IMPACT

A QUARTERLY NEWSLETTER ON ENVIRONMENTAL LAW September 1991

Environmental Defender's Office Ltd

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BANGKOK CONFERENCE: ENVIRONMENTAL RESPONSIBILITY ACROSS INTERNATIONAL BOUNDARIES

David Robinson, EDO Solicitor, gives his impressions of the National Environmental Law Association (NELA)/Lawasia Second International Conference on Environmental Law, 4-7 August 1991. Conference proceedings are to be published by NELA (telephone (06) 247 7505).

Diarise Now. EDA Seminar 18 June 1992 Powerhouse Museum See page 12 for details.

Please Note: The deadline for contributions for the next issue of IMPACT is 29 Nov 1991.

Bangkok's snarling traffic. Tropical heat. The frustrated hustle and bustle of a vast metropolis without urban infrastructure. In the middle: a hotel where 140 environmental lawyers and experts from 15 countries in the Asia-Pacific area met. The conference theme: environmental responsibility across international boundaries.

I was there thanks to the Australian International Development Assistance Bureau (AIDAB), one of the sponsors of the conference. EDO is carrying out a Pacific Island Region environmental law and policy training project with AIDAB funding. The object of the programme is to develop the environmental law and policy skills of land use workers and advisers in the Solomon Islands and Papua New Guinea[1].

The tenor of discussion at the conference between lawyers not dealing day-to-day in international and public interest questions and those who do was remarkable. As lawyers from the United States, Canada and the United Kingdom pointed out, NELA had set a more challenging, broad and progressive agenda for its conference than equivalent professional associations in their respective countries ever ventured into. There was also valuable discussion between lawyers on North-South environmental issues, and between lawyers encountering common problems in diverse jurisdictions.

Unsustainable Rhetoric or Sustainable Development?

Is "sustainable development" just a fashionable, rhetorical phrase? I had thought so. You add "sustainable development" to reports and submissions because no one could contest its desirability. That superficial approach was challenged in vigorous intellectual presentations by the Environmental Foundation of Sri Lanka's Lalanath de Silva and Malaysian lawyer Gurdial Singh Nijar.

Llanath de Silva delivered a paper entitled "Law and the Alternative Development Paradigm". The Chair of Mr de Silva's session was Mr Mana Pitayaporn, Vice-President of the Thai Law Society. In the amusing and affable style typical of the hospitality we received at the conference, Mr Pitayaporn, in introducing Mr de Silva, playfully questioned what the "traditional development paradigm" was, let alone the alternative one. Mr de Silva answered the question admirably. I have sought to summarise some of his points in Table 1.

Developing Countries and Public Interest Litigation

Gurdial Nijar argued that public interest environmental suits could be a lever for social justice in developing countries[2]. State enterprises were otherwise unaccountable as legislatures and executives were not responsible to the people. Independent bar associations and judiciaries were often lacking. Further problems such as the weakness of democratic processes, the unquestioning acceptance of the traditional development paradigm, government control of the media and intimidation and repression of those who questioned authority made difficulties encountered in public interest suits in Australia look trivial.

How to get on in the World Bank

Complementing the intellectual framework offered by de Silva and Nijar and many others were papers on the role of

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Table 1 Attitudes to Development (an interpretation of De Silva, "Law and the Alternative Development Paradigm", Bangkok Conference, August 1991)

DOMINANT DEVELOPMENT PARADIGM	ALTERNATIVE DEVELOPMENT PARADIGM
Primacy of international, materialist economics	Primacy of self-determination and endogenous values
Founded upon a hierarchical human order (the "developed" teaching the "undeveloped")	Founded upon the equal value of human beings (partnerships in development)
Wisdom possessed by educated experts	Wisdom also possessed by the elderly and indigenous peoples
People the objects of development	People the subjects of development
Poverty viewed as low material entitlement	Poverty viewed as low material entitlement and, just as importantly, low self esteem
"Top down" approach to resource management and government	Substantial community participation in resource management and government
Centralised resource control	Decentralised resource control
External input farming	Internal input farming
Extended concept of private ownership	Extended concept of communal resource ownership or control

international aid agencies and financial institutions. Bruce Rich of the U.S. Environmental Defense Fund described the superficial greening of policies of the World Bank[3]. Behind the green appearances, however, remained a brown reality. The World Bank, despite twenty years discussion of the need for funding only international aid programmes which are ecologically sustainable, has yet to adequately implement such funding policies. Conference commentator Justice Murray Wilcox likened institutional change to the process of turning around an aircraft carrier. While there were current freezes on forestry loans pending a review of World Bank policies, energy loans were still not tied to underlying questions of demand management and the need for cleaner energy production technologies.

