

# Implementing Sustainability – New Zealand’s Environment Court-Annexed Mediation

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by

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Namaste.           Kia ora mai tatou – our New Zealand greeting.

## Introduction

One of the conference themes at this 2007 ISIL conference is “*Environment and Sustainable Development*”. When considering what contribution I might be able to make to the conference discussion I was guided by recommendations contained in the Bandung Roadmap<sup>1</sup>.

## Bandung Roadmap

One year ago (16 December 2006), at a United Nations Environment Programme (UNEP) Workshop on Environmental Law and Policy, experts from Asian and African countries (including India) adopted the Bandung Roadmap. This document identified “*key issues*”, and outlined “*a way forward for the advancement of environmental law and policy to achieve environmental goals and objectives of sustainable development*”. One of the recommendations was to:

***“Promote the development of mechanisms to facilitate the prevention and peaceful settlement of environmental disputes, including the use of arbitration, environmental court and other practical dispute resolution mechanisms;”***

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<sup>1</sup> Bandung Roadmap for Advancement of Environmental Law in Support of the New Asian-African Strategic Partnership. Available at [www.unep.org/law/Calendar/PDF\\_docs/Bandung-Roadmap-info-note.pdf](http://www.unep.org/law/Calendar/PDF_docs/Bandung-Roadmap-info-note.pdf) (20 October 2007).

Taking a lead from this recommendation, this paper outlines some aspects of the New Zealand approach to sustainability-based environmental decision-making which may be relevant and transferable to the wider international community. In particular, it outlines the New Zealand Environment Court's approach to case management and the use of court-annexed mediation within the framework of the Country's principal environmental statute – the Resource Management Act 1991 (RMA).

In this paper I draw on my experience from working in environmental planning for more than 30 years. In that time I have worked as a senior manager in local government and as an environmental planning consultant, involved in preparing and administering statutory planning documents, and permitting of projects including sanitary landfills, quarries and marinas. For the last 4 years I have been appointed to my current position as a full-time Environment Commissioner with the Environment Court of New Zealand.

This paper is structured like an hour-glass. The first section is broad: briefly outlining some of the international milestones in the history of sustainable development; the key components of the concept; and the role of sovereign states in implementing sustainability.

This background provides the context to the bold initiative taken by New Zealand 16 years ago with the enactment of its Resource Management Act 1991. This environmental legislation is ambitious in its conceptualisation of sustainability and was a world first. The challenge for practitioners has been bringing it down to earth and interpreting it on the ground.

The core of the paper outlines the approaches used by New Zealand's specialist Environment Court to make sustainability-based environmental decisions with particular reference to case management and court-annexed mediation. As one of the Environmental Commissioners on the Court providing this mediation service my perspective is very much that of a practitioner<sup>2</sup>.

The paper concludes by returning to the broader theme and summarises some aspects of the New Zealand experience which may be transferable to the international community seeking to achieve sustainable development.

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<sup>2</sup> The views expressed in this paper are entirely personal. Any views expressed on legal issues, or matters bearing on the RMA's philosophy and the like, are not to be taken as representing views that would necessarily be adopted in a judicial capacity with the benefit of due argument.

## Sustainability – International Context

Some of the milestones which chart the international recognition of sustainable development also provide context to the legislative developments in New Zealand:

- 1972 - Although the concept of sustainable development had long been recognised, it gained considerable international recognition from the United Nations (UN) Conference on the Human Environment and the Stockholm Declaration.
- 1987 - Fifteen years later the “Brundtland Report” (Our Common Future; The World Commission on Environment and Development) gave international impetus to the concept, and produced the most widely recognised and accepted definition of the term:

*“Sustainable Development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”*

- Significant “events” to follow have included:
  - 1992 - Agenda 21<sup>3</sup> and the Rio Declaration;
  - 1997 – the Kyoto Protocol;
  - 2000 – the Millennium Development Goals (MDGs)<sup>4</sup>; and
  - 2002 – the Johannesburg Plan.
- Recently the issue of climate change has propelled sustainability into the top of agendas internationally and nationally. Around the world, governments and communities, businesses, households and individuals are increasingly aware of the need to contain environmental damage and are striving to incorporate sustainability into their plans and everyday actions.

However whilst there has been much talking and writing, it is proving challenging to move beyond the rhetoric.

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<sup>3</sup> Some of the main themes of Agenda 21 include: reforming policies; controlling wasteful consumption and production; improving technologies; and integrating trade and environment. Other key documents adopted at the 1992 Earth Summit in Rio de Janeiro included: the Statement of Forest Principles; the United Nations Framework Convention on Climate Change; and the United Nations Convention on Biological Diversity.

<sup>4</sup> The MDGs have been commonly accepted as a framework for measuring sustainable development progress. The MDGs are: 1. Eradicate extreme poverty and hunger; 2. Achieve universal primary education; 3. Promote gender equality and empower women; 4. Reduce child mortality; 5. Improve maternal health; 6. Combat HIV/AIDS, malaria and other diseases; 7. Ensure environmental sustainability; and 8. Develop a Global Partnership for Development.

At the international level most countries have made some commitment to achieving sustainability, for example, in terms of the Millennium Development Goals (MDGs). Most of these commitments are prefaced on the right to sovereignty, and go no further than assurances that national (domestic) legislation, policies and practices will be in harmony with international obligations. So whilst there might be a global framework in place, progress towards achieving sustainability rests essentially upon making progress at the country level.

New Zealand was one of the first countries to incorporate the concept of sustainability into the core purpose of environmental planning legislation. Sixteen years ago the Resource Management Act 1991(RMA) was enacted. The concepts underlying the RMA can be traced to the early 1970s and the principles embodied in the 1972 Stockholm Declaration.

