THE 5TH CONFERENCE OF THE UNITED STATES INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION

TUCSON, ARIZONA

20-22 MAY 2008

IS ECR REALLY "FASTER, BETTER, AND CHEAPER"?

AN AUSTRALIAN AND NEW ZEALAND PRESENTATION
BY

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You know the old saying "Good, quick or cheap, pick two"?

This workshop will examine the aphorism from three different perspectives:

- Court-based ECR as an "additional" service in the Planning and Environment Court in Queensland; and
- Court-based ECR as an integral part of the dispute resolution process through the Environment Court of New Zealand model; and
- Why we need to continue to have Private ECR before and during Litigation?; and

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The perspective from the provider of a Court-based "additional" service

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Since May 2007, the Planning & Environment Court in Queensland has provided a "free" ECR service to parties irrespective of the type of dispute or the financial capacity of the parties involved. "Free" in this sense, means that the services of the mediator are provided free of charge to the parties. Of course, there will be some cost to the parties in preparing for, and attending, mediation but there is no doubt that, at least at this threshold level, the service qualifies as "cheap".

The questions, then, are whether, and to what extent, the service is also "good" and "quick" and whether, overall, the process can still be considered "cheap".

Case Studies

Case Study 1: Biomass power station

Facts

The developer sought approval for a biomass-fuelled power station in a semi-rural residential area. The Local Government has a number of existing intensive meat production farms in the area and the proposal sought to use the litter from nearby farms as the primary source of fuel for the power station.

The application was lodged in June 2004 and approved by Council in March 2007. A local resident appealed that approval. The appeal was filed in May 2007 and five submitters elected to join as co-respondents. Some of those co-respondents acted as agent for a number of other submitters. Most of the co-respondents were local residents.

The co-respondents were not represented by legal counsel but had considerable expertise in engineering and community interest litigation.

The residents were concerned about the potential environmental effects of the power station – specifically dust, odour and reduction in water quality – and the intrusion of what they perceived to be an industrial use into a rural area.

A threshold issue in the appeal was whether, in fact, the power station was a use ancillary to a rural activity (which was generally appropriate for the area) or an industrial use (which was generally inappropriate for the area).

The dispute was referred to ECR by order of 1 June 2007; ECR was to take place by 3 August 2007. That Order also set out steps for the parties to complete pending mediation. The last of those steps was to be completed by 27 July 2007. The order contemplated that, if mediation was not successful, the appeal would be set down for hearing for 5 days in November 2007. To ensure the progress of the appeal, the matter was listed for further review on 3 October 2007.

Process

The first mediation was held on 30 July 2007. As part of the opening statements, the developer presented the results of negotiations in non-mediated meetings and sought commitment from all parties that these negotiated outcomes would be part of any agreement going forward. This was an important first step because:

- the parties had not yet committed their agreement to these changes to writing;
- further negotiations depended upon acceptance of these changes;
- it demonstrated to the parties that they were capable of agreement and that the mediation process was not simply a process to be "ticked off" before moving on to a Court hearing.

At that meeting, experts in odour, dust and noise were present. The self-represented co-respondents had the opportunity to test the experts' methodology, data and interpretation of the data. To some extent, this informal cross examination of expert witnesses mollified the co-respondents.

As a result of the informal cross examination of the experts, the parties identified some further testing and/or modelling to be undertaken. The parties also agreed that, if the appellants were to support the proposed development, a site based management plan ("SBMP") should be part of the conditions of approval. The mediation was adjourned to enable that work to be carried out.

A second mediation was held on 6 September 2007. At that mediation, the further modelling/testing had been completed and a draft SBMP had been presented. The appellants were satisfied with the methodology of the modelling/testing but were still seeking concessions about the maximum allowable levels of particulates and what constituted acceptable air and water quality.

The appellants suggested additional requirements for the SBMP; an example was the inclusion of a corrosion test, the results of which were to be monitored over the first few years of the plant's operation.

While there was broad agreement about the acceptable operating criteria and the matters covered by the SBMP, it was necessary to adjourn the mediation for a further period. The developer wanted to ensure that the more onerous criteria suggested by the residents were achievable and still enabled the plant to operate economically; the residents wanted to consult with those parties for whom they acted as agent to ensure that there was general consensus.

On 3 October 2007, the parties reported to the Court that they were making progress through the mediation process. The Court ordered a further mediation take place by 17 October 2007. In fact, it took place on 12 October 2007. All outstanding matters of detail were resolved.

A final, consent, Order was made on 22 November 2007. The appellants did not pursue a determination of the threshold question of whether or not the use was generally appropriate for the area.

Faster?

The Order of 1 June 2007 contemplated a hearing in November 2007.

