NON-ADVERSARIAL RESOLUTION OF ENVIRONMENTAL DISPUTES
Mediation in the Land and Environment Court of New South Wales: A Case Study

*Tony Foley**

The Land and Environment Court of New South Wales has had a mediation scheme since 1991. The success rate of mediations conducted in that Court has remained consistently high. Yet the role of mediation is essentially limited to the resolution of small-scale residential disputes. It is considered that these disputes, by their nature, have the potential to be negotiated, in spite of the perception of incompatibility between the parties' interests. Mediation has not become the preferred method of resolving these disputes. Parties still, overwhelmingly, prefer the dispute to be resolved by the Court as distinct from a consensual settlement. An examination of the reasons for the limited scope of mediation in environmental disputes, and the continued reluctance of parties to embrace it, suggests that the potential of consensual methods remains under-utilised.

In 1992, Fowler was able to state with authority that Alternative Dispute Resolution (ADR) methods had 'barely been used in Australia' in environmental matters.[1] He expressed the view that there was a strong case for such use 'alongside traditional court and tribunal processes'.[2] In the period since then, there have been some substantial developments. For instance, the use of mediation to resolve environmental disputes in the Land and Environment Court of New South Wales (the Court) has now been operational for some eight years. Such a period of operation for a court-annexed mediation scheme nevertheless remains rare in Australia. For this reason, it is considered a review of the effectiveness of the role of mediation in this Court is warranted. It is anticipated that such review can provide insight as to the current and potential use of mediation in the environmental context.

ADR methods, for the purposes of this study, are interpreted to be those bundle of dispute-resolution methods categorised as *consensual* and distinguishable from *adjudicative* methods (including judicial) and *administrative* methods (or, to use Preston's label, 'resolution by managerial direction'). Mediation is one of these ADR methods and is the main form of 'assisted negotiation'; it is primarily distinguished by the involvement of an additional person who is not an immediate party to the dispute. There are

---

* Tony Foley is an associate lecturer in the Faculty of Law at the University of Western Sydney.

1 RJ Fowler (1992) 'Environmental Dispute Resolution Techniques: What Role in Australia?' 9 *Environmental and Planning Law Journal* 122.

2 ibid., p 129.

myriad definitions of mediation, but one classic statement contains all the crucial elements:

> Mediation is a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.[3]

Land and Environment Court of New South Wales

What is the Role of Mediation in the Court?

The Court has specific jurisdiction to resolve environmental disputes. Such jurisdiction is divided into classes. The court has jurisdiction to conduct merit appeals under Class One, generally relating to development appeals; under Class Two, relating to building applications; and under Class Three relating to its miscellaneous jurisdiction including compensation, valuation and land tenure matters. It also determines Class Four civil enforcement proceedings and Class Five summary criminal prosecutions. The Court also conducts judicial reviews generally across this jurisdiction.

The Court, in exercising its jurisdiction to determine merit appeals pursuant to section 20(1)(e) and section 71 of the *Land and Environment Court Act* 1979 (NSW) (LEC Act), is exercising an administrative or executive power as distinct from a judicial power. Thus an appeal on the merits in Class One to Three proceedings under the Act involves resolution by an administrative rather than by an adjudicative mechanism. This is important to note because ADR methods used in this context are operating as an adjunct to *administrative* rather than *adjudicative* dispute resolution. In this form, mediation is being used to resolve the controversy to finality, subject only to a supervisory overview by the administrative or executive body.

In comparison, when the Court conducts civil enforcement proceedings or judicial reviews in Class Four matters pursuant to section 20 of the LEC Act, it is exercising an adjudicative function. The first aspect of this jurisdiction is the civil enforcement of rights, obligations or duties imposed by a planning or environmental law as defined in section 20(3) of the Act. Additionally, the Court has jurisdiction 'to review, or command, the exercise of a function conferred or imposed by a planning or environmental law' under section 20(2) of the Act. Thus, when mediation is used in Class Four matters, this involves the use of consensual methods as an adjunct to the exercise of an *adjudicative* function rather than an *administrative* one.

---

3 GW Cormick (1976) 'Mediating Environmental Controversies: Perspectives and First Experience' 2 *Earth Law Review* 215.

Mediation, however, has had only a very small role to play in Class Four matters, being used in only approximately 20 matters up to March 1995.[4] In the revised *Land and Environment Court Rules* 1996, mediation was specifically extended to all Class Four matters, but this has not produced any substantial change in the number of matters referred to mediation.

