

# Environmental Conflict Resolution:

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Mediation, Negotiated Rulemaking, and other Third Party Facilitation Methods

*John Haydon*<sup>1</sup>

*Environmental Lawyer & ECR Consultant at EcoDirections International Pty Ltd, Brisbane, Australia  
Convener, Environmental Law Roundtable of Australia and New Zealand*

## INTRODUCTION

So much depends on the personalty and environmental conflict resolution (ECR) approach of the third party facilitator (either a public official or a private practitioner) as to whether or not the ECR process is successful.

The current Queensland Planning and Environment Court<sup>2</sup> mediation model is world class. It was show cased and road tested at the 5th conference of the United States Institute for Environmental Conflict Resolution in Tucson, Arizona in May 2008.

The current Queensland Registrar (Peta Stilgoe) uses a proactive mediation style. The level of acceptance by stakeholders is high.

Looking forward, the Queensland model still needs to be broadened

even as part of the litigation skills set. As planning and environment law is multidisciplinary the relevant stakeholders include expert witnesses across all disciplines as well as clients and their legal representatives. Pre-litigation ECR techniques are required as part of resolving disputes and reducing litigation.

A cultural shift is needed amongst stakeholders. So far, the Queensland Registrar has been successful in moving the cultural shift further towards a greater acceptance of mediation. The earlier stages of the cultural shift have been underway since 2003.

The Registrar works within the Court system and has little influence on the non litigation arena. The continuing success of the ECR litigation model will encourage more interest in non litigation ECR.

It is not essential for all mediations to be conducted by Commissioners of the Environment Court (New Zealand) or by the Registrar of the Planning and Environment Court (Queensland).

It has been long established that:<sup>3</sup>

- Mediation is cheaper than litigation.<sup>4</sup> The earlier the mediation the greater the saving. The cost saving can be up to 80%.
- If well managed and run efficiently mediation saves time compared to litigation.
- As the parties to the litigation attend the mediation the public interest is protected by the local government or the public body who is a party to the litigation and mediation.
- If there is a side agreement it is capable of being developed in the public interest with all parties to the mediation being parties to the side agreement as a public document. Some side agreements do not impact on the public interest and there is no need to involve the public body as a party to the side agreement.

Public consultation can be time and resource consuming.<sup>5</sup> By using non

litigation ECR (e.g. facilitation or negotiated rulemaking techniques and skills) the public consultation becomes meaningful and interactive among stakeholders. These techniques help avoid the “consult to death” concerns because all relevant stakeholders have been involved in the process all along and they own the process.

*Planning for a Prosperous Queensland: A Reform Agenda for Planning and Development in the Smart State*<sup>6</sup> (the reform report) released in August 2007 on the Queensland Integrated Planning Act 1997 showed:

- Through the consultation process (detailed in Part 2 of the reform report) public concerns of disempowerment and disillusionment with the negotiation process;
- There is a loss of faith in the submissions process. What happens to submissions that are made?

The right to participate is an important cornerstone in any public interest law dispute.<sup>7</sup> There is an even greater need to develop this right in the context of encouraging a cultural shift towards a greater consensual and collaborative planning and environment system including dispute avoidance or resolution. All stakeholders need to be involved. It is not a “them and us” approach (no matter if it is the developers, the submitters, local government or regional or National interests who are taken as “them”). We need to use methods which include all stakeholders no matter which part of the community they represent. The inclusive approach is built up over time and involves mutual sharing of information and trust.

The “cost” of litigation in public interest law is very important. The concept of cost goes well beyond the legal and expert witnesses cost of litigation. The ability to effectively participate is part of the cost. The time spent assessing the development and resolving any disputes that arise are part of the cost equation. The community pays for all the costs whether it is an individual home owner, ratepayers in the local government area. Understandably

developers want to make profits but if it costs more to produce an end product the costs are passed on. We need developers to make profits and stay in business otherwise we will not have the services that the public want. On the other hand, we need to balance the development and environmental issues (ecological sustainability) and the opportunity to explore and resolve these issues is fundamental.

The “early chance to be heard” proposal (based on the independent hearing and assessment panel (IHAP) used by a few local governments in NSW) and the use of a “supervising facilitator” are designed to keep things moving through the development and dispute resolution system.<sup>8</sup> There is a need to work to minimise the costs passed on to the community and to see how we can continue to strive to achieve good planning and environmental outcomes.

Whatever local or regional governance model is used it should include the following:<sup>9</sup>

- The development of a comprehensive Assisted Dispute Resolution (ADR) policy for litigation and non-litigation situations to include environmental conflict resolution;
- The development and publication of a clear set of conflict of interest rules;
- A greater use of third party neutral facilitators to enhance stakeholder participation and dialogue between elected representatives; technical staff; and all interested parties in the community;
- The encouragement of greater listening opportunities for elected representatives and staff;
- A greater understanding (for example through public education and leadership) and use of consensus building and collaborative governance techniques;
- The recognition that there is a need for a cultural shift on how regional and local government engage with their communities in the future;
- The development of a proactive leadership model or framework where

meaningful public participation is the goal and developing the means by which the goal is achieved;

- The recognition of the importance of the public right to know and the public right to participation and educate all stakeholders on how best to enhance these rights.

