*Hal Wootten**

ENVIRONMENTAL DISPUTE RESOLUTION

ENVIRONMENTAL DISPUTATION

The Common Law and the Environment

THE common law's attempt to deal with environmental issues through the law of nuisance, that is, by adversary processes between adjacent property owners seeking to balance the conflicting rights of one to use and the other to enjoy their respective properties, has proved to be quite inadequate, as has the attempts of conveyancers to protect amenity by private planning schemes. The growth in technology has meant that the use of land affects many people besides nearby property owners, and even the growth of personal actions based on expanding categories like *Rylands v Fletcher*,[1] and negligence, remains too centred on damage to individual property and person to suffice when the public came to assert a general interest in the quality of its environment.

There are needs to control effects on the environment of all kinds; to limit the damage people are allowed to do to their own land; to withdraw some land from the private property system altogether in order to preserve it for public use; and to control the activities of people, not just as owners of specific properties, but as agents whose activities anywhere could damage the environment in many ways detrimental to others and to its continued existence. These needs have grown as human population has exploded, and technological change has increased the power of human activity not only to damage human amenity and health, but to eliminate other species at staggering rates, and to threaten the very conditions of life on the planet.

---

* AC, QC, BA, LLB, Judge, Supreme Court of New South Wales 1973-83, Visiting Professor of Law, University of New South Wales. This article was originally presented as a paper at the Third Symposium on Commercial Arbitration, Law School, University of Adelaide, 17 October 1992.

1 (1868) LR 3 HL 330.

The Changing Scene

Only twenty years ago what I have just written would have sounded enlightened and forward-looking, and to some radical and scare-mongering. Today it sounds hackneyed and platitudinous. I recall it to emphasise the extraordinary speed at which the environmental issues which we are still seeking ways to resolve have crept, or rather charged, up on us. In the Federal sense the environment was discovered just 20 years ago when the Whitlam government came to power and started to talk about environmental impact statements. Such relevant State law, as existed, was buried in property and local government law and conveyancing. Environmental law and environmental lawyers did not exist, and organisations of conservationists and environmentalists were still fringe groups with high ideals and little practical influence.

While the common law had shown remarkable powers of adaptation, the conservative pace of change built into it over centuries of relatively slow technological development, and its tendency to focus on private, and particularly property, rights (for example, in its rules about standing), meant that the political process had to take over the development of environmental law. Environmental rights and standards had to be defined in new ways, and that meant primarily by Parliamentary legislation, or by statutorily authorised executive decision, with the half-way house of subordinate legislation made by the executive, but disallowable by Parliament. All this meant great potential for litigation, but the courts were only one, and in some contexts a minor, arena for conflict.

Legislative Approaches

Legislation placed local planning and development decisions in the hands of elected local government bodies. Consequently, instead of new uses of land or new structures becoming the subject of litigation after the event, they had to gain the approval of the local council before they were embarked on. Other relevant powers were given to licensing authorities, Ministers, and specially created bodies.

Usually however, the possibility of courts adjudicating on the issues re-emerged in a wider form in appeals from these various authorities. Sometimes issues of standing and legal aid were addressed by legislatures and governments in ways which enhanced access to the courts, while in other cases they were not.

Political Activity

Major decisions had to be made by the executive, and even those embodied in Parliamentary legislation required executive support to get before Parliament. Hence it became inevitable that those who wanted particular environmental outcomes would become involved in politics, seeking to influence the policies of political parties, to swing the results of elections, and to lobby governments (or independents or minorities with a balance of power).

This has caused much heartburn in environmental groups, particularly those which, like the Australian Conservation Foundation, sought not just to mobilise the true believers, but to tap into a wide cross-section of an increasingly aware public, whose members, although concerned about environmental issues, attached importance to other matters which split their support amongst a range of political parties. Sometimes such organisations were forced into overt political alliances which sat uncomfortably with their primary desire to pursue environmental objectives independently and on their merits. Often they found that gaining party political support, or lobbying for Ministerial decisions, called for political machination rather than reasoned argument. Sometimes they found themselves engaged in direct action, lying in front of bulldozers or courting arrest to force attention to their concerns.

Similar difficulties (although not usually pursued to the point of offering their bodies in protest) tended to arise on the other "side", as more and more environmental issues presented themselves as disputes with "parties" taking different "sides". Major groups whose actions were problematic for the environment, such as developers, miners, forestry industries and polluting and waste producing industries, often became the adversaries of the environmentalists. Every now and then there have been attempts to bring the warring "sides" into negotiation (for example, the Salamanca agreement[2]), but it has not become a normal practice.

IMPROVING THE PROCESSES

The Search for Alternatives

Today there is much disenchantment with the two major ways of resolving environmental disputes; litigation and political (including direct) action. The former is expensive, not accessible to all interests, sometimes slow,

2 Discussed below at pp74-75.

and confined in the issues it can recognise and the outcomes it can produce. The latter is problematic in many ways: governments are elected on a wide range of issues; there are only two major parties (although minor parties sometimes have considerable leverage); the relative importance of a particular issue waxes and wanes with the influence of economic cycles; and in the ensuing melee, environmental issues become part of the bargaining chips traded by those who want power. Neither party may be open to persuasion on some issues, and forms of direct action are the next step for determined protagonists.

More and more people feel that there must be better ways of resolving issues. Given the recency of most environmental concerns, we should perhaps not be too despondent at not having worked out better ways to resolve issues, but the rapid disappearance of the natural environment and the escalating threats to the survival both of particular species and the conditions of life mean that the problem is urgent.

The environment is not the only area where litigation has been seen as an increasingly unsatisfactory ways of dealing with disputes. While extra-curial processes of reaching resolution have long had a place in some areas - family law, neighbourhood disputes and some commercial situations for example - the last five years in Australia (longer in the United States) has seen a spectacular growth in ADR. These letters originally stood for Alternative Dispute Resolution, the idea being alternative to litigation, although today some want to drop the "A" altogether, others to render it as "appropriate" or "assisted".

But in the environmental field we are looking not only for alternatives to litigation, but also for alternatives to political or direct action. Issues may not be capable of decision by courts, or interested parties may not have access to courts. In any event courts have to apply the law, and the real issue may be about getting a new law made or an old law altered. Hence the matter falls to be resolved by political action or inaction, at the levels of legislative, executive, administrative or local government decision.

Alternatives to Courts

While ADR was seen initially as consisting of alternatives to litigation in the courts, today it often refers as well to alternatives to other formal proceedings before bodies which are themselves alternatives to courts. Attempts to avoid problems of court litigation by taking decision-making elsewhere, for example to public alternatives such as tribunals, or to

privatised systems of litigation services, often lead to problems of their own, sometimes strikingly similar. Is arbitration, for example, part of the solution or part of the problem in this context?

All third party decision making is from one point of view disempowering of those who "own" the problem, depriving them of the opportunity to participate in the decision. From another point of view it is an encouragement to irresponsibility, allowing those who created the dispute to shift responsibility for its resolution elsewhere, meanwhile persisting in extravagant claims. Both consequences run against currents in modern thinking which emphasise the right and the responsibility of citizens to participate, the development of the individual personality, the desirability of co-operative solutions, and the decentralisation of power. Hence the search for alternatives to litigation has gone on to a search for alternatives to any form of third party decision.

Alternatives to Political or Direct Action

One answer to dissatisfaction with political decision-making is to attempt to remove the decision from the political sphere altogether. There is a long history of making issues justiciable that were once merely political. Courts have long asserted an inherent jurisdiction to control the executive and local government bodies and their officials, but only for excess of, or misuse of, or failure to use their powers. To the extent that resolutions on the merits emerged, they were (not for the first time in the history of the common law) secreted in the interstices of procedure.

In many cases however it was found convenient to transfer the final decision on the merits to a court or special quasi-judicial body. The classic example is an appeal on the merits from a refusal of a building or development application, but there are many others.[3] However while this provides an alternative to political action, it merely transfers the issue to the litigious sphere, to which alternatives are already being sought.

There may also be some escape for governments from the heat of environmental controversies by delegating the decision to an independent authority, whether purely expert or balanced by lay or community representation. Thus it has been proposed that the release of genetically manipulated organisms (GMOs) into the environment should be handled by establishing an expert scientific committee to advise a GMO Release

3 Bates, *Environmental Law in Australian* (Butterworths, Sydney, 3rd ed 1992) pp348-349.

Authority of wider membership, which would then be responsible for permitting release. This body would include, in addition to scientific and commercial experts, representatives of various government departments and two persons with an interest in environmental or consumer issues and a person with knowledge of law and/or philosophy.[4]

Independent Inquiries

Another approach is, while retaining the final decision in the political sphere, to set up some machinery to enable interested parties to make input into the advice on which the decision will be based. This may be of varying degree of formality. An example of a simple ad hoc procedure is that under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth). Under s9 of that Act, the Minister may make emergency declarations protecting significant Aboriginal areas from injury or desecration, but the limit of their power under that section is a 30 day order extendable by another 30 day order. The Minister may make orders of longer duration only after complying with a procedure laid down in s10, including the consideration of a report by a person nominated by the Minister who has prepared the report after calling for and considering submissions from interested persons. Another example is the appointment of GW Fitzgerald as a Commissioner of Inquiry when the Queensland Government faced a difficult decision over the future of Fraser Island and the Great Sandy Region.[5]

Examples of standing machinery for getting advice based on a hearing of interested parties and report by an independent statutory authority are NSW's Commissions of Inquiry, operating in conjunction with the *Heritage Act* 1977 (NSW),[6] and the *Environmental Planning and Assessment Act* 1979 (NSW),[7] and the Commonwealth's Resource Assessment Commission (RAC) established under the *Resource Assessment Commission Act* 1989 (Cth). Prior to the establishment of the RAC, four inquiries had been held under the procedures laid down under

---

4 Aust, Parl, House of Representatives, Standing Committee on Industry, Science and Technology, *Genetic Manipulation: The Threat or the Glory* (Report, 1992) pp279-80.