Mediation in the form of an adjunct to an adjudicative function is more akin to the classic role envisaged for mediation in environmental matters, but this has not occurred. Indeed, many Class Four matters are really only merit appeals in disguise. This was noted by the Chief Judge of the Court in explaining the rationale behind a large proportion of Class 4 matters:

> Many people who object to developments on merit grounds have recourse to actions under s 123 to change proposals on legal grounds. Such challenges sometimes have about them an air of unreality, with all parties pretending that they are concerned with legal niceties rather than the merits.[5]

With this in mind, it is fair to conclude that, for all practical purposes, the use of mediation in the Court is as an adjunct to its purely *administrative* dispute resolution function. This is important because it reflects the overall position where most environmental disputes are resolved administratively rather than adjudicatively.

Development of the Mediation Scheme

On 1 May 1991, the Court first introduced a mediation scheme in Class One and Two proceedings. A brief history of the introduction of a mediation scheme into the Court is instructive.

The 1991 *Practice Direction* commenced on 1 May 1991 and provided for voluntary court-annexed mediation using the Registrar or Deputy Registrar of the Court as mediators in Class One to Three matters. This Practice Direction further provided that if objectors were involved, it was anticipated they should attend 'so that the views of all interested parties may be taken into account in any mediated settlement'.[6]

The Rules provided that 'at callover the Registrar will where appropriate refer proceedings to mediation or conciliation in accordance with the Practice Notes.'[7]

It was under these joint provisions that court-annexed mediations were commenced in the Court, initially as a pilot program (from May–December 1991) and thereafter as a routine option offered between callover and hearing

---

4 M Connell (1995) 'Mediation in the Land and Environment Court of NSW' paper presented at the University of Technology, Sydney, 31 March, p 2.

5 McClelland J's comments of 20 September 1983, quoted in A Fogg (1983) 'Third Party Objections and Appeals in Development Control Decisions under Town Planning Legislation' 2 *Environmental and Planning Law Journal* 4, p. 11.

6 Land and Environment Court of NSW, *Practice Direction,* April 1991.

7 Division 6A Rule 2.

of a matter. The 1991 *Practice Direction* was subsequently replaced by Clause 12 of *Practice Direction* 1993, which came into force on 1 November 1993. Clause 12 (headed 'Mediation') differed from the earlier provision in that it more strongly emphasised the voluntary nature of the mediation. It said in part:

> It is a fundamental tenet of mediation that it is voluntary, therefore each party will be required to indicate that it wishes a dispute to be mediated.[8]

The *Practice Direction 1993* made a number of provisions, including:

1 The option existed of a mediation session with the Registrar or Deputy Registrar in Class One to Three proceeding.

2 It was anticipated that persons appointed to act on behalf of any party would have the ability to resolve the dispute.

3 Legal representation was not seen as a necessity but would allowed by leave.

4 Where agreement had been reached at mediation, effect to the agreement would involve one party giving consent or both agreeing to be bound by the terms of settlement, with the necessary consent orders being placed before the Court for consideration.

A year later, the Court was one a number of New South Wales tribunals affected by the *Courts Legislation (Mediation and Evaluation) Amendment Act* 1994 (NSW), which came into force on 14 November 1994. This Act inserted new provisions headed 'Mediation and Neutral Evaluation' into, *inter alia*, the LEC Act, these being Part 5A, sections 61A–61L. This amending legislation indicated that its purpose was to:

> enable the Court to refer matters for mediation or neutral evaluation if the parties to the proceedings concerned have agreed to that course of action.[9]

These provisions were seen as 'effectively formalising the court-annexed mediation conducted in this Court since 1991'.[10]

The definition of mediation provided for in the amending legislation does not mention the essential element of voluntariness, but section 61D(1)(b) makes the consent of the parties a condition precedent of the Court referring a matter to mediation. Section 61E reiterates this element of voluntariness by providing that attendance at and participation in mediation or neutral

8 Land and Environment Court of NSW, *Practice Direction,* October 1991, cl. 12.

9 Section 61A(1).

10 Land and Environment Court of NSW, *Annual Review 1994*, p. 8.

evaluation sessions are voluntary and that a party may withdraw from the sessions at any time.

