Adopting the Negotiated Rulemaking Act: A Brighter Future for Environmental Law and Policy in Australia

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Introduction

The adoption of a Negotiated Rulemaking Act is crucial to the successful development of environmental legislation because it mandates that government agencies allow for public participation in negotiations of the proposed legislation. The text of the law created is therefore representative of various interest groups' input and the outcome of a negotiation process intended to craft the most universally acceptable rule.

Passed in the United States in 1990 and reauthorised in 1996, the Negotiated Rulemaking Act is intended for use in situations where a negotiation enhances the standard rulemaking process; however, it may not be appropriate in all situations. The process can be adapted for use in making and amending environmental laws and policies in Australia and New Zealand.

The Environmental Law Roundtable of Australia and New Zealand (ELRANZ) released a Negotiated Rulemaking Project Profile in December 2006, with the aim of spurring the governments of Australia and New Zealand to adopt negotiated rulemaking as an alternative to the standard legislation, delegated legislation and policy making processes. During the NELA conference in Canberra on 15 July 2005, Deborah Dalton facilitated a dispute resolution workshop focusing on negotiated rulemaking. Ms Dalton is an International Expert in negotiated rulemaking, Environmental Conflict and Public Participation. The discussion focused on the use of negotiated rulemaking by the United States Environmental Protection Agency (US EPA).

The US EPA has had great success with negotiated rulemaking, largely because it facilitates discussion between the agency creating the law and those parties who will be affected by the legislation ("stakeholders" in the negotiation). Although the sponsoring agency (the EPA) guides the process, the stakeholders guide the discussions by adding input.

In Australia variations on negotiated rulemaking have been used thus far, although the use of a third party facilitator, an important component in the process, has not yet been fully employed. For example, wide swaths of the public were interviewed before a government strategy was developed for Queensland's ClimateSmart 2050, released in June 2007. Another paper will explore the methods used by the States and Territories and explain why negotiated rulemaking is an improvement on them.

Drawing from Ms Dalton's work and the ELRANZ Project Profile, this article explains first, the process of negotiated rulemaking, second, why it is an appropriate means of dealing with environmental issues, and third, the importance of mandating public participation in environmental law and policy.

The ELRANZ Project seeks to have a Negotiated Rulemaking Act enacted by the national Parliaments of Australia and New Zealand and in the eight State and Territory Parliaments in Australia. ELRANZ will use consensus building and other collaborative governance techniques to gather support for the Negotiated Rulemaking Act.

To become a stakeholder in ELRANZ or to obtain a copy of the Negotiated Rulemaking Project Profile, e-mail the ELRANZ Convenor, John Haydon, at johnhaydon@ecodirections.com.

The Process

Most importantly, negotiated rulemaking allows for an exchange of views between the public and the government agency prior to the agency's publication of any proposed rule[3] or, in the Australian and New Zealand context, any proposed environmental law or policy. There are numerous

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3 Dalton, Deborah S and David M Pritzker. 1995. Negotiated Rulemaking Sourcebook, 1.

models for public participation in the rulemaking process.[4] Generally, negotiated rulemaking uses in-person negotiations among stakeholders (i.e. the affected groups) and between those stakeholders and the relevant government agency, as monitored by a neutral facilitator, to create draft legislation that will be more acceptable to the affected groups (taking into account the wide range of interests represented in the affected groups). There are two major phases in negotiated rulemaking: (1) convening the negotiation committee and (2) conducting the negotiation.[5]

(1) Convening the Negotiation Committee

Always, it is crucial to begin with a feasibility study of the likelihood of a successful negotiation. Based on the US experience, in order to determine if negotiated rulemaking is in the public interest, the head of the government agency must consider whether:

(a) there is a need for the rule;
(b) there are a limited number of identifiable interests that will be significantly affected by the rule;
(c) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can
    i. adequately represent the interests identified under paragraph (b); and
    ii. are willing to negotiate in good faith to reach a consensus on the proposed rule;
(d) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
(e) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
(f) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
(g) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.[6]

The US terminology is easily adapted to the Australian and New Zealand legislative, delegated legislative and policy contexts.

