notifying applications removes any opportunity for the public to be

involved in decision-making. Associated with this concern is the identification of "affected parties" by councils. Some submitters observed that councils take a limited view of who is affected by consent applications, again excluding some people from the decision-making process. One NGO group expressed the view that:

> ... fewer activities will be notified once plans are finalised as councils are making every effort to make as many activities as possible permitted or controlled and are expressing intentions in proposed plans that many controlled activities will not require written consent of affected parties.

Some business correspondents considered that councils are often too generous in their assessment of who constitutes an affected party. One suggested that councils are "casting the affected party net too wide", creating an expectation among parties that they are affected when that is necessarily so. Another suggested that:

> ... the determination of affected parties needs to be very carefully dealt with and should err in favour of consultation and notification rather than expediency.

And, in addition:

> ... all network utility operators should be automatically notified of all applications which affect their area of operations as they are providing essential public services which are so often taken for granted that consideration of them is not made by some council staff. This means that such bodies are only left with the judicial review process should they not be notified when they are seriously compromised. This step is costly to all participants and should not be necessary over a simple decision as to whether to not to publicly notify.

Several councils also highlighted difficulties in deciding whether to notify a consent application. Some observed that the public tend to expect consents to be notified even when the effects are minor, and that some people expect "interested parties" to be notified as well as those directly "affected" by the proposal. Councils also highlighted the costs associated with notifying consents, to both the council itself and the applicant. One council suggested that there is a trade-off between practical considerations including cost and the scale of a proposed activity, and the desire of the public to be involved. Many councils, however, said that they take a precautionary approach and notify consents if there is any doubt. For example, Canterbury Regional Council advised that it promotes pre-application consultation and that it notifies applications widely, and broadly defines affected parties.

Some correspondents expressed frustration at the frequency with which councils notify minor consent applications, citing longer delays, increased and unfair imposition of costs, and greater uncertainty arising from what they consider to be unnecessary notification.

Council attitude to parties to decisions

Concerns were expressed about councillors giving more weight to parties represented by lawyers and those who can afford expert witnesses. Many individuals and local interest groups felt that the management of hearings is biased in favour of applicants. For example, inexperienced councillors are intimidated by lawyers, or councillors "don't listen and fall asleep, show hostility or leave the room".

> For some people councils can it is a personal ordeal to appear before a hearing to explain their concerns, sometimes they become flustered. Councils can be patronising to individuals that stand up and speak before them. If the council embarrasses them, by belittling their concerns, then they will never bother to participate again.

A correspondent commented that it is not reasonable to expect councillors to have in depth knowledge of all matters before them but that, in some circumstances, councillors may be more sensitive to community sentiment. Indeed, the view was also expressed that councils overcompensate for submitters who do not have representation, and that legal representation can be an impediment. One company noted that:

> ... there is already every effort being made by councils to provide assistance to individuals who represent themselves at hearings. If anything, councils expect very high standards from applicants with on-going or more costly proposals and are more forgiving and receptive to those individuals who may not be expected to know the process or be able to afford representation.

Another suggested that applicants have an advantage because they understand their business and the effects of their activities. However, such applicants:

> ... sometimes unnecessarily have to enlist additional support to ensure they obtain a fair and workable consent.

Some interest groups alleged that council staff are working for the applicants. A tangata whenua correspondent stated that staff are generally well meaning but that decision-making in councils is generally politically based.

Not all comments were critical, however. One local interest group commended the Wellington Regional Council for giving their submissions close attention, noting that many of their recommendations were incorporated into the Regional Policy Statement. Where recommendations were rejected, full reasons were given – "full marks to WRC for their procedures".

Another local group noted:

> In general we have found that the authorities with which we deal regularly consult us on most significant issues, forward copies of applications to us, and use pre-hearing meetings where appropriate. However, we feel that this situation is largely because we have considerable expertise ... we have solicitors who act for us upon a pro-bono basis, we routinely appeal decisions which do not appear appropriate, and we work closely with DOC, Maruia and Royal Forest and Bird Protection Society.

Some comments provided by tangata whenua suggest that, in some circumstances, more importance is placed on the presentation of formal reports based on technical and scientific evidence than on evidence provided by kaumatua and kuia. One correspondent commented that councils give the appearance of having been captured by their mainly Pakeha planners. Other issues raised included lack of recognition by local authorities of iwi structures and marae protocol, and the fact that most Maori prefer to make oral submissions. There was concern

that decisions of interest to tangata whenua are being made by people who are not bi-cultural and it was noted that in some cases, it would be politically unacceptable for councils to treat tangata whenua differently from any other members of the community.

Concern was expressed by one company that some councils attempt to pressure applicants into taking on the council's responsibilities to consult with tangata whenua.

Other issues raised include the use by councils of threatening or "unfriendly" venues and the need to consider holding hearings near the communities of interest.

One territorial authority commented that the views of parties are often polarised by the time a hearing is due to be held. Another acknowledged that the acceptance of decisions depends upon a fair hearing and cogent reasons being given for not adopting differing views.

Concerns about potential conflicts of interest when councils are both a developer and the decision-maker in resource consent processes were also raised. As developers, councils have an interest in obtaining resource consents for as little cost as possible, which may be inconsistent with appropriate levels of public involvement in the decision-making process.

Both national and local interest groups were concerned that some councillors do not understand the meaning of cross-examination.[7] The lack of opportunity for submitters to cross-examine applicants, other submitters or councils is seen as a major deficiency because it means that unbalanced evidence can be presented but not challenged.

It was noted, however, that some councils allow submitters to ask questions of clarification through the chair.

Individuals raised further issues including:
- councils not keeping submitters informed about developments relating to hearings;
- councils not acknowledging submissions, which leads to problems when councils say a submission was not received in time.

Canterbury Regional Council advised that as part of the hearing process for its Regional Policy Statement, hearings were held on marae so that runanga could make oral submissions in accordance with tikanga Maori. This was welcomed, although some presenters still felt ill at ease and inhibited by the hearings.