5 Fitzgerald, *Commission of Inquiry into the Conservation, Management and Use of Fraser Island and the Great Sandy Region* (The Commission, Brisbane, 1991).

6 Sections 41-43 and 55B.

7 Bates, *Environmental Law in Australian p*105; Woodward, "Environmental Inquiries in New South Wales" (1984) 1 *EPLJ* 317; Taylor, "Public Scrutiny of Planning Decisions through the Legal System" (1989) 6 *EPLJ* 156.

the *Environment Protection (Impact of Proposals) Act* 1974 (Cth), the most famous being the Ranger Uranium Inquiry. The experience of the debate relating to Coronation Hill shows that such procedures are not necessarily successful in containing political disputation,[8] and the NSW Commissions of Inquiry have been criticised as "an expensive charade so as to give the appearance of fulfilling the public involvement objectives of the EP&A Act", and "an expensive means of enabling participants to 'let off steam'".[9]

The RAC has recently considered introducing ADR techniques into its own procedures. It had consultants examine the potential role of mediation in the RAC's inquiry process.[10] As the function of the Commission is not to make decisions but to hold inquiries and make recommendations to Government, there is no scope for mediations under the auspices of the Commission to resolve environmental disputes. However the consultants considered that mediation would enhance participation in the Commission's inquiries and improve their focus and effectiveness. They saw the potential in three main phases of the Commission's inquiry process:

(1) The referral of the matter and the formulation of the terms of reference by the Department of the Prime Minister and Cabinet.

(2) The determination of the scope and procedures for each inquiry, including the identification of major issues, interested parties, research strategies and priorities, participant funding and hearing procedures.

(3) The formulation of options and recommendations.[11]

Parliamentary inquiries, taking evidence and submissions from the public, can serve a similar function on policy issues. For example the House of

---

8 Resource Assessment Commission, *Report on Kakadu Conservation Zone Inquiry* (AGPS, Canberra 1991).

9 Taylor, "Public Scrutiny of Planning Decisions through the Legal System" (1989) 6 *EPLJ* 156 at 158.

10 Boer, Craig, Handmer & Ross, *The Potential Role of Mediation in the Resource Assessment Inquiry Process.*

11 New South Wales has a statutory inquiry process for a range of environmental matters in the Commissions of Inquiry; Woodward, "Environmental Inquiries in New South Wales" (1984) 1 *EPLJ* 317; Taylor, "Public Scrutiny of Planning Decisions through the Legal System" (1989) 6 *EPLJ* 156; Bates, *Environmental Law in Australia* p105.

Representatives Standing Committee on Industry, Science and Technology was asked to report on issues relating to the development and use of genetically manipulated organisms and their release into the environment.[12]

None of these techniques lead to an actual resolution of an environmental dispute, as a final decision has still to be made by the Government or some person or body to whom statutory authority is delegated, but they may serve to define and contain issues, encourage their consideration on their merits, give all interested parties an opportunity to put their views, and generally take the political heat out of them. They must be recognised as an important part of the context in which environmental mediation would operate in Australia, and may to some extent be seen as reducing the need for it.

ALTERNATIVE DISPUTE RESOLUTION

ADR Techniques

Although arbitration is logically an alternative to litigation, it was established long before the ADR movement began, and is usually treated as in a category of its own. Increasingly the term Alternative Dispute Resolution is reserved for the situation where the parties to a dispute resolve it themselves, instead of having the decision of a third party imposed on them. Unless they agree to toss a coin (in which in any event they submit to the decision of fate), this means that they must negotiate.

Negotiation is not an ADR invention; it has no doubt existed throughout human history. What the ADR movement emphasises is two things:

1. The "principled" or "win-win" approach to negotiation described below.

2. Techniques for assisting the parties to success in their negotiations, without taking responsibility for the resolution of the dispute out of their hands.

The most common and important of these techniques is mediation, but others are sometimes employed. For example, the parties may agree to have a non-binding independent expert appraisal to assist their negotiations, or a "mini-trial" in which the competing cases of two

12 Aust, Parl, *Genetic Manipulation: The Threat or the Glory.*

companies, for example, are succinctly presented to the managing directors of those companies, who then sit together to hear them and discuss settlement. What the techniques have in common is that they seek to concentrate on the issues, "separating the people from the problem", and to look for goals of mutual advantage rather than defend positions. A panoply of ADR applications is listed by Adler.[13]

The term "mediation" is reserved by most practitioners and writers for the use of a third party, the "mediator", to assist the parties in reaching agreement, and there are some well recognised techniques, including separate confidential meetings with the various parties ("caucuses"), to achieve this end. There is some tendency in the evironmental literature, I believe unfortunate, to dilute this precise meaning of the term and use it to include any ADR technique, and in addition multi-lateral consultations by decision-making bodies.[14] Thus consultants to the RAC used it to mean a "goal-directed, problem-solving approach" to disputes.[15] Great value was seen in bringing the contending parties face to face to discuss issues, rather than merely consulting them separately or receiving separately prepared submissions from them.

I will use mediation in the stricter sense. However I will use it to include processes where parties, who lack power to resolve a dispute by their agreement, reach agreement by mediation on a common position to put to the decision-maker. This has precedent in other areas. For example, during 1992 I acted as "mediator" in Sydney between a major bank, the Commissioner for Consumer Affairs, and representatives of debtors to agree on a common proposal to put to the Consumer Credit Tribunal on an application by the bank as a credit provider under s85 of the *Credit Act* 1984 (NSW) for restoration of credit charges forfeited by reason of non-compliance with various provisions of the Act. Only an order of the Tribunal could restore the credit charges, but a mediated agreement could be persuasive to the Tribunal, and one was substantially adopted.

---

13 Adler, "Mediating Public Disputes" (Paper presented at the International Conference on Environmental Law, Sydney, 14-18 June 1989) pp2-3.

14 Fowler, "Environmental Dispute Resolution Techniques - What Role in Australia" (1992) 9 *EPLJ* 122.

15 Boer, Craig, Handmer & Ross, *The Use of Mediation in the Resource Assessment Commission Inquiry Process* (Consultants' Report to the Resources Commission, January 1991) produced in summary form as *The Potential Role of Mediation in the Resource Assessment Commission Inquiry Process* (RAC Discussion Paper No 1, 1991) p3.

In the United States there is a type of mediation known as "policy dialogs" where "a third party convenor assists the various (and usually adversarial) interest groups to formulate consensually arrived at legislative or regulatory recommendations which are forwarded to decision-makers".[16] Similar mediation has been proposed in Australia:

> The creation of policies and programmes for the controversial areas of pollution control and resource management would also benefit from this process and result in legislation and policies easily understood and able to be administered. An example which springs to mind is the implementation of the urban consolidation policy. Governments have been attempting to legislate for the facilitation of urban consolidation for nearly two decades in this state. A variety of piecemeal legislative programmes have been enforced. These have been continually amended to cater for a variety of interests which were not adequately considered in the first instance or amended because the implementation of the legislation is impractical in some respect. The incentives for a consensus building programme between governments, business interests and the community in general are evident to achieve a workable solution which will implement the urban consolidation policy.[17]

Negotiation

One result of the search for alternatives has been an enormous change in the way we think about negotiation. Not so long ago we did not really think about it at all; it was just something that happened in certain situations. Actually it happened a great deal. Very few matters actually went to the decision of the third party; most cases were settled on the court's or the arbitrator's doorstep if not before. We acknowledged the role of settlement and talked about settling cases, but gave little attention to how and why that happened. Today there are dozens of books about negotiation, both at the popular level and at the level of scholarly treatises and university texts. The number of Australian lawyers going to Harvard

---

16 Adler, "Mediating Public Disputes" (Paper presented at the International Conference on Environmental Law, Sydney, 14-18 June 1989).

17 Spiegel, "Mediation in the Court" (Paper presented to the Biennial Conference of the National Environmental Law Association (NSW Division), June 1992) p4.

for summer schools on negotiation has led United States academics to ask what is going on in Australia.

Much of the popular literature on negotiation is at the level of the used car salesman - how to outwit the other side and get the best deal for yourself. It proceeds not only as a game, but as a "zero sum game", that is on the assumption that every gain by one side is offset by a corresponding loss on the other side. The model is "win-lose". For some issues this is an inescapable model; for example, where the full extent of the possible relationship between the parties is the passing of a sum of money between them, and the negotiation is about the size of the sum. But many relationships are, or can be made, more complex than this. Often steps can be taken which are of benefit to both parties, even if not equally so. Often the cost of some concession by one party is much less than its value to the other. There may be many old or new factors in the relationship that can be manipulated so that the relationship is reshaped.

