

Guidelines for monitoring additional dispute resolution processes within the Resource Management Act

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Summary

The purpose of this research has been to develop indicators that can be used by the Ministry for the Environment to monitor what are referred to as additional dispute resolution processes permitted under the Resource Management Act. Sections 99(1)¹ and 268(1)² provide a basis for resolving disputes over resource consents, designations and heritage orders, and water conservation orders using mediation, facilitation, conciliation or similar procedures. The research was not concerned with the option of arbitration as it is not based on consensus decision making.

The differences between mediation, facilitation and conciliation were clarified. Much of the literature on additional dispute resolution relates to mediation rather than to facilitation and conciliation, therefore aspects of mediation are referred to more frequently in this publication. The steps in a mediation process are described in Appendix 1.

The legislative context in which additional dispute resolution is specifically referred to was outlined. It identified where the use of these processes are allowed for in the resource consent granting and appeal process in particular and with regard to the review of consent conditions, designations and heritage orders, and water conservation orders.

Monitoring principles were selected after a review of the overseas literature on environmental dispute resolution and an examination of existing dispute resolution models in other fields in New Zealand. These included the Christchurch Community Mediation Service, the Employment Tribunal, and the Disputes Tribunal (formerly the Small Claims Tribunal). The principles chosen were: efficiency and cost-effectiveness, legitimacy, and fairness. No attempt was made to express principles or develop indicators that might be appropriate for Maori to use in evaluating additional dispute resolution processes.

The pre-monitoring context was clarified before indicators were developed. That context related to the kinds of decisions that consent authorities would need to make with regard to choosing an appropriate dispute resolution path. The Ministry for the Environment would then be monitoring those instances where the choice had been made to use additional dispute resolution processes.

Separate guidelines were provided in Appendix 2 for consent authorities when selecting a dispute resolution path. It was recommended that a marginal analysis be undertaken of the expected costs and benefits of using additional dispute resolution processes when granting resource consents etc. The analysis would provide a comparison to the scenario of moving directly to hearings under ss.100 or 272.

Section 32 of the Resource Management Act was used as an exemplar for assisting consent authorities to justify the process of considering alternative dispute resolution processes and for developing indicators. Indicators were developed using the concept of Pareto-efficiency. A benefit-cost analysis approach was used to monitor cost-effectiveness rather than efficiency. Absolute

¹ "For the purpose of clarifying, mediating or facilitating resolution of any matter of issue, a consent authority may, upon request or of its own motion, invite anyone who has made an application for a resource consent or a submission on an application to meet with each other or such other persons as the authority thinks fit."

² "At any time after lodgement of any proceedings, for the purpose of encouraging settlement, the Planning Tribunal, with the consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing."

efficiency cannot be calculated. Indicators aimed at monitoring the correlation of a number of factors that might improve the cost-effectiveness of dispute resolution processes were presented in Appendix 3.

Indicators developed for the principle of legitimacy addressed two sets of issues: conforming with the law or legality, and the credibility of the process. Issues covered included: confidentiality, voluntary involvement, privacy, and responsiveness of the process to the needs and interests of the parties.

Fairness indicators corresponded to different stages of the process. They addressed issues such as participation, representation (including that of third-party interests and future generations), setting up process protocols, and access to information.

Conclusions reached are as follows.

An investigation should be carried out as to who would or should pay the costs if someone other than a Planning Tribunal member is appointed to mediate or conciliate under s.268.

A potential 'enhancement' benefit from adopting additional dispute resolution processes needs to be monitored. Benefit may accrue in instances where additional dispute resolution processes have served to clarify issues so that the time taken for a hearing is significantly reduced.

If the costs and benefits of an additional dispute resolution process fall in different years they need to be measured using a constant \$ value. There may also be difficulties in trying to collect information on actual costs and benefits incurred.

The Ministry for the Environment should only attempt to monitor the cost-effectiveness of individual processes at present. A large number of outcomes will need to be recorded over a substantial period of time before an attempt can be made to compare cases. It is not appropriate to attempt to compare the cost-effectiveness of additional dispute resolution processes with hearings.

Third-party intervenors must be skilled and work within relevant codes of conduct that are established by a relevant professional body. These attributes apply both to consent authorities and to people appointed by the Planning Tribunal. The Tribunal could appoint an appropriate person to be a permanent additional dispute resolution intervenor or a pool of intervenors could be identified for the Tribunal to draw from when necessary.

The issues of confidentiality, privilege and protection against defamation for non-judicial intervenors need to be addressed in the legislation.

Although the Act allows certain persons to appeal a resource consent authority decision (s.120), it is not clear whether the provisions of s.274 that permit others to appear before the Tribunal might relate to participation under s.268. This situation needs to be clarified.

Specially-appointed advocates could represent the third-party interests and those of future generations inherent in environmental disputes. Some meetings could also be made public.

Recommendations

1. That an investigation be carried out on who should pay the costs of a non-Planning Tribunal intervenor under s.268 of the Act.
2. That resource consent authorities be encouraged through the use of professional trainers to provide training opportunities for their staff in facilitation, mediation and negotiation.
3. That reference be made in the Act to the need for the skills, qualities and experience required of the intervenor under ss.99 and 268.
4. That a pool of third-party intervenors be identified, updated and available for use by the Planning Tribunal under s.268 of the Act.
5. That the legislation be clarified with regard to who may participate under s.268.

Further research

Methods for guiding the weighting of principles are necessary.

An on-going evaluation is needed of additional dispute resolution practice in New Zealand. A data base on mediation in New Zealand needs to be established by surveying those who have mediated their disputes both at the local authority and the Planning Tribunal levels.

Research into the issues related to who would/should pay for the intervenor under s.268 is required.

Section 99 provides a valuable opportunity for cost-efficient dispute resolution. This opportunity could be captured if there was a formal requirement in the Act for a dispute assessment at that stage. This issue warrants further research.

There is a need for indicators to monitor whether additional dispute resolution **outcomes** are consistent with the purpose and principles of the Resource Management Act both now and in the future.

CHAPTER 1

Introduction

1.1 Scope of the publication and clarification of terms

The Resource Management 'Act 1991³ provides specific (ss.99⁴ and 268⁵) opportunities for 'additional' dispute resolution processes to be used during the resource consent application and appeal process. These processes are intended to complement existing procedures such as local authority and Planning Tribunal hearings for resolving environmental and resource management disputes rather than providing alternatives. The intention of the Act is to provide opportunities for reducing or avoiding the need for litigation.

These new approaches are referred to as 'alternative dispute resolution' (ADR) or 'environmental dispute settlement' (EDS) in the literature. The term 'alternative' reflects the ADR philosophy that the approaches are different to conventional institutionalised forms of dispute resolution. However, the term 'additional dispute resolution' will be used in this publication to be consistent with the term adopted in s.268(1) of the Act.

Alternative or 'additional' dispute resolution refers to a variety of consensual approaches to resolving public disputes. The parties meet face-to-face in an effort to reach a mutually acceptable resolution of issues or potential controversies. The processes are voluntary, and involve joint problem solving and/or negotiation (Bingham, 1986, p.5).

The processes referred to in ss.99 and 268 (mediation, facilitation and conciliation) have not been defined or interpreted in Part I of the Act. They all belong to a category of additional dispute resolution that is sometimes referred to as 'assisted negotiation' which implies the intervention of a neutral third party. These processes may be used when parties are unable to reach agreement after negotiating on their own.

Two or more parties are assisted by an intermediary(ies) to negotiate issues of concern to them. At various points in a dispute the parties may require facilitation, mediation or conciliation assistance; the intermediary may call these different techniques into play at different times depending on the situation. The parties contribute to the development of the process and control the outcome.

Facilitation is the simplest form of third-party intervention. An intermediary can play a vital role in enabling negotiations to begin and helping them to continue. The facilitator focuses almost solely on managing the process rather than on volunteering his or her own ideas. He or she is concerned with the practical and procedural aspects of meetings as well as using different techniques to enhance communication between or amongst the parties. A skilled facilitator will also work to

³ The Resource Management Act 1991 is referred to as 'the Act' forthwith. Any other legislation is referred to in full.

⁴ "For the purpose of clarifying, mediating or facilitating resolution of any matter of issue, a consent authority may, upon request or of its own motion, invite anyone who has made an application for a resource consent or a submission on an application to meet with each other or such other persons as the authority thinks fit."