If the likelihood for success is high based on these seven factors, the negotiation committee will be responsible for outlining the negotiation process, and other means of involving the public. In conducting a convening study or a conflict assessment report, all affected external interest groups and issues must be identified. An agency may wish to use a convenor to help identify the issues and affected persons.[7]

During the convening study, a facilitator and committee members must be selected. The final committee should be comprised of 15 to 30 members and include representatives of the major sectors of interest groups rather than specific organisations. Once this convening study has been completed, it must be published in a public report along with public notice of the membership of the committee and its goals. Note that the goals will represent each interest rather than each organisation, and that additional members may be added following public comment. Persons who feel that their interests have not been adequately represented may apply for, or nominate another person for, membership in the negotiated rulemaking committee.[8] Finally, there should be a period of at least 30 days for public comments and applications.[9]

Ideally, the final negotiated rulemaking committee should be no larger than 25 persons, including at least one representative of the agency, unless the agency head determines that more are necessary.[10]

4 Haydon, John. 2006. ELRANZ Negotiated Rulemaking Project Profile.
5 Dalton, Deborah S. 1993. "The Negotiated Rulemaking Process: A Cure for Malaise." Geo LJ: 71 1, 28-29.
6 These seven factors are drawn from The Negotiated Rulemaking Act of 1996. Pub. Law No. 104-320. Title 5, U.S. Code, Subchapter III, sec. 563(a). See also, Haydon, 21-22.
7 The Negotiated Rulemaking Act of 1996. Pub. Law No. 104-320. Title 5, U.S. Code, Subchapter III, sec. 563(b). See also Haydon, 22.
8 The Negotiated Rulemaking Act of 1996. Pub. Law No. 104-320. Title 5, U.S. Code, Subchapter III, sec. 564(b). See also Haydon, 23.
9 The Negotiated Rulemaking Act of 1996. Pub. Law No. 104-320. Title 5, U.S. Code, Subchapter III, sec. 564(c). See also Haydon, 23.
10 The Negotiated Rulemaking Act of 1996. Pub. Law No. 104-320. Title 5, U.S. Code, Subchapter III, sec. 565(b). See also Haydon, 23.

(2) Conducting the Negotiation[11]

Negotiation sessions must be announced in advance and be open to public observation. At the completion of each negotiation session, summaries must be printed in the public record and sent to any interested persons. There are typically six to ten negotiation sessions, spaced every three to six weeks in order to allow representatives to communicate with distant decision-makers, gather additional data and information, and test options and alternatives.

In order for the committee to decide which data to use as a basis of its deliberations, the first few sessions are usually spent going through existing data. If the existing data is insufficient, the committee may wish to make a joint fact-finding field trip to visit a typical site, or it may sponsor a scientific or technical workshop to hear from academic or other experts in relevant fields.

Later sessions will focus on generating, evaluating, and narrowing options, as well as agreeing upon the final form of the rule. Work groups and subcommittees may form during the course of these sessions and hold private meetings, and interest sectors may likewise hold private meetings.

The goal, at the end of all the negotiation sessions, is to write the actual text of the environmental law or policy. The key to successful negotiated rulemaking (and, indeed, all types of Assisted Dispute Resolution) is the creation of value by realising shared interests and creating new ones, establishing relationships, coordinating management responsibilities and coping with differences in opinion.[12]

The negotiated rulemaking committee will be terminated once the final law or policy is officially announced unless alternative arrangements have been made in the committee charter or by the agency, in consultation with the committee.[13]

Appropriateness for dealing with environmental issues

Based on the experience of the US EPA, the use of negotiated rulemaking will reduce the number of environmental disputes. It is first necessary, however, that the public have easy access to State of the Environment reporting and other environmental data. Meaningful public participation in negotiated rulemaking is otherwise more difficult.

(1) Benefits

The benefits of using negotiated rulemaking, for environmental issues and otherwise, are manifold. The typical rulemaking process is one of debate. Lawmakers draft legislation privately, release it for public comment, and then incorporate the comments privately.[14] The process shields the legislation's development from public view, thereby inviting public mistrust. Debate ensues, and the intent of the legislation can be overwhelmed by negative feedback. Contrary to this traditional Australian model, negotiated rulemaking focuses on finding common ground, crafting constructive solutions, and exchanging opinions. Although there may be no realistic means of eliminating conflict entirely, the negotiated rulemaking model transforms law and policy making from process of conflict to one of exchange, and the rules produced thereby will be more acceptable to a broader swath of the affected population. It is a process of dialogue, rather than debate.