In the 21st century, we need to encourage a greater use of environmental conflict resolution, consensus building and collaborative governance techniques to avoid, minimise and resolve conflicts.

## **The current Queensland Planning and Environment Court Mediation Model**

Since May 2007, the Planning & Environment Court in Queensland has provided a free ECR service to parties irrespective of the type of dispute or the financial capacity of the parties involved. Free in this sense, means that the services of the Mediator are provided free of charge to the parties. Of course, there will be some cost to the parties in preparing for, and attending, mediation.

This Registrar model has worked because of the experience and personalty of the appointee. Peta Stilgoe had more than 20 years experience as a litigation Solicitor in private practice (including planning and environment litigation) and has a clever ability to be able to work the room and be a proactive Mediator who can ask probing and reality checking questions and keep the parties moving towards a resolution.

## **Some Feedback from participants in the Registrar's mediations**

The feedback has come from three sources. The first source is from submitters (objectors) who have been involved in litigation before the Planning and Environment Court. The second group are lawyers and the

third source is from expert witness engaged for hearing before the Planning and Environment Court who are subject to Practice Direction 1 of 2006 which, in particular, says that the expert has a higher duty to the Court than to the client who has engaged the expert.

- **From submitters**

*I have found the mediation an extremely constructive and informative process. Usually community groups simply cannot afford to become involved in any legal actions and are therefore excluded, mediation gives us the opportunity to at least be heard. In many cases I think informed community groups do have valid points.*

*... a relaxed atmosphere which is important for us non-legal people, we really do get a fair hearing and yet the discussion is kept disciplined and on the topic. Not always easy.*

*We are coping with procedures better and getting our points across with better understanding than with a formal hearing.*

- **From lawyers**

*The parties would like to acknowledge the assistance of the ADR registrar who was instrumental in achieving an agreement in relation to this complex matter. The parties participated in a mediation meeting before this Court's Registrar of ADR. While the matter was not resolved, areas of concern ... were better identified and articulated in a 14 point document, executed by the parties. That was helpful in providing focus. (a "successful" outcome)*

- **From experts**

*Peta, it is an unenviable task trying to organise us as we are all flat strap with work and I just wanted to thank you for all of your efforts to date.*

*Given the nature of this matter, it is clearly imperative that Peta be in attendance along with all of the actual experts involved in the ecological issues relevant to this matter.*

*Thank you Peta – at least sanity will prevail at last! Your involvement in this matter is very much appreciated by ... as we normally have to deal with this behaviour from ... on our own and forever have to deal with his twisted interpretations and convolutions that only seem to pervert the process and preclude any possibility of a solution prior to a court hearing. Thank once again for your help on this matter. I just wish we had this process and someone like you every time we have to deal with ...*

*...your assistance in the meeting process really valuable and...felt that the planners would not really have talked about the issues in the appeal and would have “fluffed about” if you were not there to keep them on track.*

*Thank you for your input once again Peta – refreshing to have you assist us get the issues clarified for the court.*

## **The lessons learnt from the current Queensland model**

“You get what you pay for” is a phrase often used to dismiss a free service. From the Court’s perspective, though, there is no doubt that ECR is faster, cheaper and better:

- At the first directions hearing, every case is listed for a particular sittings. Prior to the introduction of Court-based ECR, it was common to have about 30% of all cases listed proceed to trial. In March 2008, through ECR, the number of cases proceeding to trial to was reduced to 13% of all those listed but the total finalisation rate remained consistent.
- In March 2008, three “spare” Judge weeks were “given back” to the District Court to undertake cases in the general civil or criminal jurisdiction.
- The cost to the Court of a day of the Registrar conducting a mediation is about one fifth of the cost of a Judge sitting.
- The available statistics for the full year 2007/2008 show the Registrar

Planning and Environment Court ADR conducted 103 mediations in 141 sessions where:

- 51 of the appeals referred to mediation settled at, or shortly after, mediation (49%);
  - 2 appeals were withdrawn after mediation;
  - 12 mediation resulted in a reduction of the issues ventilated at the hearing;
  - 11 mediations were adjourned to enable further steps to be taken that would progress the dispute to a resolution.
- I assess mediation success by a complete resolution of the appeal (49%) together with a reduction in the level of dispute in the proceedings (i.e. the mediation made a beneficial difference in terms of the time and the cost of the litigation).
- The statistics show a success rate of 74% where the 11 mediations adjourned to progress towards a settlement are assumed to be ultimately resolved.
- An estimate of the Judge time saved is:
- 153 days saved for the 51 appeals resolved at an average of 3 hearing days each.<sup>10</sup>
  - 6 days saved for the two appeals withdrawn after mediation.
  - 12 days saved for the 12 appeals where the issues were reduced conservatively allowing 1 day saved for each appeal.
  - 33 days saved for the 11 appeals where there was progress towards settlement.
- The estimated 204 days is 40.8 Judge weeks or approximately 1 year of Judges' time at about one fifth of the public cost of providing the free service.
- If the Court fees included a mediation fee then the public cost will reduce and be shared across a number of public bodies who are parties to the litigation.
- Private mediation is still available and is used especially when the Registrar is not available (on leave or has a conflict of interest). The statistics do not include appeals resolved through private mediations so

the saving of Judge time will be greater.

- It is important to have both quantitative and qualitative assessments.<sup>11</sup>

## **The Private Mediation model**

There should always be a private practice for ECR.

Professor Philip J Harter (Earl F Nelson Professor of Law at Missouri University School of Law) has said that private ECR will always allow for new techniques to be developed whereas Court annexed ECR will over time become less innovative and more driven by the Rules of Court.<sup>12</sup>

There are many similarities between the Queensland Planning and Environment Court and the New Zealand Environment Court but some important distinctions. In the context of ECR the principal difference is that the New Zealand Environment Court Commissioners are judicial officers who have an ECR and adjudicative role. Both Courts offer a free service and, in theory, allow for private ECR. In practice, private ECR is limited because the Court service is free. In the long term almost complete reliance on Court annexed ECR is not a beneficial outcome. However, in the short to medium term, Court annexed ECR can help the cultural shift by stakeholders towards a more widespread use of ECR.

Professor Frank E A Sander (Bussey Professor Emeritus at Harvard Law School) notes, for reasons not entirely clear, large numbers of parties do not volunteer for mediation therefore compulsory mediation (as a type of affirmative action) could be used to encourage more parties to try mediation starting with a small pilot which is gradually modified to correct demonstrated defects.<sup>13</sup>

Mandatory ECR does not have to be a permanent arrangement. It will have

achieved its purpose if there is an increase in voluntary ECR in the form of a cultural shift by lawyers and clients.

The ability to develop new techniques is likely to be greater with private practitioners working with stakeholders than being limited to Court annexed ECR services where procedures may be linked to or have to take into account Rules of Court and Practice Directions.

Early intervention should be encouraged. It may occur before the parties get involved in any Court proceedings. The advantages of early intervention are:

- Saving time;
- Saving money;
- Early focus on underlying concerns;
- Avoid escalation of the dispute;
- Helps maintain the independence of the Judiciary and the Court annexed ECR;
- Allows, by agreement, the use of a Supervising Facilitator (this concept is discussed later).

Co-mediation can be advantageous in ECR because:

- Of the complexity of issues and number of different parties;
- Separate sessions (caucusing) can be managed simultaneously.

The mixing of science and law adds a more flexible and dynamic paradigm to ECR. Stakeholders are assisted by the co-facilitation.

Co-mediation is not currently available in the Court annexed models in New Zealand and in Queensland.

## **Survey Results from a co-mediation conducted by Jianbo**

## **Kuang and John Haydon**

The 16 participants were requested to participate in a survey as part of the ongoing research being undertaken by EcoDirections International Pty Ltd. It was a condition in the Mediation Agreement to participate in the exit survey.

All of the Respondents to the survey found the whole mediation process efficient with 42% finding that it was very efficient.

All of the Respondents agreed that the mediation:

- Saved time compared with going to Court;
- Saved money compared to going to Court;
- Clarified and narrowed the issues in dispute; and
- Allowed the participants to discuss the matters that they felt important.

All would recommend mediation to others.

At the mediation:-

- 92% of the Respondents felt at ease;
- 75% did not feel under pressure;
- 92% felt able to comprehensively express their views were well prepared;
- 92% did not feel rushed; and
- 92% were not confused about the process.

All of the Respondents said that the Mediators treated the parties fairly and explained the process and the Mediators' role clearly. Whilst 17% did not know, 75% said that the mediation was less intimidating than a Court hearing. Only 8% thought that the mediation was not procedurally informal.

75% of the Respondents thought that their concerns were listened to by the other parties and the other 25% were not sure.

The Local Government Representatives had delegated authority to finalise the litigation at the mediation. This Council did not have any procedural guidelines or policy with respect to mediation.