From this insight has developed a different model of negotiation - the "win-win" model - in which parties set out to create the maximum benefits to share. Sometimes this is called "principled negotiation". It is associated with the Harvard Negotiation Project and has been made generally accessible by the writings of Roger Fisher and William Ury. In 1981, drawing on respective backgrounds in international law and anthropology, they wrote *Getting to Yes*. The philosophy is stated in the conclusion:

> In most instances to ask a negotiator, "Who's winning?" is as inappropriate as to ask who's winning a marriage. If you ask that question about your marriage, you have already lost the more important negotiation - the one about what kind of game to play, about the way you deal with each other and your shared and differing interests.
>
> This book is about how to "win" that important game - how to achieve a better process for dealing with your differences. To be better, the process must, of course, produce good substantive results: winning on the merits may not be the only goal, but certainly losing is not the answer. Both theory and practice suggest that the method of principled negotiation will produce over the long run substantive outcomes as good as or better than you are likely to obtain using any other negotiation strategy. In

> addition, it should prove more efficient and less costly to human relationships.[18]

The approach is indicated in the headings of the first five chapters:

1. Don't bargain over positions.

2. Separate the people from the problem.

3. Focus on interests, not positions.

4. Invent options for mutual gain.

5. Insist on objective criteria.

The authors have elaborated techniques for carrying through principled negotiation in other books,[19] and many other writers have developed useful handbooks about negotiating techniques.

I will not pursue the subject of unassisted negotiation in this article. It is a well-known process, and the objectives of principled negotiation are incorporated in the particular form of assisted negotiation - mediation - which I will discuss. However the fact that many disputes can be settled by intelligent negotiation, or even avoided by more systematic consultation, should not be overlooked.[20]

Mediation

Mediation, as I have said, is generally used to describe the process where an independent third person, preferably chosen by the parties themselves, uses their good offices to assist the parties to reach an agreement.

> So the basis of mediation is negotiation - and the mediator's job is to introduce some special features to turn adversarial, win-lose negotiation into problem-solving. The mediator helps people talk to each other in ways that prevent misunderstanding, establish at least working relationships,

---

18 Fisher & Ury, *Getting to Yes* (Arrow Books, London 1987) p154.

19 Fisher & Brown, *Getting Together* (Business Books, London 1989); Ury, *Getting Past No* (Business Books, London 1991).

20 Condliffe, "Environmental Dispute Management" (1992) 1 *Newsletter of the Centre for Conflict Resolution* Macquarie University.

> clarify the issues and look for mutually acceptable solutions.[21]

The mediator makes no decision for the parties, and, unless jointly requested by them, offers no opinion or recommendations. Their role is to build consensus, so far as that is possible. However the mediator may make suggestions for the parties to consider, a process usually described as generating options for settlement.

Whatever power the mediator has flows from the agreement of the parties, but it is almost invariable that the mediation agreement will provide that the mediator may meet or "caucus" separately with the parties. Parties may use the mediator as a channel of communication between them, or may tell the mediator things which they are not prepared to reveal to the other party, but which may assist the mediator in generating options for settlement.

Parties are encouraged to stop concentrating on their rights, and instead to focus on their interests, and on what solutions may advance the interests of all parties - in other words to look for "win-win" solutions:

> It is a collaborative process. Parties are able to see different aspects of a problem and constructively explore their differences to arrive at a solution beyond their immediate vision of what is possible. This process fosters parties' ability to apply what is commonly called 'lateral thinking'.[22]

Conflict is not treated as pathological, but as a normal state of affairs which can be used as a basis to fashion more productive relationships in the future. There is no search for fault or guilt. Parties work together to find solutions.

Since mediation is assisted negotiation, it is unable to bring about settlement of disputes that are non-negotiable. Nor is it able to produce win-win results in those situations where only win-lose solutions are available. However it is surprising how often some lateral thinking can turn what looks like a win-lose situation into a win-win solution.

---

21 Acland, *A Sudden Outbreak of Common Sense* (Hutchinson Business Books, London 1990).

22 Spiegel, "Mediation in the Court" (Paper presented to the Biennial Conference of the National Environmental Law Association (NSW Division), June 1992) p3.

Among the possible benefits of mediation are privacy, speed, lower cost, the building of a cooperative rather than an adversarial relationship for the future as well as the present, and the ability to discuss the whole range of relations between parties and negotiate solutions which could not be delivered in a narrowly focussed court proceeding. The benefits are not always realised, or even necessarily feasible, and it is important to give careful consideration to whether a particular dispute is suitable for mediation.

ENVIRONMENTAL DISPUTE RESOLUTION (EDR)

Impact of Overseas Influences

While ADR techniques (usually without this title) have long had an important role amongst non-lawyers,[23] and in some specialised areas of legal practice, for example family law, the impact of the ADR movement on Australian lawyers has occurred mainly over the last five years. It has been most influential in the commercial area, and in some areas of volume litigation such as motor accident and other personal injury cases and insurance claims.

The Law Society of New South Wales has embraced it enthusiastically and sought to encourage its wider use by the institution of annual "Settlement Weeks", which after two succesful years were in 1993 converted into a standing service. Other States are following or adapting the model. The Australian Commercial Disputes Centre (ACDC) and LEADR (Lawyers Engaged in Alternative Dispute Resolution) both promote and give training in ADR techniques and offer lists of mediators. ACDC provides a general facilitation service for the settlement of disputes, with much less emphasis on the use of lawyers.

There is a large body of literature about the use the of ADR to resolve environmental disputes in North America. This area has provided most of the stimulus to the development of ADR amongst lawyers in Australia, although British experience is beginning to make an impact, as illustrated by Andrew Acland's participation in Australia's First International Conference on Alternative Dispute Resolution, organised by LEADR on 29-30 August 1992, and the reception of his book.[24]

---

23 For example in Neighbourhood Justice Centres; Fisher & Long, *Cultural Differences and Conflict in the Australian Community* (Centre for Multicultural Studies, Wollongong 1991).

24 Acland, *A Sudden Outbreak of Common Sense*.

I do not propose to review overseas experience, as I am concentrating on the current Australian context.[25] With a few important exceptions which I note below, Australia has been slower to follow the United States ADR example in environmental law than in other areas, particularly the commercial. This is not surprising. While major Australian commercial legal firms practice in a very international context, the legal backgound to environmental disputation in Australia and the United States is very different, in three respects.

As Fowler points out,[26] a much greater proportion of environmental disputes have found their way into the courts in the United States, both in relation to site-specific disputes and policy related matters. In Australia, on the other hand, the ordinary courts tend to be less accessible to environmental disputants because of rules of standing and costs, but there has been a considerable use of specialist tribunals to review certain issues, particularly site-specific and licensing issues, on the merits. Most importantly environmental policy issues tend to be dealt with to a much greater extent by governments outside of any regulatory or adjudicatory forum.

For these and other reasons it is reasonable to caution that "forms used overseas cannot be transplanted wholesale: Australian solutions must be devised for Australian issues and institutional arrangements".[27]

Categories of Environmental Disputes

Environmental disputes (EDs) come in many forms and relate to many matters. Indeed they are not a discrete category. One person's environmental dispute may be another person's industrial dispute, health dispute, or commercial dispute, an Aboriginal's sacred site dispute or land rights dispute, or a nation's sovereignty dispute. This is reflected in the United States where the preferred terminology has become "public

---

25 A useful brief summary of North American experience is to be found in Fowler, "Environmental Dispute Resolution Techniques - What Role in Australia" (1992) 9 *EPLJ* 122. The general flavour of the United States situation is given by Susskind & Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (Basic Books, United States 1987) and Adler, "Mediating Public Disputes" (Paper presented at the International Conference on Environmental Law, Sydney, 14-18 June 1989).

26 Fowler, "Environmental Dispute Resolution Techniques - What Role in Australia" (1992) 9 *EPLJ* 122 at 127.

27 Boer, *The Potential Role of Mediation in the Resource Assessment Commission Inquiry Process* p5.

dispute".[28] Apart from saying that an environmental dispute is one where someone feels that their environmental values are threatened, I will not attempt to define the concept.

For the purposes of this discussion, it is useful to break EDs into some contrasting categories. These reflect tendencies rather than clear dichotomies; the categories overlap and particular EDs may move from one category to another as time goes by or circumstances or attitudes change. I will separate out two sets of categories:

1. Disputes may be about interests which can be compromised, that is, matters of degree, or they may involve values which are felt to be absolute by one or more of the parties.

2. Disputes may be litigation-related or not so related. I will describe the latter disputes and mediation in relation to them as "disputes at large".

Before examining the categories of litigation-related mediation and mediation at large, I will say something about the problems of disputes which are essentially non-negotiable for one or more of the parties.

Is Compromise on the Agenda of the Parties?

Many environmental disputes are about issues on which there is room to negotiate; for example, how the tailings from a mine will be disposed of, what route the trucks from a quarry will take (and during what hours the quarry will operate), precisely where the boundaries of a national park will be drawn, how high a building will be, how large a commercial zone will be, what steps will be taken to ensure the sustainability of a logging operation, when the ban on mining in Antarctica will be reviewed, where a toxic waste plant will be located, and so on.

Others are presented as not negotiable. In the recent dispute over the siting of a dam at Alice Springs, the possibility of building at another location or avoiding the destruction or inundation of some Aboriginal sacred sites had been exhausted. The issue was presented as "dam or no dam". Someone had to win and someone had to lose.[29] Fowler instances

---

28 Adler, "Mediating Public Disputes" (Paper presented at the International Conference on Environmental Law, Sydney, 14-18 June 1989).

29 Wootten, *Significant Aboriginal Sites in the Area of the proposed Junction Waterhole Dam, Alice Springs* Report to the Minister for Aboriginal Affairs

the Wilpena dispute in South Australia as one where there was little room for EDR because parties believed that fundamental legal and policy issues on which no compromise was possible were at stake.[30] Such issues have to be resolved by legal or political processes.