- It is not unusual that parties are not ready for hearing in their nominated month.
- It is not unusual that there are insufficient hearing days for the number of matters in the pool, in which case, the matters is referred to the next month's sittings.
- Even if the appeal had been heard in November, it is unlikely that a decision would have been published that month. In fact, the decision in the only November appeal that did go to hearing was handed down on 7 December 2007. That appeal required considerably less hearing time; it is conceivable that a decision from a 5-day hearing might not have been delivered until early 2008.

There is no doubt that ECR achieved a result faster than a Court hearing.

Cheaper?

The process was certainly cheaper for the Court; instead of five sitting days for a Judge, involving additional court staff, ECR required only the resources of the registrar for three sessions.

The residents were able to participate in discussions with the experts without having to engage their own expert. This represented a considerable cost saving to those parties. As the residents were not legally represented, there was a limited cost saving to them in avoiding a hearing.

The developer and the Council did not have the expense of preparing for, and appearing at, a 5-day hearing.

Better?

Yes - Mediation was "better" in that the residents were fully informed by the process and fully involved in the negotiation of the conditions. The SBMP included a residents' liaison committee, enabling access to information that may not otherwise have been available and allowing the residents to participate in ongoing monitoring of the operation of the plant.

No - The mediation may not have been "better" in the sense that it did not resolve the threshold question and therefore did not provide a precedent for other proposals of that nature. It may be argued that the negotiated acceptance of the proposal created a negative precedent in that other developers, dealing with other Councils, will expect an approval without appreciating the constraints on the developer that were negotiated through mediation.

Case Study 2: Intensive meat farm in a rural area

Facts

In December 2005, the developer lodged an application for an intensive meat farm in a rural area of a rural shire. The application required consideration by:

- the shire Council officers to determine compliance with the planning scheme;
- the government department responsible for main roads in the State because the property fronted a state-controlled road,
- the Environmental Protection Agency because part of the site was listed on the environment management register; and
- the state government department of natural resources because of remnant vegetation on the site.

This type of farm is common throughout the shire although some of the older establishments are attracting complaints of offensive odour, particularly in areas where residential development was encroaching on the vicinity of the

farm. The proposed farm was remote from suburban residential development but close to national park.

The Council officers recommended approval of the development. The recommendation was rejected by Council and, in March 2007, the application was refused.

The appeal was filed in April 2007. Seven local residents elected to join as co-respondents.

Process and outcome

In its first application for directions in April 2007, the developer flagged a preference for the early use of ECR in all aspects of the appeal.

In June 2007, the Court ordered that "if any of the experts are of the view that the Registrar P&E's services would be beneficial to them, the experts can contact the Registrar P&E who will in turn chair a series of expert meetings …"

The developer's town planner did request the registrar's assistance. A preliminary meeting of the town planners, chaired by the registrar, took place in early July 2007.

This was the first occasion on which any experts in this jurisdiction were subject to direction and/or "interference" from a person outside their profession. There was resistance to the registrar's presence and it was very clearly articulated by some planners that they did not see what benefit could be gained by having the meeting chaired by the registrar. In fact, the presence of the registrar:

- enabled a sensible timetable for further steps to be agreed between the planners;

- redressed an imbalance of power. The "non-developer" planners were senior members of their profession, comfortable in negotiating and bantering with each other. Because they were, essentially, on the same side, their ease with each other gave the impression that they were "ganging up" on the developer's planner. There was an also a slight undercurrent of bullying.

- acted as a reminder that the experts had a duty to the Court to be independent. All experts at the preliminary meeting exhibited a tendency to identify with their client's position in a way that breached their duty to the Court.

The anecdotal feedback from that first meeting was that the developer's planner was happy with the assistance and that the other planners chafed against the intervention. Those reactions tend to suggest that the intervention of the registrar was useful.

The progress of the appeal then devolved into a series of expert meetings in seven different disciplines. At their preliminary meeting, the planners agreed that their final joint report would depend upon the results of all other expert meetings.

In December 2007, the Court ordered a timetable for the completion of the joint expert reports. Once again, the Order included a provision by which the experts could seek the assistance of the registrar.

By January 2008, the experts' meetings were complete, save for the planners who had met without the registrar on a couple of occasions but had not completed their joint report.

The registrar chaired a further meeting of the planners in late January 2008. This time, the process was supported by all planners involved as they had attended mediation/expert meetings with the registrar in relation to other appeals and the benefits of a structured meeting had started to become apparent. At the late January meeting, a draft joint report was projected onto a screen and the experts worked on its wording together. At the conclusion of the meeting, the experts and registrar signed a concluded joint report.

Shortly after the planners delivered their joint report, all but one of the parties agreed that the development should be approved, and that the dispute was simply a question of appropriate conditions. The remaining party was self-represented and had not engaged his own experts. Not surprisingly, he was also the next door neighbour.