One of the Appellants wrote after the mediation and said as follows:-

*We are basically satisfied with the result and wish to offer our thanks to the manner in which you conducted proceedings. At all times you maintained order and control. You kept momentum of decisions going in a forward direction. Above all we felt you were impartial and gave consideration to both sides of the argument.*

*As you were aware, our side of proceedings felt that our viewpoints were being ignored and at least some of those viewpoints received an airing.*

*In closing we offer you our congratulations on a job well done. We trust we will never require your services again as a mediator, but should the need occur we would happily accept you in such a repeat role.*

## **Litigation is not the only forum for ECR**

We should not follow a litigation model without having considered other ways of resolving conflicts.

## **Public Meetings or Facilitated Forums as ECR tools**

Public meetings (as we know them) are a thing of the past. They have a greater potential to result in increases conflict and a “them and us” approach,

which makes a later ECR process more complicated.

Facilitated public and private forums are to be preferred. An independent private Facilitator helps manage the consensus building process. Negotiated ground rules may include:

- All participants are on the same level in the hall and no one is on a stage or raised platform;
- The agency representatives are there to listen and not to lecture;
- Select beforehand two or three key speakers broadly represented of the different points of view in the conflict and from among the stakeholders to start the negotiation process.

## **Supervising Facilitator**

This is another form of early intervention. By agreement it can be started well before any litigation starts and independent of any Court annexed ECR.

The concept of a Supervising Facilitator should be considered for those development applications or proposals acknowledged as complex or those applications that become protracted during the assessment process. This may well be an ongoing appointment where the Facilitator comes in from time to time to resolve disputes when each arises and before the parties become entrenched or the issue becomes a stumbling block. With many aspects and fields of expertise there may be more than one occasion when a third-party neutral (the Facilitator) can help keep the assessment process moving.

A cultural shift will be required for this consensual process to work effectively and/or efficiently. Statutory intervention may be necessary if the idea is not voluntarily taken up.

An early and real chance for submitters/objectors to be heard will reduce the

number of legal suits.

The examples that follow are not exhaustive and they relate to Queensland legislation but can be adapted to other jurisdictions.

If at a pre-lodgement meeting with the assessing authority it becomes apparent that the proposals of the applicant and the response of the agency are not the same, then mechanisms need to be put in place then to allow for those matters to be resolved. Before or immediately after a development application has been lodged the appointment of a Supervising Facilitator allows for disputes to be discussed with the assistance of a third-party neutral person and keep the process moving so that the assessment of the application does not get bogged down.

A second example relates to a development application that attracts significant debate. A significant number of adverse submitters or serious disputes raised by submitters should call for the intervention of the Supervising Facilitator to assist in better defining what the issues of concern are and how they might be resolved. If the Supervising Facilitator has already been appointed then, subject to the new stakeholders agreeing, the ECR process is reconvened.

Once submissions have been lodged there are disputes and points of conflict. It would be useful for the assessment agency to have available to it prior to the decision a better understanding of what is involved with the submissions. Are they submissions which should lead to an amended proposal? It would be of use to the applicant to know that as well. By bringing in the third-party neutral person (the Supervising Facilitator) the 3 parties (the Submitters, the Applicant and the agency) have an opportunity of working through the disputes so that amendments can be made to the Development Application and plans or certain conditions be imposed on an approval.

On the other hand, if the application is to be refused more precise reasons

for refusal can be formulated during this process.

Once the Council has made its decision, the Supervising Facilitator may well be called in again, or for the first time, to see whether or not any of then current disputes can be resolved without the necessity of having to refer the matter to the Planning and Environment Court by way of appeal.

If an appeal is lodged to the Planning and Environment Court by a Submitter, then the Supervising Facilitator should be called in immediately to help resolve the dispute or at least formulate it as a clear and precise set of issues for the Court to hear and determine. If this can be done within the first month of the appeal being lodged, that will expedite the determination of the appeal.

If the appeal is against conditions and there are only 2 parties to the appeal (the Applicant and the assessment agency) then the use of a Supervising Facilitator would be beneficial in helping to resolve those matters quickly or at least refining what the real dispute is with respect to conditions so that the matter can proceed through the Planning and Environment Court process as soon as reasonably practicable.

Many different tools are needed to be able to assist everyone, including Government, through the statutory maze. Third party neutral persons are essential for time and money reasons as well as for stakeholders' satisfaction. The concept of the Supervising Facilitator does not require legislative intervention. It can be done by agreement now. All that is needed is the willingness of all participants to work positively and proactively towards a genuine improvement in how we deal with the development process and environmental issues. It is recognised that a cultural shift is required, but that is not impossible to achieve.

## **Public involvement to resolve and avoid environmental disputes: An Australian and New Zealand example**

How many times have you attended a conference and wanted to see a particular issue developed further? Or wanted to have a greater time for discussion of a topic at the conference?

