

Copyright is owned by the Author of the thesis. Permission is given for a copy to be downloaded by an individual for the purpose of research and private study only. The thesis may not be reproduced elsewhere without the permission of the Author.

AN INVESTIGATION OF ALTERNATIVE DISPUTE RESOLUTION  
IN RESOURCE USE CONFLICT AND  
OPTIONS FOR THE IMPROVEMENT OF ITS USE  
IN RESOURCE MANAGEMENT

A thesis presented in partial fulfilment of the requirements for the degree of  
Master of Philosophy in Resources and Environmental Planning at Massey  
University

ADAM SCOTT BLAIR

1993

## **ABSTRACT**

For the first time, New Zealand resource management legislation has included alternative dispute resolution (A.D.R.). In this thesis A.D.R. theory, particularly mediation, is explored. Conclusions from case studies and a questionnaire are drawn on to suggest ways in which the use of A.D.R. in resource management can be improved.

The introduction explains how confrontational or adversarial modes of dispute resolution have dominated the way in which resource use conflicts have been resolved in the past. What alternative dispute resolution is, its non zero sum philosophy, and what it purports to achieve is covered. It introduces the consents process in the Resource Management Act and discusses how effective public participation in that process is a moral necessity. Alternative dispute resolution can provide, in part, a mechanism by which effective public participation can be achieved.

Chapter one looks at the theory of alternative dispute resolution. The works of various A.D.R. theorists are drawn on to explain the advantages of alternative dispute resolution and when it will be effective. A typical mediation process is outlined, again drawing from the works of theorists. Problems associated with alternative dispute resolution are explored. Some of the mediator training and skill requirements are discussed.

Most of the case studies involve Maori cultural and spiritual values and the principles of the Treaty of Waitangi. One of the mechanisms Maori use to safeguard their interests and redress past 'injustices' is the Treaty of Waitangi and the 'principles' of the Treaty. To facilitate greater understanding of the case studies how Maori view the world, and the principles of the Treaty of Waitangi are discussed in Chapter two.

The major case study in this work, Chapter three, shows how a substantial resource use conflict involving cultural and spiritual values has been successfully resolved using Mediation. An analysis of that case study is conducted using

points drawn from Chapter one.. Chapter four presents four 'minor' case studies. These detail techniques which are not strictly mediation but promote the philosophy of A.D.R.. The positive aspects and problems which were encountered in all of these studies are drawn on in the conclusion.

The results of a questionnaire focusing on the attitudes to and use of A.D.R., by planning staff, in Local Government are discussed in Chapter five. Some conclusions are drawn about the way in which the A.D.R. provisions in the Resource Management Act have been used.

The conclusion suggests: agreements between parties should include some provision for re-negotiation should unforeseen circumstances arise; some gauge of the likely reaction of political decision makers to settlements needs to be made prior to entering an A.D.R. process; A.D.R. techniques could be introduced at the beginning of the consents process rather than at its concluding stages; training in mediatory techniques for planners should be introduced at the tertiary level; A.D.R. in the planning system cannot be conducted in isolation from the judicial decision makers.

**"There are no panaceas; only promising avenues to explore."**

- Frank E. A. Sander



## TABLE OF CONTENTS

### GLOSSARY OF ABBREVIATED TERMS i

### LIST OF MAPS iii

### LIST OF ILLUSTRATIONS iii

### LIST OF PHOTOGRAPHS iii

### INTRODUCTION 1

What is Alternative Dispute Resolution?.....	3
The Philosophy of Alternative Dispute Resolution: Win - Win and Non Zero Sum Settlement.....	3
Negotiation.....	5
Mediation.....	6
Alternative Dispute Resolution and Resource Management Law Reform.....	7
Public Participation and the Planning Process in New Zealand.....	10
Consents and Activities Under The Resource Management Act.....	13
The Consents Process.....	16
Assessment of Effects.....	20

### CHAPTER 1: MEDIATION THEORY 21

The Advantages of Mediated Outcomes.....	21
The Principles of Success.....	21
Timing of Mediator Entry Into The Dispute.....	22
Dispute Assessment.....	23
Outline Of A Mediation Process.....	25
Strategies Used To Reach Agreement.....	29
Team Mediation.....	33
Problems With The Mediation Process.....	33
Training.....	37
Mediator Skills.....	39

### SUMMARY 40

### CHAPTER 2: MAORI CULTURAL AND SPIRITUAL VALUES AND THE

### TREATY OF WAITANGI 41

Introduction.....	41
The Maori World View.....	41
The Maori World View And Its Conflict With Resource Use Practices....	43
The Treaty Of Waitangi.....	44
The Treaty Of Waitangi And Its Conflicting Versions.....	45
Kawanatanga and Sovereignty.....	46
Mana, Rangatiratanga, and Sovereignty.....	47
How Did These Differences Occur?.....	48
Background To The Treaty Of Waitangi Act 1975.....	49
Cultural And Spiritual Values And The Treaty Of Waitangi.....	51