## **Sustainable Development**

A cursory glance at, let alone a serious study of, the documents and “industry” associated with sustainable development confirms that it is a complex concept<sup>5</sup>. As with any complexity, it can be helpful to use some labels to summarise the concept. The key elements of sustainable development are:

- Interdependence and integration – both of, and within, the environmental, social and economic components;
- Inter-generational equity – between present and future generations;
- Intra-generational equity – between today’s people, between rich and poor;
- Interspecies – responsibility for protecting the global environment, the human and the non-human;
- Precautionary principle;
- Polluter-pays principle;
- Information, education and participation – empowerment and capacity building;
- International relations – environmental issues are borderless and may involve more than one state.

## **The Role of the Environment in Sustainable Development**

Sustainable development is about finding ways to integrate and balance environmental, social and economic goals. It challenges us all - governments, communities and individuals, to consider

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<sup>5</sup> I bear responsibility for the identification, elaboration and synthesis of ideas presented in this paper. Clearly I have drawn on the scholarship and advice of others involved in environmental sustainability and I have included links to some relevant sources but I have not detailed every reference.

all three areas and to move away from past practices that led to actions in one area often having negative effects on another. It requires holistic, integrated-thinking and actions.

The interdependence of the three commonly recognised components of sustainable development – environment, social and economic - has been well recognised. However the significance of our reliance on the environment has not always been fully appreciated. Natural resources are our most basic building blocks. We use them and we abuse them: they are the “sources” of the good(s) and the “sinks” for the bad. We rely on the environment for our “needs” - food, water, shelter and the air we breathe, to regulate the climate, and to absorb waste. Without a functioning and healthy environment there cannot be economic and social development. This is recognized by Goal 7 of the MDGs, being “*to ensure environmental sustainability*”. The environment is not just one of the pillars, it is the foundation of sustainable development.

### **International Environmental Law**

International environmental law is generally set out in various Multilateral Environment Agreements (MEAs). They set out non-legally binding principles which parties will respect when considering actions affecting a particular environmental issue (“soft-law”), or specify legally-binding actions to be taken by each country that is a party to the particular agreement (“hard-law”). Most of these treaties have addressed specific issues, for example the protection of the ozone layer, rather than taking a comprehensive and integrated approach. However MEAs are currently the main methods available under international law for countries to work together on global environmental issues.

There are also international environmental obligations associated with some free trade agreements. Trade and environment being related at the most basic level: economic activity is largely based on the environment. This is the case for New Zealand.

Sovereignty currently remains at the core of international environmental law. In practice this means that whilst each country remains autonomous to the extent that it can make and implement its own policies and laws, including those relating to the environment and natural resources, we know that ecosystems and environmental issues do not respect the arbitrary territorial lines drawn on maps – they are borderless.

Although the sovereignty-based system may not be considered ideal for environmental issues, it remains the institutional framework within which we currently have to work. This means that in seeking to achieve sustainable development the need for effective national (domestic) legislation, policies and practices is essential.

## **Implementing Sustainability**

Given the breadth and complexity of the issues associated with sustainability, it is obvious that there will be no single solution which can deliver such broad outcomes. Solutions will include a suite of measures – a tool box, including combinations of measures involving:

- Market-based tools;
- Regulation;
- Governance;
- Voluntary actions; and
- Information, Education, Participation and Communication.

The selection of the tools to use needs to be context-specific and appropriate to the targeted level, be that the country, the local community, or the individual. When selecting tools which will be effective in any given situation it is important to recognise differences in, for example, natural resource endowments, assets, environmental conditions, legislative and political frameworks, capacities and socio-economic conditions. The suite of tools needs to be “tailor-made” if it is to work in the local context.

With that proviso firmly in mind, the following section of this paper briefly outlines some of the tools New Zealand is using, with particular reference to its core environmental legislation and the operation of the Environment Court. It may be that there are some aspects of this experience that are relevant and transferable to other parts of the global community.

### **New Zealand - Context**

New Zealand is an independent, democratic nation. It is a former colony of England, becoming fully independent in 1947. It is formally a monarchy, Queen Elizabeth II is the titular Head of State represented by the Governor General. The Parliament has a single chamber: the House of Representatives with 120 members.

The New Zealand system of Government is based on the Westminster model. Its fundamental tenet is that of the “separation of powers”: that is the Legislature, the Executive and the Judiciary are kept separate. The independence of the Judiciary is an important principle of the New Zealand constitution with Judges and Judicial Officers being appointed by the Governor General<sup>6</sup>.

As an island nation, consisting of two large islands (North and South Islands) and a number of smaller islands, New Zealand’s international borders are maritime. With a total area of approximately 270,000 sq kms, it is similar in land area to Japan, the United Kingdom, or the state of Colorado in the USA. New Zealand’s total population is approximately 4.1 million

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<sup>6</sup> The web site [www.justice.govt.nz](http://www.justice.govt.nz) provides information about the New Zealand legal system. (20 October 2007).

people. The economy depends on overseas trade. The primary sector (agriculture, forestry, fishing and aquaculture) and the tourism sector, account for some 80% of foreign exchange earnings, and they account, directly or indirectly, for about one-third of Gross Domestic Product. Both of these sectors rely on the natural resource base of the country.

New Zealand's indigenous Maori, a Polynesian people, make up about 15% of the population. The Treaty of Waitangi, signed in 1840, establishes and guides relationships between the Government and Maori. The Treaty promised to protect a living Maori culture; to enable Maori to continue to live in New Zealand as Maori, while at the same time conferring on the Crown the right to govern in the interests of all New Zealanders. The principles of the Treaty have been included in many New Zealand statutes<sup>7</sup>.