Use of alternative methods of conflict resolution

It was noted that an adversarial approach is not helpful in finding innovative solutions to issues, and concerns were expressed that hearings managed in an adversarial style prejudice decisions in favour of those who can afford expert witnesses and legal representation. One correspondent noted:

> The entire culture surrounding public participation and legal services (access to justice) needs to change. The legal processes of adversarial decision-making, "winners" and "losers", penalising the "losers" through the award of costs, and the extravagant

[7] Cross-examination is not permitted and only hearings commissioners can question the parties. The system is intended to be more inquisitorial than adversarial.

expenses of expert witnesses is not an appropriate model for environmental decision-making where a range of values are always present. The basis for the legal approach is rooted in private property rights, the expropriation of resources to maximise profit and a market philosophy that sees individual members of a civic community as units competing with each other to satisfy individual needs (usually at the expense of one another). This adversarial culture is not an appropriate basis for a society that wishes to implement sustainability principles.

Many responses were received on the issue of council use of alternative methods of conflict resolution. Most of the regional councils and some of the territorial authorities responded that they have had some success in the use of pre-hearing meetings and that such meetings can provide a useful way of addressing issues to the satisfaction of all parties. One council suggested that success is based upon the early involvement of interested parties and a commitment by both the applicant and the administering body to make the process succeed. Another suggested that pre-hearing meetings can be useful when there is a good chance of issues being resolved.

A business correspondent confirmed that the Canterbury Regional Council makes extensive use of pre-hearing meetings to good effect and another council stated that its officers have successfully negotiated a number of consent orders.

Environment Waikato outlined initiatives it has taken to work through the concerns of interested parties. These include community consultative groups set up to consider large developments, community liaison groups to promote community involvement in monitoring, and pre-hearing meetings. The council advises that over the past two years, more than 50% of notified consent applications have been resolved before a hearing.

The Taranaki Regional Council noted that the pre-hearing process has been highly successful in producing lasting solutions acceptable to all parties at minimal cost. Qualities and skills of council staff are important, and training in mediation techniques and skills in conflict resolution are a necessary part of the process.

Despite this indication that the use of alternative methods is meeting with some success, the Ministry for the Environment observed that, as yet, the use of pre-hearing meetings is low.

Some territorial authorities raised issues which they consider to be problems in the use of pre-hearing meetings. These include:

- costs to council of pre-hearing meetings and facilitation;
- pre-hearing meetings can be hijacked by some participants;
- time and resources restrictions generally preclude much effort going into alternative means of resolving disagreements;
- the presence of lawyers at pre-hearing meetings can prevent free discussion; and
- intransigence on the part of some submitters.

Some national and local interest groups also expressed some reservations about the use of pre-hearing meetings. These concerns can be summarised as:

- applicants can bring an overwhelming level of expertise;

- difficulties in managing large numbers of vocal people; and
- the need for good facilitation.

One individual noted that the role of planners as facilitators in pre-hearings is not clear and raised questions about their impartiality.

Additional points raised include problems encountered where there are a large number of submitters, where there is a reluctance to attend because of suspicion about the applicant's motives, and where free discussion is prevented when lawyers are present at pre-hearing meetings. Attempts by councils to mediate agreement are sometimes abused by submitters who either fail to attend or refuse to reach agreement so they can appear before a hearings committee. Another item was difficulty for those who represent community groups and who need to obtain a committee decision before changes to proposals are approved.

Pre-application consultation between applicants and affected parties was raised as an important means of narrowing issues and resolving disputes. An example of a positive process, noted by a number of correspondents, was the management by WaterCare Services of its pre-application consultation on consents for the Mangere Sewage Treatment Plan upgrade. The process, know as Wastewater 2000, involved ongoing workshops aimed at achieving consensus between the applicant and interested parties.

Correspondents from tangata whenua groups also expressed a range of views and experiences. One suggested that independent facilitation should be provided at pre-hearing meetings. Another noted that pre-hearings are a good mechanism although parties seem reluctant to agree to anything, possibly to avoid prejudicing their chances at the Environment Court by revealing information. Yet another group stated that they have actively sought pre-hearing meetings as a means of addressing their concerns.

Te Puni Kokiri / Ministry of Maori Affairs considered that the use of pre-hearings meetings raises a number of issues: how are tangata whenua points of view presented; how is sensitive information handled; how do processes mesh with marae decision-making processes? They noted that the use of such mechanisms may encourage more direct consultation with affected parties rather than with advisory committees. They also felt that it is important to fund alternatives to the adversarial legal process.

One company suggested that an investigation should be carried out into the merits of establishing a government/quasi-government agency responsible for post hearing/pre-appeal mediation.

AgResearch advises that it is developing methods for communities to participate in resolving issues through consensus-building processes. At the time of writing, an application had been put to the Ministry for the Environment for a joint study with the Auckland Regional Council. The study proposal involves community design and management of the participatory process through their representatives on a management committee.

Landcare Research is presently updating its multi-stakeholder processes manual. A new edition will be more focused on New Zealand processes and issues, and will include a section on processes for tangata whenua. Landcare Research is also involved in several consultation

projects. These include a strategic planning exercise with the Wellington City Council and a catchment approach to the management of Raglan Harbour.

Council capability
Doubts were expressed by some correspondents about the ability of councils to manage public participation issues. These doubts related to council funding, the ability of the individuals involved, concerns about council independence, and access by councils to information.

One territorial authority suggested that public participation can be a problem for councils who have very few staff. Another suggested that the willingness of elected representatives to devote resources to public participation is fundamental to its success.

Council independence was a subject of concern for some submitters. One noted that their local council appeared to favour development and was therefore biased in its consideration of information presented to it by submitters. The issue of councils granting consent to themselves or to council-owned businesses for activities was also raised as an area in which councils may lack independence. In these circumstances, questions were raised about the capability of councils to overcome such conflicts of interest both in terms of the skills of staff and councillors, and the resources which may be required to hire independent expertise.

Some concerns were expressed by government agencies, individuals and national and local interest groups about the level of understanding of councillors and council staff of RMA procedures. One correspondent suggested that many councils still see the RMA as planning legislation in the old sense rather than effects-based legislation. Another commented on the level of understanding of the RMA among councillors and some council staff, in many small communities, noting:

> I am still shocked by the level of ignorance, not just of the general public, but also of elected members. I also have to say that staff very often don't quite understand what their role is supposed to be.

Another correspondent noted that some councils require consultation as part of a consent condition, whereas they should require consultation as part of the process of obtaining consent. On the issue of consultation, one submitter from a government body suggested that councils provide little direction as to what consultation is meant to achieve.

An NGO group noted one case where Environment Waikato appointed their own independent witness to assess the ecological values of a site. However, other NGOs expressed concern at the lack of resources available to some councils to commission independent advisers.

