THE MEDIATION OF PUBLIC ISSUE DISPUTES: SEVEN KEY ELEMENTS*

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The Alternative Dispute Resolution Branch of the Department of Justice (Queensland) has a busy practice in public issues disputes. This article draws on this experience to highlight the different types of public issue disputes and their particular complexities. It identifies what the author considers to be seven essential elements, including the careful identification of parties, the role of the mediator, the neutrality of the mediator, assessment, identifying "interests" and the development of options, negotiation and implementation.

Introduction

Public issue disputes are those which affect members of the public as well as the principal parties. They are important because they often represent important public choices about economic, social and environmental issues; they are usually time consuming and expensive to litigate; and if they are not fully resolved they can re-emerge in other forms as new litigation or administrative battles. The Alternative Dispute Resolution Branch of the Queensland Department of Justice (the ADR Branch) has, through its Dispute Resolution Centres, developed quite a sizeable portfolio of cases in this area.

Case Studies

The ADR Branch has been involved in disputes in the Conondale Ranges, Fraser Island, a number of Aboriginal communities, the Brisbane Landfill and a planning dispute in inner city Paddington and the Regional Forest Agreement process. These experiences and others have indicated the potential that mediation, and related processes, have in these types of disputes.¹ Local government is, along with police and courts, its major source of referrals.

The Conondale Ranges mediation was concerned with the future of the area, including a proposed increase in the size of the Conondale National Park. In 1990 a consultative committee of interested parties was formed. In

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Early 1991 the ADR Branch was invited to provide mediation services to the group. Mediation proceeded over the next six months and agreement was reached on all major issues. Unfortunately implementation of this agreement has never been fully realised.

During 1993 the ADR Branch was engaged in a mediation within the Aboriginal community at Yarrabah over land ownership and management. Despite ongoing difficulties due to tensions between rival groups of traditional owners, an agreement was reached consisting of a statement of principles as to land use and the process of making claims in relation thereto. The land in question is presently subject to several claims and counter-claims before the Native Title Tribunal.

The Fraser Island mediation involved a mediation between all interests relating to a management plan for this area although final decisions relating to this were kept at the political level. The Branch provides an ongoing facilitation role in the regular bi-monthly management meetings between the various parties involved.

The Brisbane Landfill was to be the largest dump in the southern hemisphere with five proposed transfer stations around Brisbane. It was opposed by residents who lost a court case. The ADR Branch mediated for two years between the council, the developer and the residents to reach an agreement as to ongoing management of the proposed facilities. It facilitates ongoing committee meetings in relation to two of the transfer stations.

The Paddington dispute involved local residents, community agencies, small businesses and the Brisbane city council. Over a series of meetings, stretching over six months, a management plan was developed.

The Regional Forest Agreement (South East Queensland) is an agreement between the Queensland and Commonwealth governments on how the native forests of the region can be best used and managed. The Branch assisted the Department of Environment (Qld) and Environment Australia (Commonwealth) in designing and running 13 consultation workshops around the region.

More recently the Branch has been involved in mediations and large-scale transport planning issues, disputing within a primary industry sector and several public meetings involving planning issues. We have also been involved in numerous consultations involving native title matters. We have, in addition, joined with the Royal Australian Planning Institute to offer courses in dispute management to planners and others involved in the planning profession.

**Types of Public Issue Disputes**

Public issue disputes can be divided into three types — enforcement disputes, permitting disputes and policy or law-making disputes. Enforcement disputes relate to the compliance with particular laws or regulations that require the attainment of a particular standard, for example, air and water pollution controls. Permitting disputes arise over planned construction of new facilities such as dams, highways or rubbish dumps. Policy or law-making disputes are concerned with the establishment of new policy or standards in management.
These distinctions are important because the level and type of involvement in each is likely to be different. Further, the ability to resolve or manage these various types of disputes has different ramifications for the disputants themselves and for society as a whole. The ability of stakeholders to participate in these disputes is of crucial importance in their processing and transformation. In particular, failure to manage the dispute issues adequately may result in its projection into other arenas of conflict.

Environmental conflict is often portrayed as a particularly distinctive and difficult species of public issue dispute. For example, Painter\(^3\) argues that there are four inter-related attributes of the environment itself which distinguish environmental disputes from other types of disputes. These are described in summary as follows:

1. **Complexity**: this is a measure of the entropy and information levels of environmental processes which are manifestly complex.

2. **Dissipative Shift**: living systems are constantly moving from one degree of order to a higher degree of order. That is, natural systems constantly reorganise themselves, in the face of disruption, towards a new state of order.

3. **Irreversibility**: environmental systems cannot go back in time to an earlier manifestation because natural processes cannot be reversed.

4. **Logarithmic and Analogic Qualities**: environmental processes are not binary or discrete but things happen in them in graduated and uncertain ways. Change to a process will affect other processes in logarithmic rather than arithmetic ways. Change will occur in "multiples", thus creating a high degree of uncertainty in ecological processes.