On St Valentine's Day, the registrar chaired a meeting between the developer, the Council and the neighbour. As with the previous case study, the developer's experts were available to answer questions and provide clarification.

We worked through the neighbour's list of concerns. In some cases, all that was required was an explanation, and clarification, of the relevant condition and the way the condition would be enforced by Council. In other cases, the draft condition was amended to meet the neighbour's concern. The neighbour volunteered solutions based upon his knowledge of the area acquired over many years which served to improve the overall operation of the development. At the conclusion of the meeting, the neighbour was content to leave the detail of the conditions to negotiation by Council. The developer and neighbour had moved some way towards a friendly, but respectful, working relationship.

In late February the parties met before the registrar to finalise the conditions of approval. Three groups of experts had not been able to finalise their agreement as to conditions because some of them had been precluded from meeting with their peers.

The conditions were negotiated over 1½ gruelling days. The phrase “pressure cooker” had been applied to the conduct of the appeal generally; it was certainly true of the final negotiation of the conditions. The registrar had an electronic copy of the draft conditions and the SBMP. Changes were made to those documents as they occurred and were emailed to interested parties who were not present.

At the conclusion of the second round of negotiations, the parties had a consent Order to present to Court on 29 February 2008.

Faster?

The first Order of the Court, in June 2007, contemplated a hearing in September 2007. By August 2007, it was clear that this timeframe would not be met because of the amount of work required of the parties. In August, the hearing of the appeal was tentatively set down for 10 days in February 2008.

By the time the joint reports were completed, the scope of the hearing had reduced to 2 days and the appeal was set down for hearing on 28 and 29 February 2008.

If the appeal had been a 10 day hearing, it is unlikely that the Court would have handed down a decision in less than 3 months. If the decision had been favourable to the developer, the parties still had to negotiate conditions. It is possible that final approval would not have been forthcoming until towards the end of 2008.

Cheaper?

- 10 days of Court time was saved.

- Representatives for one of the parties estimate the parties’ collective saving of $750,000.00 in legal and expert fees.

- The developer is in a position to commence construction at least 10 months earlier than if it had waited for a Court decision. Based on government forecasts, the developer has avoided an escalation in building costs over that period of about 2% per month.

Better?

There is no doubt that this process had its difficulties:

- it was a pressure cooker. The final negotiation of the conditions left us all exhausted;

- some of the parties were reluctant participants;

- some of the experts were excluded from the whole of the process.

On balance, though, the process delivered an acceptable result in an acceptable time frame and at a lower cost. Feedback from the participants indicate that, in future:

- the experts are more likely to approach the registrar for assistance in their joint report process, whether or not it is Court ordered and whether or not their "clients" request it;

- the Court, and the parties, need to give some further consideration to the interrelationship of the Court process and the ECR process, whether the Court should give the parties more proscriptive directions about their participation in ECR, and the logistics involved in requiring parties to act within very tight time frames.

Case Study 3: Residential Subdivision in capital city suburb

This is a success story of a different kind.

Facts

Two neighbours between them owned 5 acres of bushland within a suburban area 8 miles from the centre of the city. The land is steep and heavily treed. The developers applied to subdivide the land into 25 residential lots. One of the neighbours wanted to keep his family home as part of the subdivision. Both neighbours wanted roughly equal return on investment (which meant each parcel yielded about 12 lots). Part of the area to be developed fell within a protected waterway area. The land is adjacent to a protected forest park managed by Council.

The application was lodged with Council in August 2003. By August 2004, the Council had not made a decision, so the developers appealed on the basis of a deemed refusal.

The appeal was filed in June 2005. Seventeen local residents and a local community environmental group joined the appeal.

Between July 2005 and February 2007, nothing happened. The developer made no application to Court for the appeal to be moved forward until May 2007. At that time, the appeal was set down for hearing for three days in October 2007.

In June 2007, it was clear that the appeal would not be ready for hearing in October 2007. In September 2007, the appeal was referred to mediation.

In January, the appeal was listed for three days in March 2008.

Process and outcome

The first mediation took place in October 2007. It was clear from that meeting that the principal issue was the ecological impacts of the development and that the experts in that area were significantly apart. Mediation was adjourned to early November 2007 to enable some further detailed reports in relation to traffic and hydraulics.

At the resumed mediation in early November, the parties agreed that traffic, ecology and most amenity arguments were no longer issues in the appeal. What remained at issue was the extent of tree clearing permitted. The relevant factors influencing that decision were:

- the developers desire to maintain a particular yield and for the yield to be evenly divided between the two blocks;

- the developer's perception that the location of the road was fixed because of the gradient of the slope;

- the desire to retain an existing house;

The developer's ecology expert held the view that the ecology could be protected by:

- a small "exclusion zone" in which no tree clearing could be conducted; plus

- identifying, within each lot, a building exclusion zone rather than an allowable building envelope;

- otherwise identifying significant trees for preservation.