The **Environmental Law Roundtable of Australia and New Zealand (ELRANZ)** provides a forum for discussion and development of proposals for the harmonisation or coordination of environmental law and policy throughout Australia and New Zealand. As a multidisciplinary forum, ELRANZ is open to professionals, Government Departments and Agencies, statutory corporations, business, industry, NGOs, academics and students. As an inclusive and multidisciplinary approach to improving environmental laws and policies across Australia and New Zealand, ELRANZ advocates the processes of public participation and consensus building. Even before harmonisation, a greater level of cooperation will develop out of the ELRANZ process.

The Roundtable is a joint initiative of the **National Environmental Law Association Limited (Australia) (NELA)** and the **Resource Management Law Association of New Zealand Inc (RMLA)**.<sup>14</sup>

The ELRANZ offers opportunities for all spheres of government to have a forum where new ideas and improvements on old ideas can be discussed in a consensus building framework. ELRANZ expects suggestions to come from the public sector. The ELRANZ will allow Governments to engage with stakeholders through an independent forum.

### **ELRANZ Manual**

The ELRANZ Manual is a concise document describing the essential elements

of the Roundtable is available at [http://www.rmla.org.nz/images/content/ELRANZ%20Manual%20\(3rd%20edition\)%20March%202008.pdf](http://www.rmla.org.nz/images/content/ELRANZ%20Manual%20(3rd%20edition)%20March%202008.pdf)

The table of contents of the ELRANZ Manual is:

- Foreword.
- Why an Environmental Law Roundtable of Australia and New Zealand?
- How to raise an issue for ELRANZ consideration.
- What will ELRANZ do with your issue?
- Process Design.
- Sample Approaches.
- **Sample Approach 1:** The Blank Page approach encourages the regulatory authority to seek out public input early before a policy or law is considered for drafting, rather than holding back on public consultation until a discussion paper has been developed by the Government. The purpose of the blank page approach is to bring stakeholders into the policy creation process early. Building relationships of trust and cooperation are key components of public participation and consensus building. Common ground can be identified early in the process.
- **Sample Approach 2:** Discussion Paper. This approach is to draft a discussion paper with the identified interest groups and then to publish and distribute the paper, requesting feedback from interest groups and other important parties who may be identified after the paper is published.
- **Sample Approach 3:** Visioning is “a process in which people build consensus on a description of their preferred future – a set of conditions they want to see realised over time” (Moore et al., 1999:588). In Moore et al (1999) the focus is on community-wide visioning. In this example the cross-section of stakeholders who are involved are predominantly residents. Visioning is said to mobilise citizen participation in political decision making. Community wide visioning also creates expectations amongst residents that similar consultation will be implemented in the future, and that certain actions will be taken.
- **Sample Approach 4:** Joint Fact Finding allows all parties to participate

in identifying the issues, the experts, and the questions to ask the experts. This can be a very important means of resolving factual disputes that may arise if different interest groups have different experts with varying information on the issues at hand.

- **Sample Approach 5:** Best Use Technology is using available technologies to communicate with potential stakeholders as well as to disseminate information. This may seem simple, but the power of communication is exponentially increased with the use of the Internet. The possibility of harnessing this mechanism of communication for environmental regulation is tantalizing and should not be ignored.
- Members Only Information
- Appendix A - Bibliography.

Achieving good environmental outcomes requires the combination of a number of different efforts. These efforts are integrated within an ecological sustainability discourse. Setting broad policy and law frameworks is part of the process. ELRANZ promotes greater stakeholder involvement, through consensus building and public participation, in making improvements in environmental law and policy in Australia and New Zealand. Within the environment and planning law and policy disciplines there is a need for raising awareness of best practice facilitation, creative visioning, meaningful stakeholder participation and other consensus building techniques.

Consensus building and public participation can transform the traditional adversarial forum of dispute resolution into a forum characterised by collaboration and cooperation. These techniques are relevant to dispute avoidance, minimisation and resolution. ELRANZ recognises that the adversarial tone of litigation (and cultures of adversarialism) can undermine the more cooperative spirit of consensus building, so all stakeholders must be strongly committed to achieve this goal.

The Roundtable includes the following concepts:

- Corporations, associations, organisations and individuals can register as ELRANZ Associates and initiate roundtable issues;

- Project Teams are established to assist in ELRANZ projects;
- Associates may engage in research, consultation and brainstorming with respect to a project on the ELRANZ agenda and actively participate in neutral third party facilitated conferences, seminars and meetings;
- Suggested projects will be prioritised within the ELRANZ agenda. The results may include draft legislation, a new policy approach or a protocol for industry;
- Issues suitable for resolution through consensus building processes may be recommended to the Australian and New Zealand Judicial and Intergovernmental Ministerial meetings;
- Some ELRANZ projects could be managed through adaptations to the negotiated rulemaking process; and
- Seminars, public forums and other educational activities can be included as Roundtable events to ensure the involvement of individual and corporate NELA and RMLA members as well as to continue building support for the growing network of ELRANZ Associates.