In the United States, the benefits of negotiated rulemaking have included a long-term reduction in monetary and temporal costs, and less effort to enforce and develop the rules. Rules are also likely to be implemented earlier, have a higher rate of compliance, and parties outside the agency will be more inclined to cooperate should similar issues arise in the future. Additionally, businesses are made aware of how they will be affected by the legislation, and so have time to prepare while the negotiations are taking place and further public comment is taken.[15]

11 Dalton, 355-357.

12 Moore, Susan A and Robert G Lee. 1998. "Creating Value: A Hidden Benefit of Environmental Dispute Resolution in Australia and the United States." 9 ADRJ 11.

13 The Negotiated Rulemaking Act of 1996. Pub. Law No. 104-320. Title 5, U.S. Code, Subchapter III, sec. 567. See also Haydon, 25.

14 A good example of this notice-and-comment proceeding is found in the October 2004 Draft South East Queensland Regional Plan. The draft plan was released in October 2004 and allowed members of the public to give feedback through 28 February 2005. The comments were then taken into account as amendments to the draft, when the final plan was released in June 2005.

15 Dalton and Pritzker, 3.

(2) Drawbacks

As seen in the US experience, there are some drawbacks to the process. For example, negotiated rulemaking can be resource-intensive for the short-term, both for the guiding agency and the affected stakeholders. The process will include the costs of a convenor and facilitator, and require that senior managers be appointed at least on a short-term basis, thus increasing the administrative burdens. Affected public interest groups will also need to supply more resources and time in discussions than they would typically spend in pre-proposal contacts with the guiding agency.

Despite these problems, negotiated rulemaking still is a feasible method of drafting environmental legislation and policy. Enduring the difficulties would likely prove worthwhile because, by creating value earlier in the rulemaking process, negotiated rulemaking facilitates creation of value later in environmental disputes.[16] With a single agency guiding the process, it should be relatively simple to transfer resources that would be spent after the publication of draft legislation on assuaging public doubts and managing disgruntled interest groups to the pre-proposal process of negotiation. If this could be done, the initial supposition of increased costs may not be valid.

Additionally, the fact that most environmental disputes are local issues, the importance of which is only ever grasped upon seeing them on a grander, widespread scale, makes negotiated rulemaking a particularly appropriate method. It is, after all, a process of decentralising bureaucratic power.[17]

(3) Types of Negotiated Rulemaking in Action

Negotiated rulemaking is finding roots in Australia, as variations of it are used in several jurisdictions to create laws and policies. A form of negotiated rulemaking was a success in the February 1996 Queensland Department of Local Government and Planning's Planning Environment and Development Assessment Workshop when over 80 percent of twenty-one identified issues were resolved, with all stakeholders in agreement. The stakeholders in the negotiation represented eleven different interest groups.[18]

The following year in Caloundra, Queensland, the Caloundra City Council and 65 community members convened for preliminary discussions, which were then reviewed by staff and councillors. With 29 Councillors and staff of the city council including the Mayor present, the community members felt that their opinions were being seriously considered. From this meeting emerged a comprehensive set of issues for the council to review while developing the city plan.[19]

Typically, Australian jurisdictions engage in notice-and-comment proceedings that limitedly invite public participation.[20] For example, the *Subordinate Legislation Act (1989)* of New South Wales is an excellent example of this process. The Minister must publish notice in multiple sources in order to alert the public of the purpose of the proposed law or policy, identify where a copy of this proposal may be found, and allow for comments for at least 21 days after publication.[21]

Although notice-and-comment proceedings may become more efficient and invite comments from a great proportion of the public as legislators publish draft laws and policies on the Internet, thereby expanding public access.[22] The problem of leaving particular groups—particularly those with less economic power—out of the discussion still looms, however, and negotiated rulemaking may be the best means of remedying the problem.

Recently, the Queensland government compiled public comments before releasing a draft of its ClimateSmart 2050 action plan. Using community comments to craft the plan, the Department

16 Moore and Lee, 19

17 Lyster, Rosemary 1998 "Should We Mediate Environmental Conflict A Justification for Negotiated Rulemaking" Sydney Law Review 20 579-598, 583 See also Haydon, 9

18 Haydon, 13

19 Haydon, 16

20 Lyster, Rosemary "Should We Mediate Environmental Conflict A Justification for Negotiated Rulemaking" 20 Sydney Law Review 579 (1998), at 586 http //austlii edu au/au/journals/SydLRev/1998/25 html

21 Id at 586

22 Lyster, Rosemary "Rethinking Participation in Administrative Decision-Making" *Sunrise or Sunset Administrative Law in the New Millennium* Ed Chris Finn (2000), at 298 http //law anu edu au/aial/Publications/webdocuments/Procedures/SunriseorSunset pdf.