A local interest group noted examples of councils using "insufficient discretion" to decline applications. It was suggested that where an application contravenes a plan, the council leaves it up to objectors to point this out.

1.4.3 Resources for the public to participate

The issue of resource constraints on participants and councils was one of the most commonly raised. One NGO noted that:

> The key barriers to full public participation in environmental decision-making are economic ... if these barriers are not removed, the goal of sustainable development which the RMA promises will be lost and the legal process will be captured by those groups in NZ society with the greatest resources.

Resource constraints identified as a barrier to public participation in environmental decision-making were not only financial, but included constraints caused by limited time, and the ability and availability of people to respond and participate. One individual noted:

> New Zealanders today have much less capacity to get involved compared to even five years ago. More families require two breadwinners, more jobs require evening or weekend work, and less money is available to buy documents, fund travel and allow time off work. The time frames, technical knowledge (books, reports and experts), and traditional practice arrangements for personal attendance are much less easy to be met by the public than many public administrators understand.

Resource constraints were identified at each of the following stages of the resource management decision-making process.

Participation in the development of planning documents

The costs of obtaining information on planning documents has been noted as a concern by some correspondents, including local authorities, tangata whenua, and interest groups. The complexity of language used and the cost of obtaining advice to understand technical information were also raised. This is an issue which is also of relevance to consent applications (see next section). One tangata whenua correspondent suggested that the Government needs to fund technical assistance to help interpret such information. Comments were also received about the range of plans presently being prepared under the Resource Management Act and the correspondingly high demand placed on the public.

> We consider that there is both a great need by Maori for access to technical information and to interpretation of same. We believe that government should fund organisations such as Maruwhenua / PCE to provide iwi / public assistance in those fields.

Responses from regional councils, territorial authorities, government agencies, and tangata whenua generally agreed that tangata whenua lack the resources to participate in the processes of the Resource Management Act. For example, one tangata whenua correspondent commented that:

> ... the amount of requests for comment and the physical ability to meet those demands puts a strain on the few resources available.

Another suggested that problems with the law requiring consultation with tangata whenua arise then councils do not provide the resources. Nevertheless, some commented that particular local authorities do provide some resources. Many other correspondents also suggested that members of the public generally have the same problems.

Initiatives being taken by local authorities in developing relationships with the tangata whenua to address both planning issues and more specific consent situations were set out by some respondents:

- Otago Regional Council outlined its relationship with tangata whenua which is cemented in a Memorandum of Agreement with the Kai Tahu runanga. This resulted in the appointment of an Iwi Liaison Manager to coordinate iwi matters both in terms of policy development and resource consent applications.

- Wellington City Council advised that it has developed a guide for applicants on consultation with tangata whenua and a leaflet summarising the main points.

- Wellington Regional Council advised that it involves tangata whenua in plan preparation by means of an annual consultation contract with each iwi. A sum of $5000 is available for each iwi for advice (both written and verbal) on plans and other environmental matters which may arise through the year.

- Waipa District Council recognises the particular status of tangata whenua by providing resources for iwi authorities to prepare discussion documents and to make both formal and informal submissions during the district plan preparation process.

- Hutt City Council advised that it has a formal contract with Te Runanganui o Taranaki Whanui ki te Upoko o Te Ika a Maui. The council has begun negotiations with the Taure Here group to form an agreement.

- Gore District Council sends copies of all notified applications to iwi. Applicants are also encouraged to consult with iwi.

- Napier City Council advised that hapu and marae representatives have been involved in developing the process that the council uses in dealing with resource consents. A tangata whenua representative has been appointed to the hearings committee and has the same rights as an elected representative on that committee. In addition, a Maori liaison officer has been appointed who works with the subdivision planner and development control planner when an application affects a site of significance to Maori. The council's Maori Consultative Committee has five iwi-nominated representatives plus two councillors. This committee reviews all the items on the agendas of the standing committees and any items that they see as being relevant.

- Franklin District Council and the Huakina Development Trust have a Memorandum of Understanding between them, which one correspondent pointed out has been instrumental in overcoming certain problems.

- Timaru District Council has a member of the tangata whenua on its Resource Management Committee, and fees and expenses for this person are covered.

- Te Runanga o Ngaiterangi advise that they have been involved in a number of initiatives with the Tauranga District Council including the preparation of a comprehensive Iwi

Resource Management Plan, preparation of iwi issues reports on some projects carried out by the council, and other iwi-driven initiatives.

- The fund established by the Queenstown Lakes District Council for a community advocate was also noted. As the council stated:

> ... we believe it is the responsibility of the consent authority to provide advice and guidance about the RMA matters it is handling. Therefore the [trust] seems appropriate. Other councils may consider following suit.

The chairperson of the community advocate trust noted that:

> ... the notification of a new District Plan by the QLDC has proved the worth of the Community Advocate as an essential part of the system of obtaining informed and reasoned comment from the general public.

Initiatives by other bodies were also noted:

- The Ngai Tahu Maori Law Centre provides legal support and advice to tangata whenua.

- The forestry industry is developing activity standards which can assist in addressing tangata whenua concerns in relation to archaeological sites.

- One correspondent commented that the Christchurch Community Law Centre seems to be working well as a source of advice to the community.

A disparate view was presented by an individual who suggested that "there is no place for community law centres in this field, the Act is specialised and requires people who work with the Act all the time and do nothing else".

On the other hand, one NGO suggested the concept of community law centres needs to be taken further:

> Support is needed for rural dwellers concerned about their local environment who still have a largely intact natural environment to protect. If equity of access to support was to be achieved between communities, support would be to be coordinated at a national level.

Another NGO suggested that public funding of environmental law centres would provide a source of expertise for public interest groups and could foster the development of a core of legal advocates. A local interest group suggested that, as an alternative to legal aid, a well funded and independent environmental advocacy service should be established, suggesting as an example the Environmental Defenders Officer (EDO) in Australia. A number of other correspondents referred to the EDO as an appropriate model.

Participation in the consent process

As with the policy planning process, many correspondents including local authorities, government bodies, businesses, tangata whenua and public interest groups noted that participation in resource consent procedures is problematic. Problems include the amount of time required to participate; attending hearings in work time; organising consultative working parties when members of voluntary organisations have other priorities; time frames for response being too short – particularly when hapu, iwi and organisations need to consult their members to formulate responses to proposals; and too short a time available to lodge appeals. Some also felt that consultation is always "last minute" and very rushed. Issues relating to the difficulty some groups have travelling to hearings were also raised.