Institutional problems underlying funding authorities such as the World Bank results in continued funding of major engineering projects in developing countries. In some cases these make poor people poorer (for example rural inhabitants displaced without proper restitution in areas flooded by major dam projects). Careers within aid agencies are often furthered through engineering achievements. A World Bank officer would not be promoted for building a major power station, but not for educational or basic technology investments which provided no focal point for photographs, VIPs and the media.

Pollution Law Trends

The conference then moved towards more traditional environmental law problems. The emphasis was on the future of pollution laws. A number of lawyers presented broad analyses of pollution control legislation in Australia. A useful overview, State by State, of non-criminal sanctions in the various pollution statutes was included in Mark Brennan and Stephen Garrett's paper[4]. John Taberner offered a challenging list of sixty propositions for a hypothetical pollution control statute[5].

Characteristics of US Pollution Laws

The question of contaminated land management was addressed on the final day of the conference. It is clear that the United States experience is influencing thought in Australia on this issue. Californian lawyer Michelle Corash offered a vivid description of US environmental litigation[6]. The characteristics of US pollution laws were the ease with which enforcement could be achieved, the use of quantitative emission standards rather than the "best practical means" test, the undisputed role which non government organisations have in achieving enforcement compliance, the self-implementing nature of pollution laws in which the burden of inaction is shifted to industry and the excessive emphasis on lawyers in achieving environmental protection.

An Environmental Ethic for Lawyers and Advisers?

In the final session of the day Freya Dawson of the University of Northern Territory Law School asked the Australian lawyers what their advice would be to a client who wanted to know which country had the slackest environmental laws so that an investment decision for an environmentally damaging industrial plant could be made accordingly.

One lawyer from a big firm offered the traditional legal adviser's view that one simply provides the technical advice requested. Moral implications are for the client to determine. In other words, the adviser should provide a list for the client of the possible investment destinations in order of the inadequacy of the country's environmental protection laws. Other lawyers suggested that the "traditional" view could be tempered by pointing out to the client that the trend in environmental laws internationally was towards more stringent standards. The Australian company would be unwise to invest in a country with weak laws because of the likelihood of more stringent standards. The Australian company would be

unwise to invest in a country with weak laws and the standards set by international conventions would soon replace them.

Ben Boer commented that in fact a number of countries in southern and south-east Asia had no environmental laws at all. It was wishful thinking that all countries in the region would achieve, in the foreseeable future, common environmental ethic such as the of the Environmental Institute of Australia (EIA)[7].

Is environmental law just a growing, but otherwise indifferent area of legal practice? Alternatively, should the professionalism of an adviser be measured by the degree to which advice given enhances or protects the environment? If so, can "high moral ground" advisers from rich countries expect poor countries to impose environmentally stringent conditions on development without addressing broader issues such as food, housing, jobs, health and human rights in those countries?

The conference thus closed where it began, in the public interest field. An enriching conference. A challenging conference. A forum for the exchange of ideas between private practitioners, international development workers, environmental experts and public interest advocate alike.

Footnotes

(1) See **IMPACT**, July 1991, "South Pacific Law and Policy Training Programme", p.15

(2) "Public Interest Law: The Third World Experience".

(3) "Environmental Reform in the Public International Finance Institutions: What Progress?".

(4) "An overview of Australian Environmental Offences Legislation"

(5) "Future Directions in Pollution Control Laws".

(6) "Overview of united States Environmental Laws and Practical Suggestions for Dealing with the Government".

(7) The EIA has an eight-point Code of Ethics and Professional Conduct governing the professional activities of the Institute. One component of the code is, for example, that "The member shall at all times place the integrity of the natural environment and the health, safety and welfare of the human community above any commitment to sectional or private interests". On the role of lawyers' professional organisations in environmental issues, see also Ben Boer, "Our Common Future; The Report of the World Commission on Environment and Development: Implications for Environmental Law", paper delivered to International Bar Association Committee on Environmental Law, Auckland, 1988, at pp 24-25.

THE LAST WILD FORESTS
Sustainability or Development?

Aboriginal issues, biological sciences, economics, management, business ethics and politics come together in a single question: what future for wilderness and the natural environment in Australia?