⁵ "At any time after lodgement of any proceedings, for the purpose of encouraging settlement, the Planning Tribunal, with the consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing."

create a favourable climate for joint problem solving (Susskind and Cruikshank, 1987, pp.152-162). Facilitation is also useful in dealing with intra-party conflict before mediation actually begins (Ministry for the Environment, 1988, p.19).⁶

Mediation operates in a climate of conflict whereas facilitation does not require conflict. Steps in the mediation process are described in Appendix 1. Mediation involves an impartial intermediary(ies) who is (are) acceptable to all the parties. This person's involvement is considerably more substantial than in facilitation. He or she is often privy to information given in confidence by the parties. The mediator may caucus with the parties when necessary and in some situations may perform what is popularly referred to as 'shuttle diplomacy' in international negotiations. By acting as a repository for such information, the mediator is in a unique position to suggest options that any one party would be unable to suggest from a limited amount of information. A skilled mediator will ensure that he or she has a good knowledge of the substantive issues that concern each party. He or she will then be well placed to understand what each party may be willing to trade and what is probably non-negotiable (Susskind and Cruikshank, 1987, pp.162-164). The final outcome of mediation may be a clarification of some or all of the issues, the making of a recommendation to some higher authority, or reaching agreement on a particular course of action. Success may also be in the form of improved communication between or amongst the parties.⁷

(The definition of mediation outlined here is not necessarily the same as that used in, for example, family courts, tenancy mediation, community mediation and industrial mediation. Mediation in those arenas may span a spectrum from facilitation to arbitration (Cameron, J., 1992, Senior Lecturer, Department of Sociology, University of Canterbury, pers. comm.). The concept of mediation in the environmental dispute resolution field has been shaped largely in the industrial relations field (Bingham, 1986, p.162).)

The term conciliation is not referred to in the major literature on environmental dispute resolution; it appears to be used mainly in the industrial relations field. In that arena the major role of a conciliator is "to convene conciliation councils for the hearing of disputes of interest and to take such steps as he deems advisable with intent to procure fair and amicable voluntary settlements of such disputes" (Woods (1963) cited in Howells and Cathro, 1986, p.14). A conciliator acts as a neutral third party and assists the disputants by guiding, exploring, interpreting, advising, and cajoling to settle their own disputes and to reach their own agreement.

I have made the assumption that the use of the words "conciliation and other procedures" in s.268 reflects an attempt to empower whatever concept or form of consensus decision making the parties wish to use rather than imposing technical distinctions. This publication is not concerned with the option of arbitration allowed under s.356. Arbitration generally involves an enforceable decision being imposed on the parties (Hearn, 1987, p.101); it is not based on consensus decision making.

It is important to note here that local government staff have been practising facilitation extensively under the legislation preceding the Act; the legislative provisions for mediation and conciliation are the real 'newcomers'.

⁶ See footnote 54 in Susskind, 1981, p.19, for cases involving facilitation.

⁷ See Bingham (1986), Susskind and Cruikshank (1987), Sullivan (1984), Bacow and Wheeler (1984), and Talbot (1983) for examples of mediated disputes. Crowfoot and Wondolleck (1990) provide examples of disputes that illustrate both facilitation and mediation.

1.2 Purpose and approach

The Minister for the Environment is required to monitor, amongst other things, the effect and implementation of the Act (s.24 (f)). The Ministry will also be concerned to avoid, where possible, the problems experienced in North America where additional dispute resolution has been practised on an ad hoc basis (Ministry for the Environment, 1988, pp.13, 38).

The Ministry for the Environment needs specific criteria and indicators with which to monitor the effectiveness of processes described above. This will enable policy and procedure appropriate to additional dispute resolution processes to develop in New Zealand. The objective of this research is to provide guidelines for monitoring additional dispute resolution processes as permitted under the Resource Management Act. The discussion of issues relating to indicators will also assist local authorities to examine certain factors before making a decision to use one process or another.

The research approach comprises three components. First, the opportunities for using these processes under the Act have been outlined. Second, the core principles on which monitoring should be based have been derived after (a) a review of the North American literature on approaches to monitoring additional dispute resolution processes used in resource management disputes, and (b) an examination of dispute resolution models used in New Zealand such as community mediation services, industrial relations, and the disputes tribunals. Although the North American experiences may be different because their judicial system is different to New Zealand's, the philosophy underlying the principles of additional dispute resolution is likely to be relevant. Third, attributes or characteristics of these principles have been identified and relevant monitoring indicators developed.

CHAPTER 2

Legislative context

2.1 Additional dispute resolution processes in the Resource Management Act

In the Resource Management Act the following sections provide a basis for additional dispute resolution.

Section 99(1) Pre-hearing Meetings states that “(f)or the purpose of clarifying, mediating or facilitating resolution of any matter of issue, a consent authority may, upon request or of its own motion, invite anyone who has made an application for a resource consent or a submission on an application to meet with each other or such other persons as the authority thinks fit”. This applies to s.88 with regard to making an application for a resource consent under s.94(1)(c)(ii) regarding controlled activities, s.94(2)(b) regarding discretionary or non-complying activities, s.94(3)(c) regarding restrictions relating to coastal marine areas, lakes of beds and rivers, water, and discharge of contaminants into the environment, s.128 with regard to review of consent conditions, and ss.169 and 209 regarding designations and heritage orders, and water conservation orders.

Section 268(1) Additional Dispute Resolution states that “(a)t any time after lodgement of any proceedings, for the purpose of encouraging settlement, the Planning Tribunal, with the consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing”.

Additional dispute resolution processes can also be used voluntarily as part of the consultation required under the First Schedule of the Act in the preparation, change and review of policy statements and plans (Part V of the Act).

2.2 Resource consent granting and appeal processes

The following description of the steps involved in the resource consent application, granting and appeal process under the Resource Management Act is illustrated in Figure 2.1. The shaded boxes illustrate the points at which decisions must be made as to the appropriate dispute resolution process to be used in any one case.

A resource consent application is made under s.88 and submissions are called for (s.96) if the application has been notified in accordance with s.93. (An application may be called in under s.140 if the application is of national significance and the decision is made by the Minister.) Under s.99 there is an opportunity for issues to be resolved or clarified using mediation or facilitation.

The parties involved need to agree on whether a pre-hearing meeting could assist in resolving the issues in the hope that a resource consent authority hearing (s.100) could be avoided or at least the issues could be clarified and the hearing time needed reduced. In the event that an agreement is made to have a pre-hearing meeting the choice must be made between mediation and facilitation. Chapter Four will address issues relating to this choice.

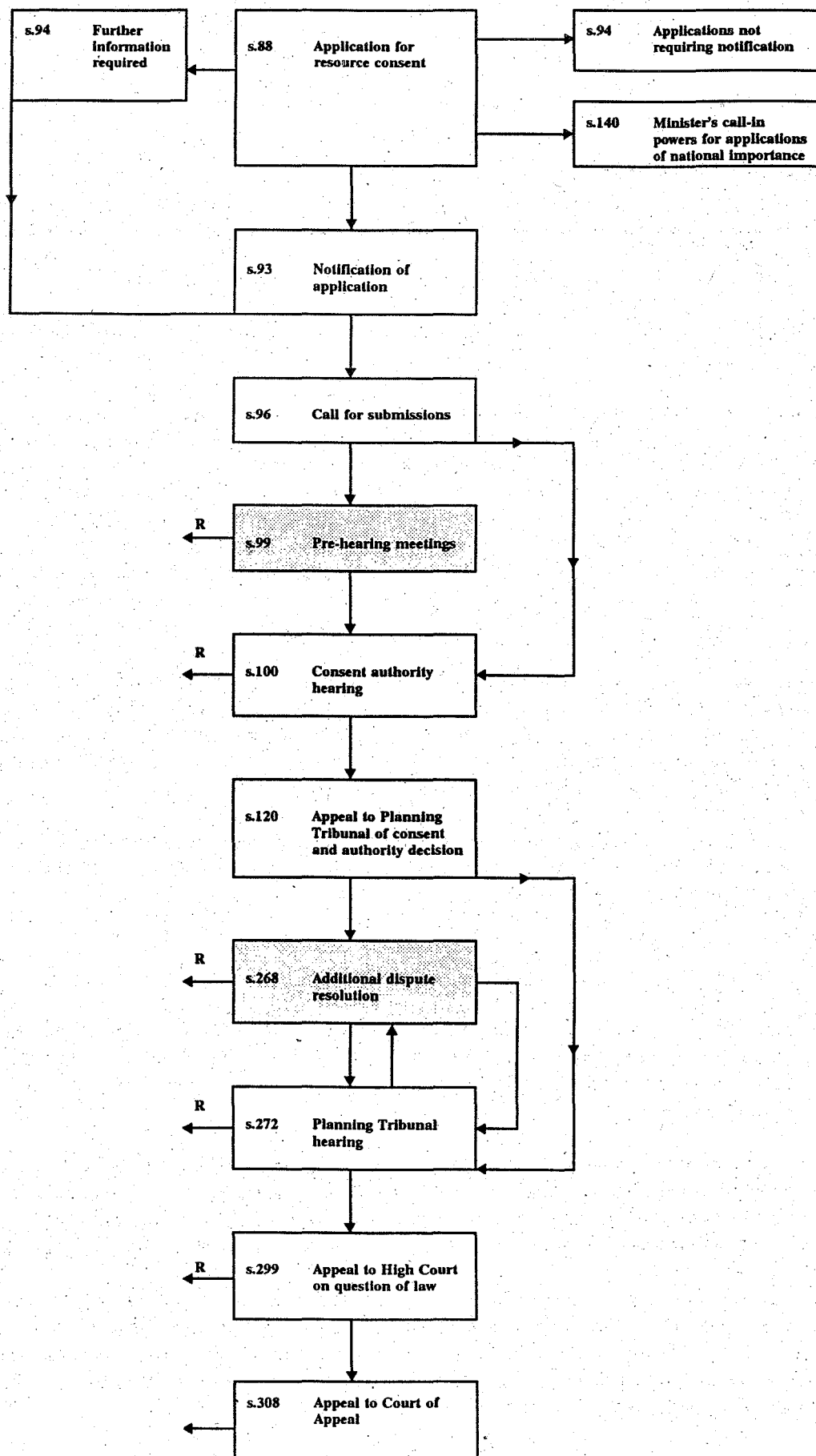


Figure 2.1 Resource consent granting and appeal process.