The constant pressure to compromise is bitterly resented by many environmentalists, and may make them wary of such a "reasonable" process as mediation. They fear that it may, like economic rationalism, conceal a form of rationality that denies fundamental values. Karenne Jurd, director of the Wilderness Society, recently said:

> Environment groups concerned about the integrity of the last great natural places are constantly confronted with the false logic of "equality". In the conflict over Australia's native forests, we are told to be balanced, to accept a reasonable compromise and that a fair deal would be for half the forests to be protected, and half logged.
>
> Even if we were prepared to do that sort of deal - which is impossible because more than half has already been destroyed - there's a deep flaw in that kind of thinking. You can't just save *half* the forests. You can't save *half* an ecosystem, any more than you can save *half* a human life, or *half* a sacred site. As Norm Sanders once said, you can't turn around and say, "okay, let's save *half* the planet".

Not many of those with whom the environmentalists would be asked to mediate over forestry issues would understand, let alone share these views. Until there is a greater convergence of fundamental values over the environment, many of the biggest environmental issues in Australia are likely to elude mediation or other forms of settlement by agreement. There remains a deep gulf between what have been describes as the humanisitc view and the technocratic view.[31]

---

under s10(4) of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth).

30 Fowler, "Environmental Dispute Resolution Techniques - What Role in Australia" (1992) 9 *EPLJ* 122.

31 Cosgrove, *Catastrophe or Cornucopia: The Environment* (John Wiley, New York 1982).

Litigation and Mediation as Alternatives

There are probably few environmental disputes which could not find their way into a court in some respect, although often it might only be for the limited control of procedure by administrative law, or by way of injunction against or prosecution of those who are displaying their dissatisfaction with the present state of the law. In this article I will use the term "litigation-related disputes" to refer to disputes which are within the jurisdiction of a court to deal with on the merits, so that mediation takes place against the background that if the parties do not agree they can, and probably will, have the matter determined by a court.

Mediation in these circumstances is truly an alternative to litigation and in the Australian context at least is usually more manageable than where the dispute is at large. The parties who have a right to participate are defined by the rules and practices of the courts, and the principles which the court will apply and the evidence it will receive are usually reasonably predictable. Australia has some quite specific, well-documented experience in this area and I will deal with this in some detail.

MEDIATION IN THE NSW LAND AND ENVIRONMENT COURT

The Basis of Mediation

The New South Wales Land and Environment Court ("the Court") has offered optional mediation since 1 May 1991. Later that month the Public Accounts Committee of the NSW Parliament published its *Report on Legal Services Provided to Local Government,* criticising the amount of time and money expended by local government councils in the Court, and suggesting that they had been using the Court as their Planning Departments by refraining from determining contentious development applications. These then went to the Court as "deemed refusals", and there became the subject of lengthy cases supported by a number of expert witnesses. The Report noted with enthusiasm the Court's initiatives put in place during the course of its inquiry, which are described here as at October 1992.

The Court's jurisdiction is categorised in five classes: Class 1 covers mainly appeals in development applications; Class 2 appeals in respect of building applications, demolition orders, and refusals to issue certificates under s317AE of the *Local Government Act* 1919 (NSW); Class 3 disputes about compensation for compulsorily acquired land; Class 4 general civil enforcement; and Class 5 a summary criminal jurisdiction.

There is no statutory provision for mediation, but pursuant to a Practice Direction the parties to every application within Classes 1, 2 and 3 are notified that the Court offers the option of a mediation session or sessions before its Registrar or Deputy Registrar. Although there is no formal offer of mediation in Class 4 matters, the same Practice Note provides for a compulsory Issues Conference, the primary purpose of which is to explore the possibility of settling the matter or at least narrowing the issues. These also occur before the Registrars, and sometimes result in agreement to a mediation.

Classes 1 and 2, which comprise the bulk of the mediations, usually involve an applicant for some approval appealing against the refusal of approval, or against the granting of approval with unacceptable conditions, by the approving authority, which is usually a local government council but is sometimes the Environmental Protection Agency. The Practice Note states that if objectors are involved, it is anticipated that they should attend at the mediation so that the views of all interested parties can be taken into account in any mediated settlement.

No additional court fees are paid if there is a mediation, and no charge is made for the services of the Registrar or the use of the Court's premises. Mediations are usually held at the Court premises in Sydney, although some have commenced at the site of a disputed development, and some have been held at country centres.

The mediation can be requested at any time between service of the initiating documents and the setting down of the matter for hearing. The Court merely notifies parties of the availability of mediation, so it is necessary for one of them to propose the course to the other. This may occur at various times and in various ways. The Practice Note anticipates that in Class 3 compensation matters the parties may seek mediation after the exchange of expert reports and that their valuers and any other experts will attend the mediation.

Hearing dates which have been set are not vacated because parties have agreed to mediate. This means that the mediation cannot be used tactically to delay the hearing, and in fact generally produces an earlier resolution of the matter.[32] The Registrars believe that "a fixed hearing date has served as an incentive to parties to make a greater commitment to settle. Each party realises that the curtain comes down on the day the hearing

32 Muller, "Report on Young Lawyers' Survey - 'Mediation in the Land and Environment Court'" (1992) 3/3&4 *LEADR Brief* 8.

commences and the progress made during the mediation can be brought to nothing."[33]

In contrast to ordinary private mediations, no mediation agreement is entered into. One consequence is that there is no formal statement of the degree of confidentiality and absence of prejudice attached to the proceedings, although these are stressed in general terms by the Registrar at the mediation. Another consequence is that the parties do not give the mediator the release from liability and indemnity commonly written into mediation agreements.

Preparation for Mediation

At least a week before the mediation, each party is required to serve on other parties a statement of its position and the issues as it sees them. It is requested that if possible the statement be limited to 2 or 3 pages. Thus it is not intended to be a comprehensive statement of the party's case. An applicant usually restates its proposal and a respondent council its grounds of refusal. The Registrars regard the process as an attempt to set the agenda for the mediation.

So far preliminary conferences have not been held, although recently, following criticism of the absence of conferences and a suggestion that there has not been sufficient explanation of the process or indication to the parties of what is expected,[34] preliminary conferences have been suggested to the parties as a further option. The advantages of a preliminary conference include the opportunity to fully explain the nature of the mediation process, to ensure that all relevant persons who can assist the parties to resolve the matter will be present, and to explore the need for experts or government agencies to take part. Otherwise such matters are dealt with at callover, or by telephone.

Participation and Representation

The Practice Note states:

> It is expected that persons appointed to act on behalf of any of the parties to a mediation will have the authority to

---

33 MacMillan, "Mediation in the Land and Environment Court" (Paper delivered to the Land and Environment Court Conference, September 1992) p3.

34 Muller, "Report on Young Lawyers' Survey - 'Mediation in the Land and Environment Court'" (1992) 3/3&4 *LEADR Brief* 8.

> authorise a resolution of the dispute. If a party does not have that authority it will substantially weaken the mediation process.

According to the Practice Note, "legal representation is not seen as necessary at mediations, but it will be allowed by leave". In practice, leave for legal representation is always granted, and non-legal representatives are also treated as appearing by leave. From the point of view of a Registrar, one of the disadvantages of an absence of legal representation is that they may have to give a lot of attention to explaining things to, or reassuring or mollifying an unrepresented party, thereby running the risk of compromising their neutrality in the eyes of another party. In the evaluation survey discussed below, two thirds of the unrepresented participants indicated an unsuccessful outcome, whereas the general success rate was nearly three-quarters.[35] While it is not desirable to generalise from a small number and early sample, this result must give some comfort to lawyers.

Most proceedings involve a developer seeking approval and a Council which has refused approval, given approval with conditions unacceptable to the developer, or failed to give a decision within a prescribed time - a "deemed refusal". In addition to the developer and the Council there may be objectors, who, depending on the circumstances, may or may not have standing in the proceedings. If they do not, the Registrar cannot join them in the mediation, and the extent of their participation depends on the agreement of the parties. This can create problems:

> In some cases a party objects to the involvement of a 'stakeholder' in a mediation process because there exists between them a further area of difference which is only peripheral and may jeopardise the resolution of the matter. The mediator runs the risk that if they attempt to involve the ostracized person/s, it may detract from the central issues and undermine the opportunity to reach a solution. On the other hand if the person/s is/are not involved it may hinder the implementation of a solution. This is when the exercise of sensitivity and experience by the mediator is important.[36]

---

35 Muller, "Report on Young Lawyers' Survey - 'Mediation in the Land and Environment Court'" (1992) 3/3&4 *LEADR Brief* 8..

36 Spiegel, "Mediation in the Court" (Paper presented to the Biennial Conference of the National Environmental Law Association (NSW Division), June 1992) p9.

Spiegel has suggested that mediation might be used when decisions which might give rise to litigation are being made. An obvious example of the latter is the situation where a contentious development application is under consideration:

> [T]he collaborative approach may allow all the interested parties and community groups, the council professional staff, the aldermen and the developers to interact and perhaps vary or modify the proposal so that when the determination is made, it is one which results in an economically and environmentally feasible development.[37]

The encouragement by Councils of mediation at this stage had been recommended by the May 1991 Report of the Public Accounts Committee of the NSW Parliament on legal services provided to local government. The Report also recommended a similar encouragement of mediation prior to the lodgement of applications relating to proposals likely to be of a controversial nature.[38]

Procedure

No procedure is laid down for the conduct of the mediation, but the Registrars have undertaken training in mediation with the Australian Commercial Disputes Centre (ACDC). Hence the procedure generally follows what is regarded as standard mediation procedure, with some exceptions already noted - absence of a preliminary conference, and a granting of leave to appear by the mediator. This last point suggests that the mediator must have a slightly "official" character lacking in ordinary mediation where parties choose their own mediator and negotiate their own mediation agreement.