Section 61G gave to the Court a supervisory role by providing that the Court may make orders to give effect to 'any agreement or arrangement arising out of a mediation session'. The range of possible outcomes from a mediation session included: non-resolution; agreement to discontinue the dispute by withdrawing the application; and agreement to resolve the dispute in terms of consent orders. It is through the ratification of such consent orders that the Court exercises its supervisory role. It was possible that an agreement reached by the parties to the mediation while acceptable to them may not be in the broader public interest — for instance, because it is environmentally unacceptable. The ratification requirement is designed to ensure that the Court's primary role in the exercise of its administrative function is not constrained and that it can exercise an oversight in the public interest.

Implementation of the Mediation Scheme

In the early days of the mediation scheme, a number of 'designated development' matters were identified as being successfully mediated and approved by the Court.[11] These were principally large-scale disputes involving different forms of heavy industry specified in Schedule 3 of the Regulations to the EPA Act. Examples of mediation of substantial designated development matters were evident in the Court's Pilot Mediation Program. The Chief Judge at that time indicated:

> Mediation has been successful in reducing time and costs. This is particularly evident in some very large multi-party designated development cases. For example, successful mediations have included a goldmine at Parkes, a mine at Tumut and an extractive industry at Cecil Park.[12]

The goldmine referred to was the Adovale Mine dispute over the impact of mining on grazing and farmland, mediated in mid-1991. It was referred to in the New South Wales state parliament as 'probably the most successful mediation to date'.[13]

It was anticipated that disputes such as these — which could be more appropriately seen as environmental conflicts, involving as they did a large number of parties and a number of intractable issues such as noise, vibration, dust, traffic, water quality, site rehabilitation and visual amenity — would be

---

11 E Spiegel (1992) 'Mediation in the Court' paper delivered to the NELA (NSW Division) Biennial Conference, June p 4.

12 M Pearlman CJ, Letter to ALJ Forum (1993) 67 *Australian Law Journal* 941.

13 NSW Parliament (1991), *Legislative Assembly Debates,* 11 December 1991, pp. 6480–81.

particularly amenable to mediation.[14] But this expectation has not been borne out by the subsequent history of the scheme.

Further minor modifications to the practice of mediation in the Court occurred with the repeal of the *Practice Direction* 1993 and Division 6A Rule 2 of the *Land and Environment Court Rules* 1980. These provisions were repealed with the introduction of the new *Land and Environment Court Rules* 1996 (Part 18 — Mediation). These rules were effective from 29 January 1996 and essentially repeat the provisions of *Practice Direction* 1993, providing that mediation is available in Classes One to Four of the Court's jurisdiction and that 'parties may apply to the Court for referral to mediation of a matter arising in proceedings'.[15]

Review of the Effectiveness of the Mediation Scheme

From the summary of the legal framework and practice of the Mediation Scheme, it can be seen that the Court has had a system of mediation operating as an adjunct to its administrative function since May 1991. Comprehensive data is available from the Court for the first four and a half years of that period, during which time 285 mediations were conducted. The results of three studies of this data are available:

1 survey by the Young Lawyers' Section of the Law Society of NSW of mediations conducted in the period 1 May to 31 December 1991;[16]

2 review of matters referred to mediation in the period January 1992 to December 1994;[17]

3 Review of the Court files for matters referred to mediation in the period 1 January to 31 December 1995.[18]

Review of Mediations conducted 1 May–31 December 1991

The Young Lawyers' study was conducted as a review of the first seven months of the scheme's operation, during which time the scheme operated as a pilot project. The purpose of the survey was to monitor the effectiveness of

14 TFM Naughton (1995) 'Court-Related Alternative Dispute Resolution in New South Wales' *Environmental and Planning Law Journal,* December, p 386.

15 Part 18, Rule 2.

16 J Muller (1992) 'Report on Young Lawyers' Survey — Mediation in the Land and Environment Court' 3/3 & 4 *LEADR Brief* 8.

17 D Tow and M Stubbs (1995) The Effectiveness of ADR Techniques in the Resolution of Planning Disputes, unpublished, University of Western Sydney.

18 Undertaken for the purposes of LLM Honours thesis, University of Wollongong, 1998.

mediation in the Court.[19] The survey method was by way of distribution of written surveys to parties to mediations in the period May–December 1991. The response rate was said to be approximately 50 per cent.[20]

The surveys were distributed by sending them to the parties' legal representatives for completion or, if the parties were unrepresented, by sending them direct to the parties. The survey results do not disclose the proportion of responses received from parties or legal representatives, although it is possible from the responses to deduce that approximately 75 per cent of the responses were from lawyers.

The report drew a number of conclusions from particular responses, which have gained wide currency in the literature concerning the effectiveness of the Court's scheme. The most important of the conclusions the report drew was that:

1 a substantial majority of the participants considered the mediation successful; and

2 a high level of 'user satisfaction' was evident.