Some concerns were expressed about the cost for members of the public of assessing technical information and making submissions. One correspondent observed:

> Often submitters need only address quite specific issues yet they have to assess huge documents to ensure nothing is of concern.

Concerns were also raised about the cost of employing expert witnesses to support cases in front of council hearings and appeals to the Planning Tribunal. One local interest group suggested that technical advisers should be made available to groups to overview a project and that such advisers should be paid for by the company, council or government. An additional problem noted is the difficulty of accessing good advisers in small towns.

General concerns about the workload faced by voluntary/unpaid participants were noted by some local authorities, government bodies, tangata whenua, and public interest groups. Some correspondents noted difficulty consulting with tangata whenua. It was pointed out by some businesses that some iwi only consult when a fee is paid; it was also noted that it is not always clear who has authority to represent tangata whenua. Other submitters expressed concern that iwi are consulted as affected parties but are often unaware of the environmental implications of proposals or lack the personnel and resources to deal with them.

One quasi-government body suggested that tangata whenua can be assisted to participate through iwi management plans, legal support and advice, and Memoranda of Understanding.

A number of submitters noted that for tangata whenua, resources applied to developing tribal policy statements can save resources required for comment during the resource consent process. It was noted that Ngaati Te Ata have prepared such a statement.

Te Runanga o Ngati Pikiao noted that consultation with Works Consultancy on a state highway development proved to be a successful partnership.

The Ministry of Forestry pointed out that consultation can cause delays which have undesirable environmental consequences.

ECNZ advised that it intends to put together a public discussion paper on its consultative approach, including its experience to date. They consider key factors in the success of their approach to be:

- careful identification of the issues;
- commitment to letting the interested parties decide what they want to achieve by the process;
- endeavouring to keep the process going;
- tackling only the important issues;
- allowing enough time;
- approaching the process in a non-threatening and helpful manner.

The company noted that "consultation on the renewal of significant resource consents may take between two to five years and require significant input from ECNZ in the form of direct costs in the order to $2-3 million".

One NGO outlined an initiative taken by the Christchurch Regional and City Councils to bring overseas experts to a cell site symposium at the time of an Environment Court hearing which focused on related issues.

Appeals to the Environment Court

Many correspondents expressed views about the appeal process. One NGO noted:

> One wonders how long its will be before the US tactic of Strategic Lawsuits Against Public Participation (SLAPP suits) make an appearance on the NZ legal scene. With a SLAPP suit the trial is irrelevant, as a Canadian environmentalist commented "the idea is to force the environmentalists to spend themselves into oblivion".

There appear to be two main issues. The first involves the cost of obtaining information both about the legal process, and about the environmental effects of proposals. The second involves the incentives created by the Environment Court's power to award costs against unsuccessful parties.

Information costs (legal and technical)

The costs of participation and appeal are recognised by local authorities. Many of those who responded suggested that the high cost of litigation inhibits people from taking appeals. Some suggested that providing legal aid to groups with limited resources should be considered. One government body noted that concerns that small submitters can be "burnt off" by large corporations are valid. Another suggested that, without substantial funds, parties cannot afford to "stay in the fight" if it becomes protracted. Yet another observed that, at times, developers engage all the available experts, leaving citizens groups with no option but to seek assistance from overseas. Many of the tangata whenua correspondents echoed these concerns, noting that iwi are unable to match the expertise that developers are often able to afford.

Many local interest groups and individuals also echoed the above concerns, noting the imbalance of power between well-funded applicants and interest groups who are devoid of support under the RMA. One local interest group stated:

> The scales are always tipped in favour of the large corporation against the voluntary public. Often the applicant is joined by the Council or a representative of a Government department such as Commerce. Problem that all decisions are influenced by the situation in which the vast majority of the evidence is provided by the applicant. The loser here is really the environment.

It was noted that councils under financial pressure can have problems providing assistance, resulting in them taking the least costly approach. Some councils are afraid to decline applications because of possible litigation. One submitter raised a more fundamental issue about information:

> One of the most important things the RMA has done is to highlight the lack of knowledge we have on the environmental parameters that are important. There is a huge information vacuum which must be addressed.

One NGO correspondent was concerned that many councils do not have their own in-house technical expertise, resulting in an imbalance between what applicants on the one hand, and submitters on the other, are able to provide in terms of technical evidence:

> Where there is a disagreement in the views of experts hired by applicants and submitters and councils have no independent expertise, it appears that there is no conclusive evidence of adverse effects and a decision is made accordingly.

One individual suggested that current funding and institutional arrangements are failing to facilitate advocacy of the public interest. There were a number of calls from individuals for a change of the RMA or Legal Services Act to provide funding for the representation of environmental interests. One correspondent suggested that:

> ... a good working concept of early stage consultation and mediation would ease the pressure to fund legal cases. Access to courts (Planning Tribunal) could, in fact, be limited to certain objections provided the preceding decision-making has been fair and comprehensive. A shift from the present focus on adversarial hearings and court procedures to a system of negotiation and mediation would be important here. ...I spent a few thousand dollars (own funds) on expert advice (architects, planners) for negotiations and mediation's with resource applicants - only to find that my funds were too exhausted to consider legal proceedings. Publicly funded public participation in planning procedures (eg. for professional neutrals) could mitigate the need of legal procedure and the higher costs involved there.

An interest group noted that:

> The greatest deterrent to participation is that people do not like confrontation.

Awarding of costs

Many correspondents, including local authorities, noted that the awarding of costs by the Environment Court may dissuade interest groups from taking appeals. One local interest group noted that:

> ... small groups are now not bothering to make submissions as much as previously. Legal aid or introduction of no-costs awards against small groups (providing the appeal is not frivolous or vexatious) appears essential if the public is to participate effectively. Various appeals in which we have been involved have proved capable of being resolved by consent, and we feel that this process works well. However, we also believe that it is largely due to the fact that we appeal decisions that we are taken seriously.

Another correspondent stated:

> When a developer rides into town with a posse of hired guns the community tends to run for cover. The threat of costs has led to a popular belief that appeals must cost $x10,000.

A tangata whenua correspondent was concerned that the threat of costs has taken away the iwi duty of kaitiakitanga. Another commented that:

> ... when tangata whenua can be penalised for attempting to protect wahi tapu, the spirit of the Treaty is being ignored yet again.