Development Of The Principles Of The Treaty Of Waitangi .....	51
The Court of Appeal Principles.....	52
The Waitangi Tribunal's Methodology .....	57
The Principles Which the Tribunal Has Developed.....	61
CONCLUSION.....	62
CHAPTER 3 MAJOR CASE STUDY: WAIKAREAO ESTUARY	64
Background To The Conflict.....	64
The Need For And Planning Of Route P .....	64
The State Of Relations Prior To The Mediation.....	66
The Planning Of The Project: Extent of Ngai Tamarawaho's Involvement.....	67
Lodgement of the Wai 42 and Wai 86 Claims. ....	70
An Epochal Description Of The Mediation Process.....	73
The First Meeting.....	74
Meeting 2 August 1990.....	75
Meeting 13 August 1990.....	76
Description Of Issues Highlighted To Date. With Comment From Council And Ngai Tamarawaho Representatives. ....	77
Council Concern and Action on Section 178 Consent.....	83
Mediation Meeting 27 March 1991.....	84
Catalysts to the Conflict Resolution. ....	86
Mediation Meeting 22 April 1991.....	88
Mediation Meeting 9 May 1991.....	89
Transference of Shell Fish During Construction.....	96
The Continuing Negotiations.....	98
Analysis Waikareao Estuary Mediation .....	100
CHAPTER 4 MINOR CASE STUDIES	112
CASE STUDY 1: UPPER WAITAKI WORKING PARTY	112
Background to the Upper Waitaki working Party.....	112
Development of the Upper Waitaki Hydro Electric Schemes .....	114
"Genesis" of the Upper Waitaki Working Party .....	114
Working Party Meetings.....	117
Inclusion of the Ngai Tahu Trust Board.....	118
Inclusion of the Lower Waitaki Working Party with the Upper Waitaki Working Party.....	119
The Agreements Reached.....	120
Strengths of the Process.....	121
Use Of The Working Party Process In Other Water Permit Applications.....	122
The Power Crisis of 1992 .....	122
CASE STUDY 2: MANUKAU HARBOUR TASKFORCE	123
The Manukau Harbour and it's Decay .....	123
Initiation of the Manukau Task Force.....	126
Themes and Principles .....	127
The Meetings: Format And Tensions.....	128
The Options Developed.....	129
The Final Recommendations.....	130
The Failure to Define a Kaitiaki Structure.....	131



The New Minister's Response to The Recommendations.....	132
Conclusion.....	133
CASE STUDY 3: WHAKAMOENGA POINT	134
Whakamoenga Point Residential Development .....	134
The Agreement For the Realignment of Acacia Bay Road .....	134
Early Conflict With The Department of Conservation.....	135
First Signs Of Trouble: Bone Fragments Are Found.....	136
Secondary Agreement Reached.....	138
D.O.C. Re-enters The Alignment Dispute .....	139
The Decision to Continue Construction.....	141
The Final Meeting .....	144
Conclusion .....	145
CASE STUDY 4: KAKANUI SEWERAGE MEDIATION	146
Conclusion .....	149
CHAPTER 5 QUESTIONNAIRE SUMMARY	151
Percentages From Responses To Questionnaire.....	151
Discussion of Written Responses to the Questionnaire .....	153
Responses to Question 5.....	153
Responses To Question 7 .....	156
Responses To Question 8 .....	157
Summary .....	158
CONCLUSION	160
The Need For Fall-Back Negotiation/Mediation Clauses.....	160
The Need For Political Acceptance .....	161
Assessment Of Effects And A.D.R. ....	163
The Benefit Of Early Consultation In E.I.A. ....	164
The Role Of Consent Authorities In The Assessment Of Effects And A.D.R. ....	164
Promotion Of A.D.R. Is Dependent On The Philosophy Of The Consent Authority.....	165
The Role Of The Consultant And A.D.R. Techniques On Large Projects .....	166
Graduate Training.....	166
Alternative Dispute Resolution And Legal Interpretation Of The Resource Management Act.....	168
Concluding Comment .....	169
BIBLIOGRAPHY	171
Interviews.....	184
Seminar .....	185
APPENDICES	186



**GLOSSARY: ABBREVIATED TERMS USED IN THE TEXT.**

A.D.R. = Alternative Dispute Resolution.

A.R.C. = Auckland Regional Council.

B.A.T.N.A. = Best Alternative To a Negotiated Agreement.

C.R.E.D. = Centre for Resolving Environmental Disputes.

D.O.C. = Department of Conservation.

D.S.I.R. = Department of Scientific and Industrial Research.

E.I.A. = Environmental Impact Assessment.

H.D.T. = Huakina Development Trust.

---

H.E.P. = Hydroelectric Power.

K.A.O.S. = Kakanui Action On Sewerage.

M.A.F. = Ministry of Agriculture and Fisheries.

M.F.E. = Ministry For the Environment.

M.H.P.S. = Manukau Harbour Protection Society.

N.Z.M.C. = New Zealand Maori Council.

O.M.C. = Oamaru Maori Committee.

P.C.F.E. = Parliamentary Commissioner For the Environment.

R.M.A. = Resource Management Act.

R.M.L.R. = Resource Management Law Reform.

T.D.C = Taupo District Council or Tauranga District Council.

U.W.W.P. = Upper Waitaki Working Party.

W.V.A.S. = Waitaki Valley Acclimatisation Society.

### **List of Maps**

Options for access to Tauranga Harbour bridge	65
Waikareao Estuary habitat	80
Waitaki Power Development	113
Acacia Bay road reconstruction	136 A

### **List of Illustrations**

Formal processes of decision making	17
Waikareao Estuary time lines	71
Cross section of Ponui Point	138 A

### **List of Photographs**

Commemorative plaque - Waikareao Estuary	78
Sea Lettuce	81
Storm Water outlet - Kopurererua Stream	81
Expressway under construction	97
Expressway looking north	101
Expressway looking south	101