For the purpose of examining the validity of these conclusions, a select number of questions and answers are considered pertinent. These are examined in some detail.

Responses Upon Which a Conclusion of 'Success' was Based

In response to a question that asked: 'do you consider the outcome of your mediation as successful (whether or not it proceeded to a hearing)?', 73 per cent of respondents said 'yes' (from a small sample of 26).

In response to a question which asked: 'Which of the following factors do you consider added to the success?', 47 per cent of respondents indicated 'total resolution/settlement of the dispute and 16 per cent indicated 'partial resolution of the dispute'.

The report drew a number of conclusions from these particular responses. It said the 'greatest interest is that 73 per cent of all responses considered the outcome of their mediation to be successful'.[21] This was in turn compared favourably with success rates achieved overseas.[22] But the survey had provided respondents with no objective measure of what 'success' was, leaving it to the subjective judgment of the respondent. A number of problems exist with this method and this conclusion.

Firstly, the 'success' was not equivalent to resolution or settlement of the dispute, in the sense of a closure to the legal proceedings. There was no basis

19 J Muller (1992) 'Report on Young Lawyers' Survey', p 8.

20 ibid.

21 ibid.

22 Young Lawyers' Environmental Law Group (1992) 'Report on Survey "Mediation in the Land and Environment Court"', paper presented 30–31 May, p 14.

on which to say that 73 per cent of matters referred to mediation were resolved or settled. This is clear from the responses to the second question referred to, which suggested that a 'total resolution/settlement of the dispute' occurred in less than a majority (47 per cent) of cases and a 'partial resolution' in a further 16 per cent.

The nature of these responses provides an insufficient basis on which it is valid to compare the '73 per cent successful' rate with other studies which are measuring 'success rates' in terms of resolution or settlement of disputes. This has, however, been the use routinely made of the survey results.[23]

Responses Upon Which a Conclusion of 'User Satisfaction' was Based

From the responses to a question which asked in part: 'If you are a lawyer, did you experience any difficulties convincing your client to participate in the mediation?', it was apparent that only 23 per cent of respondents were unrepresented and therefore completing the survey themselves.

It is thus reasonable to suppose that legal representatives completed more than three-quarters of all remaining surveys. As such, there is no basis on which it is valid to draw the conclusion that the parties participating in the mediations were satisfied with the process. The results can only support a conclusion that the legal representatives were satisfied, not the parties. However the data has consistently been cited as a measure of 'user satisfaction'.[24]

From this brief review, it is reasonable to conclude that the results of the Young Lawyers' Survey do not in fact support the two main published findings — namely that the scheme was achieving a 73 per cent 'success rate' and that it was displaying a high level of 'user satisfaction'. The 'successful outcome' expressed as 73 per cent of respondents does not equate to the settlement of the dispute but to some lesser outcome short of resolution. Similarly, since less than a quarter of the respondents to the survey were direct parties, the claim that the results of the survey provide evidence of 'a high level of acceptance of the process' is not reliable.[25]

Mediations Conducted January 1992–December 1994

The second survey consisted of an examination of all Court files for matters that were the subject of mediation in the period January 1992 to December

---

23 See, for example, E Spiegel (1993) 'Mediation in the Court', op. cit., p 8; H Wootten, 'Environmental Dispute Resolution' 15 *Adelaide Law Review* 33, p 58; P Stein, 'Mediation in the Land and Environment Court' paper presented to Local Government and Planning Law Review, College of Law, Sydney, 21 November 1992, p 4; and M Connell (1994) 'Mediation in the Land and Environment Court', paper presented to Allen, Allen & Hemsley, Solicitors, Sydney, 10 May, p 8.

24 See, for example, J Pearlman, Letter to the Editor 67 *Australian Law Journal* 941.

25 ibid.

1994.[26] A total of 170 files were examined in that study. Its purpose was to review the success of the court-based facility as a guide to the wider application of ADR methods in planning disputes.

The research method consisted of transcribing details from Court files of matters referred to mediation and analysing the information obtained. The results showed that Class One disputes dominated the work of the Court in terms of mediations (60 per cent), and less so in terms of hearings (43 per cent). However, the proportion of Class One disputes going to mediation was small, at only 4.5 per cent. Similarly the proportion of disputes in all Classes being mediated (successfully or otherwise) was small, at 3.3 per cent.[27]

The great majority of disputes going to mediation involved a local government body as respondent (83 per cent) and a private individual as applicant (71 per cent). In virtually all the remaining disputes, the respondent was a state authority such as the Environment Protection Authority (15 per cent). In only one matter was an environmental group or other objector a party.