One government body suggested that the issue needs clarification:

> ... is the problem not knowing the risks, not knowing the amount of costs or not accepting that costs should be awarded? Recent cases that have caused concern need careful consideration – there is danger of over-reaction.

Another noted that community groups are not treated differently in the award of costs, while one local interest group suggested that no costs should be awarded against those who only wish to protect the environment.

One company wrote that:

> It cannot be denied that in some circumstances the likely costs of appealing and the possibility of further costs being awarded, do discourage appeals. However we are not aware of any substantial submissions that have not been followed through to appeal.
>
> Further to the above there has to be, in our opinion, some mechanism to discourage frivolous appeals. The awarding of costs will ensure this.

Another noted that:

> There needs to be a balance so that the proposer is not dissuaded and the opposers are genuine ... such a balance currently exists.

Some territorial authorities suggested that individuals sometimes hold developers to ransom and take a matter through a hearing for little or no reason. Some regional councils also noted that some ill conceived and possibly vexatious appeals can be identified. One government body noted:

> ... there is potential for some objectors to use processes to promote their own agendas, eg where there is a grudge against an agency staff member. There are also problems where individuals will not accept scientific advice or other points of view and are only satisfied if the outcome is the one sought.

Another noted:

> ... an intrinsic problem that developers gain from applications and development and submitters are only trying to protect the status quo or limit impacts.

While many NGOs, local interest groups and individuals who responded expressed concern about the deterrent effect of high costs awarded against unsuccessful appellants, one group noted that:

> ... attention focuses on funding needs for appeal however the council level is the most crucial. The vast majority of unsatisfactory cases progress no further.

In April 1995, the Ministry for the Environment released a working paper entitled *Awarding of Costs by the Planning Tribunal*. The author of the paper concluded that:

> The Planning Tribunal has no fixed guidelines or rules on awarding costs against the unsuccessful parties in an appeal. Each case is assessed on its merits, having regard to the circumstances of the particular case. Public interest groups are not exempt from having costs awarded against them but can, by their approach to their cases, minimise the potential for costs to be awarded against them.[8]

1.4.4 Statutory processes

Some of the barriers to participation identified relate to the statutory processes and guidelines governing local authority activities. The most frequently commented on is the statutory time frame within which councils must process and consider consents. Many community groups, iwi, and individuals commented that there is insufficient time for the public to assimilate information and then comment on it. One correspondent noted that public notices are not always seen in time for the reader to make a submission.

Fees charged by the Environment Court, as set through RMA regulations, were identified as another statutorily imposed barrier. The Ministry for the Environment is presently examining the issue with a view to promoting a change in the RMA regulations to reduce the cost of registering with the Court.

One way of addressing the problem of restrictive time frames under the RMA is for councils to encourage, and applicants to undertake, pre-application consultation with affected parties and interest groups. Several councils, including the Wellington and Otago Regional Councils, encourage pre-application consultation as a means of minimising submissions and addressing potentially time consuming conflicts before the statutory process is entered into.

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[8] Ministry for the Environment 1995 p 21

The Canterbury Regional Council has a policy of ensuring that officers' reports are circulated a minimum of ten days (rather than the statutory two days) prior to hearings.

1.5 Public participation in other contexts

Questions about the role of public participation in tourism planning were raised by some correspondents. One government body expressed concern that, where strategies are developed at a national level and outside the RMA framework, environmental effects are dealt with in one-off cases at a local level. It pointed out that there is a regulatory gap between DOC and the Civil Aviation Authorities and provided an example of public participation being hampered by an inadequate legislative framework. Two NGO correspondents also commented on the absence of adequate public involvement in the growth and development of the tourism industry.

An NGO correspondent expressed concern about the lack of independent scientific authorities in the system with the demise of government departments. There has been a switch from independent advice to advocacy for clients.

A conservation board noted that Select Committee Hearings are a "mystery":

> At present one learns from experience and in seems different people have totally different experiences.

One NGO pointed out that the Conservation Act is also significant in terms of public participation issues and that investigation of decision-making under that Act is warranted. The same organisation expressed concern about issues relating to public participation and state owned enterprises. Issues of concern included the accessibility of information held by SOEs and arguments often used to justify the withholding of information for commercial reasons.

RESPONDENTS TO THE DISCUSSION DOCUMENT

BUSINESSES

ECNZ
Harrison Grierson Consulting Engineers
Tasman Pulp and Paper Company Ltd
Telecom Mobile Communications Limited
Transit New Zealand

COMMUNITY GROUPS

309 Residents Against Aerial 1080
Action for Environment Inc.
Auckland Civic Trust
Buller Conservation Group
Christchurch Community Law Centre
Coromandel Watchdog of Hauraki Inc.
Eastern Bay of Islands Preservation Society
Friends of Nelson Haven and Tasman Bay
Kapiti Environmental Action Inc.
Kilbirnie Lyall Bay Rongotai Progressive Association
Lakes District Community Advocate Society
Northwatch
Paihia and District Citizen's Association
Residents Airport Noise Action Group
Tasman Bay Amateur Marine Fisheries Association
The Tree Council
Waikato Anti Racism Coalition

GOVERNMENT AGENCIES

AgResearch
Conservation Board – Wellington
Conservation Board – Aoraki
Conservation Board – Eastern
Conservation Board – Marlborough
Conservation Board – Otago
Conservation Board – Rangitikei/Hawke's Bay
Conservation Board – West Coast
DOC – Bay of Plenty Conservancy
DOC – Hawke's Bay Conservancy
DOC – Otago Conservancy
DOC Head Office
Landcare Research – Manaaki Whenua
Ministry for the Environment
Ministry of Fisheries
Ministry of Forestry

Ministry of Women's Affairs
Office of Treaty Settlements
Te Puni Kokiri

IWI GROUPS

Ati Awa Ki Whakarongotai Inc.
Ngai Tahu Maori Law Centre
Ngati Paoa Whanau Trust Board
Ngati Pikiao Runanga
Ngatiwai Trust Board
Te Atiawa Manawhenua Ke Te Tau Ihu
Te Iwi O Te Roroa
Te Ngati Tama-I-Rangi Inc. Society
Te Runanga O Ngaiterangi
Te Runanga O Ngati Apa Inc.
Te Runanga O Turanganui A Kiwa
Whanganui River Maori Trust Board

MEMBERS OF PARLIAMENT

Annette King
David Carter
Dianne Yates
Graeme Lee
Judith Tizard
Warren Kyd
Wyatt Creech