More information can be accessed through the ELRANZ section on the NELA <http://www.nela.org.au/node/8> and RMLA [http://www.rmla.org.nz/library\\_elranz.aspx](http://www.rmla.org.nz/library_elranz.aspx) websites. The information will be updated from time to time.

## **Dispute Avoidance and Minimisation**

ECR should also be involved in encouraging dispute avoidance and dispute minimisation. With better environmental knowledge there is an opportunity to avoid disputes. The community needs to focus on dispute avoidance as a mechanism. The Court system and Additional Dispute Resolution (ADR) cannot be expected to deal with all potential disputes that are likely to arise if dispute avoidance does not become a reality. Disputes will not be eliminated completely.

Accessibility to all relevant knowledge is fundamental to any consideration of dispute avoidance. There is a need for trust so that all relevant information

is recorded and available for public access.

It is an essential part of the right to public participation that that participation is based upon the best information available. Otherwise a biased result occurs. We all should trust the process which results in a publicly available **ecoinformationbank**.<sup>15</sup> If we all have access to the same information then the level of disputation can reduce.

Where environmental factual disputes arise, limited enquiries or “fact finding assessments” can be undertaken which are aimed at resolving the dispute. The result is then recorded in the ecoinformationbank. Such a system can allow for amendments to be made when better scientific information becomes available. The right to public participation should be included in these processes.

Environmental guidelines or standards can be formulated based on the ecoinformationbank. Negotiated rulemaking techniques can be used to help formulate the guidelines.

It is important to emphasise that the type of participation needs to be meaningful otherwise sections of the public will come to distrust the process and then look for a confrontational approach. The methodologies will vary with the circumstances. The challenge is to work positively at the issues. Dispute avoidance will follow. Not all disputes will be avoided. However, by concentrating on trying to avoid disputes those that do arise will be limited in scope. If that does not work then ECR techniques (before or during litigation), properly used, will help to narrow or better define the scope of the dispute.

No discussion is complete without recognising that if all else fails, there is litigation. It should not be the technique of first resort. Litigation is undergoing changes as Courts have case management, change the rules relating to disclosure (discovery) and adopt improve techniques to identify and define the scope of the dispute. Courts are adopting ECR. Judicial

administration will undergo a process of continual improvement. Total Quality Management (TQM) is a process of continual improvement for businesses, the professions and industry. So why not include Governments and the Courts?

Litigation should not be abandoned as a public participation technique. There needs to be legislative recognition of “*environmental law standing*” to all persons.

### **Early ECR and positive attitude**

It is important to encourage parties to be proactive and positive when they approach ECR.

Modern litigation is more intense because of the increased case management by the Courts. An early and co-operative approach to ECR will help establish a sensible timetable within the Court’s case managed framework or even before the Court imposes its timetable.

Coming to mediation late in the Court’s case managed timetable (close to the hearing dates) will result in increased pressure on the parties. If some parties are reluctant to participate and the matter has been case managed over many months by the Court before the ECR session is held there will be time constraints set by the Court with additional pressure on the parties.

### **Pre-mediation Sessions or more than one Mediation Session**

Those Facilitators and Mediators who use pre-mediation say that it helps prepare the parties for the joint ECR session. Pre-mediation can improve the prospects of the ECR being successful.

In some cases it helps in preparing some options before the parties meet together. The advantage to the parties is that they can test out or investigate how the options might work before discussing them with the other parties to the conflict.

The Facilitator or Mediator needs to maintain a non biased position otherwise the joint ECR session may be put in jeopardy.

Confidential communications between a party and the Facilitator or Mediator during the pre-mediation session will be subject to the same rules as those communications at any time during the ECR process.

More than one mediation session allows for separate issues to be examined in one session as part of a staged ECR approach. For those who are unfamiliar with mediation or underprepared the opportunity to reconvene the mediation later is an additional benefit. Amended plans may be needed and adjourning the mediation to allow that to occur allows time to develop and consider the amended plans.

## **Mini Mediations**

A mini mediation is a form of pre-mediation that is useful where large numbers of people are involved in the ECR process. There may be a number of groups with different interests so more than one mini mediation should be considered.

Before the mediation day, the Mediator can hold a mini mediation where there is a large group of people with similar interests.

The advantage is that parties with common concerns are able to discuss among themselves, with the assistance of a third party facilitator, how they will approach the ECR process.

It is a useful preparation step and can involve more than one session.

A free and open discussion within this group helps clarify and prioritise the groups concerns. After discussion some issues may not be pursued.

The purposes of the mini mediation can include:-

- See the site and where the people live.
- Allow the whole group to meet the Mediator.
- Discuss the mediation process.
- Allow the lawyer for the group to discuss matters relevant to the dispute and the mediation with the clients.
- Allow the Mediator to gain an understanding of the group concerns

The group should be encouraged to select a small negotiating team to attend a mediation. The size of the negotiating team will depend on the width of disputed issues and the diversity of the group.