By comparison with India, New Zealand is a small country – India having a land area of some 3.3 million sq kms and a population in the order of 1.2 billion. However the two countries draw on a shared history and have many common linkages, including 1947 as the year of independence, membership of the Commonwealth, parliamentary democracy, the legal system, the English language, and a passion for sport, particularly cricket. Being of a “peninsula shape”, India too has substantial maritime international borders. Relations between the two countries go back many years. The first New Zealand High Commissioner was appointed in 1960. In more recent years there has been increased trade and people-to-people contacts. There has been a steady increase in the number of visits to New Zealand by Indians for study, tourism and film making. The New Zealand 2006 census figures show 43,344 residents were born in India, a doubling of numbers from the 20,892 residents in the previous census in 2001. A larger number of people (97,443) indicated their ethnicity as Indian in the 2006 census<sup>8</sup>.

### **New Zealand's Environmental Legislation**

New Zealand governments, from the earliest days of settlement, adapted public health legislation from the United Kingdom. This resulted in separate legislations dealing with individual natural resources or issues. Environmental regulation was ad hoc, with one aspect of the environment managed in isolation of others.

During the 1980s New Zealand embraced the concept of sustainability and the culmination of an extensive public consultation exercise was the Resource Management Act 1991 (RMA), essentially a single, integrated resource management statute relating to the use of land, air and water. It affected over 50 statutes and repealed a number of major pieces of existing legislation, including the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967,

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<sup>7</sup> The web sites [www.treatyofwaitangi.govt.nz](http://www.treatyofwaitangi.govt.nz) and [www.justice.govt.nz/pubs/other/pamphlets/2001/legal\\_system.html](http://www.justice.govt.nz/pubs/other/pamphlets/2001/legal_system.html) provide further information about the Treaty of Waitangi. (20 October 2007).

<sup>8</sup> Available at [www.teara.govt.nz/NewZealanders/NewZealandPeoples/Indians/7/en](http://www.teara.govt.nz/NewZealanders/NewZealandPeoples/Indians/7/en) (20 October 2007).

the Clean Air Act 1972, the Noise Control Act 1982, and most of the Mining Act 1971. It also significantly amended a number of other Acts, including the Harbours Act 1950. In essence it merged the traditional town planning with environmental impact assessments and applied it to the wider range of natural resources – land, air and water. A restructuring of local government occurred in tandem to implement the Act.

The RMA is the cornerstone of New Zealand’s environmental legislation. The Government Ministry for the Environment<sup>9</sup> is responsible for administering the Act. Since 1991 other legislation has been introduced containing the principle of sustainability, including the Local Government Act 2002, Land Transport Management Act 2003, and Building Act 2004<sup>10</sup>.

A detailed analysis of the RMA, and its effectiveness, is beyond the scope of this paper. It has now been in operation for 16 years. It is a large and evolving piece of legislation: several amendments having been made since its enactment. Rather I propose to outline the Act’s general principles and some aspects of its operations which enable, and contribute to, implementation of the principles of environmental sustainability.

### **New Zealand’s Resource Management Act 1991 (RMA)**

The long title of the RMA simply calls it “*An Act to restate and reform the law relating to the use of land, air and water*”. This is clarified by the purpose of the Act, set out in section 5<sup>11</sup>, which is:

*“to promote the sustainable management of natural and physical resources”*

“Natural and physical resources” are comprehensively defined to include:

*“land, water, air, soil, minerals and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures”.*

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<sup>9</sup> The web site [www.mfe.govt.nz](http://www.mfe.govt.nz) provides information about the New Zealand Ministry for the Environment.

<sup>10</sup> The web site [www.legislation.govt.nz](http://www.legislation.govt.nz) provides public access to unofficial versions of New Zealand legislation and statutory regulations.

<sup>11</sup> References are to the New Zealand Resource Management Act 1991, unless otherwise stated.

“Sustainable management” is at the heart of the RMA and is defined in section 5(2):

*“ In this Act, “sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while: -*

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*

There is a very wide definition of “Environment”, which includes –

- “(a) Ecosystems and their constituent parts, including people and communities; and*
- (b) All natural and physical resources; and*
- (c) Amenity values; and the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.”*

In achieving the purpose of the Act further direction is to be found in sections 6 to 8 which identify matters of national importance, other matters, and the Treaty of Waitangi 1840. Matters include, inter alia:

- The preservation of the natural character of the coastal environment, wetlands, lakes and rivers and the protection of them from inappropriate subdivision, use and development;
- The protection of outstanding natural features and landscapes;
- The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu(sacred places), and other taonga(treasures);
- The efficient use of natural and physical resources;
- The efficiency of the end use of energy;
- Biodiversity and the intrinsic values of ecosystems;
- The effects of climate change;
- The benefits to be derived from the use and development of renewable energy.

## Assessment of Effects

The emphasis of the RMA is on “effects”. It requires assessments of effects on the environment (AEEs) to be carried out to identify likely impacts and to evaluate options, for both projects and policies. The focus is, in particular, to “*avoid, remedy or mitigate adverse effects of activities on the environment*”. This effects-based approach means that activities themselves are not regulated per se, rather it is the effects of the activities that are to be assessed.

The term “effects” is defined (s. 3), and includes:

- positive and adverse effects;
- temporary and permanent effects;
- past, present, future, and potential effects; and
- cumulative effects.

## **The RMA and Sustainable Development**

Even from this brief introduction to the purpose and principles (Part 2) it is easy to recognise the inclusion of “sustainability” concepts and language in the RMA.