However the general pattern is much the same - the mediator introduces themself; everyone else is introduced; the mediator makes an opening statement and asks for an update on the position between the parties; the parties make opening statements; the mediator caucuses privately with each party, seeking to understand any hidden agendas; the mediator meets with the parties again, together or separately as the developing situation

---

37 Spiegel, "Mediation in the Court" (Paper presented to the Biennial Conference of the National Environmental Law Association (NSW Division), June 1992) p3.

38 NSW, Parliament, *Report on Legal Services Provided to Local Government* (Report of the Public Accounts Committee, 1991) Recommendations 30-31.

requires; issues may be arranged in order of priority; and if an agreement is reached it is reduced to writing and its manner of formalisation agreed.

The procedure is flexible and the normal course may be interrupted at any time to suit the circumstances. For example, the parties may find a basis for discussion before the matter reaches the caucusing stage, or the parties may agree that further information is required and adjourn the mediation so that tests may be carried out or information obtained in other ways. Sometimes it may be clear to the mediator after caucusing that the parties are so far apart, or one party is so intransigent, that no successful outcome is possible. In that case the mediator will terminate the mediation, to avoid the risk of it being used as a "fishing expedition" by a party who hopes to learn more about an opponent's case.

One matter that the (present) Deputy Registrar stresses as the result of their experience, is the great importance of ensuring at the end of each session and at the end of the mediation that all parties fully understand exactly what has been agreed, and what each of them proposes to do. It is desirable to rehearse everything fully, including matters of apparently small detail which may nevertheless be important to someone; for example, the species to be planted in a landscaping program. It is important that "parties should not terminate the mediation in a state of euphoria because a solution has been reached".[39]

Giving Effect to Agreement

The Practice Note states:

> At the conclusion of the mediation, where agreement has been reached the parties will be expected to give effect to the agreement in the best possible way. In most cases this will involve one of the parties giving consent or agreeing to be bound by terms of settlement. In those cases where the parties see a need for orders of the Court to be made it is expected that consent orders will be agreed upon between the parties, and these will be placed before a Duty Judge.

There may be other courses that the parties may agree to adopt to give effect to their agreement. For example, it may be agreed that a developer

---

39 Spiegel, "Mediation in the Court" (Paper presented to the Biennial Conference of the National Environmental Law Association (NSW Division), June 1992) p14.

will lodge a fresh application with the Council or, where the Council has not yet made a determination, that the matter will be referred back for determination. The course followed is affected by legal considerations, particularly the fact that once an appeal is made to the Court it becomes the consent authority and the Council cannot amend its decision.

In the case of "designated developments", that is those of a type identified by a planning instrument as requiring special procedures of notice and exhibition and an environmental impact statement because of their environmental significance and importance, it would be lengthy and expensive to start with a fresh application. Hence a Court order is usually sought, the parties preparing a joint submission to the Court. Other cases are often dealt with by standing the proceeding over while a new application for consent is made, the representatives of the Council agreeing to support it. If the Council should fail to approve the new application, the developer can take that application to the Court or proceed with the appeal on the original application if so desired. However this problem has so far not arisen, all agreements having been incorporated in council consents.

One of the advantages of the mediation is that the parties may be able to negotiate issues which it would be outside the jurisdiction of the Court to resolve, but which may nevertheless be of great importance to one or more of them.

Considerable pains are taken to avoid any feeling by the parties that they are under any pressure from the Court to mediate, and to avoid any risk that the parties may feel that anything about the mediation will influence later proceedings. The Practice Note emphasises that "it is a fundamental tenet of mediation that it be voluntary. Therefore, each party will be required to indicate in writing that it wishes a dispute to be mediated."

Results

Between May 1991 and September 1992, 77 mediations took place, mostly in Class 1 and Class 2 matters. This is only a few per cent of the matters coming before the Court, but a high proportion of the mediations result in settlement in whole or in part. It is estimated that about 145 days of court time, that is before a judge or assessor, would have been required if the matters had not been settled by mediation. The mediations occupied about 35 days of the Registrar's time, averaging about 3 hours each. Of

course some of these matters might have settled before hearing in any event.[40]

As mediations are conducted on a confidential basis, there is not much information available about particular cases. However in answer to a question in the Legislative Assembly on 11 December 1991 about the working of the mediation program, the Minister for Justice referred to the successful mediation of a dispute over the establishment of a major new copper and gold mine, which was a designated development in the Parkes Shire. Local residents organised to express their concern about the effect of the mining on grazing and farmland, and it was estimated that there would be a four week hearing in the Court. After two marathon mediation sessions totalling 26 hours before the Deputy Registrar, agreement was reached.

This appears to have been the largest matter which has been mediated through the Court program, and the Minister stressed the advantage to the parties in having been able to work out their own solution to the problem, and the saving of "a small fortune in legal fees". He went on to say:

> Many of the matters being mediated in the Court involve disputes with councils over small developments. In these cases the ordinary person does not have to be subjected to the rigid, unfamiliar and sometimes traumatic environment of the courtroom. Instead, contentious issues can be discussed in an atmosphere more conducive to negotiation. The parties leave the conference room fully aware of opposing points of view and, it is hoped, with an agreed outcome to which all contributed.[41]

It is understood that Woollahra Council, a major suburban Council in eastern Sydney, has resolved to examine all matters to which it is joined to determine if mediation is appropriate.[42] This is consistent with the finding of the survey that, contrary to expectation, the political nature of a Council's functions has not proved a barrier to mediation.[43]

---

40 But see "Evaluation" at pp58-59.

41 NSW, Parl, *Debates* (1991) 11 December 1991.

42 MacMillan, "Mediation in the Land and Environment Court" (Paper delivered to the Land and Environment Court Conference, September 1992) p3.

43 Muller, "Report on Young Lawyers' Survey - 'Mediation in the Land and Environment Court'" (1992) 3/3&4 *LEADR Brief* 8.

Evaluation

The New South Wales Law Society has a Young Lawyers Section, which in turn has an Environmental Law Group. This Group decided to monitor the introduction of mediation by the Court, and with the cooperation of the Court distributed survey questionnaires to the legal representatives (or if there were none, to the parties) in all mediations conducted to the end of 1991. There was a 50% response rate. The following account is based on a report in *LEADR Brief*.[44]

The results showed that 73% of those responding considered the outcome "successful". Most interestingly only 16% of the respondents in these matters thought that their matter would have settled before the hearing if the mediation had not taken place. About 84% of them considered that there had been a saving in costs.

The respondents ranked the most important factors contributing to the success of mediations as:

(1) A narrowing of the issues.

(2) The less formal procedures.

(3) A better understanding of the other parties' position or needs.

(4) The skill of the mediator.

Generally responses confirmed other matters that are commonly seen as advantages of mediation.

Significantly, only 30% of those in unsuccessful mediations felt that costs had been increased. Explanations for this low figure include the narrowing of issues requiring determination, and the fact that preparation for the mediation also prepared the matter for hearing. It is also to be noted that some of the unsuccessful mediations were followed by further negotiations between the parties.

Among the reasons seen by respondents as contributing to lack of success were the political nature of councils and the absence of authority in officers to settle. However, as noted earlier, this is clearly not a general

---

44 Muller, "Report on Young Lawyers' Survey - 'Mediation in the Land and Environment Court'" (1992) 3/3&4 *LEADR Brief* 8.

obstacle to success and is likely to diminish in importance as more councils become experienced in the mediation process. Another reason given by respondents was the perceived unwillingness of the other side to negotiate, although my experience suggests that parties are not necessarily good judges of who the obstacle to success is.

The other principal reason for lack of success was seen to be the existence of points of law. In the general mediation area it is often possible to invite parties to put aside their legal rights and discuss what outcome would be best for all concerned. It is no doubt difficult to do this in most of the matters mediated in the Land and Environment Court because Councils are creatures of the law and are therefore bound to observe it in carrying out their statutory functions.

Some respondents felt that they did not receive enough prior information about the mediation process, or have enough contact with the Registrar to settle preliminary matters. This led the surveying group to suggest the distribution of an explanatory pamphlet to parties at the time proceedings are filed.[45] As noted above, the Registrars now give the parties the option of a preliminary conference. The Registrar has also suggested that as mediation becomes more widely used, acceptance and general levels of knowledge of the process will increase.[46] While this is undoubtedly so, it may be doubted that it should increase sufficiently fast and universally to eliminate the problem.

IS COURT-ANNEXED MEDIATION DESIRABLE?

The Integrity of the Courts

The empirical evidence of the survey is generally very favourable to the Land and Environment Court's voluntary mediation program. However a challenge has been made to the concept of mediation by court officers. Naughton has suggested that considerably more thought needs to be given by Government to the role and specifics of court based mediation as a means of alternative dispute resolution. He has asked:

> If a mediation conducted under the rubric of the Court system, and by one of its officers, breaks down and the dispute proceeds to a hearing in the Court, might it not be

45 Muller, "Report on Young Lawyers' Survey - 'Mediation in the Land and Environment Court'" (1992) 3/3&4 *LEADR Brief* 8.