Consent authorities have already been using facilitation to address conflict before hearings and are likely to continue to do this in most cases. However, if it appears that a major dispute is likely to emerge involving, for example, contamination by discharge the authority may recommend bringing in a professional facilitator or mediator to assist.

Several outcomes are possible at this stage. One outcome is that agreement is reached by the parties involved as to whether the resource consent should be allowed or disallowed, and the provisions that might be attached. On the other hand, agreement may not be reached, and the dispute may proceed to a Council hearing under s.100 of the Act. In this instance the issues may be clarified and the hearing time potentially reduced.

The consent authority's decision may be appealed to the Planning Tribunal under s.120. If that is the case, there is the opportunity for mediation, conciliation or other procedures to be used to facilitate the resolution of any matters before the Tribunal at any time after lodgment of any proceedings before or at any time during the course of a hearing (s.268). It is important to stress that by contrast with s.99 (pre-hearing meetings), s.268 procedures can only be invoked if all the parties agree, and in many instances that may involve a large number of people. The Tribunal also can exercise discretion in this decision.

CHAPTER 3

Core principles for monitoring

The purpose of this Chapter is to look at principles that are relevant to the monitoring and evaluation of additional dispute resolution processes in the resource management field, and the principles used to monitor and evaluate other New Zealand models of additional dispute resolution. As more information is available on mediation than on facilitation and conciliation, the literature on mediation has been drawn on most extensively in this publication.

3.1 Principles identified in environmental mediation in North America

During the Resource Management Law Reform process Jane Chart, Senior Lecturer in Law, University of Canterbury, was invited by the Ministry for the Environment to contribute to the debate on the introduction of mediation as a means of settling disputes in the environmental and natural resource field. Chart's paper, based on her knowledge of mediation in the United States, has provided a starting point from which to identify core principles.

Chart emphasises that public perceptions of the process will influence the willingness of potential participants to consider mediation as a means of resolving resource management conflicts. "In practice, the extent to which mediation can offer the benefits suggested (in a previous section) is likely to depend on public perceptions of the **legitimacy and fairness** of the process" (Ministry for the Environment, 1988, p.8). Fairness of the process should result in an outcome that is perceived by the wider public to be fair.

Further, "(f)ailure to address legitimacy and fairness objectives is also likely to result in a less **cost-efficient** process than might otherwise be possible. For example, outcomes which are widely seen as having been achieved through a legitimate, fair process (e.g., all those affected participate, mediator impartial etc.) are more likely to be sustainable over the long-term" (*Ibid.*, p.9).

Susskind and Cruikshank (1987, pp.21-33) identify four characteristics of a good settlement: **fairness, efficiency, wisdom, and stability**. In order to evaluate the fairness of an outcome, they discuss the need to evaluate the fairness of the process. This evaluation includes issues such as the opportunities available for participation, the nature of the participation etc.

Although a mediation process may be fair and legitimate, they argue that it is unacceptable if the agreement takes an inordinate amount of time to achieve, or if it costs much more than it should. The process is also inefficient if it takes much longer to achieve a slightly fairer outcome than could have been achieved in the absence of consensus (Susskind and Cruikshank, 1987, p.26).

From the perspective of Goldberg *et al.* (1985, p.7) "an effective dispute resolution mechanism is one that is inexpensive, speedy and leads to a final resolution of the dispute. At the same time it should be procedurally fair, efficient (in the sense of leading to optimal solutions), and satisfying to the parties". Bingham (1986, p.68) states that parties care about the fairness, legitimacy, and efficiency of the process.

3.2 Principles identified in New Zealand models of additional dispute resolution

The Christchurch Community Mediation Service was evaluated on the basis of **legitimacy, quality of justice, cost-effectiveness, and speed/immediacy** (Cameron and Kirk, 1986, pp.118-136). These principles were selected for the following reasons. Legitimacy was reflected in the need for the Service to have its own enabling legislation, that is, to be recognised in law. An examination of the Service's economic efficiency was needed to help decision makers decide whether to continue to provide funding. Success in providing a means of dispute resolution as well as access to justice indicated the quality of justice being provided by the Service.

Mediation, conciliation and arbitration have been used extensively in the field of industrial relations. One of the objects of s.76 of the Employment Contracts Act 1991 has been to establish "(a) low level, informal, specialist **Employment Tribunal** to provide a **speedy, fair and just** resolution of differences between parties to employment contracts....". The functions of the Tribunal (s.78) are to assist parties "by facilitating resolution of differences...", and to "(p)rovide mediation assistance in order to facilitate agreed settlement of differences....".

Oxley (1986) has carried out an extensive evaluation of the **Small Claims Tribunal** (now called the Disputes Tribunal) in New Zealand. "The primary function of the Tribunal agreed settlement" is to attempt to bring the parties to a dispute to an agreed settlement (s.15, Small Claims Tribunals Act 1976). The goals of the Tribunal have been to provide a **low cost, speedy and fair** service to the public. The service has been evaluated in terms of its record in providing justice for the ordinary person.

3.3 Takata whenua principles

For a discussion on Maori experience of additional dispute resolution readers are referred to Blackford and Matunga (1991). No attempt was made to develop indicators for monitoring additional dispute resolution processes from a Maori perspective; this work could be done by Maori researchers if there is a need to do so.

3.4 Principles for monitoring

Although the core principles for additional dispute resolution have been expressed in different ways in both environmental mediation as it is practised in North America, and in the community mediation, industrial relations, small claims, and family courts models used in New Zealand, they can be aggregated into a few broad categories. It seems reasonable to adopt the principles of **legitimacy, fairness and efficiency and cost-effectiveness** from which to develop monitoring indicators for additional dispute resolution processes as provided for in the Resource Management Act.

CHAPTER 4

Indicators for monitoring

The purpose of this Chapter is to examine the characteristics of and issues relating to each of the principles for monitoring the process derived in Chapter Three. These principles are efficiency/cost-effectiveness, legitimacy and fairness. Indicators are developed for determining how these characteristics and issues are handled and in turn, therefore, whether or not the principles are observed. Indicators are pieces of descriptive information that can be used to measure changes over time.

4.1 Efficiency/cost-effectiveness

4.1.1 *The pre-monitoring context*

Indicators enable us to monitor events that have already taken place. Before attempting to develop indicators we need to clarify the pre-monitoring context. Readers are referred to Chapter Two and to Figure 2.1 in particular. The points at which decisions need to be made on the choice of dispute resolution process are illustrated by shaded boxes. The Ministry for the Environment will be monitoring in an ex-post way instances where resource consent authorities have chosen to use additional dispute resolution processes.

Resource consent authorities may need guidance in choosing a cost-effective dispute resolution path that will be monitored by the Ministry. As there is no specific guidance in the Act we propose s.32 as an exemplar for considering the principles of cost-effectiveness and efficiency. Section 32 requires the Ministers for the Environment and of Conservation as well as every local authority to evaluate the likely benefits and costs of the principal alternative means of adopting objectives or policy (and the likely implementation and compliance costs) in order to achieve the purpose of the Act. In addition they must "be satisfied that any such objective, policy, rule, or other method is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means".

Guidelines for resource consent authorities when selecting a dispute resolution path are presented more fully in Appendix 2. The proposed method involves a marginal analysis of the expected costs and benefits of each additional dispute resolution process available relative to the scenario of moving directly to hearings under ss.100 or 272.