However, “sustainable management”, as defined in the RMA, is primarily concerned with one aspect of the wider concept of sustainable development - first and foremost the RMA is an environmental statute concerned with the sustainable management of natural and physical resources. That was intentional<sup>12</sup> and it is essential to recognise these intentional limitations to the purpose of the legislation. Whilst some might consider the more restricted focus of the Act as a shortcoming, it could be said that the environmental focus of the RMA appropriately recognises the pivotal role of the environmental dimension in the wider sustainable development equation. Given the political and ethical nature of sustainable development, there are other opportunities to complement the RMA and to seek to achieve that broader goal.

## **RMA Operations and Practice**

The RMA provides a regulatory and administrative framework and covers many areas of resource use, development and protection, including:

- Land use and land subdivision;
- The use of water;

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<sup>12</sup> Kenneth Palmer, Resource Management Act 1991, in *Environmental & Resource Management Law* 85,88 (Derek Nolan ed., 3<sup>rd</sup> ed. 2005), at 92-94.

- Discharges of contaminants into air and water, and onto or into land;
- The use of coastal areas, foreshore and seabed;
- Activities on the surface of water; and
- Noise.

The Crown is bound by the Act (s.4). There is an emphasis on individual responsibility with a general duty on every person to avoid, remedy or mitigate any adverse effect on the environment (s.17). Throughout the Act there are strong themes of devolution, consultation, and public participation.

There is a devolved, yet integrated, form of planning and decision-making which provides for a three-tiered framework of policy and plans – national, regional and district. Broadly the main mechanisms under the Act are:

- Policy and Planning Documents – national policy statements and national environmental standards, regional policy statements, and regional and district plans;
- Resource Consents – permits for land use activities, subdivisions, water takes and discharges, coastal activities, and air discharges, etc; and
- Enforcement Proceedings

### Policy and Plan Documents

Whilst it is open to the Government to prepare National Policy Statements, the only one to date is the mandatory New Zealand Coastal Policy Statement. Therefore most of the policy and plan-making occurs at the regional and local level. The preparation and administration of regional policy statements, and regional and district plans is devolved to the 85 local authorities, being 12 Regional Councils (broadly defined by the catchments of the major river systems), and 73 Territorial (local City or District) Councils (based on communities of interest).

The regional and local planning documents must be publicly notified. There is a right to lodge submissions, and the council conducts public hearings before delivering its decision on those submissions. These planning documents are intended to provide local context by identifying the resource management issues for the region or local district, and subsequently providing a cascading and interrelated structure of objectives, policies, rules/methods and anticipated outcomes, for the purpose of managing the natural and physical resources.

### Resource Consents

Regional and District Plan rules identify activities which require a resource consent (a permit). The consent authority is required to decide whether or not to publicly notify any application for a resource consent. In general the presumption under the Act is that an application must be notified, unless the consent authority is satisfied that the adverse effects of the activity on the

environment will be minor. Where an application is notified there is a right for persons to lodge a submission and, as with plans, there is a public hearing before a decision is made to grant or refuse the consent. Approvals are usually subject to conditions.

Each year councils decide on about 50,000 resource consent applications. The breadth of decisions under the RMA is very wide and can range from minor projects, such as an extension to a house or the removal of a protected tree, to major proposals of national significance such as electricity generation proposals (geothermal, hydro and wind projects), water allocation, and coastal reclamations/marinas.

### Enforcement Proceedings

The RMA contains a range of provisions dealing with enforcement: declarations; abatement notices; interim enforcement orders; enforcement orders and prosecution. Abatement notices are served by an enforcement officer of a council. Declarations and enforcement orders can be sought by anyone.

Prosecutions are heard in the District Court. The presiding District Court Judge will be an Environment Judge. The Act provides for a range of penalties including imprisonment for not more than 2 years or a fine not exceeding NZ\$200,000. If the offence is a continuing one, there may be a further fine not exceeding NZ\$10,000 per day (s.339).

### Right of Appeal

The first instance decision is made at the regional and local council level. There is a broad right of appeal. Any party who is dissatisfied with the decision of the council (in whole or in part), can then appeal against the decision to the Environment Court.

## **Environment Court of New Zealand**

The main court system of New Zealand has four tiers: the Supreme Court; the Court of Appeal; High Courts; and District Courts. From 2004 the Supreme Court of New Zealand replaced the Judicial Committee of the Privy Council, based in London, England, as New Zealand's highest court.

There are also a number of specialist courts. One of these is the Environment Court<sup>13</sup>, established by section 247 of the RMA as a Court of Record<sup>14</sup>.

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<sup>13</sup> The web site [www.justice.govt.nz/environment](http://www.justice.govt.nz/environment) provides more information about the Environment Court of New Zealand (20 October 2007).

<sup>14</sup> A court whereof the acts and judicial proceedings are permanently recorded and which has power to punish for contempt of its authority. *Butterworths New Zealand Law Dictionary*, Spiller, 4<sup>th</sup> ed. 1995, p.76.

New Zealand has had a system of appeals from local government and planning decisions for more than 50 years. The Town and Country Planning Act 1953 set up the Appeal Boards. These were replaced in 1977 by the Planning Tribunal. The recognition of the present forum as a Court came under the RMA in 1996 (s.247).

### Structure and Composition of the Court

The Environment Court consists of the Principal Environment Judge, Environment Judges, and Environment Commissioners. Although usually an Environment Judge presides at a sitting of the Environment Court, Environment Commissioners are fully members of the Court. Environment Judges also hold warrants as District Court Judges. Environment Commissioners are judicial officers appointed under warrant by the Governor General. Commissioners have knowledge and expertise in relevant specialist areas such as local government, resource management, environmental sciences, engineering, surveying, landscape architecture, alternative dispute resolution, and Maori issues.