The results showed that a total of 73 per cent of disputes mediated were 'successfully resolved'. A successful resolution was defined as a matter in which agreement was reached on a mutually acceptable approval (usually by way of consent orders) or where the proceedings were withdrawn. Matters which subsequently proceeded to a hearing were classified as unsuccessful and 27 per cent of disputes were in this category. It was noted that the data on the court file did not allow a determination as to whether there had been some partial agreement in the sense of lessening the areas of dispute.[28]

This study was subject to a number of limitations recognised by the authors, which arose because of the confidential nature of the mediation proceedings. Neither the Court nor the mediator kept written records of the mediation process or outcome. The only record of the proceedings was a notation on the front of the file that it had been referred to mediation. The outcome of the mediation was not recorded and could only be determined from the course of the proceedings following the mediation conference, for instance, whether consent orders were subsequently filed, the matter was discontinued or a hearing date was obtained. This presented a number of limitations:

1 There was no evidence of any partial agreement.

2 There was no evidence of participants other than those on the record.

---

26 Tow and Stubbs (1995), p 1; note, however, D Rollinson, Deputy Registrar, personal communication, 20 June 1996, records 178 mediations conducted in this period.

27 ibid., p 3 (Note: the 'total matters' figure is registrations in the Court in the relevant period).

28 ibid., p 5.

3 There was no evidence as to whether any agreement reached was implemented.

These restrictions hampered the methodology of Tow and Stubbs' study. More adequate records of the mediations conducted would have assisted more comprehensive analysis of the effectiveness of the Mediation Scheme. To address these restrictions, Tow and Stubbs' methodology was modified in examining mediations conducted in the Court in the 12-month period to December 1995.

Mediations Conducted January–December 1995

A review of the Court files of matters, which were the subject of mediation conducted in the period 1 January to 31 December 1995 was carried out.[29] The files were examined to elicit as much information as possible about the nature of the disputes mediated.

The aim of this study was to provide data on the effectiveness of the mediation scheme and to compare the results with those obtained in the two earlier studies.

With the cooperation of the Court registry, the files of all matters the subject of mediation in this 12-month period were examined. Notations recorded on the front of the file were read and the body of the file was examined to peruse pleadings, affidavit material and expert reports filed.

Further, more details were collected as to the nature of the dispute. Data collection in this study was extended to indicate whether a development application related to residential, commercial or industrial development and the type of development involved in terms of single-dwelling, dual-occupancy, medium-density, subdivision (for residential) and business premises, factories and plants (for commercial/industrial). Similar data were collected as to the type of building applications made. It was anticipated that from this additional data, some tentative conclusions could to be reached as to the nature of the matters mediated.

The following results were obtained in relation to these matters.

Class of Dispute

The vast majority of matters were in Classes One or Two (82.5 per cent).[30] Class Three matters relating to compensation and valuation accounted for a further 16.5 per cent. Of the matters mediated, there was only one Class Four matter, which was an objection to development consent for a restaurant extension. The 73 mediations conducted in 1995 represented only a small proportion — 4.2 per cent — of all matters registered in the Court in that year.

---

29 Seventy-three files were examined; D Rollinson records 74 mediations conducted in this period.

30 The proportion of overall matters in Class 1 as compared with Class 2 had changed significantly over the period 1992–95, essentially reflecting a trend in the Court for a predominance of matters to be filed as Class One proceedings.

Parties

There was no formal notation on the file as to parties attending. In only 4 per cent of matters was there any evidence of objectors or third parties attending the mediation as a party. One case involved a third-party appeal opposing a development consent and the developer was present at the mediation, not yet having been added as a party. In the second case, the objector was an adjoining owner supporting a demolition order against his neighbour. In the third case, a group of community objectors attended to oppose a development application for a concrete batching plant on the North Coast of New South Wales.

In all other cases (96 per cent), the file notation did not disclose any participants other than the applicant, respondent and mediator, who was either the Registrar or Deputy Registrar of the Court.

In all cases, the respondent was a government instrumentality, either in the form of a local government planning authority (83.5 per cent) or state government body, such as the Roads and Traffic Authority (16.5 per cent).