By the time the representatives of all the parties meet there has been some focusing within the groups have a common interest which helps the ECR process move forward.

## **Private ECR Case Studies**

Two case studies have been selected:

- The Caloundra City Council facilitated workshop with a broad cross section of the public prior to a review of a planning scheme;
- A Planning and Environment Court dispute which involved questions of law and fact and would have required the resolution of a point of law in the Court of Appeal.

## **Private ECR Case Study 1: Caloundra City Council Planning Summit**

In 1997 Caloundra City Council decided to have a planning summit to air the views of local stakeholders on the current planning scheme and its ability to meet the needs of the community. They saw the planning summit as an important process in directing Caloundra City's future planning focus. John Haydon was engaged as a professional facilitator to ensure that all issues were dealt with objectively between the stakeholders.

The Summit aimed to examine:

- Is there a Shared Vision for Caloundra?
- What are the essential elements for the future?
- Does the Group have common goals?

Stakeholders involved in the Summit were:

- Caloundra City Council - the summit was a listening exercise for the Councillors and the staff (a total of 29 Councillors and staff attended the Summit).
- 65 community members attended the Summit including representatives from Industry, Commerce, Development, Environment groups, community groups and the rural community. For e.g. representatives from the Sunshine Coast Economic Development Board, Sunshine Coast Environmental Council and the Combined Citizens of Caloundra City Association.

John Haydon facilitated the all day Summit. Each stakeholder present was given a chance to express their viewpoint and discuss the issues. Having a total of 29 Councillors and council staff there in a listening role really let the participants see that their views were being heard. There was a 95% participation in the Summit by the community members who attended. The method of ECR used for the Summit was Facilitation.

At the end of the day, a comprehensive set of issues had been established for the Council to review.

## **Private ECR Case Study 2: Outdoor Recreation use**

A dispute had arisen between adjoining neighbours after an unlawful outdoor recreation use commenced.

Subsequently, an application for a material change of use with respect to the outdoor recreation was made to the Local Government and the neighbour became the adverse submitter.

After the Council issued a Development Permit, the Submitters appealed to the Planning and Environment Court. The Council listed the matter for a directions hearing in July 2002. The matter was set down for hearing in October 2002 with a timetable for interlocutory steps. No mediation order was included.

A Mediation Agreement was signed between the parties and the mediation proceeded on 5 September 2002. John Haydon represented one of the neighbours at the mediation. The private Mediator was Martin Daubney SC.<sup>16</sup> The parties agreed to suspend the timetable under the directions hearing order while the mediation proceeded. The appeal was due to be mentioned at a callover on 27 September 2002.

After a one day mediation the parties resolve the appeal by amending the conditions. A three day hearing in the Planning and Environment Court was not required. No appeal to the Court of Appeal was required to resolve the question of law.

Because the parties had suspended timetable disclosure did not take place

so substantial costs were saved with respect to advancing the appeal towards a hearing.

All three parties cooperated positively during the mediation process.

A realignment of the boundaries and a change to easement arrangements including the surrender of one easement and the creation of a new easement were part of the Heads of Agreement signed at the end of the mediation. The Planning Scheme of the Council was respected in the realignment of the boundaries so that the minimum subdivision area was maintained with respect to the two allotments of land.

As a result of the Heads of Agreement a Consent Judgment was drawn up so that the conditions of the approval were amended by the Court without a contested hearing. Secondly, the Heads of Agreement allowed for the parties to resolve other matters between themselves especially in relation to the realignment of the boundaries and the easement arrangements. The adjustment to the easement is something that the Planning and Environment Court could not order as part of the appeal if there was no agreement. However, because there was an agreement to surrender the lease the parties were able to reach a compromise outside the scope of the types of orders that the Planning and Environment Court could have made on a contested hearing of the Submitter Appeal.

Because of the timing and the speed at which the mediation moved to resolve the dispute the parties saved considerable legal and expert witness costs.

The negotiation process was assisted by the Solicitors for each of the three parties agreeing to meet on site with a contractor to look at developing options prior to the mediation. There were five options on the table before the mediation commenced.

Because of a legal issue the matter may well have ended up in the Court of Appeal before it was finally resolved. That had been saved in addition to the 3 day hearing in the Planning and Environment Court because of the settlement achieved at the mediation. The parties secured certainty within a reasonably short time frame.