The other ecology experts took the view that the exclusion zone needed to be significantly bigger to allow for wildlife access corridors. They also took the view that isolated trees in suburban backyards was not a suitable way of preserving the vegetation. Trees in isolation are more vulnerable to storm damage, are less useful to wildlife and more likely to be the subject of wilful destruction by the owner.

There was also an allegation amongst the ecology experts that the site had been "salted" with koala scat.

By the end of the second mediation, the only issue outstanding was ecology. During the mediation, I cautioned the experts about their independence and questioned whether, at least as far as one expert was concerned, he was truly objective. At the conclusion of the second mediation, the ecology experts were to meet jointly on the site, plot the line of the exclusion zone, nominate the trees for preservation and prepare a plan for submission to Court.

It took 113 emails to arrange a further conference between the experts. There was considerable animosity between them although it was apparent that views of the expert engaged by the developer were not shared by the other experts.

The experts' joint report was finalised in late January 2008. Even then, there was a dispute about its terms and one of the parties filed an "addendum" to joint report in February 2008.

In February 2008, I counselled the residents as to how the appeal would proceed to hearing, what resources were available to assist them in preparing for the hearing and what might occur at the hearing.

Faster?

Today, the lack of activity between 2005 and 2007 would not be permitted. All files are subject to scrutiny by the registrar to ensure that they are progressing. If there has been no court action, and no reasonable excuse for the lack of action, parties are required to explain that lack of activity to a Judge.

Cheaper?

The hearing of the appeal revolved around the evidence of the ecology experts. It was not necessary to call hydraulics or traffic experts. There was some saving of cost. That saved about 1½ hearing days and each party about $50,000 in costs.

Better?

While the main fight was always going to be between the ecologists, mediation was successful in focussing the parties' attention to that fact and eliminating the peripheral issues from the debate.

The appeal went to hearing in late March. At the end of the first day, not knowing the mediation history, the judge sent the parties away to negotiate a solution to the ecological issues. Not surprisingly, the parties did not negotiate a solution although some concessions, in relation to individual trees, were made by the developer. The only question left to the Judge was the size of the wildlife corridor.

The local residents had limited funds to fight this appeal. They always contemplated spending most of their fighting fund on an ecologist but mediation enabled them to better focus their energies on this issue.

The mediation allowed all parties to refine their approach to the ecology issues, because there was no doubt about where the difference of opinion between the experts lay.

Although there was no saving of time in a strict statistical analysis, the representatives for the Council and the residents have reported that they found mediation a valuable process.

The Feedback

(from submitters)

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

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

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

(from lawyers)

"The parties would like to acknowledge the assistance of the ADR registrar who was instrumental in achieving an agreement in relation to this complex matter"

"The parties participated in a mediation meeting before this Court's Registrar of ADR. While the matter was not resolved, areas of concern … were better identified and articulated in a 14 point document, executed by the parties. That was helpful in providing focus." (a "successful" outcome)

(from experts)

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

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

"Thank you Peta – at least sanity will prevail at last! Your involvement in this matter is very much appreciated by … as we normally have to deal with this behaviour from … on our own and forever have to deal with his twisted interpretations and convolutions that only seem to pervert the process and preclude any possibility of a solution prior to a court hearing. Thank once

again for your help on this matter. I just wish we had this process and someone like you every time we have to deal with …"

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

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

Conclusions

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

- At the first directions hearing, every case is listed for a particular sittings. Prior to the introduction of Court-based ECR, it was common to have about 30% of all cases listed proceed to trial. In March 2008, through ECR, the number of cases proceeding to trial to was reduced to 13% of all those listed but the total finalisation rate remained consistent.

- In March 2008, three "spare" Judge weeks were "given back" to the District Court to undertake cases in the general civil or criminal jurisdiction.

- Since commencement in May 2007, there have been 95 mediations. 42 (44%) of those cases sent to mediation have resolved completely. In only 16 mediations was there no discernable benefit at all.

- The 95 mediations were conducted over 138 sessions. Many sessions were no more than ½ a day. By resolving the dispute, or narrowing the issues for trial, an estimated 143 Judge days were saved.

- The cost to the Court of a day of the Registrar conducting a mediation is about 1/5 of the cost of a Judge sitting.

New Zealand Environment Court Model

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Since 1996 there has been an Environment Court in New Zealand. The Court was formerly called the Planning Tribunal.

The New Zealand Resource Management Act 1991 (RMA) is a single piece of legislation dealing with all applications land use and development, discharges to water, air and land, allocation of water and coastal permits.

The Environment Court is a single national court and various benches go on circuit around the country. The Court is a specialist court and as such, sits outside the pyramid for courts of general jurisdiction. Appeals from the Environment Court can be made (on a point of a law only) to the High Court of New Zealand.