The structure and composition of the Environment Court recognises that the “business” of the Court is multidisciplinary, and not merely a matter of law (s.253).

For matters heard in the Environment Court, a quorum for the Court is one Environment Judge and one Environment Commissioner, but the Court is most often constituted with one Environment Judge and two Environment Commissioners. The Act also provides for Judge or Commissioner alone sittings. Currently the Court has 10 Judges (including 3 Alternate, or part-time) and 21 Commissioners (including 6 Deputies). Commissioners are appointed for a term of up to 5 years and can be reappointed any number of times.

### The Court’s Procedures

The Environment Court hears matters that have been before a council. The Court has all the powers of the original consent authority and although it is required to have regard to the first instance decision it is not bound by it. The Court’s hearings are “de novo”, or “as new”. The effect of the de novo power vests the Environment Court with final authority to make findings of fact and to determine what “sustainable management” means in a case.

Because the Court does not usually deal with retrospective issues, but with prospective, the legalistic questions of standard and burden of proof may be more misleading than useful. The effects-based emphasis of the RMA means procedures (including litigation) centre around an inquiry and the Court’s basis of consideration is not constrained by the rules of evidence or procedure (s.269). The Court has powers (s.267(1)) to receive any appropriate evidence and to call for any helpful evidence. Consistent with the strong tone of the RMA for openness and public participation, the Court’s hearings are almost always open to the public and are comparatively informal. Parties are not required to have legal representation (s.275).

The Environment Court is a circuit court. It is required to conduct its business as near to the locality of the subject matter as is convenient unless the parties otherwise agree (s.271). So although the Court is based in three registries geographically dispersed, the Court travels throughout the Country. This also enables site visits, which are a vital part of the Court's consideration.

Most of the Court's work is under the RMA but it also has jurisdiction under other related legislation, including the Public Works Act, Historic Places Act, Forests Act, Local Government Act, and Transit Act.

The Court delivers reasoned decisions, most usually in writing. There can be appeals from the Environment Court to the High Court (s.299), and from there (with leave) to the Court of Appeal and the Supreme Court, although only on a question of law, not on the factual substance of the Environment Court's decision. There have been numerous decisions of the High Court confirming that the court will not interfere with any determination of fact by the Environment Court.

### The Court's Caseload

Numerically the proportion of decisions that are appealed to the Environment Court is small. For example of the approximately 50,000 resource consents processed by councils each year, only 1.0% were appealed to the Environment Court in 2005/2006, compared to 1.8% in 2001/2002<sup>15</sup>. The Court's work also includes policy and plan appeals and enforcement proceedings, in addition to resource consents.

As would be expected, the cases filed are usually ones of significance, and most of the Court's work involves matters of public interest. Over the year 2006/07<sup>16</sup>, the Court received 1142 new registrations and disposed of 1073. The outstanding caseload as at 30 June 2007 was 1463.

### **Environment Court Case Management**

The Environment Court has considerable flexibility to regulate its own proceedings. The Court operates an active case management system. In addition to standard adjudication proceedings, the Environment Court uses a range of techniques to resolve disputes and prepare cases for hearing, including case management tracks, conferences, arbitration, alternative dispute resolution (ADR) and mediation.

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<sup>15</sup> Ministry For The Environment, The Resource Management Act: Key Facts About Local Authorities and Resource Consents in 2003/2004 and 2005/2006, available at [www.mfe.govt.nz/publications/rma/annual-survey/](http://www.mfe.govt.nz/publications/rma/annual-survey/) (20 October 2007).

<sup>16</sup> Environment Court, Report of the Registrar of the Environment Court for the 12 months ended 30 June 2007.

### Case Management Tracks

Upon filing, every case is assigned by a “managing Judge”, or the Registrar, to one of 3 case management tracks:

- Standard
- Complex
- Parties’ Hold

Cases may be transferred between tracks at any time. Provided parties comply with the Court’s directions in the standard track, the Court endeavours to set a hearing date within six months of the case being filed.

More involved cases that require individual management, such as plan appeals involving policy issues and numerous parties and major development proposals, are assigned to the complex track. These cases, or sets of related cases, are managed on an individual programme as set by the managing Judge.

Subject to the Court’s agreement, cases in which all the parties agree that case management may be deferred for a period, may be placed on the on-hold track, usually for example, to allow parties to negotiate and/or mediate a resolution face to face. Case management is resumed (failing settlement or withdrawal of proceedings) at the parties’ request or at the expiry of the deferral period or otherwise at the Court’s direction. Of the 1463 matters outstanding as at 30 June 2007, 238 (16%) were on hold.

### **Environment Court-Annexed Mediation and ADR**

An increasingly important part of the New Zealand resource management process is the use of alternative dispute resolution (ADR). The RMA (s.268) empowers the Environment Court to arrange mediation and other forms of ADR for the purpose of encouraging settlement. Members of the Court, or other persons, can conduct the proceedings, which may occur at any time before or during the course of a hearing.

Although the processes are not mandatory, as part of its case management the Court actively encourages the use of ADR and offers a mediation service run by its Environment Commissioners. The Commissioners receive professional training for the purpose. No additional fee is payable to the Court for use of the court-annexed mediation service. The parties meet their own costs of the mediation unless they agree otherwise.

Where an Environment Commissioner conducts a mediation the role is different to that of another outside person. Although the role does not confer a decision-making authority, it does occur within the jurisdiction of the Act and is Court-annexed. The Commissioners are operating

under an oath of office and a statutory obligation of good faith in the performance of the duties of the office (ss.256 and 261).

