MEDIATION PRIVILEGE IN THE ENVIRONMENT COURT

The issue of privilege attaching to mediation has exercised the minds of Courts over the last 20 years as mediation has become more popular in settling litigation, better understood by the legal profession and the judiciary, facilitated by well-trained mediators, and increasingly important as a tool in case management systems. The philosophical underpinnings of the need for confidentiality in mediation are usefully summarised in a paper used in LEADR mediation training.[1]

In 2003 the New Zealand Law Society Environmental Law Committee considered the issue of confidentiality in mediation, having regard to rulings in *Hannah v Tasman District Council*[2] and *Logan v Upper Hutt City Council*[3] that appeared to indicate that papers prepared by an expert witness to assist a mediation before the Court's hearing could be put to the witness in the subsequent hearing. Further consideration of these cases and discussion with those involved in them suggest that the rulings were made on the understanding that the papers or reports were available outside the mediation process and therefore were not privileged.

The *Hannah* and *Logan* cases dealt with the question of whether something said, admitted, or done during a mediation can be raised in another forum. These issues have been discussed in other jurisdictions, for instance, in *Vaucluse Holdings Ltd v Lindsay*[4] and *Crummer v Benchmark Building Supplies Ltd*.[5] Not yet considered in any Environment Court case (as far as the Committee is aware) is whether counsel involved in a mediation can advise a party in a related dispute where something potentially learned in a mediation may prejudice another party to the other dispute, the issue raised in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd*.[6]

The need for practitioners to fully understand the issues of privilege is important, and the Environmental Law Committee has prepared a paper for the benefit of all lawyers operating in the resource management field. This paper is now available at …………..

The Law Society Environmental Law Committee urges practitioners involved in Environment Court litigation to be aware that, if material produced for or at mediation is at risk of being required to be produced at a subsequent hearing, the parties need to be made aware of that risk before the material is produced for or at mediation. Further, parties and their counsel would be well-advised to document, in advance of the preparation of material in respect of which mediation privilege may be claimed, agreement as to the existence or otherwise of that privilege.

Mark von Dadelszen
New Zealand Law Society Environmental Law Committee Member

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1 Originally prepared by F. Crosbie of Firmstone & Fell, Sydney, although it is written primarily from an Australian perspective and without reference to the New Zealand material (including two Court of Appeal judgments).
2 The ruling was not reported, but the substantive decision is W058/2002, Judge Sheppard.
3 EnvC W12/2003, 10 February 2003, Judge Treadwell, at [5].
4 (1997) 10 PRNZ 557 (CA) at 559.
5 [2000] 2 ERNZ 22.
6 [2001] NZLR 343 (CA); 15 PRNZ 379.