## CONCLUSIONS

For further reading on ECR and ELRANZ related topics the following appear in the Resource Management Journal (RMJ) published by the Resource Management Law Association of New Zealand Inc:

- ELRANZ: Introduction.<sup>17</sup>
- ELRANZ: Legal Issues in Consensus Building.<sup>18</sup>
- ELRANZ: Designing a Consensus Building Process.<sup>19</sup>
- ELRANZ: Environmental Conflict Assessment.<sup>20</sup>

An **eight point plan** which is a multi disciplinary approach arises out of the discussion of the various topics in this paper:

- Resolve public interest disputes without fully contested Court hearings and save time and money. Reducing the amount of litigation is in the public interest especially when the cost of public interest litigation is passed onto the public in various ways.
- Encourage a greater use of mediation and other ECR techniques after litigation has commenced. Both public and private mediation services need to be encouraged.
- Provide an early and meaningful chance to be heard because public participation is important.
- Dispute avoidance through sharing of information and consensus building by seeking out and identifying common ground.

- Pre-litigation ECR needs to be developed further through the recognition of the importance of the third party neutral Mediator, or Facilitator, or Supervising Facilitator. Even look at using a third party neutral for public meetings.
- Improve participation in plan making processes by consensus building and dialogue not debate.
- Improve the dialogue during the processing of the resource management applications <sup>21</sup> by increasing the opportunities for dialogue.
- Work with stakeholders to achieve cultural shifts necessary to have a greater use of ECR techniques. The development of ECR policies will help. Holding dialogues at interactive seminars will assist.

## NOTES

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1. I have been assisted by Dr Jianbo Kuang, Science Mediator and ECR Consultant at EcoDirections International Pty Ltd and I have drawn from a joint paper delivered at the United States Institute for Environmental Conflict Resolution 5th Conference in May 2008 by Peta Stilgoe, Janet L Crawford, Jianbo Kuang and I in *Is ECR really "Faster, Better and Cheaper"?* I have had 31 years experience as a planning and environment litigator in Queensland; have advocated a greater use of Assisted Dispute Resolution (ADR) techniques since the 1988 Planners Conference in Brisbane; trained as a Mediator in 1990; I am a Fellow of the Salzburg Seminar on Negotiation Theory and Practice in Environmental Disputes in 1990; I presented a number of information seminars on ADR in 2003; created the Environmental Law Roundtable concept in 2004; continue to present conference papers on ADR and now ECR as being more focused on environmental conflict.

2. The Queensland model uses the Registrar Planning and Environment Court ADR.

3. EcoDirections International Pty Ltd *Alternative or Assisted Dispute Resolution for Planning and Environment Issues* (Information Seminar materials) (8th edition) (2003).

4. EcoDirections International Pty Ltd *Alternative or Assisted Dispute Resolution for Planning and Environment Issues* (Information Seminar materials) (8th edition) (2003) where a number of cost scenarios were analysed in 2003 Australian dollars and Tow, David and Stubbs, Michael *The Effectiveness of Alternative Dispute Resolution Methods in Planning Disputes* (1997) which analysed NSW mediations between 1992 to 1994.

5. Public consultation in Queensland ran from 1991 to 1997 for the then review of the *Local Government (Planning and Environment) Act 1990* to get to the *Integrated Planning Act 1997* with an adapted form of negotiated rulemaking in February 2006 which resolved 80% of the most contentious issues arising out of earlier written submissions as discussed in the first private ECR case study in this paper. The negotiated rulemaking exercise focused on resolving disputes that were in the written submissions through a representative stakeholder forum. The process could have been used earlier and more often to make the public consultation process more time and resource efficient.

6. The reform report was released by the then Department of Local Government, Planning, Sport and Recreation with the reform process continuing under the now Department of Infrastructure and Planning.
7. Haydon, John *The Continuing Development of the Right to Know and the Right to Participate as Public Environmental Rights* presented to the Queensland Environmental Law Association Inc (QELA) conference (1995).
8. Both developed through EcoDirections International Pty Ltd in 2003 for the early chance to be heard (Dr Kuang and John Haydon) and in 2004 the supervising facilitator concept (John Haydon).
9. Haydon, John: Summary of Key Points in the *Submission to the Royal Commission into Auckland Governance* (2008).
10. This average of 3 days is based on the judgments listed on the Queensland Supreme Court Library website for 2006, 2007 and to 10 September 2008 in 2008 where the type of proceedings is listed as "appeal". It will be a conservative estimate as I was involved in successfully mediated appeals that had been set down for more than 3 days and up to 10 days.
11. Preston, Justice Brian in the 2006 Annual Report of the Land and Environment Court (NSW).
12. Personal comment (1990).
13. American Bar Association Dispute Resolution Magazine (Winter 2007)
14. The Environmental Law Roundtable concept was created by John Haydon who is now the Convenor of ELRANZ
15. Haydon, John *The Continuing Development of the Right to Know and the Right to Participate as Public Environmental Rights* presented to the Queensland Environmental Law Association Inc (QELA) conference (1995).
16. Now Justice Daubney of the Supreme Court of Queensland.
17. November 2005 RMJ.
18. April 2006 RMJ.
19. August 2006 RMJ.
20. November 2006 RMJ.
21. In Queensland called planning and environment development applications.