4.1.2 *Cost-effectiveness v. efficiency*

The concept of **efficiency** has not been defined in the Act. For the purpose of this work indicators have been developed within the concept of Pareto⁸ efficiency, that is, a measure of efficiency from a societal perspective. Indicators need to be specific to the efficient use of public and private

⁸ A Pareto-efficient solution is achieved when all changes (Pareto-improvements) make one individual better off without hurting anyone else (Wonnacott and Wonnacott, 1979, p.441). An efficient frontier or Pareto optimal frontier is defined as "the locus of achievable joint evaluations from which no joint gains are possible" (Raïfa, 1982, p.139).

resources in the provision of additional dispute resolution opportunities. The position is considered to be Pareto efficient where no other options provide additional nett benefits to society.⁹

The method of choosing a dispute resolution path recommended in the section above and explored in Appendix 2 is used to maximise the cost-effectiveness of the option selected and as a proxy of Pareto efficiency, recognising that non-monetary values are not factored into the calculation. If the most cost-effective option is adopted, that is, the one demonstrating the maximum expected benefit/cost ratio, we are approaching Pareto optimality and the option should therefore be the most efficient. It is more appropriate to aim for cost-effective processes as absolute efficiency cannot be calculated.

4.1.3 Benefit-cost analysis

A benefit-cost analysis approach has also been used to develop monitoring indicators. These indicators will assist the Ministry for the Environment to see if additional dispute resolution processes are achieving agreements in a cost-effective manner.

The first step in assessing the cost-effectiveness of a process is to calculate the actual total costs and benefits incurred by all the parties. Tables 2, 3, 5 and 6 in Appendix 2 list the kinds of costs and benefits likely to be incurred.

The cost of the intervenor may vary depending on whether facilitation, mediation or conciliation was used. A mediator would presumably have carried out a dispute assessment and this requires resources, time, and skilled personal to work with the parties and to provide technical information. However, there is no formal requirement for a dispute assessment to be carried out. Costs may also vary depending on whether a consent authority staff representative may have facilitated or a professional intervenor may have been called in under s.99 (pre-hearing).

Under s.268 the costs for the intervenor may differ depending on whether a judge mediated/conciliated or whether a professional intervenor was invited to assist. In the event that a Planning Tribunal member chose to invite a non-member intervenor to be involved, a decision would have been made as to who should pay for the intervenor. At the time of writing this issue had not been tested.

If the dispute was complex or there was a large degree of polarisation between or amongst the parties initially the intervenor may have needed assistance to manage the information gathering for example. The negotiators may have required training in order to negotiate effectively.

The following factors therefore need to be taken into account when determining the cost of the intervenor:

- did the intervenor require paid assistance to manage the information gathering etc.?
- was the dispute in litigation?
- what costs were involved in the training of representatives?
- what was the total cost of the intermediary's fee and expenses?

⁹ For those who are interested, Raiffa (1982, pp.133-165) describes how negotiating parties can find an efficient frontier for negotiations over cost and time.

When the costs have been determined the total costs incurred by all the parties need to be summed. At this stage it not possible to specify the costs incurred with conciliation as there is no experience in the environmental field to give any guidance.

Indicator - Cost-effectiveness

Total (process¹⁰) costs of all parties (\$)

Benefits are represented as cost savings of not having to proceed to a hearing under ss.100 or 272 of the Act. The kinds of costs saved are shown in Tables 1 and 4 of Appendix 2. These include the daily fees and travel allowances for Council members to attend hearings, as well as staff administration costs (s.100). If the dispute is not resolved there may still have been a saving of some costs if issues are clarified and reduce the time necessary for the hearing. This potential for an 'enhanced' hearing situation needs to be monitored over time to see whether it should be included in the list of benefits achieved. If mediation or conciliation are used to resolve a dispute before or during a Planning Tribunal hearing savings are represented as avoiding some or all of the costs of a hearing. These costs include providing evidence, witness fees, legal advice, producing documents, etc.

Relevant questions to be asked when assessing benefits include:

- how many Council members would have been involved?
- how many Council staff would have been required for administration?
- what was the potential cost of providing evidence?
- what was the potential cost of witness fees?
- what was the potential cost of legal advice? etc.

Indicator - Cost-effectiveness

Total (process) benefits of all parties (\$)

From a Pareto perspective it is unacceptable if the agreement takes an inordinate amount of time to achieve, or if it costs much more than it should have. The process is also inefficient if it takes much longer to achieve a slightly fairer outcome than could have resulted in the absence of consensus (Susskind and Cruikshank, 1987, p.26). For this reason we want to be able to measure the costs and benefits incurred in relation to the time taken over the process.

The next step in calculating the cost-effectiveness of a process is to measure the duration of that process. The first step is to select beginning- and end-points. A number of different beginnings could be chosen: the date that the intervenor was first contacted, the date that the dispute assessment was completed, the date of the first meeting or some other point where the intermediary begins to provide assistance to the parties. The end-point could be the date of the last meeting, or

¹⁰

Readers are reminded that the analysis focuses on process costs only; it does not include costs of borrowing funds for development, for example.

the date on which an agreement was signed or ratified (Bingham, 1986, p.140). The former allows for cases in which the parties failed to agree to be included.

As in court processes, additional dispute resolution processes may take a long time if the issues are complex. According to Bingham (*Ibid.*, p.129) "(i)t may be unrealistic to begin counting the costs of mediation at the time that the parties agreed to negotiate, if the previous period of contention, litigation, or clarification of relative power contributed to the parties' willingness to negotiate a voluntary settlement". This point is of particular relevance in the case where mediation or conciliation is used during a Planning Tribunal hearing as allowed under s.268.

If it is found that costs and benefits fall in different financial years, costs and benefits need to be measured using a \$ value that is constant. This can be done either by discounting future costs and benefits (at a public sector rate of 10% presumably) or inflating past costs and benefits from a particular point in time.

A cost-effective process is one where the benefit-cost ratio is greater than one.

Indicator - Cost-effectiveness

Ratio of total (discounted) benefits to total (discounted) costs

4.1.4 Increasing the probability of benefits of additional dispute resolution

It may be tempting to compare the use of hearings with additional dispute resolution to see if one process is more cost-effective than another. In her evaluation of a decade of experience in resolving environmental disputes in the United States, Bingham (1986, pp.127-147) cautions against misleading claims that additional dispute resolution is cheaper and faster than litigation. No systematic attempt has been made to test these claims; there is little evidence available on the time it takes to resolve disputes using litigation or additional dispute resolution processes, and there are also a number of conceptual problems in trying to make comparisons. The lack of parallel data makes a general comparison difficult.

Too few similar cases have been mediated and litigated (gone to hearing) to find a large enough sample to remove the effects of case variability. However, in the future it might be possible to find correlations between particular characteristics and the dispute resolution processes used using a qualitative process rather than a quantitative one. Examples of these characteristics include whether cases went all the way to trial (hearing), whether disputes at trial (hearing) were resolved using additional dispute resolution, and whether additional dispute resolution was used before or after cases were filed for trial (hearing) (*Ibid.*, p.132).

A number of other characteristics could also be monitored over time to see whether they increase the probability of increased benefits using additional dispute resolution processes. After interviewing participants we can monitor the benefits achieved and incorporate them into other scenarios. Those characteristics could include whether a dispute assessment was carried out, the complexity of the dispute and the number of mediator assistants (information management, for example) thus required, and whether there is a relationship between the speed at which agreement is reached and the type of intervention used. Over time it may also be found that different classes or categories of dispute, for example, can be resolved more efficiently than others (e.g. number and types of parties, resource issue etc.) using a particular dispute resolution process (see Appendix 3).

Although the costs and benefits of using additional dispute resolution processes can be quantified in general terms, the realisation of benefits depends on the willingness of all the parties to be involved. Parties will need to be convinced that whatever process they choose it is likely to be both legitimate and fair. This is particularly important for mediation where the intervenor plays a substantial role.

4.2 Legitimacy

Two sets of issues are discussed in this section; the first pertains to conforming with law or legality while the second is concerned with the credibility of processes.

4.2.1 Conforming with the law or legality

A legitimate process is one that conforms with the law or legality. The Resource Management Act provides the legislative basis for the use of additional dispute resolution processes (see Section 1.1) and some basic guidelines on participation.

Cameron and Kirk (1986, pp.118, 124) found that some of those interviewed about the Christchurch Community Mediation Service believe that processes such as mediation can be legitimate if they have a legislative basis. Legislation can confer legal protection, credibility and professional assurance. Issues such as confidentiality, privilege and protection against defamation were covered by the Community Mediation Service (Pilot Project) Act 1983.