The Court is comprised of Judges and Commissioners.

Environment Judges may sit alone to hear some kinds of cases (e.g., enforcement orders), but for appeals about Regional and District Plans (town planning schemes) and resource consents (development applications), the Court is usually comprised of one Environment Judge and two Environment Commissioners. It may however be comprised of one Judge and one Commissioner or, in major cases, one Judge and three Commissioners.

Environment Commissioners are fully members of the Court. There is the opportunity to appoint Deputy Environment Commissioners. The Commissioners are judicial officers appointed under warrant by the Governor General. Commissioners have knowledge and expertise in relevant specialist areas such as local government, resource management, environmental sciences, engineering, surveying, landscape architecture, alternative dispute resolution, and Maori issues. The Commissioners have two roles in the Environment Court. The first is as adjudicators and the second is as Mediators.

Parties before the Court are usually represented by lawyers, but anyone may appear in person, or be represented by an agent who is not a lawyer. The Court is not bound by the strict rules of evidence and its proceedings are often less formal than the general courts. Most of the Court's work involves public interest questions.

The Environment Court has a website (www.justice.govt.nz/environment) which includes:

- "You, Mediation and the Environment Court" (June 2006) published by the Ministry for the Environment (handbook).
- Practice Notes – Alternative Dispute Resolution (ADR)

The provisions of the RMA do not specify the type of ADR to be used, nor do they detail the procedures to be followed. There is a requirement that parties consent to the use of ADR, but beyond that the timing, the form and the procedural arrangements are left to the Environment Court. The Court provides a mediation protocol, or guidelines, through its published Practice Notes. These are not a set of inflexible rules, but it is expected that they will be followed unless there is good reason to do otherwise. This flexibility is consistent with the Court's powers to regulate its own proceedings.

The handbook:

- Is particularly useful to fill in the gaps of the Practice Notes for the actual prospective parties to the mediation rather than being a guide for the Mediators.
- Is useful to parties as it sets out in a user friendly manner, what mediation is, how mediation operates in the RMA, and the main benefits and limitations of mediation so that parties may be able to better determine whether their case would be suitable for mediation and whether they should make a request to the court to have the dispute mediated.
- Also provides some helpful pointers about selecting mediators and what they can expect generally from the process by setting out the basic structure of mediation.

An increasingly important part of the New Zealand resource management process is the use of alternative dispute resolution (ADR). The RMA empowers the Environment Court to arrange mediation and other forms of ADR for the purpose of encouraging settlement. Members of the Court, or other persons, can conduct the proceedings, which may occur at any time before or during the course of a hearing.

Although the processes are not mandatory, as part of its case management, the Court actively encourages the use of ADR and offers a mediation service run by its Environment Commissioners. The Commissioners receive professional training for the purpose. No additional fee is payable to the Court for use of the court-annexed mediation service. The parties meet their own costs of the mediation unless they agree otherwise. Most, if not all, of the mediations are conducted by the Environment Commissioners.

Where an Environment Commissioner conducts mediation, the role is different to that of another outside person. Although the role does not confer a decision-making authority, it does occur within the jurisdiction of the Act and is Court-annexed. The Commissioners are operating under an oath of office and a statutory obligation of good faith in the performance of the duties of the office. There is an obligation to uphold the purpose of the Resource Management Act 1991.

The Environment Court regards mediation and other forms of ADR as particularly well suited to resolution of environmental disputes. Environment Court-annexed mediation is now widely accepted as a valuable option. Even for cases where complete settlement may not be likely, the use of ADR processes is encouraged to narrow and settle issues within disputes and to assist with preparing cases for a hearing.

Where full settlement is not reached then the case is scheduled for a hearing before the Court. Usually the Commissioner who has conducted the mediation does not sit as a member of the Court on any subsequent hearing, although there is provision for that to occur if all of the parties agree.

An evaluation of the Environment Court's use of mediation completed in 2004 concluded that the consensus was that approximately 80% of cases referred to mediation were successfully resolved. This trend has continued. In 2007 there was agreement in full in 180 matters; partial agreement in 20; and agreement not reached in 51 matters showing a success rate (ie made a difference) in approximately 80% of the 251 matters.

The demand for the Court's mediation service is increasing and most of the mediation sessions resolve the disputes such that court hearing time is not required. The success of mediation is also being reflected in the nature and duration of matters that are scheduled for court hearing time. Many of the less complex appeals are now being resolved expeditiously through the Court's mediation service, and the Court's adjudication expertise is being used for large and complex matters, often involving issues of national significance and wide public interest.