Nature

Of the 73 files examined, 56 per cent related to Development Applications, either in terms of appeals against the planning authority's refusal to approve the application or against the conditions of approval. As a proportion of all the files examined, 44 per cent were concerned with development applications for residential use (dual-occupancy, medium-density, subdivision, single dwellings); 10 per cent of mediations involved commercial developments; and 3 per cent of mediations concerned industrial developments involving a factory and the concrete plant referred to above.

All of the 13 Building Applications, which accounted for 18 per cent of all mediations, related to residential land use.

Other matters, relating to demolition or removal orders, constituted 10 per cent of mediations. The balance of 16 per cent of matters dealt with claims for compensation due to highway construction. All of the demolition orders and all the compensation disputes related to residential properties.

Aggregating these figures, 87.5 per cent of all disputes referred to mediation in this period could be classified as essentially 'residential'.

Result

A total of 73 per cent of the mediations were successful in the sense of being resolved in accordance with the definition adopted. Files which indicated the matter was not resolved at the mediation conference itself or subsequently and therefore proceeded to a hearing were categorised as unsuccessful and constituted 27 per cent of the mediation in that year.

Discussion

Two questions arise for discussion:

1 What is the nature of the environmental disputes resolved by mediation in the Court?

2 Does their successful resolution suggest a larger role is warranted for mediation in environmental dispute resolution generally?

Environmental disputes are, by their nature, wide-ranging in subject matter and intensity. At one extreme, they can involve issues of land use and planning seen to be of interest and importance primarily to local residents; at the other extreme, they can involve issues of national importance and significance with acutely polarised positions. The latter are more often identified as *environmental conflicts* to emphasise their intractable nature. Some method is necessary to categorise this broad range of disputes. A relatively simple method is that suggested by Preston:

> Environmental disputes can be classified by the extent to which they exhibit certain characteristics. The more characteristics a particular dispute exhibits the more readily it can be classed as a conflict. The fewer characteristics a particular environmental dispute exhibits the more readily it can be classified as a dispute.[31]

The characteristics Preston refers to have been comprehensively reviewed by a number of authors.[32] The characteristics include such defining features as disputes which are multi-party, multi-issue, or which involve government or questions of scientific uncertainty. However, it is argued that certain of these features act as greater discriminators and identify those environmental disputes which have the defining elements of conflict. The three characteristics selected as being suggestive of irreconcilable conflict are disputes which involve:

1 value conflicts;

2 questions of scientific uncertainty; and

3 public-interest concerns.

With a view to classifying the disputes mediated by the Court, we can usefully consider whether they display these three characteristics.

---

31 BJ Preston (1995) 'Limits of Environmental Dispute Resolution Mechanisms' 13 *Australian Bar Review* 149 at 175.

32 See, for example, T Atherton and T Atherton (1994) 'Mediating Disputes over Tourism in Sensitive Areas, Part 1' *Alternative Dispute Resolution Journal,* February, pp 11–17.

Do the Mediated Matters Exhibit Value Conflicts?

Any distinction in value conflicts is really one of degree. To the participants, the values in dispute may be perceived as fundamental, though objectively they might not be of such a fundamental nature as to equate to an environmental conflict. Nothing in the data obtained from the Court's files supports a conclusion about whether the disputes mediated involve such fundamental value conflicts. There are simply no data available as to the subjective considerations of the parties involved in the matter. But the nature of the subject matter of the disputes certainly does not suggest matters involving conflicting fundamental values.

Each of the disputes could be said to involve a value conflict in the simple sense of a difference of opinion about what is a valuable or beneficial development in a residential context. Such a dispute may involve a disagreement about what is valuable to the proponent of a residential development and what, on the other hand, is deemed valuable in terms of the consent authority's planning instrument or in terms of what objectors value in their neighbourhood.

But to call this a value conflict is substantially removed from the fundamental divergence in values that mark environmental conflicts, described by Tillett as 'values about the relative rights of human beings and other species, or the merits of exploiting natural resources or conserving them, or what constitutes an acceptable quality of life for people in a particular community.'[33] Hence the subject matter of the disputes mediated is not considered to involve value conflicts of this order.

Do the Mediated Matters Involve Questions of Scientific Uncertainty?

There is nothing in the nature of the disputes to suggest the ecological complexity or uncertainty that mark out environmental conflicts. Certainly there are issues affecting one or more parties' amenity through the approval of a new dwelling or through a building alteration. But this is vastly different in degree to questions of scientific uncertainty producing ecological damage.