Besides these attributes, there are a number of other potential ingredients which characterise environmental conflict, including their uncertain boundaries; the large number of participants (usually); the indeterminate nature of potential costs; the common claim by one or more of the participants to represent the "public interest"; and the difficulty of making private agreements. They are as much value disputes as "scientific controversies".\(^4\) That is, they are as much political and social problems as problems of ecology. The confusion this creates causes special problems in environmental disputes, especially as scientific investigations and outcomes are themselves often perceived as value laden. As Ashby comments:

"In summary there are problems in ecology about which the policy makers and the public want factual information, but these statements of fact, to the extent that they can be value free (which is only partially), do not answer the question of what ought to be done. And, it is the 'ought' that lies at the heart of most environmental disputes."\(^5\)

Cotgrove\(^6\) has identified two particular ideologies commonly associated with environmental disputes. There is the humanistic view that embraces harmony with nature and non-material goals. Humanists advocate a holistic approach that firmly places humankind within the intricate web of ecology. Then there is the technocratic view that emphasises mastery of the environment and material development. The technocrats believe that decisions about the environment are essentially a sort of cost-benefit analysis based on scientific and technological information.
These aspects of public issue disputes, particularly environmental disputes, make it more difficult for traditional conflict management systems to respond. The substantive issues in the dispute are often more difficult to deal with especially if there is a preoccupation with legal and procedural matters. Some therefore argue that mediation of these types of disputes should be kept separate from the courts. Mediation and related processes in public issue disputes are often regarded as a useful alternative.

Most mediations of public issue disputes have involved site-specific or policy-related environmental disputes but they can be usefully used as a way of developing mechanisms of improved communication. The form and process of mediation is nowhere officially prescribed or formally incorporated in administrative procedures although government policy in certain areas encourages its use, and various government agencies, especially in the United States of America, have clear policy reinforced by legislation which guides its practice.

Seven Elements

A review of the literature and the experience of the ADR Branch reveal that there are at least seven essential elements of public issue mediation. It cannot be assumed that they occur in any linear order. They are perhaps more accurately described as occurring in a circular or asymmetrical pattern. The seven elements are briefly summarised as follows:

(1) Careful Identification of the Parties

It is important that there be adequate representation of the different interest groups involved in the dispute. Some commentators go so far as to suggest that a check list or questionnaire be systematically used to make sure that this aspect is thoroughly canvassed. It is also generally assumed in the reports from public issue disputes that attendance of parties is voluntary and that any agreement reached will be consensual. Without the proper initial identification of parties, the progress of any mediation can be severely disrupted.

(2) The Role of the Mediator

The role of the mediator is usually defined as a crucial element of any mediation and is intimately related to the processes described in the first element. There are differing views on whether the mediator should be an expert in the area of dispute. The experience of the ADR Branch would indicate that expertise in the area of dispute may be an advantage but is not necessarily crucial. What is more crucial is the competence of the mediator in managing and controlling the process. Further, experts can be brought into the process as backup or support persons to the mediation team and/or participants. A related issue is the qualification of mediators. The Society of Professionals in Dispute Resolution (SPIDR) in the United States has adopted a number of "central principles" to promote competence and quality in practice. Perhaps the most advanced move in this direction in Australia is the development of mediation competency standards in the Australian Capital
Territory. The various State government community mediation programs (including the ADR Branch) in this country have also developed a range of accountability and quality assurance measures to ensure consistently competent practice. The National Alternative Dispute Resolution Advisory Committee (NADRAC), a working group established by the Federal Government, is further considering the issue.

(3) Neutrality of the Mediator

There is a great preoccupation in the Australian and American literature with the neutrality of the mediator and this is often the key reason disputants have chosen the ADR Branch in these types of disputes. But as Susskind and Ozawa maintain:

"While it may be necessary for mediators to be perceived as nonpartisan the claim of neutrality in our view is misleading. Mediators are rarely disinterested in the outcomes of their efforts. Every mediator has a motive for engaging in dispute resolution. Whether that motive is primarily money, fame, or public service, mediators have an interest in bringing disputants not only to an agreement, but to an agreement that ‘sits well’ with their peers!"

The anecdotal evidence from our cases would seem to indicate that disputants, at the least, require an impartial (that is, one who will treat all sides fairly) as distinct from a neutral (that is, one who is not “connected” at all to the disputants) mediator.

(4) Assessment

The fourth element involves assessing the nature of the dispute and gathering all available data, including scientific, that may be necessary to acquaint both the parties and mediator with all the issues involved. Public issue disputes are frequently plagued by conflict over the meaning of data or even its very existence. For example, Stephen makes the important point that there are two levels of decision-making in resolving environmental disputes. These are: (i) fact-finding to establish a “measure” and consequent opinion about what is happening in any particular case; and (ii) attaching weight to each “measure”. This will often rest upon questions of public policy.