There is very little private mediation undertaken at the appeal level because the Environment Court service is free of charge. However, there is room for private mediation services before a matter reaches the Court and the re should be an encouragement for parties to choose private mediation or the Court annexed service. For example, if a private Mediator is involved at the Council level when the Environment Court is not involved and the matter subsequently goes to Court the parties should have the opportunity to continue with the private Mediator who already has established a relationship with them and is familiar with the proposal and the issues.

In 2007 there were 251 mediations which is equivalent to only 22% of the new intake for the year of 1142. The referral rate is still low despite the support given to mediation by the Court.

Types of Cases Mediated from the paper by Marlene Oliver, Environment Commissioner

Cases falling within all three of the main categories are successfully mediated: that is, policy and plan documents; resource consents (permits); and enforcement proceedings.

Policy and plan documents are complex and comprehensive documents. As they are the community's identification of issues and subsequent objectives, policies and rules – they are the primary expression of the meaning of environmental sustainability. The interrelated nature of these documents makes resolving disputes about them amenable to the more informal forum of mediation sessions than to the adversarial court hearing. Often the bulk of the disputes are
resolved through mediation with a few remaining matters requiring a hearing. Where mediation has not completely settled the matters, it has usually meant that the remaining matters have been more narrowly defined and focused. This results in a more efficient court hearing. Multiple mediation sessions are usually required for these documents and individual sessions can easily involve more than 50 people.

With resource consents and enforcement cases the disputes are usually about the conditions of the approved consent. The following few examples serve to illustrate the nature of matters dealt with:

- Lime rock quarry in a rural area – dispute between the quarry operator, neighbouring residents, and both the regional and district councils, and related to the enforcement of, and compliance with, conditions requiring: the crushing machinery to operate within an enclosed building; installation and operation of truck wheel-wash facilities; acoustic fencing along boundaries; construction and sealing of onsite access ways; and upgrading of an adjacent public road and intersection. (Mediation involved 5 parties and 18 people.)

- Geothermal power station – disagreement between the regional council (consent authority), the operator, other users of the geothermal field, and the local district council over a considerable number of the conditions of consent including: measures to avoid land subsidence in the town overlying part of the geothermal field and to remedy any damage; details of research, reservoir and subsidence modelling, monitoring and reporting; details of the drilling and re-injection programmes; measures to avoid adverse effects on other existing operators on the same geothermal field and a multiple-operator protocol including a dispute resolution process; and the establishment of a peer review panel for the management of the geothermal field. (Mediation involved 5 parties and 25 people.)

- Urban land subdivision – dispute regarding the intensity of the development (number and location of sites), the extent of additional upgrading to public roads and public utility services, the size and location of public reserves, and the retention of existing large trees. (Mediation involved 7 parties and 20 people.)

- Residential development – dispute between the council and landowner relating to illegal and unstable landfilling works affecting a stream, and

requirements for improvements to the stormwater disposal. (Mediation involved 3 parties and 8 people.)

- Redevelopment of an historic building – dispute as to whether the application documents were accurate, whether the new work was within the scope of the application, and the effects of the increased height of the building on neighbours' sea views and privacy. (Mediation involved 3 parties and 10 people.)

Information for this New Zealand Environment Court Model section has been sourced from:

- Marlene Oliver, Environment Commissioner, **Implementing Sustainability – New Zealand's Environment Court-Annexed Mediation**. A paper presented to the Indian Society of International Law (ISIL) Fifth International Conference on International Environmental Law, 8 - 9 December 2007, New Delhi, India.

- Report of the Registrar of the Environment Court for the 12 months ended 30 June 2007.

- Stephen Quinn & Ashley Cornor, Ministry for the Environment, Alternative Dispute Resolution for Resource Management Disputes (June 2004).

- Resource Management Act 1991 (New Zealand).

- Environment Court of New Zealand Consolidated Practice Note 2006, paragraph 3.1.4. Available at www.justice.govt.nz/environment/consolidated-practice-note/consolidated-practice-note.pdf (20 October 2007).

Why we need to continue to have Private ECR before and during Litigation?

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There should always be a private practice for ECR.

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

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

Professor Frank E A Sander (Bussey Professor Emeritus at Harvard Law School) said in the American Bar Association Dispute Resolution Magazine (Winter 2007) notes, for reasons not entirely clear, large numbers of parties do not volunteer for mediation therefore compulsory mediation (as a type of affirmative action) could be used to encourage more parties to try mediation starting with a small pilot which is gradually modified to correct demonstrated defects.

Mandatory ECR does not have to be a permanent arrangement. If will have achieved its purpose if there is an increase in voluntary ECR in the form of a cultural shift by lawyers and clients.

The ability to develop new techniques is likely to be greater with private practitioners working with stakeholders than being limited to Court annexed

ECR services where procedures may be linked to or have to take into account Rules of Court.