The Environment Court regards mediation and other forms of ADR as particularly well-suited to resolution of environmental disputes<sup>17</sup>. Environment Court-annexed mediation is now widely accepted as a valuable option. Even for cases where complete settlement may not be likely, the use of ADR processes is encouraged to narrow and settle issues within disputes and to assist with preparing cases for a hearing.

### **Environment Court-Annexed Mediation Procedures**

The provisions of the RMA do not specify the type of ADR to be used, nor do they detail the procedures to be followed. There is a requirement that parties consent to the use of ADR, but beyond that the timing, the form and the procedural arrangements are left to the Environment Court. The Court provides a mediation protocol, or guidelines, through its published Practice Notes (see footnote 16). These are not a set of inflexible rules, but it is expected that they will be followed unless there is good reason to do otherwise. This flexibility is consistent with the Court's powers to regulate its own proceedings (s.269). The Practice Notes are issued by the Principal Environment Court Judge who has responsibility for "*ensuring the orderly and expeditious discharge of the business of the Environment Court*" (s.251).

It is usual at the close of a mediation session for the parties to record the outcomes in a Memorandum of Understanding (MOU) or similar document. This may include matters settled, matters not agreed upon, and matters to be further investigated and reported back. A case may be the subject of more than one mediation session.

Where settlement is reached without a Court hearing then the aspects of the agreement that are within the jurisdiction of the Court become the subject of documentation referred to a Judge with a request for a consent order. Sometimes settlement can include additional matters which are beyond the grounds of the appeal and the jurisdiction of the Court. Any such additional matters are not included in the draft consent order, but may instead be made the subject of a separate agreement that may be enforceable in other forums. Approval of a consent order is not a foregone conclusion. The Court provides an important judicial check on whether those agreements are legal and in the public interest.

Where full settlement is not reached then the case is scheduled for a hearing before the Court. Usually the Commissioner who has conducted the mediation does not sit as a member of the Court on any subsequent hearing, although there is provision for that to occur if all of the parties agree.

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<sup>17</sup> Environment Court of New Zealand Consolidated Practice Note 2006, paragraph 3.1.4. Available at [www.justice.govt.nz/environment/consolidated-practice-note/consolidated-practice-note.pdf](http://www.justice.govt.nz/environment/consolidated-practice-note/consolidated-practice-note.pdf) (20 October 2007).

### Number of Cases Mediated

In 1993 only six Commissioner-assisted mediations were recorded. In the year 2006/2007, the Court conducted 449 mediation events, compared with 544 in the previous year<sup>18</sup>. As these statistics record only the number of mediation events, the total number of cases mediated is somewhat higher, as usually several related cases will be scheduled together. This is particularly so for mediations on policy statements and plans.

Of the 449 mediations conducted in 2006/2007, agreement was reached in full in 40% of them, resulting in consent orders being lodged with the Court. But again, the total number of cases resolved is higher. An evaluation of the Environment Court's use of mediation completed in 2004 concluded that the general consensus was that roughly 80% of cases referred to mediation were successfully resolved<sup>19</sup>.

From my personal experience, as a Commissioner conducting mediations in the Court for the last four years, I can confirm the trends identified in this data. The demand for the Court's mediation service is increasing and most of the mediation sessions resolve the disputes such that court hearing time is not required. The success of mediation is also being reflected in the nature and duration of matters that are scheduled for court hearing time. I have observed a change: whereas previously the Court's hearing roster included many sitting weeks in which 3 or 4 separate hearings would be scheduled; now it is more likely that single hearings will be scheduled over several weeks. For example, the week before I left New Zealand for this visit to India, I completed the sixth week of sitting on a hearing involving the rezoning of land to extend urban development adjacent to the coast in Auckland, our largest city. Many of the less complex appeals are now being resolved expeditiously through the Court's mediation service, and the Court's adjudication expertise is being used for large and complex matters, often involving issues of national significance and wide public interest.

### Types of Cases Mediated

Cases falling within all three of the main categories are successfully mediated: that is, policy and plan documents; resource consents (permits); and enforcement proceedings.

Policy and plan documents are complex and comprehensive documents. As they are the community's identification of issues and subsequent objectives, policies and rules – they are the primary expression of the meaning of environmental sustainability. The interrelated nature of these documents makes resolving disputes about them amenable to the more informal forum of mediation sessions than to the adversarial court hearing. Often the bulk of the disputes are resolved through mediation with a few remaining matters requiring a hearing. Where mediation has not completely settled the matters, it has usually meant that the remaining matters have been

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<sup>18</sup> Environment Court, *supra* note 15.

<sup>19</sup> Stephen Quinn & Ashley Cornor, Ministry for the Environment, *Alternative Dispute Resolution for Resource Management Disputes* (June 2004).

more narrowly defined and focused. This results in a more efficient court hearing. Multiple mediation sessions are usually required for these documents and individual sessions can easily involve more than 50 people.