46 As above.

> difficult to convince some parties, witnesses, objectors and observers that the Court decision was not influenced by knowledge obtained in strict confidence by one of the Court's own officers during the mediation? Is there not some danger that the perceived independence of the Court could be put in question?[47]

Naughton is echoing concerns expressed very strongly by Sir Laurence Street, the retired Chief Justice of New South Wales who has been deeply involved in the promotion of mediation in New South Wales and is undoubtedly Australia's most experienced mediator in commercial matters. While Sir Laurence is a strong advocate of the use of mediation, he has expressed concern that courts "in well-intentioned attempts to extend their services to litigants, will stray beyond their conventional role". He has written:

> The particular focus of this warning is on proposals that the Courts should provide mediation services from their own resources and personnel. There are already some Courts in which mediation services are in fact provided by a judge or registrar. In other Courts a re-vamp of the well understood and useful settlement or pre-trial conference has been mis-described as mediation. Whilst the latter is to be regretted as misleading and as introducing confusion into the meaning of mediation, the former ventures represent a real threat to the very foundation of public confidence in the Courts.[48]

Stressing that the private caucus between the mediator and separate parties is fundamental to mediation, Sir Laurence suggests that

> private access to a representative of the Court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the Courts observe.[49]

---

47 Naughton, "Mediation and the Land and Environment Court (NSW)" (1992) *EPLJ* 219 at 221.

48 Street, "The Courts and Mediation - A Warning" (1991) 3 *Judicial Officers Bulletin* No10.

49 As above.

He goes on to argue that no amount of separation of functions or barriers to communication within the Court structure and between its officers and its judges can eliminate the problem. "The public sees the Court as an integrated institution - indeed this is to be encouraged."[50]

Sir Laurence's contention that mediation services should be provided by organisations outside the court system has been rather stupidly characterised by some ill-informed critics as the "sour grapes" of a self-interested professional mediator. Anyone who knows Sir Laurence (and the superfluity of work available to him) would realise not only the absurdity of the suggestion, but also the fact that in his stern language we are hearing the voice not of a professional mediator but of a former Chief Justice, jealous of and concerned for the standing and prerogatives of the courts in a political system based on the rule of law.

However, while I for one would accord the greatest respect to the sincerity and authority of his views, I do feel that his fears are exaggerated and that his argument gives insufficient weight to the advantages of what the Land and Environment Court, for example, is doing. I believe that our court system has the strength and public confidence to withstand the risk he conjures up. It is of course not a case where any motive of pecuniary or material motive would be imputed to the court officer or judge, only presumably a misplaced attempt to see that justice was done, or the incapacity of busybodies to keep secrets.

Sir Laurence argues from principle, and I am not aware of any empirical evidence to support his views. One would of course not ask for evidence that any corruption of the judicial process had actually taken place. It would be sufficient if there were a real risk that reasonable people might fear that it had happened, or even perhaps that a significant number of less than reasonable people were likely to form such a view. However, the mere fact that some malicious or unreasonable people could be found to advance such a view would not in my view be sufficient to discredit the process. There is no limit to the possible speculations and insinuations of a small minority of obsessed and disappointed litigants in any court system, and this cannot be allowed to prevent the introduction of otherwise desirable measures.

Certainly no evidence of concern amongst litigants was uncovered in the Young Lawyers study of mediation in the Land and Environment Court,

---

50 Street, "The Courts and Mediation - A Warning" (1991) 3 *Judicial Officers Bulletin* No10.

and the Registrars feel that they are able to take steps, and do take steps, sufficient to prevent any misconceptions arising. They do this by what they say in their opening address at the mediation, where the independence, disinterestedness, and confidentiality of the process is stressed. At the end of the mediation all documents used in the mediation are handed back to the parties and nothing appears on the Court records except a note of the fact that a mediation has taken place. Judges have firmly refused to allow any reference in later proceedings to the holding of the mediation.

Pressure to Settle

Another concern expressed about court-based mediation is that litigants may feel that they are being put under pressure to settle, and indeed that official mediators may consciously or unconsciously apply such pressure in the hope of relieving choked lists and reducing delays in the court, or simply improving their own statistics. It is generally agreed that if this were to occur it would undermine the essentially voluntary and consensual character of mediation and prejudice the quality and durability of the outcomes.[51]

This problem must always be of great concern in relation to any court associated mediation. It could be a problem if the mediation is referred to private mediators as well as if it is carried out by court officers. Again all the evidence is that the Land and Environment Court has avoided the fact or is suspicious of coercion. In this it is no doubt assisted by the fact that, unlike some other courts, its lists are up to date and there are no pressures to reduce them.

Need for Specialist Mediators

Another very serious risk about court-sponsored mediation is that the need for special skills and training may be overlooked or given insufficient weight. There is no certainty that the experience and personal qualities which have brought a person to judicial office, or to one of the various offices in the court administration, will be accompanied by the personal qualities needed to make mediation successful. There has also been a

---

51 NSW Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators* (LRC 67, 1991) pp71-6; Naughton, "Mediation and the Land and Environment Court (NSW)" (1992) 9 *EPLJ* 219 at 223-4; Astor & Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney 1992) pp179-80.

certain professional arrogance detectable amongst barristers and judges which might disincline them to accept the need for training in mediation techniques,[52] although, in New South Wales at least, this seems to be disappearing as mediation becomes a better understood process. Again these risks seem to have been avoided in the Land and Environment Court. There are only two officers involved, they have undergone training in mediation, and they seem to be giving satisfaction to those who come before them.

Advantages of Court-Based Mediation

On the other hand, there are practical advantages in a system of mediation closely connected with a court. It means that the court can actually offer the alternative of mediation, instead of sending litigants off to look for it. The court can also ensure that the mediators are experienced in the jurisdiction and informed as to the types of settlements that are possible, and that the service is of acceptable quality and cost. The containment of costs is a very important consideration if mediation is to fulfil its promise, and not follow the lead of legal services in providing a high quality service which few can afford.

I do not propose to offer a definitive pronouncement on the future of court-based mediation generally. It is proper for those who discern risks to emphasise them, and for those who believe they can be overcome to endeavour to work out ways of doing so. My view is that at least in many circumstances the risks can be avoided, and the advantages, particularly as to costs, can be realised. I think the issue will ultimately be resolved on pragmatic grounds on a case by case basis. In all probability we will end up with a mixed system, in which parties have some degree of choice of mediators, limited by their means, but still an important alternative to litigation. It will be part of the continuing tension between Volkswagen and Rolls Royce models for resolving disputes.[53]

Court-based Mediation Elsewhere

The Federal Court and the Administrative Appeals Tribunal have systems of court-based mediation, and the Supreme Court of New South Wales and various other courts are in the process of introducing them. I am not

---

52 Astor & Chinkin, *Dispute Resolution in Australia* pp178-9.

53 Kirby, "Mediation: Current Controversies and Future Directions" 1992) 3 *ADRJ* 139.

aware of any court other than the Land and Environment Court where such mediation is particularly focussed on environmental issues.

In Queensland, the terms of reference of the Fitzgerald Inquiry into Fraser Island and the Great Sandy Region included:

> [T]he establishment of principles, systems and procedures for the orderly development and implementation of policies, and the resolution of issues or disputes concerning areas of Queensland in relation to which particular regulation or control may be needed for environmental, cultural or other reasons.

The report recommended that the Department of Justice investigate the role of alternative dispute resolution in administrative and court structures in Queensland.[54] Apparently the Department is not currently taking any action on this recommendation.

A Queensland academic, who explored the potential for effective use of ADR in the State in relation to environmental disputes, suggested that environmental disputes will normally arise in three main categories.

(1) As a part of a town planning application for consent, rezoning or other application often as a result of the involvement of a third party objector pursuant to the *Local Government (Planning and Environment) Act* 1990 (Qld).

(2) As an objection raised to a decision of an authority to grant a licence; for example, for development of State forests, feedlot approval, dealings with land for the purposes of mining (disputes on these matters are often limited by locus standi requirements).

(3) As a public protest against government or local authority proposals for perceived environmentally-sensitive or significant sites.[55]

Weir concluded that while ADR is not a final solution to all environmental conflict, "its use as an important aspect of our existing court systems will

---

54 Fitzgerald, *Commission of Inquiry into the Conservation, Management and Use of Fraser Island and the Great Sandy Region* (The Commission, Brisbane 1991) p129.

55 Weir, "Alternative Dispute Resolution in Queensland Environment Law" (1991) 2 *ADRJ* 224.

assist in the efficient resolution of such conflicts".[56] While no action is being taken to provide court-based mediation (his first two categories), it will appear below that Queensland is already taking a lead in the third category, which embraces EDs at large.

MEDIATION OF ENVIRONMENTAL DISPUTES AT LARGE

Features of EDs at Large

Despite the impossibility of making universally true statements about environmental disputes at large, some features occur very commonly.

(1) EDs are commonly multi-party disputes, in which many people or groups assert often different or conflicting interests.

(2) The identification of interested parties, while important to a lasting solution, is often difficult. Potentially interested parties may be unaware of the effect on their interests, and their interest may not be obvious to others.

(3) Interested groups are often unorganised, lacking in access to advice and other resources, inexperienced in recognising their common interests and acting together, and unfamiliar with the mediation process.

(4) There is often a great imbalance in resources between parties in terms of finances, access to expertise, and sometimes opportunity to influence public opinion or power to influence government policy.

(5) Government agencies are likely to be involved more frequently than any other bodies.[57]

(6) EDs are often complex, involving numerous issues, with different groups concerned with different issues or ranges of issues.

(7) EDs often involve technical issues requiring expert advice, but, as in other spheres, experts often disagree.

---

56 Weir, "Alternative Dispute Resolution in Queensland Environment Law" (1991) 2 *ADRJ* 224.

57 Condliffe, "Environmental Dispute Management"(1992) 1 *Newsletter of the Centre for Conflict Resolution* at 8.

(8) There is not yet a broad community consensus on how conflicts between development and environmental values should be resolved.

(9) EDs often involve value issues which cannot be converted to a monetary amount, including fundamental philosophical issues such as the rights of other species or the inherent value of environmental features.