NATIONAL NON-GOVERNMENT ORGANISATIONS

ECO
Environmental Protection for Children
Federated Farmers
Federated Mountain Clubs
Legal Services Board
National Council of Women of NZ Inc.
NZ Local Government Association
Royal Forest and Bird Protection Society of New Zealand Inc. – Far North Branch
Royal Forest and Bird Protection Society of New Zealand Inc. – Gisborne Branch
Royal Forest and Bird Protection Society of New Zealand Inc. – Head Office
Royal Forest and Bird Protection Society of New Zealand Inc. – Otago Branch

REGIONAL COUNCILS

Auckland Regional Council
Canterbury Regional Council
Environment Waikato
Hawke's Bay Regional Council

Northland Regional Council
Otago Regional Council
Southland Regional Council
Taranaki Regional Council
Wellington Regional Council

TERRITORIAL AUTHORITIES

Auckland City Council
Christchurch City Council
City of Napier City Council
Dunedin City Council
Gore District Council
Hurunui District Council
Hutt City Council
Kapiti Coast District Council
Manukau City Council
Marlborough District Council
North Shore City Council
Palmerston North City Council
Southland District Council
Timaru District Council
Upper Hutt City Council
Waipa District Council
Wanganui District Council
Wellington City Council
Whakatane District Council

INDIVIDUALS

A number of individuals also responded. Individual respondents have not been named.

APPENDIX 3 GROUPS CONSULTED FOR THIS INVESTIGATION

Auckland Civic Trust.

Auckland Regional Council.

Carter Holt Harvey.

David Bogan – International Mediation Services.

Department of Conservation – Auckland Conservancy.

Department of Conservation – Wanganui Conservancy.

DowElanco (NZ) Limited.

Federated Farmers of New Zealand Inc – Auckland Province

Federated Farmers Of New Zealand Inc – Taranaki

Fish and Game Council – Taranaki.

Royal Forest and Bird Protection Society of New Zealand Ltd. – Northern Region.

Huakina Development Trust.

Manukau City Council.

New Plymouth District Council.

Ngaati Te Ata.

Otaraua Hapu.

Petrocorp Exploration Limited.

Robert Gapes – Consultant in Engineering and Management, Arbitrator.

South Wairarapa District Council.

Taranaki Regional Council.

WaterCare Services Limited.

Wellington City Council.

APPENDIX 4 OVERSEAS EXPERIENCE OF ALTERNATIVE DISPUTE RESOLUTION IN THE ENVIRONMENTAL CONTEXT

1 Australia

NSW Land and Environment Court

In New South Wales, all planning appeals are dealt with by the Land and Environment Court. The Court is made up of judges and assessors. The assessors are non-legal experts in technical fields. The assessors determine appeals relating to the planning merits of a case and the judges determine legal issues.

Mediation was introduced into the Land and Environment Court in 1991 by an amendment to the Land and Environment Court Rules. Mediation is available through the Court for town planning, building and rating appeals. Mediation sessions are conducted by the Registrar or a Deputy Registrar specifically appointed for this purpose. The Registrar or Deputy Registrar is a neutral and independent party who assists negotiations between the disputants.[9]

Australian Commercial Disputes Centre

The Australian Commercial Disputes Centre (ACDC) was established following a survey of Sydney business people who indicated a strong demand for the creation of an ADR service provider for commercial disputes. The ACDC was set up in 1986 as a non profit-making company, which is distinct from the state but is subsidised by the New South Wales, Western Australian and Queensland State Governments.

ACDC provides a neutral, non-court dispute resolution management consultancy for commercial disputes. It also offers services such as training mediators and facilitators, providing neutral meeting facilities, and arranging seminars on ADR developments.

Among its areas of specialisation is environmental mediation. ACDC brings the disputing parties together and provides a neutral third person chosen by the parties from ACDC's panel of mediators.

Environmental Defender's Office

The Environmental Defender's Office Ltd (EDO) is a community legal centre specialising in public interest environmental law. Its functions are: provision of legal advice; casework and litigation; law reform; and community legal education. The EDO was set up in 1981 as a committee of the Environmental Law Association of NSW. In 1983 the EDO became eligible to receive a grant under the community legal centres funding programme, provided it became independent of any other organisation and was managed by a committee on which the interests of the community were significantly represented. The EDO was incorporated as a non-profit

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[9] Michael Stubbs "Environmental Mediation in Planning Appeals: Lessons from the Land and Environment Court of New South Wales" *Journal of Environmental Planning and Management* 39(2) 1996 273, 275.

making company in 1985 and it has a board comprising lawyers, legal academics, members of the Royal Australian Planning Institute, the National Trust and the Total Environment Centre.

The EDO also obtains funds through individual legal aid applications for individual cases under the Legal Aid Commission Act 1979. Legal aid is available for public interest environment matters to all applicants subject to a means and merit test. It is available for public interest environmental cases where the activity raises a matter of substantial public concern about the environment.

The EDO represents litigants at both court proceedings and mediations. During the period December 1992 to March 1994 when legal aid was not available, the EDO found a dramatic drop in its casework, and "a proliferation of procedural antics" designed by opponents to avoid a determination of the substantive issue, including applications for security for costs.

The EDO also has an educative role. It produces resources – an environmental law text for schools, and fact sheets about environmental laws – runs workshops and seminars, and provides training. The EDO has a small staff and depends on the assistance of a large group of volunteers. It also relies on a group known as the Friends of the EDO for financial assistance. This enables businesses, organisations and individuals to make tax deductible donations.

EDOs have been established in other Australian states.

NSW – Farm Debt Mediation

The Farm Debt Mediation Act 1994 was enacted to provide for mediation of farm debts before a creditor can take possession of property or other enforcement action under a mortgage. The Act requires the parties to make reasonable attempts to negotiate settlement, failing which the creditor may commence enforcement action. The farmer has the right to elect mediation and if he or she does so, the creditor must not take enforcement action until the NSW Rural Assistance Authority is satisfied that satisfactory mediation has taken place. Parties cannot contract out of the provisions of the Act. As at 30 June 1996, the Farm Debt Mediation Unit claims that 85% of mediations resulted in successful outcomes.