The issue of **confidentiality** on the part of the third-party intervenor is intrinsic to the philosophy of mediation. An intervenor is usually called in because parties have been unable to negotiate a dispute without assistance; the dispute may be very complex or the parties may need someone to help with devising and presenting options. The intervenor has to be relied upon not to disclose information that is confidential to individual parties. Information may be commercially-sensitive, for example, or parties may feel uneasy about openly putting forward a particular option. By being privy to such information the intervenor can suggest potential trades in values without violating the confidence of the participants. He or she is in a position to propose possible options that the parties themselves would not have been able to fashion alone (Susskind and Cruikshank, 1987, pp.146-147, 162-163).

A Planning Judge mediating under s.268 of the Act is required (as a District Court Judge) to take the Oath of Allegiance and the Judicial Oath under the Oaths and Declarations Act 1957. He or she is also subject to the ethical codes of his or her profession. However, Planning Tribunal members may not want to be mediators if they have to involve themselves to the extent implied in Section 1.1. They may also not have the appropriate training and experience. A person other than a Planning Tribunal member appointed to mediate would not be required to take these oaths nor would he or she necessarily be guided in their professional conduct.

Non-judicial intervenors are also not protected legally under the Act. The implication of this lack of protection is that an intervenor may be called to give evidence over information given in confidence by one of the parties.

Indicators - Legitimacy (conforming with the law or legality)

Degree of conformity with intent of the law (Complete/Incomplete)

Degree to which legislative basis of additional dispute resolution influenced parties to use processes (High/Medium/Low)

Perceived trustworthiness by parties of intervenor (High/Medium/Low)

4.2.2 Credibility of the process

The remaining issues in this Section are not addressed specifically in the Act but are likely to affect the perceptions of those involved as to the credibility of the process and therefore influence future use of these processes. These issues include the voluntary nature of participation, private v. open meetings, and the capacity of the process to meet the needs and interests of the parties.

A process must be perceived to be legitimate both before it begins and after it has ended. The success of these processes, particularly mediation, is dependent on participation being wholly **voluntary**. Participation is voluntary under the Act but there is a need to be vigilant that parties are not coerced into participating. Parties should not feel that they have been 'taken advantage of', manipulated or co-opted (Susskind and Cruikshank, 1987, p.25).

Indicators - Legitimacy (voluntariness)

Degree of coercion to participate (None...High) (Scale of 1-10)

Degree of coercion to compromise (None...High) (Scale of 1-10)

The fact that mediation is often conducted in private means that much of what goes on is not open to public scrutiny. Oxley (1986, pp.59-61) reports that most of those responding to the Small Claims Tribunal evaluation believed that privacy is important because matters being debated and resolved were private. However, the issue of legitimacy could be raised over the public interest aspect of environmental disputes. Agreement may be reached by the parties involved, but public or third-party interests may not have been considered. (It should be noted that in using additional dispute resolution approaches parties are helped to focus on their needs and interests rather than on producing evidence to support a predetermined outcome or position.)

There is no widespread agreement that the process of environmental dispute resolution should be private although many would argue that it is essential for parties to be able to reach a compromise (Ministry for the Environment, 1988, p.21). Parties do not want to be seen to be weak or to lose face; they may be prepared to compromise in a private meeting while still being able to maintain a more intransigent public stance. Selected meetings could be made open to the public (Susskind, 1981, p.44) to attend in a non-speaking capacity.

Indicators - Legitimacy (privacy)

Degree of privacy (All meetings Closed/Open)

Opportunities for safe, non-committal exploration of options (Sufficient/Insufficient).

Stakeholder willingness to negotiate (High/Medium/Low)

Impact of closed/open meetings on willingness of parties to negotiate (High/Medium/Low)

A legitimate process is also one that has the **capacity to respond to the needs and interests of the parties**. Issues include the group's decision in selecting an intervenor - whether they were given a range of people to choose from - and whether the cultural needs of the parties (see Blackford and Matunga, 1991) were recognised and built into the process.

Indicators - Legitimacy (response to the needs and interests of the parties)

Degree of satisfaction that cultural needs were built into the process (High/Medium/Low)

Degree of satisfaction with intervenor (High/Medium/Low)

4.3 Fairness

Susskind and Cruikshank (1987, p.21) present a number of questions that can be asked to evaluate the fairness of the process by which resolution was reached. Examples of these questions are:

- “
- * Was the process open to public scrutiny?
 - * Were all the groups who wanted to participate given an adequate chance to do so?
 - * Were all parties given access to the technical information they needed?
 - * Was everyone given an opportunity to express his or her views?
 - * Were the people involved accountable to the constituencies they ostensibly represented?”

These questions suggest that indicators of 'fairness' can be derived for the different phases or stages in the dispute resolution process (see Appendix 1). They address issues such as participation, representation, setting up process protocols, access to information, etc. The degree of fairness of a process is determined in large part in the pre-negotiation phase when guidelines are established for subsequent phases.

4.3.1 Participation

Section 93 of the Act sets out guidelines as to who should be notified about an application for a resource consent. Section 99 states that all those who made submissions can be invited to meet with the applicant.

One potential difficulty could emerge with regard to participation as it relates to the principle of fairness. Section 120 of the Act allows only those who made submissions under ss.96, 130, 169, and

209 to appeal a local authority decision. However, s.274(2) does allow those who are not party to the proceedings to appear at a Planning Tribunal hearing but it is not clear whether this section could also apply to s.268 (additional dispute resolution). One of the principles of additional dispute resolution states that all those **affected** by any decisions made need to be included i.e. those identified in s.93, for example, so that subsequent agreements are not undermined. If all **affected** interests participate, there is a greater chance of securing sustainable outcomes and public acceptance that the process was fair (Ministry for the Environment, 1988, p.15).

Third-party/public interests as well as the interests of future generations are also **affected** interests. Resource consents, designations, etc. have to be considered in relation to a regional or district plan that encompasses third-party interests. The purpose of the Act (s.5(2)(A)) requires that the potential of natural and physical resources (excluding minerals) be sustained to meet the reasonably foreseeable needs of future generations.

There are a number of ways of dealing with unrepresented public interests. One option is to hold the mediator accountable for the impact an agreement may have on unrepresented parties although this is not a favoured one. A preferred option is the direct involvement of regulatory agencies whose presence would not only protect affected public interests but could also contribute specialist expertise. Department of Conservation representatives could act as 'guardians' or advocates of particular interests (Ministry for the Environment, 1988, pp.17-18).

A third option is to open agreements for public scrutiny before they are ratified in some form (Pavelka, G. 1992, Centre for Resolving Environmental Disputes, Lincoln University, pers. comm.) though this may not always be appropriate as reporting provisions vary in the Act (see ss.99(3), 114, and 297).

No guidelines are given in the Act as to how local authorities are to represent the needs of future generations. An advocate could be specially appointed to this role.

A recent inquiry into public needs for legal services found that current legal services, including environmental and planning services, offer limited access to justice for some sections of the community. Reasons for this included ignorance, costs and the intimidating nature of proceedings (Advisory Committee on Legal Services, 1986, pp.86-87). A 'fair' process is one where resources were available to enable all affected parties to participate. The Legal Services Act 1991 (s.19(k)) provides limited opportunities for the granting of civil legal aid in specified instances in the making of all applications, submissions and appeals under the Resource Management Act. It is not clear how this might apply to the use of additional dispute resolution.

Indicators - Fairness (participation)

Index of stakeholder participation (100% ...n)

Effective representation of third-party interests (Always-None)
(Scale 1-10).

Effective representation of future generations (Always-None)
(Scale 1-10)

Timeliness of participation (Good/Adequate/Poor)

Availability of resources for stakeholder participation (100%...n)
(Scale 1-10)

Availability of agreement for public scrutiny before ratification (Always
... Never) (Scale 1-10)

4.3.2 Representation

The process of selecting representatives/negotiators should be carried out by the parties themselves. The people involved need to be accountable to the constituencies they ostensibly represent so that agreements are not undermined later. Splinter groups may claim that their interests were not represented or that the representatives did not have the authoritative consent of their constituents. The intervenor may assist local community interests to look for an existing body to represent their interests (Susskind and Cruikshank, 1987, p.25). Representatives will also want sufficient opportunities to express their views. Protocols can be established to ensure that opportunities occur.

Indicators - Fairness (representation)

Stakeholder satisfaction with representatives (High/Medium/Low)

Opportunity for representatives to express views (Sufficient/Insufficient)
(Scale 1-10)

4.3.3 Access to information

All parties need to have access to technical information and resources to participate effectively. The intervenor may set up a resource pool for joint information-gathering.

Indicators - Fairness (access to information)

Accessibility to shared information (Excellent-None)

CHAPTER 5

Conclusions, recommendations and future research

5.1 Conclusions

Monitoring indicators were developed for the principles of efficiency/cost-effectiveness, legitimacy and fairness. Although the principles were expressed in different ways in both the overseas literature and in the literature on other models of additional dispute resolution in New Zealand, they were able to be aggregated into a few broad categories. Much of the additional dispute resolution literature is on mediation rather than facilitation or conciliation and so the mediation literature was drawn on most heavily. No attempt was made to develop indicators for monitoring additional dispute resolution processes from a Maori perspective; this work could be done by Maori researchers if there is a need to do so.