of the Premier and the Cabinet first released a discussion paper in November 2005, then took public comment and released an action plan based on an analysis of public comment and further consultation with stakeholders and government agencies. The action plan was released on 6 June 2007, and allowed for additional public feedback until 4 July 2007.[23]

Queensland Premier, Peter Beattie, noted in his foreword to ClimateSmart 2050 that the state's goals for 60 percent emissions reductions by 2050 will necessarily be met in part by "supporting Queenslanders to lower their emissions and conserve water at home, at work and in their local communities."[24] By involving the public in at least part of the process, the Queensland government has endeavoured to identify all potential issues, on a local level, related to climate change. This, in turn, will make the public more likely to respond favourably to the government's call for reduced emissions and conservation of water. If negotiated rulemaking were to be used, an independent third-party facilitator would have been involved, which would have helped create dialogue among stakeholders and within stakeholder groups to resolve or better understand conflict. The 2050 action plan may require further development, at which time negotiated rulemaking and collaborative governance techniques should be considered as part of a conflict assessment report or negotiated rulemaking convening study.

The next important step for Australia and New Zealand is to move beyond these versions of negotiated rulemaking and adopt a comprehensive law similar to the US Negotiated Rulemaking Act.[25] Such a law would allow for more thorough and involved dialogue between the government agency and the affected public, thereby transforming many of the debates that ensue after release of draft laws and policies into meaningful dialogues. The enactment of legislation that mandates the use of negotiated rulemaking will lead to improved public participation options.

Importance and benefits of mandating public participation

Because environmental problems and their effects are localized, so too will the solutions be localized. Without true and meaningful public participation and dialogue among affected groups, environmental law and policy will be of less effect. Instead, they will flounder, as members of the public fail to see the relevance of the policy to their own lives, fail to include elements of the policy on a daily bases, and undermine the entirety of the solution. By allowing members of the public, as stakeholders, to "own" the law or policy—that is, to participate in its creation and feel as though they have contributed to the outcome—agencies are able to reach real results and will likely save money implementing the policies on a more localized basis.

Moreover, breaking the task into smaller elements is part of the natural and positive progression of political ideas. Particularly as the powers of the executive, expand, involving the public in rulemaking is crucial.[26] As Ms Lyster writes, "Although responsibility for the final rule rests with the administrative agency, this must be reconciled with the need to accommodate the consensus reached during negotiations."[27]

As noted above, negotiated rulemaking has numerous benefits, most of which are derived from public participation in the formulation of the laws and policies. By allowing affected groups input into draft law and policy, the rules will be more sensitive to the needs and limitations of the groups as well as the government. Most importantly, negotiated rulemaking opens the floor for dialogue, exchanging ideas and finding common ground. Previous methods, such as comment-and-publish legislation, have instead, encouraged debate, which focuses on the differences between groups rather than commonalities.

23 Moffat, Nicole. Lecture at the Queensland Environmental Law Association Seminar, "Queensland Climate Change Strategies—Implications on the Ground." 25 June 2007. Additional information obtained from Ms. Moffat via e-mail 6 July 2007.

24 http://www.thepremier.qld.gov.au/library/office/climate/ClimateSmart_foreword.doc.

25 "Negotiated rulemaking is a sophisticated participatory mechanism which is more advantageous to interested and affected parties than its precursors, like notice and comment procedures." Lyster. "Should We Mediate Environmental Conflict: A Justification for Negotiated Rulemaking." 20 Sydney Law Review 579 (1998), at 589.

26 The Negotiated Rulemaking Act of 1996. Pub. Law No. 104-320. Title 5, U.S. Code, Subchapter III, sec. 561 (from sec. 2 of Pub. Law No. 101-648).

27 Lyster. "Should We Mediate Environmental Conflict: A Justification for Negotiated Rulemaking." 20 Sydney Law Review 579 (1998), at 587.

Mandating some method of public participation in rulemaking by adopting a Negotiated Rulemaking Act ensures that affected groups have a chance to negotiate with governments and their agencies before environmental legislation goes into effect. This, in turn, will ensure that legislation is more likely to garner public support and less likely to be undermined by disgruntled parties affected by the law. Allowing the public to "own" the law or policy will make them more likely to abide by the eventual rule and to feel as though it is relevant to their lives. Participation in the dialogue of negotiated rulemaking creates a moral duty for interest groups to avoid conflict with the government agency once the law or policy is published.