This highlights the qualitative rather than the quantitative nature of the process and any consequent discussion that may be involved. However, Stephen also suggests that it may be crucial for good “public policy” decision-making to engage in relatively objective fact-finding. This may be crucial in creating trust and confidence in the process as well as providing the necessary information upon which the parties can reasonably define and refine interests and issues, and generate options for solution. The provision of relatively objective data may help the parties to be more flexible in their approach. Often the appointment of an independent “fact-finder” may assist in this process. The development of such relatively sophisticated computerised planning and data collection procedures as CSIRO’s SIRO-PLAN and Lupis software is a good example of this emphasis upon assessment in these types of conflict.
(5) Identifying "Interests" and the Development of Options

Once interests are identified, then the parties are usually more able to move beyond their stated, and often entrenched, positions to consider the other participants' situation. This then leads to the easier development of options. Grad\textsuperscript{23} suggests that it is necessary to develop options because only then can "trade-offs" be developed.

(6) Negotiation

The process of negotiation between the parties is regarded as the central core of mediation. Strangely, the available mediation literature does not explore in great detail the nature of negotiation. However, this is more than compensated for by the multitude of books and articles written about this subject.

(7) Implementation

It is important that any agreements reached will be implemented and where necessary enforceable at law. American mediation is characterised by detailed and painstakingly prepared agreements. Part of the rationale for this is often to lock the parties into a public commitment. Another consideration is the "intraparty problem" which is the problem negotiators sometimes have in binding their constituencies to the agreements made. This is often a particular difficulty in environmental disputes because the interest groups that negotiators represent are often ad hoc coalitions which do not have well-developed internal decision-making processes. At least one major public issue dispute the ADR Branch has mediated has been plagued by an inability to implement the agreements reached. The \textit{Dispute Resolution Centres Act 1990} (Qld), under which the Branch operates, provides for both immunity of mediators and privileges the mediation process. The provision facilitates the process but does not necessarily ensure the post-mediation enforcement or compliance with decisions which should therefore be carefully considered.

Conclusion

The experience of the ADR Branch in these matters provides a good example of how well-prepared and well-resourced teams of community mediators can work productively, often over long periods of time and in complex contexts, to achieve good outcomes for participants and the wider community.

The identification of these seven elements indicates a dynamic and procedurally fluid process. The emphasis on a tailored process marks it in strong contrast to more traditional and formal responses to conflict management. An examination of these elements indicates the need to carefully examine the merits of each case before proscribing a definitive intervention. As Justice Wooten commented in his useful article on the subject, mediation is "not a panacea but it does have a useful role to play".\textsuperscript{24}

\textsuperscript{23} Grad, \textit{The Role of Public Interest Mediation} (1995).

\textsuperscript{24} Wooten, \textit{Mediation in Australia: A Practical Guide} (2000).
REFERENCES

1. The Branch usually uses a process derived from mediation called "facilitation" designed specifically for use in groups in these types of disputes. Facilitation now represents about 10% of the work carried out by the Branch. For an earlier description of the Branch's work in this area see M O'Donnell (1994) 3 Queensland ADR Review 10.

2. This division of environmental disputes comes from A Goldberg, E Green and F Sander, Dispute Resolution (Little Brown and Co, Boston, 1985), p 403.


5. A Ashby, cited by Susskind and Weinstein, op cit n 4, at 325.


8. See, eg, T Naughton, "Mediation and the Land and Environment Court of NSW" (1992) 9(3) Environment and Planning Law Journal 219; See also Sir Laurence Street's argument that there may be a danger that the courts will compromise their traditional role: L Street, "The Courts and Mediation — A Warning" (1993) 3 Judicial Officers Bulletin, p 10.


10. See G Bingham and L Haygood, "Environmental Dispute Resolution: The First Ten Years" (1986) 41(4) Arbitration Journal 3 at 4; for a good description of a mediation that helped communication between the parties in a dispute involving the fishing industry and the oil industry in California, see G W Cormick and A Knaster, "Mediation and Scientific Issues" (1986) 28(6) Environment 6.

11. See Negotiated Rulemaking Act 1990 (USC); Administrative Dispute Resolution Act 1990 (USC).


15. Society of Professionals in Dispute Resolution, "Qualifying Neutrals: The Basic Principles" (1989) 44(3) Arbitration Journal 48 at 48-49. These are: (a) that no single entity but rather a variety of organisations should establish qualifications for neutrals; (b) that the greater degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements should be; and (c) that qualification criteria should be based on performance, rather than paper credentials.

16. ACT Community Services and Health Industry Training Advisory Board, ACT Mediation Competency Standards (Canberra, 1995).


19. For a good description of this dilemma see L Susskind, "The Siting Puzzle: Balancing Environmental Gains and Losses" (1985) 5 Environmental Impact Assessment Review 157. Susskind illustrates how fact-finding was the starting point for siting of a waste disposal facility.


21. Ibid.


24. Op cit n 4, at 76.