The Ministry for the Environment will be monitoring additional dispute resolution in an ex-post way. In order to develop indicators it was necessary to clarify the pre-monitoring context. That context is represented by the decisions consent authorities have to make about the choice of a dispute resolution option. No specific guidance is given in the Act as to how choices could or should be made so we proposed s.32 as an exemplar for considering principles of cost-efficiency and efficiency.

Indicators were developed within the concept of Pareto efficiency. Although the literature suggested that efficiency and cost-effectiveness were appropriate monitoring principles we decided that it is more appropriate to aim for cost-effectiveness rather than efficiency as absolute efficiency cannot be calculated.

One issue that emerged in determining actual costs incurred was the lack of clarity as to who would or should pay the costs if someone other than a Planning Tribunal member is appointed to mediate or conciliate under s.268. The Tribunal does not know and it is unlikely that anyone else is certain. The costs could be shared by the parties with the Planning Tribunal making a contribution according to a specified formula. The justification for this proposition is that savings can ostensibly be made to Vote:Justice through the use of these additional procedures. An investigation is needed into this issue.

A second issue relating to costs was that it is not possible to specify the costs incurred with conciliation as there has been no experience of that practice within the environmental dispute resolution field.

A potential 'enhancement' benefit generated by additional dispute resolution processes needs to be monitored over time. Benefit may accrue in instances where additional dispute resolution processes have not resulted in resolution but have served to clarify issues to the extent that the time taken for a hearing to be completed is significantly reduced. The negotiations associated with Electricorp's water right applications for the Waitaki power development is a good example (France, p.16, 1991).

If the costs and benefits of an additional dispute resolution process fall in different years they need to be measured using a constant \$ value.

One problem associated with monitoring the cost-effectiveness of these processes is the uncertainty of being able to collect information on the total costs and benefits involved. The cost of collecting that information may be too great, or alternatively parties may be unwilling to disclose information they would rather keep confidential.

A number of questions arise as to how the Ministry for the Environment might use the information collected through monitoring, particularly with regard to the issue of cost-effectiveness. Initially the Ministry will be able to monitor whether individual cases of additional dispute resolution have been cost-effective processes. However, a large number of outcomes will need to be recorded over a substantial period of time before an attempt can be made to compare cases. Variables need to be kept constant to enable a comparison to be made, but the nature of different disputes cannot be adjusted to a comparable baseline.

It was concluded that it is not appropriate at this stage to attempt to compare the efficiency of additional dispute resolution processes with hearings. Even after a decade of experience in the USA there were too few similar cases of mediation and litigation to establish a large enough sample to remove the effects of case variability. However, a number of monitoring indicators were developed to assist the identification of correlations between various characteristics and the dispute resolution process used.

The indicators developed for legitimacy take into account issues that relate both to processes conforming with the law and legality, and to the credibility of these processes in the eyes of the participants. The extent to which all the principles are adequately catered for depends in large part on how responsive the person who managed the process was to the needs and concerns of those affected by the final outcome. An unskilled intermediary leads to distrust of the process and the outcome.

While members of the Planning Tribunal have statutory guidelines governing their professional integrity and codes of conduct, there is no provision in the Act for professional assurance of non-judicial intervenors. However, there has already been an Auckland-centred move to establish a system of accreditation for mediators by the Mediators Institute of New Zealand (Incorporated). Consent authorities may recognise that professional training in both facilitation and mediation for their staff is a cost-effective investment.

In Australia there appears to be no system for accrediting environmental mediators, nor is there any formal process whereby they are made accountable. The Family Law Court of Australia and the NSW Community Justice Centres train and accredit their own mediators (McMillan, J., 1991, Deputy Registrar, Land and Environment Court of NSW, pers. comm.).

The Act does not specify in either ss.99 or 268 that the intermediary be skilled in additional dispute resolution. The Canadian legislation developed to establish a federal environment assessment process requires that where a project is referred to mediation the Minister of the Environment appoints a person **possessing the required knowledge or experience** (House of Commons of Canada, 1990, p.16). The Land and Environment Court of New South Wales has appointed a legally qualified person as Deputy Registrar to undertake the role of mediator. Both he and the Registrar have been trained in mediation through the Australian Commercial Disputes Centre (McMillan, 1991, pers. comm.). An alternative could be to identify a pool of trained third-party intervenors that the Planning Tribunal could draw from.

The issues of confidentiality, privilege, and protection against defamation for non-judicial intervenors involved in additional dispute resolution processes are not dealt with in the Act. A third-party intervenor may therefore choose to draw up a contract with the parties to confer legitimacy on the procedure. This should be a temporary measure until these issues are addressed in the legislation.

Although s.268 allows a Planning Tribunal member to conduct additional dispute resolution, Judges may not wish to be involved to the extent required for mediation or conciliation. They may also not have the appropriate training or experience. There would also be difficulties over members sitting on any consequent hearing involving the same matter.

Fairness indicators were developed for use in the pre-negotiation phase of the process. Although the Act allows certain persons to appeal a consent authority decision (s.120), anyone else is permitted to appear before the Tribunal (s.274). It is not clear how these provisions might relate to participation in additional dispute resolution under s.268.

The public-interest nature of environmental disputes requires that the interests of the public and future generations need to be represented in additional dispute resolution processes. The public good could be represented by a specially-appointed public advocate as could the interests of future generations. Some meetings could also be made public.

Practical experience suggests that additional dispute resolution processes are not yet working in an ideal environment. Parties are often faced with making pragmatic choices constrained by a variety of factors. Outcomes are sometimes far from parties' ideals but at least the best practical option may emerge if they are assisted by a well-trained intervenor. Parties' perceptions of the process may well be influenced by a less-than-ideal outcome.

5.2 Recommendations

1. That an investigation be carried out on who should pay the costs of a non-Planning Tribunal intervenor under s.268 of the Act.
2. That resource consent authorities be encouraged through the use of professional trainers to provide training opportunities for their staff in facilitation and mediation.
3. That reference be made in the Act to the need for the skills, qualities and experience required of the intervenor under ss.99 and 268.
4. That a pool of third-party intervenors be identified, updated and available for use by the Planning Tribunal under s.268 of the Act.
5. That the legislation be clarified with regard to who may participate under s.268.

5.3 Future research

There has been no attempt in this publication to provide guidance as to how principles might be weighted. Weighting given to the principles when monitoring or evaluating a process is often the outcome of a value decision. Susskind and Cruikshank (1987, p.27) point out the important trade-off that sometimes has to be made between the attributes of fairness and efficiency. Although the effort of one individual may be considerably more efficient than a group process at times, participation by those likely to be affected by the policies may be needed to gain the necessary support for implementation and ensure fairness. Perceived fairness, in this instance, may be the primary goal; efficiency may be secondary. At other times external time constraints may force parties to work within strict limits and efficiency becomes the primary goal. Further research could develop methods for weighting principles.

An on-going evaluation of additional dispute resolution practice should be carried out, including the perceptions of those affected by the outcome. To assist this evaluation a data base on additional dispute resolution in New Zealand needs to be established by surveying those who have used these processes both at the local authority and Planning Tribunal levels.

The s.99 opportunity for resolving disputes could be better captured if there was a requirement built into the legislation for a formal dispute assessment to be carried out by a person with the appropriate skills and experience. The assessment would determine whether a dispute was negotiable or non-negotiable and would assist the parties to select a cost-effective dispute resolution option that would afford them the greatest chance of success at reaching agreement. Parties may be able to calculate the potential costs of different options but have no way of knowing what their chances are of realising or maximising the potential benefits, that is, of avoiding a hearing altogether. A 'clearing house' role such as that used in North America could be established. Research into this issue is very important.

Finally, while a process might have been fair, legitimate, and efficient in the eyes of the parties involved, there is both private and public interest in the **outcome** of that process. Key indicators need to be developed to monitor whether outcomes achieved using additional dispute resolution are consistent with the purpose and principles of the Act.

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Appendix 1 Steps in a mediation process

Phase One: Prenegotiation

Getting started

- The potential parties (those who believe their interests are likely to be affected by any decisions made) need to be identified and contacted by the mediator.
- Agreement has to be reached amongst the parties to consider mediation to help resolve the conflict.
- The consensus-building process has to be described to parties.
- An initial meeting has to be held and other logistics discussed.

Representation

- Parties need to choose a spokesperson(s) or team leaders.
- Initial parties help to identify missing groups.
- Strategies have to be devised for representing different interests if there is a large number of parties involved.