All of these attributes would seemingly mitigate against the success of mediation efforts aimed at the resolution of environmental conflicts. Interestingly, this has not been the case.[58]

Speaking generally, experience of handling multi-party disputes by ADR processes is at an embryonic stage in Australia.[59] Nevertheless Adler's conclusion about the United States is supported by the experience so far in Australia, which I discuss below,[60] despite the gloomy prognostication of an eminent legal practitioner in the field.[61] Although the three problems which he emphasised - lack of parity of power between parties, absence of likelihood of compromise, and unmanageability - may prevent the successful mediation of some disputes, there are many which the process can handle.

Special Needs in EDR at Large

Successful EDR at large may often (although of course not always) have special requirements flowing from the characteristics I have identified. I note the following.

Time

Because of the difficulties of identifying all affected or interested parties, securing their organisation and representation, exploring technical issues, and building consensus between disparate groups with a variety of disputes, months or even years may be necessary.

---

58 Adler, "Mediating Public Disputes" (Paper presented at the International Conference on Environmental Law, Sydney, 14-18 June 1989) p9.

59 Dewdney, "Application of Mediation to Multi Party Disputes" in Fisher (ed), *Dispute Resolution in the '90s* (Australian Commercial Disputes Centre, Sydney 1990) p122.

60 See below at pp70-75.

61 Preston, *Environmental Litigation* (Law Book Co, Melbourne 1990) p392.

Human Resources

The burden of work may be such that multiple mediators may be necessary or the mediator may need substantial secretarial or administrative support, or funding to contract support as required.

Cost

The cost of mediation may have to be borne by one or more parties differentially or exclusively. Government or governmental authorities may bear the cost because of the public interest in finding a solution to the problem, or a developer may build the cost into the capital expenditure in getting the project off the ground.

Preparation

It may be necessary to go through a period of team building and training to prepare parties for participation in the mediation.

Openness

The confidentiality which is put forward as an advantage of mediation in other types of dispute may have to be abandoned or severely restricted because of the need to gain the support of the community at large or the members of large groups. This may create tensions where a developer has a commercial interest, for example, in keeping processes secret. There will need to be agreement about the extent to which the media will be informed of what is happening and who will inform them. It is often better to ensure that the media is informed about what is going on than to leave it to seek leaks from the disgruntled, or to engage in speculation.

Strutcture and Flexibility

Both the need for everyone to feel confidence in the process and the problem of keeping all issues in sight may dictate a high degree of structure in the procedure, yet in all mediation there has to be room for flexibility. A minimum procedure involves rules about interruption, abuse and other "unhelpful" conduct, yet people must be able to "let off steam".

Delegation and Representation

Where large numbers of people are affected, there has to be a large measure of delegation to representatives to act as spokespersons and to

negotiate. There must be adequate reporting and consultation mechanisms between the representatives and their constituencies, and agreements reached will probably have to be subject to ratification in many instances.

Enforceability

Due to the great variety of situations and the absence of a link with court proceedings in which a binding order can be made, great care and some ingenuity may need to be exercised to ensure that agreements reached will be carried out.

It is beyond the scope of this article to go into the techniques and procedures that have proved useful, and which are the subject of a rapidly growing literature.

Selection of a Mediator

It is fundamental to successful mediation that the parties have confidence in the mediator, and ideally that they have all joined in choosing them. But in EDR at large, one of the tasks is to identify the interested parties and ensure that they are sufficiently organised to participate effectively. Indeed it may only be at that point that it is possible to make a realistic assessment as to whether it is worth proceeding with an attempted mediation. Connected with these problems is the question of who suggests mediation in the first place.

One party may take the initiative in suggesting mediation to the other parties, with a view to their agreeing on a mediator who will be approached. This course is not always possible: mediation may not occur to the parties, no party may be willing to propose mediation lest it be construed as a sign of weakness, or the relationship between the parties may make such discussions difficult. One possibility is that a mediator may come forward and offer their services, but this may be construed as touting for business. Another is that one or more of the potential parties may approach a mediator and invite them to approach other parties. This may involve the same difficulty and the added problem of the mediator having been initially selected by one party.

Sometimes a government agency which either regards itself as above a fray between other interests, or which wishes to get agreement to its plans, will engage a mediator to contact interested parties. In such circumstances the mediator may have to educate the agency to understand the nature of mediation and to accept that although it (the agency) is paying them, they

(the mediator) are not its tool and that the mediator must have regard to the interests of all parties.[62] The distinction between a genuine mediation and a public relations exercise must be understood and respected.

In these situations professional agencies, whether publicly funded or working on a fee for service basis, may be able to play a facilitating role in bringing the parties together, informing them of available ADR techniques, and perhaps later proposing a list of mediators from whom a selection can be made. Examples of such agencies in Australia are the Community Justice Program (CJP) of the Queensland Attorney-General's Department and the Australian Commercial Disputes Centre (ACDC) which operates nationally and, despite its name, does not confine itself to commercial disputes. LEADR will also suggest mediators, but unlike the other bodies, it is closely tied to the legal profession.

In the United States in 1983 NIDR (the National Institute for Dispute Resolution) decided to sponsor state-level and state-sponsored mediation offices to specifically address public disputes, and start-up grants were given to Massachussetts, New Jersey, Minnesota and Hawaii. Through the visits of Peter Adler, the Hawaiian experience is becoming well-known in Australia,[63] but only Queensland has such a service - the Queensland Community Justice Program in the Attorney-General's Department.

In theory it is desirable that all parties should contribute (ideally equally) to the remuneration of the mediator, so that they will all feel that the mediation is theirs, and will not suspect that the one who is paying the piper is calling the tune. In practice, as I have already noted, this is usually not feasible in disputes at large. But the situation calls for a great deal of care and professionalism on the part of the mediator, and it would help to have well understood conventions. If public dispute mediation grows in Australia, there will be a need for a professional organisation, such as the American based SPIDR (Society of Professionals Engaged in Dispute Resolution). Other overseas experience, such as the guidelines used by the US Environmental Protection Agency for the selection of mediators, may also be drawn on.[64]

---

62 Moore, "Environmental Litigation" in Fisher (ed), *Dispute Resolution in the '90s* (Australian Commercial Disputes Centre, Sydney 1990) p131.

63 Adler, "Mediating Public Disputes" (Paper presented at the International Conference on Environmental Law, Sydney, 14-18 June 1989).

64 Administrative Conference of the US, *Sourcebook: Federal Use of Alternative Means of Dispute Resolution* (Office of the Chairman, Washington 1987) p738.

Qualifications of Mediators

The only consensus about the necessary qualifications of mediators is that they should be trained in the mediation process. The Queensland CJP chooses mediators for aptitude and personal qualifications, not professional expertise in any discipline, and has mediators with many different backgrounds.

When in 1987, ADR started in Australia outside the longstanding specialist areas, the legal profession (apart from a few visionaries like Sir Lawrence Street), tended to be uninterested or even derisive. There was a real question as to whether lawyers would take to ADR; five years later the question was whether they would take it over. Solicitors were quickly converted, and more recently barristers have been trying to make up ground. It would be fair to say that the advantages of lawyers are more apparent to lawyers than to other people. Most mediators like the parties to have had, and to have available, appropriate legal advice, but prefer to deal directly with the parties in the mediation. Increased cost, and increased numbers present are disadvantages, and although there are many brilliant exceptions, there is often a tendency for lawyers, and particularly barristers, to slip into an adversarial approach that is not helpful.

Co-mediation

As a general policy the CJP (which has the most relevant experience in Australia) favours co-mediation, with at least two, and sometimes three or even four, mediators. Co-mediation allows provision for gender balance, and sometimes other balances (ethnic, for example) which may be important in particular cases. It enables the sharing of the front line mediation work, which can be lengthy, tiresome and stressful. It has a potential for quality control, as we are all better at seeing the mistakes of others than our own, and makes it easier for mediators to avoid co-option by influential interests. It is regular practice to have an hour's debriefing between the mediators at the end of each day.

AUSTRALIAN EXPERIENCE

Queensland Community Justice Program

The Community Justice Program (CJP), an initiative of the the Queensland Attorney-General, Dean Wells, opened on 1 July 1990, with a charter to provide a dispute resolution service to the State, starting in the south-east corner. It has a panel of 120 accredited mediators from many walks of

life, ages, and ethnic backgrounds. In its first two years it had about 450 mediation sessions with an 85% success rate. The disputes presented included disputes between neighbours, family members, co-workers, landlords and tenants, resident groups and local authorities. Three innovative programs are a Crime Reparation Program, a Police Complaints Mediation Initiative and a program to promote mediation within Aboriginal communities.[65] It has also been involved in developing a process for the return of Aboriginal remains from overseas.

In the environmental area it has been concerned with disputes in the Conondale Ranges, Fraser Island, the Brisbane Landfill and Latrobe and Given Terraces, Paddington. The Paddington dispute involved local residents, community service agencies, small businesses and the Brisbane City Council. Over a series of meetings, weekly over six months, a mangement plan was developed for an inner city area in Brisbane where zoning was hotly disputed.

The Conondale Ranges dispute was about the future of the area, including an increase in the size of the Conondale National Park. In 1990 a consultative committee was formed, including the timber industry, the conservation movement, the National Parks and Wildlife Service and the Forest Service. In early 1991 the CJP was invited to provide mediation services to the group. Mediation proceeded over the next six months with the result that agreement was reached to triple the size of the Park, add to it a substantial area of State Forest, reserve 3000 hectares of State Forest from timber production, establish a scientific area and a nature refuge in the State forest, and review and research management practices in the Forest.