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

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

Co-mediation can be advantageous in ECR because:

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

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

Survey Results from a co-mediation conducted by Jianbo Kuang and John Haydon

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

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

All of the Respondents agreed that the mediation:-

(a) Saved time compared with going to Court;
(b) Saved money compared to going to Court;
(c) Clarified and narrowed the issues in dispute; and
(d) Allowed the participants to discuss the matters that they felt important.

All would recommend mediation to others.

At the mediation:-

(a) 92% of the Respondents felt at ease;
(b) 75% did not fell under pressure;
(c) 92% felt able to comprehensively express their views and were well prepared;

(d) 92% did not feel rushed; and
(e) 92% were not confused about the process.

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

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

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

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

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

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

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

Public Meetings or Facilitated Forums as ECR tools

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

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

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

Supervising Facilitator

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

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

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

An early and real chance for submitters/objectors to be heard will reduce the number of legal suits.

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

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

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

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

disputes so that amendments can be made to the Development Application and plans or certain conditions be imposed on an approval.

On the other hand, if the application is to be refused more precise reasons for refusal can be formulated during this process.

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

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

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

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

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

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

The **Environmental Law Roundtable of Australia and New Zealand (ELRANZ)** provides a forum for discussion and development of proposals for the harmonisation or coordination of environmental law and policy throughout Australia and New Zealand. As a multidisciplinary forum, ELRANZ is open to professionals, Government Departments and Agencies, statutory corporations, business, industry, NGOs, academics and students. As an inclusive and multidisciplinary

approach to improving environmental laws and policies across Australia and New Zealand, ELRANZ advocates the processes of public participation and consensus building. Even before harmonisation, a greater level of cooperation will develop out of the ELRANZ process.

The Roundtable is a joint initiative of the **National Environmental Law Association Limited (Australia) (NELA)** and the **Resource Management Law Association of New Zealand Inc (RMLA)**. The Environmental Law Roundtable concept was created by John Haydon who is now the Convenor of ELRANZ.

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

ELRANZ Manual

The ELRANZ Manual is a concise document describing the essential elements of the Roundtable is available at http://www.rmla.org.nz/images/content/ELRANZ%20Manual%20(3rd%20edition)%20March%202008.pdf

The table of contents of the ELRANZ Manual is:

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

citizen participation in political decision making. Community wide visioning also creates expectations amongst residents that similar consultation will be implemented in the future, and that certain actions will be taken.

- **Sample Approach 4:** Joint Fact Finding allows all parties to participate in identifying the issues, the experts, and the questions to ask the experts. This can be a very important means of resolving factual disputes that may arise if different interest groups have different experts with varying information on the issues at hand.
- **Sample Approach 5:** Best Use Technology is using available technologies to communicate with potential stakeholders as well as to disseminate information. This may seem simple, but the power of communication is exponentially increased with the use of the Internet. The possibility of harnessing this mechanism of communication for environmental regulation is tantalizing and should not be ignored.
- Members Only Information
- Appendix A - Bibliography.

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

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

The Roundtable includes the following concepts:

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

- Project Teams are established to assist in ELRANZ projects;

- Associates may engage in research, consultation and brainstorming with respect to a project on the ELRANZ agenda and actively participate in neutral third party facilitated conferences, seminars and meetings;

- Suggested projects will be prioritised within the ELRANZ agenda. The results may include draft legislation, a new policy approach or a protocol for industry;

- Issues suitable for resolution through consensus building processes may be recommended to the Australian and New Zealand Judicial and Intergovernmental Ministerial meetings;

- Some ELRANZ projects could be managed through adaptations to the negotiated rulemaking process; and

- Seminars, public forums and other educational activities can be included as Roundtable events to ensure the involvement of individual and corporate NELA and RMLA members as well as to continue building support for the growing network of ELRANZ Associates.

More information can be accessed through the ELRANZ section on the NELA http://www.nela.org.au/node/8 and RMLA http://www.rmla.org.nz/library_elranz.aspx websites. The information will be updated from time to time.

Dispute Avoidance and Minimisation

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

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

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

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

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

It is important to emphasise that the type of participation needs to be meaningful otherwise sections of the public will come to distrust the process and then look for a confrontational approach. The methodologies will vary with the

circumstances. The challenge is to work positively at the issues. Dispute avoidance will follow. Not all disputes will be avoided. However, by concentrating on trying to avoid disputes those that do arise will be limited in scope. If that does not work then ECR techniques (before or during litigation), properly used, will help to narrow or better define the scope of the dispute.

No discussion is complete without recognising that if all else fails, there is litigation. It should not be the technique of first resort. Litigation is undergoing changes as Courts have case management, change the rules relating to discovery and adopt improve techniques to identify and define the scope of the dispute. Courts are adopting ECR. Judicial administration will undergo a process of continual improvement. Total Quality Management (TQM) is a process of continual improvement for businesses, the professions and industry. So why not include Governments and the Courts?