Drafting protocols, agenda setting and selecting a mediation strategy

- Draft protocols have to be prepared based on past experience and the concerns of the parties. Ground rules and behavioural guidelines need to be established.
- An agenda-setting process has to be determined.
- The mediator helps parties to assess approaches to conflict management and resolution and then to choose an approach.

Defining issues

- Issues of concern to the parties have to be identified. Agreement needs to be gained on the scope of the issues. This provides a framework for the fact-finding/information-gathering stage.

Joint fact-finding

- Fact-finding/information-gathering protocols have to be established.
 - Technical consultants, advisors etc. need to be identified. Relevant data about the substance of a conflict are collected and analysed. Accuracy of data must be verified.
 - Funds have to be raised and administered in a resource pool.
 - The mediator can act as a repository for confidential or propriety information.
-

Phase Two Negotiation

Inventing options

- The parties propose a range of potential options, with the mediator contributing options too. A lowering of commitment to fixed positions or a single alternative is encouraged.
- Subcommittees are set up to draft options.

Packaging

- The mediator meets privately with each group to identify and test possible trades, and then suggests a potential agreement package for the group to consider.

Written agreement

- The mediator works with a subcommittee to produce a draft agreement.
- The mediator assists in producing a procedure to create a single text.
- A preliminary draft of a single text is prepared.

Binding the parties

- The mediator holds the bond, and approaches outsiders if necessary on behalf of the group.
- The mediator helps to invent new ways to bind the parties to their commitments.

Ratification

- The parties are helped by the mediator to 'sell' the agreement to their constituents.
- The mediator ensures that all representatives have been in touch with their constituents.

Final bargaining

- Reaching agreement occurs either through a gradual convergence of positions, final leaps to package settlements, development of a consensual formula, or establishment of a procedure to reach a substantive agreement.
-

Phase Three: Implementation or post-negotiation

Linking informal agreements and formal decision making

- The mediator works with the parties to invent linkages.
- The mediator approaches elected or appointed officials on behalf of the group.
- The mediator identifies the legal constraints on implementation.

Monitoring and evaluation

- The mediator serves as the monitor of implementation and convenes a monitoring group.
- An evaluation procedure is established.

Renegotiation

- The mediator reassembles the participants if subsequent disagreements emerge, and helps to remind the group of its earlier intentions.
-

(compiled from models by Susskind and Cruikshank (1987) and Moore (1986))

Appendix 2 Performing a benefit-cost analysis

Using s.32 of the Act as an exemplar, consent authorities need to assess the likely benefits and costs of alternative means of resolving disputes whilst evaluating their relative efficiency and effectiveness.

Figure 1 indicates alternative means available when choosing a dispute resolution path.

In order to choose a path parties need to know the nature of expected costs and benefits likely to be incurred when following that path. The numbers in the shaded boxes correspond with Tables 1 to 6. These tables list the expected costs and benefits associated with a particular option. Values that are not expressed in \$ terms are not factored in. (An example of this could be the impact of improved relationships between or among parties and the time saved in not repeating another conflict.) Following the tables is an example of how this information can be applied in practice for one decision path.

Table 1 Costs and benefits of a hearing under s.100 (baseline scenario).

Costs¹	Benefits
Council members' daily fee ² (possible three members)	Not having incurred the costs of mediation or facilitation (Tables 2 or 3)
Council members' travel allowance ²	
Staff time - administration - writing up decision ³	
Other?	

1. Generally borne by the applicant (s.36) although not always (s.36(5)).
2. Standard scale of charges.
3. Time taken depends on complexity of decision.

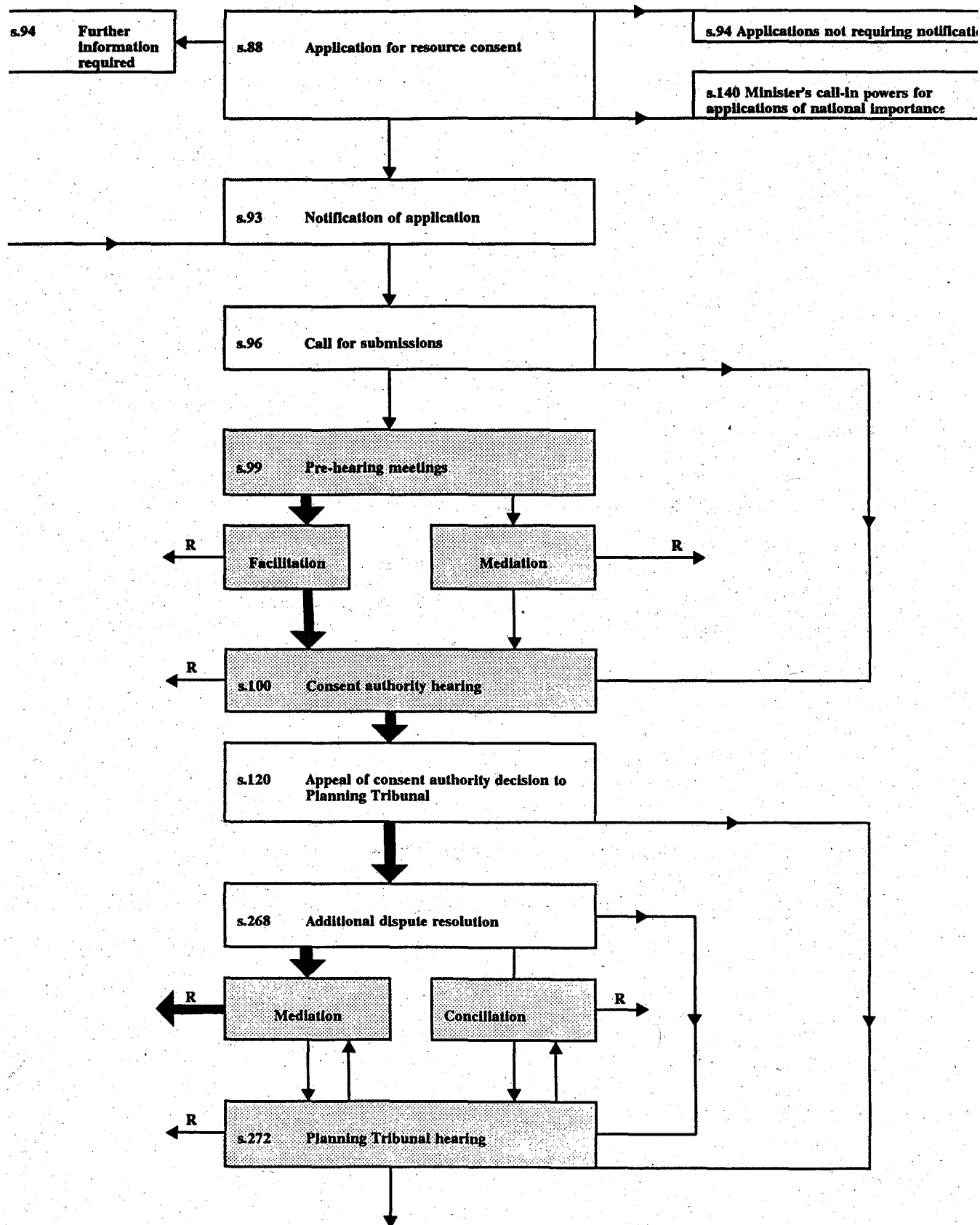


Figure 1 Choosing a dispute resolution path.

Table 2 Costs and benefits of mediation under s.99 (pre-hearing meeting).

Costs¹	Benefits
Intermediary ^{2, 3} - dispute assessment - mediation	Possible outcomes (i) Dispute resolved = saving of hearing costs (Table 1)
Training negotiators ⁴ Bringing information Legal advice Independent expert/s	(ii) Dispute not resolved = *saving of some hearing costs (enhancement) ⁵
Staff time - administration - writing up decision ³ Other?	Timing of outcome ⁶

1. Generally borne by applicant (s.36) although not always (s.36(5)).
2. Number of intermediaries involved (see discussion below).
3. Duration (see discussion below).
4. Optional.
5. See discussion below (paragraph 2).
6. An outcome that is achieved quickly is of higher value than one achieved over a longer duration.

Table 3 Costs and benefits of facilitation under s.99 (pre-hearing meeting).

Costs¹	Benefits
Consent authority staff time ² - facilitating - writing up decision	Possible outcomes (i) Dispute resolved = saving of hearing costs (Table 1)
	(ii) Dispute not resolved = *saving of some hearing costs (enhancement) ³
	Timing of outcome

1. Generally borne by applicant.
2. See Footnote 6 in Table 2.
3. See discussion below (paragraph 2).

Table 4 Costs and benefits of a hearing under s.272.