With resource consents and enforcement cases the disputes are usually about the conditions of the approved consent. The following few examples serve to illustrate the nature of matters dealt with:

- Lime rock quarry in a rural area – dispute between the quarry operator, neighbouring residents, and both the regional and district councils, and related to the enforcement of, and compliance with, conditions requiring: the crushing machinery to operate within an enclosed building; installation and operation of truck wheel-wash facilities; acoustic fencing along boundaries; construction and sealing of onsite access ways; and upgrading of an adjacent public road and intersection. (Mediation involved 5 parties and 18 people.)
- Geothermal power station – disagreement between the regional council (consent authority), the operator, other users of the geothermal field, and the local district council over a considerable number of the conditions of consent including: measures to avoid land subsidence in the town overlying part of the geothermal field and to remedy any damage; details of research, reservoir and subsidence modelling, monitoring and reporting; details of the drilling and reinjection programmes; measures to avoid adverse effects on other existing operators on the same geothermal field and a multiple-operator protocol including a dispute resolution process; and the establishment of a peer review panel for the management of the geothermal field. (Mediation involved 5 parties and 25 people.)
- Urban land subdivision – dispute regarding the intensity of the development (number and location of sites), the extent of additional upgrading to public roads and public utility services, the size and location of public reserves, and the retention of existing large trees. (Mediation involved 7 parties and 20 people.)
- Residential development – dispute between the council and landowner relating to illegal and unstable landfilling works affecting a stream, and requirements for improvements to the stormwater disposal. (Mediation involved 3 parties and 8 people.)
- Redevelopment of an historic building – dispute as to whether the application documents were accurate, whether the new work was within the scope of the application, and the effects of the increased height of the building on neighbours' sea views and privacy. (Mediation involved 3 parties and 10 people.)

## **Environment Court-Annexed Mediation and Sustainability**

The New Zealand Environment Court-annexed mediation service, as it is conducted, contributes to achieving sustainable environmental decisions. There are a great many synergies between the key elements of sustainable development and the benefits of mediation.

The benefits of the New Zealand Environment Court-annexed mediation service can be identified as:

- **Flexibility** – The RMA legitimises ADR and mediation as a way of resolving environmental disputes but leaves the detailed implementation undefined. The Act does not codify the practices to be followed. The broad discretion provided by the RMA provides scope to tailor the process to suit the particular circumstances of the case. This flexibility extends to timing, venue, mediator selection, number of sessions and site visit opportunities. Whilst adjudication through the more adversarial court hearing is the primary vehicle by which the Court carries out its functions, important benefits are realised by being able to utilise alternative techniques and procedures. The opportunity to trial and develop the use of alternative techniques is enabled by having sufficient flexibility within the empowering statute.
- **Ownership** – Mediation allows parties to resolve their dispute as they see fit, within procedural boundaries that are protected by a neutral third party. The feeling of control or ownership can lead to greater creativity in problem-solving and increased commitment to agreed outcomes. The individuals directly affected by the dispute are able to actively participate and speak for themselves – they are empowered. Often people are more willing to accept and implement a solution which they have helped to create. This could be considered a more sustainable outcome. It also enables matters to be addressed that may not be determinable in a Court hearing.
- **Maintaining Relationships** – Defining a dispute in terms of interests rather than positions allows for wider exploration of problem-solving options and encourages less adversarial dialogue. Mediation can be more conducive to the preservation of inter-party relationships than litigation, a court hearing and an “imposed” decision. This can be particularly significant in the context of environmental disputes where opposing parties are often members of the same local community or even neighbours, where it can be important to retain or re-build trust.
- **Resource efficiency** – Mediation is perceived as both a “low cost” and “speedy” form of dispute resolution – especially in comparison to litigation. Parties frequently do not feel the need to be legally represented, and expert testimony may not be required. In contrast, litigation is expensive in terms of the parties’ legal and expert witness’ costs, and also the

administrative costs of the Court. One member of the Court conducts a mediation compared to three members usually sitting for a hearing. The use of an active case management system including mediation, contributes to managing the Court's workload in a timely manner.

- **Accessibility** – Although the Environment Court is relatively “user friendly” and may be less formal than other courts, it nevertheless conducts its hearings in a courtroom environment. For many people this can still be too intimidating to contemplate. By comparison, mediation is much more informal, and therefore more accessible to a greater proportion of the population. Consistent with being a circuit court, mediations are conducted “locally”, that is, close to the location of the subject matter. This makes it easier and cheaper for those people affected to attend. Because of the collective interest in the sustainable well-being of the environment, doing justice in making environmental decisions calls for opportunities of participation to be given not only to those whose private interests may be directly affected, but also to the public generally. The RMA's open public participation processes have seen community groups and non-governmental organisations (NGOs) (civil society) play an active role in representing the public interest in New Zealand's environmental decision-making.
- **Information, shared learning and capacity building** – One of the recognised benefits of mediation is that it allows people to learn from one another, often referred to as “shared learning”. By actively and personally participating in making an environmental decision, there is a benefit gained from exchanging information and learning. These benefits can have an enduring effect on how people approach resolving disputes in future. Increasing the availability of environmental information can culminate in changing attitudes and values, which will lead to, and in many cases demand, changes in behaviour – including institutional and governmental behaviour and practices, as well as individual's behaviour. Environmental education, in the broadest sense, is well recognised as an important contributor to “capacity building” and the promotion of sustainable development<sup>20</sup>.
- **Confidentiality** – Mediations are confidential unless the parties agree otherwise. This allows parties to explore options without that information being used or disclosed outside of the mediation, including in a subsequent Court hearing should settlement not be reached.
- **Governance/ trusteeship of the public interest** – As a part of the judiciary, the Court is to resolve disputes in a prompt, impartial, and consistent manner that engenders public

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<sup>20</sup> For example, details of the United Nations Decade of Education for Sustainable Development (2005 – 2014) can be viewed at [www.desd.org](http://www.desd.org) (20 October 2007).

trust and confidence in the judicial system. As such the Court provides an important “governance” role. Because the Environment Commissioners also adjudicate RMA disputes they are “in touch” with the jurisprudence and practice of the Environment Court. This can be particularly useful in ensuring that the agreed outcome is legitimate in terms of the formal legal system. It also means that parties have access to facilitators who bring expertise in both the subject matter and the legislation that governs the dispute. Should settlement not be reached then the Commissioner is able to provide accurate information on what to expect should a Court hearing be required. Additionally by being officers of the Court, the Commissioners can bring “authority” to a mediation and command a greater degree of respect than might a private mediator.