The assumption that issues of scientific uncertainty do not arise is supported in some measure by the fact that the only expert reports on the files relate to planning or valuation questions that can be resolved with a relative degree of certainty. In only one matter, involving the concrete batching plant, were any issues requiring scientific evaluation such as, dust control, noise, soil contamination and the like raised and the likely effects of these could be determined with some measure of certainty.

Do the Mediated Matters Display Public-interest Concerns?

All environmental disputes involve the public interest in some measure The distinction can be made, however, between those in which the public interest is dormant and those in which the public interest is activated or aroused. All of

---

33 G Tillett (1991) *Resolving Conflict: A Practical Approach,* Sydney University Press, p 138.

the respondents in the matters mediated were government bodies, implicitly representative of and responsive to public interest. But there was nothing in the subject matter of the disputes, nor in the information gleaned from the Court files, to suggest that the public interest had been aroused. In only one case — namely the concrete batching plant referred to — did the file indicate public-interest concerns. This was apparent from the fact that resident groups were noted as being involved and expert reports were only obtained in this one matter.

In the case of residential developments, the public interest may be dormant. In larger designated development matters — involving, for example, extractive industries — the public interest may well be aroused. But other than the early examples cited, such subject matter was not evident in any of the mediated matters examined.

Subject to the qualifications that the data reviewed were limited, the disputes dealt with in the Court's mediation scheme do not exhibit any of the three key characteristics of environmental conflicts. It was concluded that the matters subject to mediation were disputes over essentially negotiable interests and as such, at least implicitly, open to mediated resolution.

Conclusion

A number of conclusions can be drawn from the examination of the data of the Court's Mediation Scheme:

1 *In a small number of the matters coming before the Court, the parties agree to mediation.* Of the 1727 matters registered in the Court in Class One to Four in 1995,[34] 4.2 per cent were subject to mediation.

Mediation is 'offered' by the Court but it is difficult to determine how rigorously the policy is policed. Parties are issued with a document when they first lodge proceedings in the Court setting out details of the mediation service. This document must be provided to the other party when serving the initiating process to draw that party's attention to the availability of the alternative of mediation.[35] There is no indication that the availability of mediation is stressed later in the proceedings.

---

34 *Land and Environment Court Annual Review, Year Ended 31 December 1995,* Annexure A 'Caseflow in the Court: Registrations'.

35 In this regard, see the comments of Lynn Taylor, Solicitor, who said that, in addition to sending the prescribed form, her firm also sends a letter making overtures as to using ADR methods, 'To date, we have never had an answer — ever — from the council' in Parliamentary Accounts Committee, *Proceedings of the Interactive Seminar on Dispute Management in Local Government,* PAC Report No. 24/51, NSW Parliament, 1998, p 30.

2 *Mediation is being effectively used to resolve environmental disputes, the subject of administrative proceedings in the Court.* Using agreement rates as a tangible measure of effectiveness, the data disclosed an average 'success rate' of 73 per cent. Without overstating the empirical findings, it appears that in the main these matters are environmental disputes rather than environmental conflicts.

Justice Lloyd of the Court, on reviewing the high success rate of the Mediation Scheme, asked rhetorically in relation to mediations: 'Why are there so few of them?'[36] He said he suspected one of the reasons was a reluctance on the part of local councils to authorise their legal representatives, General Manager or Mayor to settle or compromise proceedings. Local councils defended their position by saying that mediation with its required delegation of authority to compromise could involve an abrogation of their political responsibility.[37]

More pragmatic reasons were mainly procedural, in that there was a lack of knowledge in local government circles about the availability, timing and effectiveness of mediation.[38] This problem was being addressed and a recent survey of councils in the Sydney/Newcastle area showed '60 per cent were starting to use mediation', though more than half of these councils at that time had been involved in only one, two or three mediations.[39]

3 *Mediation is used primarily for environmental disputes rather than environmental conflicts.* The data disclose that 87.5 per cent of matters mediated could be classified as disputes relating to residential matters. These were environmental disputes in that they lacked the key features of irreconcilable differences indicative of environmental conflict: value conflicts, questions of scientific uncertainty and public-interest concerns.

The use of ARD methods to resolve disputes of a similar scale has existed outside the Court's system for some time.[40] The Australian Commercial Disputes Centre undertook a pilot project designed to formalise non-Court annexed mediation in this area in 1995. The aim of the pilot project was to select a number of environmental disputes, subject these to facilitation or mediation and utilise the results as case studies to promote the benefits of ADR methods to

36 ibid., p 14.