2 The United States

State of Hawaii

The National Institute of Dispute Resolution (NIDR) established a programme to encourage the institutionalisation of public interest disputes. This involved the creation of state-level and state-sponsored mediation offices to address public disputes specifically. In 1985 the Program on Alternative Dispute Resolution was established by the Chief Justice of the State of Hawaii's Supreme Court. The main goal of the Program was to mediate various complex disputes and to promote the use of ADR within the State. The Program became a permanent office within the State Judiciary in 1989 and has developed into the Center for Alternative Dispute Resolution. The Center provides expertise and technical assistance, promotes the use of ADR for conflicts involving government agencies, and educates government and community decision-makers and the public about the ADR options available in Hawaii.

The Center assists with cases referred by judges, legislators, and government agencies and deals with:

Public disputes concerning the allocation of scarce resources or the siting of public facilities. Such disputes often involve government agencies, business, and community and environmental groups.

Complex litigation cases which involve multiple parties, difficult legal and factual issues, or complex scientific or technical issues.

Policy "round tables" where the Center convenes and chairs discussions on matters relating to standards, rules and policies.

Other cases referred directly by judges, legislators, and agencies.

The Center also provides information through various publications; advice and consultation services to government agencies; education and training for state and county government groups; and undertakes research and evaluation. The Center has published *Standards for Private and Public Mediators in the State of Hawai'i* (1986) and *General Rules and Procedures* (1994) for the conduct of ADR. The *General Rules and Procedures* are a guide to good practice although the parties may agree on other procedures.

3 Canada

Round Tables on the Environment and Economy in Canada have published a set of *Guiding Principles: Building Consensus for a Sustainable Future* (1993).

British Columbia

A number of agencies sponsor negotiation processes. In some cases these agencies are the ultimate decision-maker if there is an impasse. They are also often government agencies involved in determining government policies that can significantly affect the outcome of the negotiations.

Shared decision-making is promoted by the British Columbia Commissioner on Resources and Environment, who defines it as follows:[10]

> Shared decision-making means that on a certain set of issues, for a defined period of time, those with authority to make a decision and those who will be affected by that decision are empowered to jointly seek an outcome that accommodates rather than compromises the interests of all concerned. Decision-making shifts to a negotiating team and when consensus is reached, it is expected that the decisions will be implemented.

Planning at the sub-regional level

At the sub-regional level, Land and Resource Management Planning (LRMP) has a significant role. LRMP is:

> an integrated, sub-regional, consensus building process that produces a Land and Resource Management Plan for review and approval by government. The plan

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[10] Commission on Resources and Environment *Report on a Land Use Strategy for British Columbia* 1992, 25.

> establishes direction for land use and specifies broad resource management objectives and strategies.[11]

Public participation is required in each LRMP. The public, aboriginal groups, and government agencies negotiate an agreement on the objectives and methods of public participation at the outset of each project. A main objective of LRMP is to develop consensus among participants and government agencies at each stage:

> Consensual decision-making is used in LRMP to develop agreement on future land use and address conflicts that arise as a result of differing resource values. The Dispute Resolution Core Group of the BC Round Table on the Environment and the Economy states that "attempting to solve problems through consensus can enhance sustainable use of natural resources as well as provide British Columbians with meaningful input to decisions regarding these resources".[12]

4 Denmark

Consensus conferences were developed by the Danish Board of Technology and are run to involve ordinary citizens in the assessment of technology.[13] A consensus conference takes the form of "a dialogue between experts and citizens". A lay panel is appointed from volunteers who respond to newspaper advertisements. Experts are to inform the panel about the new technology and its possible consequences.

Conferences run for three days. On the first day, the expert panel answers questions provided by the lay panel in advance. The second day involves the audience in discussion with the lay panel to develop supplementary questions for the experts and then the lay panel drawing up its conference report. On the third day the lay panel reads its report to the experts and the audience (including media). The experts may correct any misunderstandings and factual errors.

The purpose of the conferences is to stimulate public debate on modern technology and to let politicians know what the public think on certain issues.

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[11] Integrated Resource Planning Centre *Land and Resource Management Planning: A Statement of Principles and Process* 1993, 1.

[12] Above n 3, 20.

[13] Danish Board of Technology 1992. *Consensus Conferences.* Copenhagen: Danish Board of Technology.

APPENDIX 5: CONFLICT MANAGEMENT MECHANISMS

1 Definitions

There are various conflict management mechanisms. These range from consensus-building mechanisms such as consultation at one end of the spectrum through various negotiation, mediation, and facilitation processes (commonly referred to as alternative dispute resolution) to arbitration and litigation at the opposite end of the spectrum. Litigation and arbitration involve abdication by the parties of their decision-making power in favour of the Courts or an arbitrator, resulting in an imposed decision which may not satisfy either party.

The term "alternative dispute resolution" or ADR was coined to describe the mechanisms, involving assistance by an independent third party, which could be used to resolve disputes without litigation. The emphasis was on avoiding litigation, although litigation is a valid and useful form of dispute resolution in certain circumstances.

The non-judicial dispute resolution mechanisms (that is, those mechanisms where a decision is not imposed by a third party) may be regarded as being additional dispute resolution mechanisms rather than alternative to litigation and arbitration, since parties always retain their right to go to Court if they are not satisfied with the outcome. Sir Laurence Street, former Chief Judge of the Supreme Court of New South Wales, prefers the term additional dispute resolution, since the function of adjudicating disputes is a sovereign function delegated to the Courts, which cannot be challenged by an alternative mechanism. Dispute resolution mechanisms other than litigation are also additional in the sense that parties do not decide to opt for mediation or facilitation rather than litigation, but try such mechanisms as a step towards resolution of their dispute. If such mechanisms do not result in a solution, parties may proceed to litigation.[14]

2 Types of conflict management mechanisms

There are a number of approaches to conflict management, other than litigation. All, apart from consultation and negotiation, have the common feature of being based on facilitated communication between the parties. One purpose and advantage of such mechanisms is their flexibility. The particular approach adopted may be adapted to the particular circumstances of the dispute and the parties involved. The main variations are described below:

- **Consultation** means meaningful discussion, and is intended to build consensus early in a process before conflict arises, rather than to address existing conflict. The authoritative statement of what is consultation in the New Zealand context is found in the judgment of McGechan J in *Air New Zealand v Wellington International Airport Ltd*:[15]

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[14] Laurence Street "The Court System and Alternative Dispute Resolution Procedures" (1990) 1 ADRJ 5-9.

[15] Unreported decision, High Court, McGechan J, CP 403/91, Wellington Registry, 6 January 1992, 8.