Some concerns that have been expressed about Environment Court-annexed mediation include:

- **Abuse of process** – Mediation may be used to delay the process and extend the time taken to resolve the dispute. Mediation might be used by opponents of a development or vexatious litigants as a way of stalling the RMA process. The active case management system used by the Court mitigates opportunities for abuse of this kind.
- **Protecting the public interest and achieving the purpose of the RMA** – Environmental disputes usually involve issues of significant public interest. The confidential nature of mediation means that there is no guarantee that the parties have considered the public interest in the course of their deliberations, or whether the mediated outcome achieves the purpose of the Act<sup>21</sup>. There are at least two “safeguards” operating in practice.
  - First, the Commissioners are not operating in a law-free vacuum, they operate under the statute’s jurisdiction. In this regard they are able to intervene during a mediation to ensure that parties consider whether or not their agreement satisfies the purpose of the Act and that the public interest is served. This can be seen as part of the “reality testing” that is a standard part of the mediation process.
  - Secondly, any agreement has to be endorsed by the Environment Court through the request for a consent order. Consent orders are given due consideration by the Judges in exercising their overall decision-making discretion, and they may decline to sanction a consent order if it is clear that the sustainable well-being of the environment would not be well served. To assist in this process the Court has issued a standard consent order form in which all parties confirm or otherwise that

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<sup>21</sup> This subject is further addressed in the article by Stephen Higgs, *Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court* (2007) *Environmental Law*, Vol. 37:61, pp. 61 – 104. Available at <http://cmi.alt-design.net/new-zealand/articles/full/47.html> (20 October 2007).

they are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the RMA, including Part 2 and the purpose of the Act.

### **Summary and Concluding Comments**

This 2007 ISIL conference provides a timely platform to debate international environmental law issues, coming 20 years after the "Brundtland Report" which injected considerable momentum into the recognition of the concept of sustainable development.

Today the concept of sustainable development – meeting the present needs of development and environmental protection without compromising the needs of the future – finds wide support. However sustainability-based decisions are complex and challenging. They are multi-faceted and require a wide range of environmental, social and economic factors to be taken into account. But it is the natural resources - the environment - that provide the foundation of sustainable development. Protecting the environment is an imperative to achieving social and economic development.

The issue of climate change has propelled sustainability into the top of international agendas. It has highlighted that ecosystems and environmental issues are borderless – they do not recognise territorial lines drawn on a map of the world. Yet sovereignty remains at the core of efforts to address environmental issues under international law.

The current sovereignty-based framework means that each country has both a responsibility and the authority to take national action. National initiatives are able to be implemented now. If there is a critical mass taking similar action, there will be an impact globally.

While current structures (both internationally and nationally) may not be ideal, they nevertheless provide an important framework for action now. No doubt international structures will continue to evolve in seeking to better address environmental challenges in a coordinated way, but that role will more likely be to support national and local level actions.

To be effective, implementation of sustainability has to occur at all levels and be ongoing – it is a process. The direction of influence may be from high level institutional and governmental policy down through the community, or upwards from the grass-roots actions by individuals and local communities influencing political commitments. Legislation is a pivotal tool in implementing sustainability. It sits in the middle of the "top down" and "bottom up" flows – it can implement policy and it can require compliance. To play its part effectively the law needs to be able to adapt and change as society changes.

Sixteen years ago New Zealand was one of the first countries to incorporate the concept of sustainability into the core purpose of environmental legislation. Experience has confirmed the

complexity of sustainability and the bigger challenge of the implementation of such concepts. Legislation like the New Zealand RMA is complex and challenging and requires considerable resources. As such it is not necessarily suited to all countries. However some of the lessons learned and techniques developed are relevant and transferable, and may be useful to assist to give sustainability an operational meaning.

The Environment Court of New Zealand, in fulfilling its role in sustainability-based environmental decision-making, has developed an active case management system, and, in addition to adjudication through court hearings, uses a range of procedures including a court-annexed mediation service. The Court regards mediation and other forms of ADR as particularly well-suited to resolving environmental disputes and the court-annexed mediation service is now widely accepted as a valuable option. Decisions arising from mediation procedures are often more sustainable. Indeed it may be argued that the use of such models of consensus-based decision-making is a cornerstone of sustainability.

Under the RMA, the New Zealand Environment Court has considerable flexibility to regulate its own proceedings. This flexibility, subject to concepts of natural justice and reasonableness, enables the Court to respond readily to the variety and complexity of the cases that come before it by providing a range of dispute resolution techniques and procedures without requiring further legislative amendments.

Implementing sustainability is a complex challenge that requires a suite of measures and tools to achieve. The practical experience of the New Zealand Environment Court, and in particular its Court-annexed mediation service, is relevant to the international community seeking, as stated in the Bandung Roadmap, *“the development of mechanisms to facilitate the prevention and peaceful settlement of environmental disputes”*.

In outlining in this paper some aspects of New Zealand’s experience in implementing sustainability I am not suggesting that New Zealand has got it all correct. Much more needs to be done and there are on-going efforts being made at all levels of society. However I trust that there are some practical lessons to be learned from the New Zealand experience that can be transferred, with appropriate adaptation, and implemented elsewhere in the world as part of the global effort to achieving sustainability. Whilst the discussions and debates ought to, and need to continue, we need also to complement the rhetoric by taking action now.

Thank you.

Kia ora

Dhanyavad.