37 ibid., p 66.

38 ibid., p 60.

39 ibid. The survey was carried out by Carleen Devine, Sydney City Council.

40 E Speigel, Local Government and Environmental Mediator, personal comments, 14 April 1996.

industry and local government.[41] A report released in October 1996 detailed the mediations conducted and a recommendation was made in that report that councils proceed to implement a dispute-resolution program using ADR methods as part of the standard Development Application process.[42]

While taking account of these positive developments, the role of mediation still essentially remains limited to the resolution of environmental disputes. It was anticipated that these disputes, by their nature, had the potential to be negotiated, even though the perception of incompatibility of interests may exist. But accommodating the compromise inherent in consensual processes in a confidential atmosphere does not appear to be regarded as appropriate by stakeholders in environmental conflicts.

In conclusion, mediation has not become the preferred method of resolving environmental disputes of relatively small scope and divergence. Disputants still prefer the dispute to be resolved by the Court administratively, as distinct from a consensual settlement. The reason for this continued reluctance and whether it is the reluctance of applicants, government respondents or the Court itself warrants further attention. The Court sees the scheme as a 'customer service', but it remains at present a largely under-utilised one. The suggestion that, 'given sufficient resources, the Court could potentially introduce a range of ADR methods to supplement' the formal system may indicate that the basis of the limited use is funding.[43] Similarly, the use of mediation is not a common — or preferred — method of resolving environmental conflicts. The stakeholders in these conflicts prefer to conduct the dispute in the public eye at a political level. The role of mediation in that setting is either small or nonexistent on current evidence. This is not to say that other ADR methods such as interest-based negotiation may not have a significant role to play in these conflicts.

References

Atherton, T and Atherton, T, 'Mediating Disputes over Tourism in Sensitive Areas, Part 1' (1995) 5 *Alternative Dispute Resolution Journal* 7.

Australian Commercial Disputes Centre, *Dispute Resolution in Local Government-Strengthening Local Economic Capacity,* ACDC Publications, 1996.

Connell, M, 'Mediation in the Land and Environment Court of NSW' paper presented at University of Technology Sydney, 31 March 1995.

Cormick, GW, 'Mediating Environmental Controversies: Perspectives and First Experience' (1976) 2 *Earth Law Journal* 215.

41 Australian Commercial Disputes Centre, Press Release, 1995, p 1.

42 Australian Commercial Disputes Centre, *Dispute Resolution in Local Government: Strengthening Local Economic Capacity,* ACDC, 1996, p 3.

43 JH Keogh (1996) 'Dispute Resolution Systems in the NSW Land and Environment Court' 7(3) *Alternative Dispute Resolution Journal* 169, p 180.

Fogg, A, 'Third Party Objections and Appeals in Development Control Decisions under Town Planning Legislation' (1993) 2 *Environmental and Planning Law Journal* 4.

Fowler, RJ, 'Environmental Dispute Resolution Techniques: What Role in Australia?' (1992) 9 *Environmental and Planning Law Journal* 122.

Keough, JH, 'Dispute Resolution Systems in the NSW Land and Environment Court' (1996) 7 *Alternative Dispute Resolution Journal* 169.

Land and Environment Court of New South Wales, *Annual Review, Year ended 31 December 1995,* 1996.

Muller, J, 'Report on Young Lawyers' Survey: Mediation in the Land and Environment Court' (1992) 3(3–4) *LEADR Brief* 8.

Naughton, TFM, 'Court-related Alternative Dispute Resolution in NSW' (1995) 12 *Environmental and Planning Law Journal* 373.

New South Wales Parliamentary Accounts Committee, *Proceedings of the Interactive Seminar on 'Dispute Management in Local Government'* PAC Report No 24/51, 1998.

Preston, BJ, 'Limits of Environmental Dispute Resolution Mechanisms' (1995) 13 *Australian Bar Review* 149.

Spiegel, E, 'Mediation in the Court' paper presented to the NELA (NSW) Biennial Conference, June 1992.

Stein, P, 'Mediation in the Land and Environment Court' paper presented to Local Government and Planning Law Review, College of Law, Sydney, June 1992.

Tillett, G, *Resolving Conflict: A Practical Approach* Sydney University Press, 1991.

Tow, D and Stubbs, M, 'The Effectiveness of ADR Techniques in the Resolution of Planning Disputes' unpublished, University of Western Sydney, 1995.

Wootten, H, 'Environmental Dispute Resolution' (1993) 15 *Adelaide Law Review* 33.