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

How and why should the ELRANZ concept be adapted for use in the United States?

The United States has long been recognised by the international community for its mechanisms of public participation in lawmaking. Negotiated Rulemaking started in the United States in the 1980s and has since been used by federal agencies to involve the public in making legislation that will be more readily accepted after its passage.

It seems that environmental law is more and more under state control. (see, e.g., **Massachusetts v. EPA**) The individual states are closer to the public than is the federal government, and the natural progression of this system may hint at more localized environmental regulations. As far as public involvement goes, this is a good thing—it is easier to involve people on a local basis than on a federal basis because the relevance of the regulation is more immediate.

This is where an environmental law roundtable would be useful: combining the public participatory mechanisms of localized environmental regulations with the legislation-making powers of the federal government in order to pass national legislation that would take into account the interests of all parties potentially affected by the act.

To use an environmental roundtable process in the United States, a neutral facilitator should be appointed to supervise and mediate the discussions. A convenor would determine which parties were potentially affected by the suggested legislation and invite them to attend the negotiations. These parties would be able to suggest other groups who may be affected, such that no party with important interests in the proposed legislation would be left out of

the discussions. A Conflict Assessment Report is often a useful preparatory tool.

It is important to recognize that the parties are “interest groups”—that is, they are composed of representatives of multiple entities with similar interests in the proposed legislation, but are represented in the discussions by only one person, who is responsible for reporting to all the entities.

Combining the processes of negotiated rulemaking (which is already being used by federal agencies) with mediation, negotiation and other methods of collaborative rulemaking, in the single body of a United States Environmental Law Roundtable (USELR) would benefit all participants, as well as the environment.

Ideally, environmental legislation and policy created by using USELR processes would incorporate the opinions of all the interest groups so that the development of the law or policy would go more smoothly. The period of public complaint or public noncompliance with regulations would be shorter, which benefits the agencies and members of the public. Additionally, the consensuses reached in the roundtable would, by requirement, be environmentally sound, and so benefit all citizens.

Early ECR and positive attitude

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

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

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

In Case Study 2: intensive meat farm in a rural area the difficulties (including the “pressure cooker” comment) identified by Peta Stilgoe were avoidable. Had all the parties embraced an ECR approach in April or June 2007 instead of resisting ECR and delaying other case management processes there would have been at least 8 months to work through expert meetings and then negotiate the conditions. Instead it was not until January 2008 that draft conditions were available when the hearing dates of 28 & 29 February 2008 had already been fixed which resulted in a tight ECR timetable. The hearing time of February 2008 had been set in August 2007. There was an unsuccessful application to delay the hearing made in January 2008 after which an ECR process was ordered in February 2008. If it had not been for the development proponent continuing to have the matter case managed and

progress reviewed the conditions would still not be resolved by April 2008. The hearing Judge's case management (the litigation "pressure cooker") in February 2008 helped focus the parties to finish their ECR tasks (the ECR "pressure cooker" within the litigation calendar or "pressure cooker").

Premediation Sessions

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

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

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

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

Mini Mediations

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

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

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

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

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

The purposes of the mini mediation can include:-

- See the site and where the people live.
- Allow the whole group to meet the Mediator.
- Discuss the mediation process.

- Allow the lawyer for the group to discuss matters relevant to the dispute and the mediation with the clients.
- Allow the Mediator to gain an understanding of the group concerns

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

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

Private ECR Case Studies

Two case studies have been selected:

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

Private ECR Case Study 1: Caloundra City Council Planning Summit

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

The Summit aimed to examine:

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

Stakeholders involved in the Summit were:

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

Coast Environmental Council and the Combined Citizens of Caloundra City Association.

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

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

Method Used: The method of ADR used for the Summit was Facilitation.

Private ECR Case Study 2: Outdoor Recreation use

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

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

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

Private agreement to mediate: A Mediation Agreement was signed between the parties and the mediation proceeded on 5 September, 2002. John Haydon represented one of the neighbours at the mediation. The private Mediator was Martin Daubney SC (a senior lawyer). The parties agreed to suspend the timetable under the directions hearing order while the mediation proceeded. The appeal was due to be mentioned at a callover on 27 September, 2002.

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

Because the parties had suspended timetable disclosure did not take place so substantial costs were saved with respect to advancing the appeal towards a hearing.

All three parties cooperated positively during the mediation process.

Outcome: A realignment of the boundaries and a change to easement arrangements including the surrender of one easement and the creation of a new easement were part of the Heads of Agreement signed at the end of the

mediation. The Planning Scheme of the Council was respected in the realignment of the boundaries so that the minimum subdivision area was maintained with respect to the two allotments of land.

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

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

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

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