The Brisbane Landfill will be the largest rubbish dump in the southern hemisphere, and there will be five transfer stations at various places around Brisbane. It was opposed by residents who lost a court case. The CJP has a two year task of mediating between the Council, the developer and the residents about all aspects of the operation.

The Fraser Island mediation is intended to take two years in the development of a management plan. The CJP is mediating between all the various interests, including conservationists, Aborigines, four-wheel drive clubs, and residents to formulate agreed recommendations for management. However final decisions rest with the Minister, and

---

65 O'Donnell, *Mediation Within Aboriginal Communities* (Mimeo, 1992).

participants are becoming increasingly restless about the extent to which their views are taken into account.

During 1993 the CJP has been engaged in a mediation within the Aboriginal settlement of Yarrabah, with a view to reaching agreement as to how the land in the settlement should be owned and managed. The matter has been difficult due to tensions between two groups claiming to be traditional owners, and to the existence of a majority of "historical" residents, who may have lived there several generations after their ancestors were sent there by the Government. The outcome is not yet clear.

ACDC Experience

The Australian Commercial Disputes Centre (ACDC) has been involved in several environmental matters. The first related to a situation in Melbourne where residents objected to the action of a Council in approving a change of route for trucks of a trucking company passing through a residential area. The episode is now regarded as a learning experience for ACDC, the lessons including the lack of wisdom in tendering a fixed amount for an unpredictable amount of work and expense, and the desirability of having the parties choose the mediator as part of committing themselves to the process.

The Brisbane office of ACDC has concluded successful interventions in two very wide ranging disputes. The first was a case of the NIMBY (not in my back yard) or LULU (locally unwanted land use) situation, which is a classic type of case in the United States literature on mediation. The State Government wished to establish a toxic waste dump and local residents objected. David Paratz, of ACDC's Brisbane office, was involved in an on-going way in facilitating communication between the Government agency and the residents concerned. The exercise has been described as a mediation, but this has been questioned by other observers.

The second intervention would appear to have been a clear case of mediation. It dealt with a dispute affecting some 130 houses built in a canal development, which experienced subsidence problems some years later when the area was sewered. One resident's case had been taken to court and settled, but not before total costs had been incurred in the vicinity of $800,000. ACDC was asked to mediate in the remaining matters. The parties included a residents' action group, the State government, the local council, and the insurers for the developer and the

council. The mediator succeeded in getting agreement that the parties other than the residents would contribute to a capital fund, and in establishing a basis for the distribution of the fund amongst affected residents. Although engineers had to be employed to assess each house for distribution purposes, the total costs of the mediation exercise and its implementation in respect of all the remaining houses (which were paid out of the fund) is expected to be about half the costs incurred in litigating the claim for the one house.

These Queensland experiences show that United States experience in mediating environmental issues affecting substantial numbers of people can be repeated in Australia, and that there are organisations willing to undertake the task.

Aboriginal Sacred Sites

The *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) empowers the Minister to make orders for the protection of Aboriginal sacred or significant areas or objects, on application by an Aboriginal individual or group. The Minister has power to make emergency declarations up to a total of 60 days, but otherwise must appoint a person to call for submissions and write a report, and must consider the report, before making an order.[66]

The Minister also has power under s13(3), after receiving an application, to request such persons as they consider appropriate to consult with them, or a person nominated by them, with a view to resolving, to the satisfaction of the applicants and the Minister, any matter to which the application relates. This enables the Minster to appoint a mediator to endeavour to resolve the dispute.

A most successful mediation between Ballina Shire Coucil and the Jali Aboriginal Land Council was carried out by two joint mediators, one Aboriginal, appointed by the Commonwealth Minister for Aboriginal Affairs. The Land Council had sought an injunction in the NSW Land and Environment Court relating to the building of a bridge and associated roadworks which they claimed would damage important Aboriginal sites. The National Parks and Wildlife Service also took part in the mediation, which commenced in July 1991. By agreement various fact-finding exercises were carried out and a series of meetings were held.

---

66 Section 10.

On 28 January 1992 the Shire Council and the Land Council issued a joint media release saying that they had resolved their differences and entered into a number of agreements concerning the future management of Aboriginal sites in the area of the bridge through a joint management committee, and also affecting future relations between the parties.

The release was glowing in its praise of the mediation process, which had "succeeded in opening lines of communication, and fostered respect and understanding of each party's commitments and obligations". "Areas of significance to all Australians, particularly Aborigines, will be preserved; legal costs are avoided; and Ballina gets its second bridge." This was only possible because of "the tremendous efforts" of the mediators. "Their patience, skill and impartiality was instrumental in creating the atmosphere in which the mediation process could succeed."

In April 1993 an application was made by the Barngarla people for the protection of sites in the area of BHP's Iron Princess mine at Iron Knob, a source of supply of iron ore to the Whyalla steelworks. I was asked by the Minister to prepare a report under s10 of the Act, and I suggested that I also be asked to mediate under s13. The Minister agreed and the matter is proceeding at the time of writing.

The Salamanca Agreement

The Salamanca Agreement was not a case of mediation, but of unassisted negotiation, and it was unsuccessful. However it is of interest as an ambitious attempt at "policy dialog" in the Australian context. Prior to the 1989 Tasmanian State election informal discussions had been held between some members of the Farmers and Graziers Association and conservationists to find some way to resolve the bitter disputes over forest issues that had dominated Tasmanian politics for a decade.

After the election, and with the support of the Labor/Green Accord, the Salamanca Agreement was signed on 31 August 1989 by the Forest Industries Association of Tasmania, the Trades and Labor Council, the Farmers and Graziers Association, the Forestry Commission, the Government, the Wilderness Society and the Australian Conservation Foundation (the latter two later together forming the Combined Environment Groups (CEG). The parties agreed to work together for 12 months to develop a long term strategy for forest management which would guarantee security of resource supply for the industry, security of employment and security and protection of conservation values.

There were intensive negotiations and public consultations over the 12 month period, but in the end the exercise was not successful. A document titled "Secure Futures for Forests and People" was signed on 14 September 1990 by all parties except the CEG, whose position was stated in the document. On 1 October 1990 the Cabinet endorsed in principle recommendations in the document, and on 2 October 1990 the Labor/Green Accord ceased.

Clearly this was a very ambitious endeavour, given both the history of forestry issues in Tasmania and the peculiar political situation then existing, and does not warrant any general conclusion about the impracticality of negotiating agreed policies.

Privatisation

One issue which has become politically very sensitive in New South Wales is the government policy of privatising what were public hospital services in certain areas. There have been objections both in principle and in terms of the effect in particular places. In one area the regional health authority attempted to have the issue mediated. A particular mediator was appointed on the recommendation of solicitors, without the parties being given a chance to choose their mediator. In the event the mediation was unsuccessful.

Jervis Bay

A number of environmental issues relating to the Jervis Bay area have been mediated with in the course of developing planning policies for the area.[67]

CONCLUSION

Some see the handling of environmental issues as having moved from a power basis (the power of the property owner, entrepreneur or government to impose its will) to a rights basis (determined by courts on the basis of legal (largely statutory) rights), and on to an interests basis (reflected in a transition to decision making based on full consultation and ideally by mediation).[68] While no neat progression can be detected in Australia, the proposition does point to a possible general direction of change.

---

67 No doubt there are other examples which have not come to my notice.

68 Moore, "Environmental Litigation" in Fisher (ed), *Dispute Resolution in the '90s* p131.

Everyone who has considered the potential role of mediation in environmental disputes in Australia has come to a broadly similar conclusion, albeit with varying degrees of enthusiasm. It is not a panacea, but it does have a useful role to play.

Fowler puts the position well:

> There is a strong case for the use of EDR techniques such as environmental mediation alongside traditional court and tribunal processes in Australia. In particular, the extensive resort to extra-legal techniques for environmental dispute resolution could be significantly decreased by the use of such techniques. But the adoption of EDR techniques will require significant acts of faith, first on the part of environmentalists who fear that such techniques entail inevitable and unacceptable compromises and fail to address fundamental environmental reform needs; and secondly, by governments who are extremely wary of handing over any form of responsibility for what are perceived to be a wide range of policy issues to any forum other than Cabinet. Perhaps the parties who might stand to gain most from such techniques might be developers, who frequently find themselves caught between these two viewpoints.[69]

Factors which may slow the growth of environmental mediation in Australia as compared with the United States include the greater tradition of untrammelled executive-decision making in Australia, where courts have been less interventionist than in the United States; the investment of governments in inquiry mechanisms such as RAC; and the feeling in two major conservation organisations that they burnt their fingers in the experiment relating to Tasmanian forests. On the other hand there have been some positive experiences of mediation, and some disenchantment with the results of inquiries into which great effort and resources have been put (for example, the Helsham inquiry into possible World Heritage areas in Tasmania in the late 1980s). Even in inquiries where the outcome has been reasonably satisfactory to certain parties, the process has sometimes been strongly criticised (for example, conservation interests in relation to the Fitzgerald inquiry into Fraser Island).

---

69 Fowler, "Environmental Dispute Resolution Techniques - What Role in Australia" (1992) 9 *EPLJ* 122 at 128.

The future of mediation will only be prejudiced by asking it to deal with major issues such as the future of native forests, where there is a chasm between conflicting understandings of the world. Its future will be more assured if it starts with more modest issues, where the possibilities of compromise can be seen to exist, and gradually extends its range as understanding of and confidence in its processes grows. Beware of the mediator who tells you that anything can be mediated and that they have a 100% success rate.