> To consult is not merely to tell or present. Nor, at the other extreme, is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion.

And citing his own statement in *West Coast United Council v Prebble*:[16]

> Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.

- **Negotiation** is the basic form of dispute resolution from which all the non-judicial dispute resolution mechanisms derive. Negotiation takes place between two parties without the involvement of a third party. Each party tries to persuade the other in order to achieve a settlement to which they can both agree.[17]

- **Mediation**. "Mediation is assisted negotiation."[18] This means that the parties come together with an independent person of their choice who will help dispel antagonism, clarify issues, explore alternatives and explore solutions. The mediator does not advise the parties, but rather facilitates their discussion. The purpose of mediation is not to recommend settlement, but to assist the parties to communicate with a view to reaching their own settlement, or until an impasse occurs.

- **Facilitation** is essentially mediation where the potential effects of a proposal are of a larger scale, affecting more people including some who regard the proposal as a public interest issue. Facilitation involves a meeting of objectors, applicant and other concerned parties with a neutral person. The aim of the meeting is not necessarily to resolve the dispute, but to clarify issues, reduce animosity, improve communication and understanding of different points of view, narrow the issues in dispute by identifying areas of agreement, and give everyone the opportunity to put their views.

- **Independent expert evaluation**. This involves a technical expert being appointed by the parties to provide an opinion on certain disputed technical facts, quantification issues and valuation issues. Independent expert evaluation is especially suitable for technically difficult disputes.

- **Mini-trial**, where the case is essentially heard by an expert, legal or technical, who is able then to advise the parties of the likely outcome of the case if litigation proceeds.

Much of the literature focuses specifically on mediation, although that term is used in various senses by different commentators, which can cause confusion. It is sometimes used as the

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[16] (1988) 12 NZTPA 399, 405.

[17] David A Newton 1989. "The Potential and Prospects of Environmental Mediation and Other Means of Alternative Dispute Resolution in Environmental Matters in Australia" Conference paper, 2.

[18] Australian Commercial Disputes Centre 1996. *Building and Development Application Mediation Training Manual* Sydney: ACDC, 12.

generic term for alternative or additional dispute resolution, and sometimes restricted to its narrow meaning as described above. In this report, the term is used in its narrow meaning.

3 Principles

Over recent years, a number of principles have been identified which have come to be considered fundamental to the success of *mediation*, although they may also apply to dispute resolution generally:

1 **Voluntary process**: The disputants must voluntarily agree to try mediation for their dispute and they may withdraw from the process at any stage for any reason. Various players in the environmental legal system are emphatic on this point.[19] Adler writes "[M]ediation does indeed run the risk of perpetuating injustices if disputants are coerced into [mediation] involuntarily".[20] Compulsion is generally not conducive to a mechanism which relies on the good will of the parties involved to work towards a mutually acceptable resolution.

2 **Driven by the parties**: mediation empowers the parties to find their own solutions to their disputes. The parties choose whether or not to participate; they decide on the mediator and the agenda; and they come to their own agreement if possible. The mediator does not impose a settlement on the parties, but helps them to find their own solutions.

3 **All the parties must be present**: To be effective, all the parties to the dispute must be present or represented at the mediation meeting(s). If not, there is a danger that an affected person, who is not a party to the final agreement and who feels that their concerns have not been addressed, may derail the process.

4 The attendance of the principals substantially increases the likelihood of settlement, and the involvement of **participants with authority to make settlements** is essential.

5 **Independent facilitator or mediator**: The person who conducts the mediation must be independent of the parties and any ultimate decision-maker (in the event that agreement is not achieved). The mediator must have no vested interest in the outcome of the mediation and must be trusted and accepted by all the parties. It is common practice overseas for a court to provide parties with a list of persons from among whom they could select a mediator. The Parliamentary Commissioner for the Environment has used this practice in selecting independent review panel members.

6 **Fair hearing**: Everyone present should have an opportunity to put their view of the situation without interruption.

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19 Judge Kenderdine personal comment; Jerrold Cripps QC (NSW) personal comment.

20 Peter Adler *Mediating Public Disputes – The Experience of Environmental Mediation and Other Alternative Dispute Resolution Methods in the US and in Hawaii* Paper presented at the International Conference on Environmental Law, Sydney, June 1989, 24.

7 **Confidentiality**: Information made available by one party in the course of the mediation is confidential and should not be made available by any other party to the ultimate decision-maker. This encourages full disclosure between the parties to the mediation. In particular, offers made and discussions during mediation are without prejudice to any later litigation.

8 **Equal access to information**: There should be full disclosure of information between the parties.

The Center for Alternative Dispute Resolution of Hawaii has adopted a set of *General Rules and Procedures 1994* for the conduct of alternative dispute resolution. These Rules and the companion *Standards for Private and Public Mediators in the State of Hawaii 1986* govern any voluntary alternative dispute resolution process provided under the auspices of the Center, unless the parties agree otherwise. The Rules provide a good example of most of the principles set out above. Rule V.1 concerning confidentiality is particularly well-expressed and is set out here:

> Confidentiality is an important part of the ADR process.
>
> Unless otherwise required by law, information disclosed to neutral(s) [eg the facilitator], either in general sessions or in caucus, by the parties or by witnesses in the course of the ADR proceedings shall not be divulged by the neutral(s) without the consent of the affected party. All records, reports, or other documents received by the neutral(s) while serving in such capacity shall be confidential. The neutral(s) shall not be compelled to divulge such records or to testify in regard to the ADR proceedings in any deposition, adversarial proceeding or before any court. The above shall apply unless otherwise provided by law or rules of procedure or unless the parties and the neutral(s) otherwise consent in writing.
>
> The parties shall maintain confidentiality of the ADR proceedings, including conversations with the neutral(s), and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceedings:
> (a)a view expressed or suggestion made by another party regarding settlement;
> (b)admissions made by another party in the course of the proceedings;
> (c)a proposal made or a view expressed by any neutral(s); or
> (d)the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the neutral(s) or the conflicting party.

As to the rights and duties of participants, the Rule VI.1 provides:

> Participants remain in control of information exchanged in the proceedings, the degree to which they participate, and any decisions that are reached. ...
>
> Participants have a responsibility to come to ADR proceedings in "good faith" and with all the data they believe necessary or useful to the resolution of the dispute. They are expected to attend with authority to settle, an open mind, and a willingness to discuss a range of options which may meet their needs in resolving the issue(s) in dispute.