Costs¹	Benefits
Filing fee of appeal ²	Not having incurred costs of mediation or conciliation (Tables 5 or 6)
Hearing	
- providing evidence	* Saving of some hearing costs (enhancement) ³
- witness fees	
- legal advice	
- producing documents (s.278)	
- party representatives appearing	Timing of outcome ⁴
- Other?	

1. Borne by all parties.
2. Borne by the party appealing the decision.
3. See discussion below (paragraph 2).
4. Likely to have major impact on indicator ratio in cases of prolonged activity.

Table 5 Costs and benefits of mediation under s.268.

Costs¹	Benefits
Intermediary ^{2, 3}	Potential outcomes
- dispute assessment	(i) Dispute resolved = saving of hearing costs (Table 4)
- mediation	
Training negotiators ⁴	(ii) Dispute not resolves = *saving of some hearing costs (enhancement) ⁵
Administration	
Legal advice	Timing of outcome ⁶
Independent expert	
Bringing information	
Other?	

1. See discussion below.
2. Number of intermediaries involved (see discussion below)
3. Who pays is not known if it is not a Planning Tribunal member.
4. Optional.
5. See discussion below (paragraph 2).
6. See Footnote 6 in Table 2.

Table 6. Costs and benefits of conciliation¹¹ under s.268.

Costs ¹	Benefits
Intermediary ^{2, 3}	Potential outcomes
4	(i) Dispute resolved = saving of hearing costs (Table 4)
	(ii) Dispute not resolved - *saving of some hearing costs (enhancement ⁵)
	Speed of outcome ⁶

1. See discussion below.
2. Number of intermediaries involved (see discussion below).
3. Who pays is not known if it is not a Planning Tribunal member.
4. Unknown because no past experience in environmental dispute resolution field to call upon.
5. See discussion below (paragraph 2).
6. See Footnote 6 in Table 2.

Readers will notice that costs and benefits incurred during mediation under ss.99 (Table 2) and 268 (Table 5) do not differ greatly. The main difference is that under s.99 the consent applicant could be required to pay for costs incurred by the consent authority (s.36) whereas each party would pay for its own administrative costs under s.268.

In Tables 2, 3, 4, 5 and 6 there is a Benefit marked (*). This represents a situation where the dispute is not resolved but where there is the potential for an 'enhanced' hearing situation. The issues may have been clarified using additional dispute resolution and this has the potential to reduce the hearing time needed. The presence of this benefit needs to be monitored over time and parties may choose to adjust their list of benefits as a result.

A number of issues need to be taken into account when calculating expected costs and benefits of additional dispute resolution processes. The following discussion relates to points raised in connection with the Tables above.

The applicant must consent to the course of action under s.99 of the Act because administrative charges relating to resource consent applications are generally payable by the applicant in accordance with s.36. However, s.36(5) allows the local authority discretion to remit the whole or any part of the charge.

The applicant would need additional information when deciding whether to pursue mediation or facilitation. With mediation, a significant amount of time may be spent in the pre-negotiation/-mediation phase (see Appendix 1). Bingham (*Ibid.*, p.xxii) found that "(a) particularly important reason for the relatively high success rate in the dispute resolution efforts ... is that the mediators conducted dispute assessments at the beginning of each case as a first step in helping the parties decide whether to proceed with a voluntary dispute resolution process". This requires adequate resources, time, and skilled personnel both to work with the parties and to provide technical

¹¹ Readers are reminded that (a) the term conciliation has come from the industrial relations field and that there is no experience to call upon in the environmental dispute resolution field and (b) both mediation and conciliation have probably been used to empower a range of additional dispute resolution processes in s.268 of the Act rather than applying in a strict technical sense.

information. Although relatively high initial investments may have to be made, this can result in significantly greater benefits in the long run as acceptable, workable outcomes avoid the need for hearings in the future (Ministry for the Environment, 1988, p.8).

Several important issues are apparent here. First, if a hearing of an application for a resource consent is to be held, the date for the commencement of that hearing is to be no more than 25 working days from the closing date for submissions on the application (s.101(2)). Because of the nature of the involvement of a mediator and the time required to conduct a dispute assessment and to carry out the tasks in the pre-mediation/negotiation stage (see Appendix 1) insufficient time might be available to reach agreement although issues could be significantly clarified. Consensus building can seem inefficient and unproductive initially; it can be time-consuming, expensive, and unproductive (Susskind and Cruikshank (1987, pp.216-217).

Second, the resources required initially for mediation may deter pursuit of this option within this timeframe. However, a high potential value can be attributed to the carrying out of a dispute assessment before the choice is made as to a particular dispute resolution process. At present there is no formal requirement under ss.99 and 268 for a dispute assessment to be carried out by a person with the necessary skills and experience.

A further issue relates to the complexity of the dispute. If there are a number of complex issues, several different types of parties, and a large degree of polarisation between or amongst the parties, the intervenor may require assistance with information gathering and ordering, for example, and concentrate on managing the process only.

In Tables 5 and 6 two issues arise over costs. In the event that a Planning Tribunal member chooses to invite a non-member intervenor to be involved under s.268 a decision has to be made as to who should pay for this intervenor. Second, s.285 allows one party to seek to have costs awarded against another. There is no indication as to how this provision might apply under s.268.

One difficulty in assessing different dispute resolution opportunities is the uncertainty surrounding the outcome, particularly with regard to the open-endedness of the time frames relating to ss.268 and 272. The probability of not achieving resolution is a problem. In her review of environmental dispute resolution in the United States, Bingham (1986, p.141) was encouraged to find that "parties took significantly less time to conclude cases in which they failed to agree, indicating that, in calculating the risks of failure when considering a mediation option, parties need not be overly concerned about wasting their time".

Calculating a benefit-cost ratio

It is recommended that a marginal analysis be undertaken of the costs and benefits relative to the scenario based on moving directly to hearings under ss.100 or 272. As such, the costs and benefits identified below should be considered as additional costs and additional benefits including cost savings arising from the process selected.

One possible pathway illustrated in Figure 1 will be used to illustrate how a benefit-cost ratio can be calculated. The scenario chosen is marked with a bolder line and larger arrows. The first step is using one of the options available under s.99, namely facilitation. The dispute is not resolved but the issues are clarified before proceeding to a hearing (s.100). The consent authority decision is appealed by one of the parties. The parties choose to try mediation under s.268 before going to a hearing under s.272. The dispute is resolved and the need for a hearing is avoided. Table 7 illustrates the expected costs and benefits involved in this scenario. The column totals marked with a solid dash represent the total costs and benefits that will feature in the benefit-cost ratio.

Using the method shown here, the benefit-cost ratio for each major option should be calculated. A cost-effective process is one where any value greater than one is an improvement over the baseline. The path that should be chosen is the one with the ratio that maximises expected marginal benefits relative to expected marginal costs.

Indicator (Cost-effectiveness)

Ratio of expected marginal benefits to expected marginal costs (a ratio of greater than one is desirable)

Table 7 Calculating the benefits and costs of one dispute resolution scenario.

Events	s.88 Appln	s.93 Notifn	s.95 Submiss.	s.99 Pre-hearing meeting		s.100 Consent authority hearing	s.121 Appeal Plan. Trib.	s.268 Additional dispute resolution		s.272 Planning Tribunal hearing			s.299 Appeal to High Court
Time allowed				25 working days									
Costs	Appln fee			<u>Facilitn</u> Council staff (set rate of charges) Table 3	<u>Mediation</u> Intermediary Training negot. Bringing information Legal advice Indep. expert/s Staff time: Administration Write up Decision Other? Table 2	Council members' daily fee and travel allowance Council staff: Administration Write up decision Others Table 1	Appeal fee	<u>Mediation</u> Intermediary Training negotiators Administration Legal advice Independent expert Bringing information Other? Table 5	<u>Concilm</u> Inter- mediary Table 6	**** Refer Benefits Provide evid. Witness fees Legal advice Producing documents Party reps appearing Other? Table 4	<u>Concilm</u> Inter- mediary ? Table 6	<u>Mediation</u> Intermediary Training negs. Admin Legal advice Indep. expert Bringing info. Other? Table 5	
Total costs				—		—		—					
Benefits						Saving of some hearing costs (enhanced)		RESOLVED Save Planning Tribunal hearing costs ***					
Total benefits						—		—					

— Total costs and benefits that feature in the benefit-cost ratio.

Appendix 3 Improving the probability of increased benefits with additional dispute resolution

Indicators (improving the probability of increased benefits)

Duration of hearing without prior mediation (Hours)

Duration of hearing with prior mediation (Hours)

Duration of hearing without prior facilitation (Hours)

Duration of hearing with prior facilitation (Hours)

Duration of hearing without prior conciliation (Hours)

Duration of hearing with prior conciliation (Hours)

Availability of dispute assessment (Always - Never)

Complexity index (Ratio of intervenor's assistants to number of parties)