Sunday 20 October 1991 1.30-4.30pm
Goldstein Undercroft
UNIVERSITY OF NEW SOUTH WALES
Near Gate 4,
High St – Car Entry Gate 14,
Baker St
KENSINGTON, SYDNEY

ENVIRONMENTAL LAW ASSOCIATION 1992 CONFERENCE (QUEENSLAND DIVISION)

15-17 May, 1992

GREAT KEPPEL ISLAND

CONTACT: Carmel Coyne Phone: (07) 832 4865

Human Rights and Environmental Protection Workshop:

THE VITAL LINK

Saturday 12 October 1991 9.00 am-6.00pm
Hal Wootten Moot Court
Level 10, Law School
UNIVERSITY OF NEW SOUTH WALES
KENSINGTON, SYDNEY

NOTICE

In the last edition of IMPACT an article about the Centre for International Law appeared. We would like to make it clear that the Centre for International Law in London and the Centre for International Law in Washington are completely separate organisations. Each office has different Trustees, Directors and staff, and pursue unrelated work programmes and projects. We apologise for any confusion which may have arisen because of that article.

IMPACT INTERVIEWS CRAIG HARDY

*Impact interviews **Craig Hardy**, accountant of Rockhampton, an organiser of the Mt Etna "Ghost Bats" campaign and litigation, and Conservation Convenor of the Australian Speleological Federation Inc., on his experiences of environmental law and litigation. IMPACT thanks Patrick Larkin of the Sydney Bar for this article.*

Impact: You're an accountant from a conservative Queensland provincial city. How did you become interested in conservation?

Hardy: I was concerned about the environment for many years, but didn't do anything about it. Then, in 1986, I didn't attend an Annual General Meeting of the Central Queensland Speleological Society (CQSS), so they elected me Conservation Secretary. I didn't really want the job because I knew it would be a lot of work.

Impact: What are Speleological Societies?

Hardy: Caving clubs. They explore caves. There are many around Australia and most are affiliated with the national body, the Australian Speleological Federation.

Impact: In the last two years there have two major pieces of environmental litigation, and four appeals, about caves. Why?

Hardy: Caves are important and under threat. The cave environment is arguably the most sensitive natural environment to which humans have access. Some of the mineral formations which have formed and some of the animals which have evolved in caves have done so in extremely low energy conditions, virtually isolated from normal energies (e.g. wind, sun) associated with other environments. Consequently they can be very easily damaged or destroyed. Cavers, who visit these places, can't but be conscious of just how sensitive the cave environment is. Consequently, there is a real awareness of the environment and its fragility among cavers. And Australia, apart from Antarctica, is the cave-poorest continent in the World, so caves are a scarce resource. Since the exploitation of limestone for commercial applications (cement, agricultural lime) destroys caves and cave fauna, all of the ingredients were there.

Impact: You were a key organiser of one of those cases, the Mt Etna case. How did it get started?

Hardy: Well, Mt Etna has been a hot spot since at least the mid 1960's. There was controversy over the grant of the mining leases to start with. Then, in 1975, we obtained senior counsel's advice that the mining was unlawful as a consequence of the mountain's reserve status. We applied for the Attorney-General's fiat to commence proceedings. The reserve was revoked and two weeks later, the fiat application was refused. Then in 1982, a nationally significant and ornate cave, Crystal Palace, was blown up. That really galvanised CQSS. So in late 1987 when it became apparent that Speaking Tube Cave, the Ghost Bat winter roost, would be the next to go, we took action. There were protests which delayed blasting for ten months. At that stage we didn't realise that there was possibly a legal avenue open to us. It was not until after the first blasting of Speaking Tube Cave that we received advice that we had a possible legal avenue. Luckily, the damage to the cave caused by the first blast was fairly superficial.

Impact: The avenue that you spoke of was an action for an injunction founded on the **Fauna Conservation Act (Qld)**?

Hardy: Yes. The **Fauna Conservation Act** prohibits "taking or keeping" "protected fauna". "Taking or keeping" is defined to include, inter alia, "disturbing", and "destroying", and "protected fauna", in relation to a mammal, includes, inter alia, the "nest" of the mammal. The Ghost Bats used Speaking Tube Cave as a winter roost. The Ghost Bats were protected fauna. Indeed, there are only some nine colonies still in existence. So the arguments were first that Speaking Tube Cave, as a "nest" of the Ghost Bat, was itself "protected fauna" for the purposes of the Act, and second that to destroy the cave would disturb or destroy the bats themselves. I think that Impact has already published a detailed article about the case in June 1989.

Impact: The **Chaelundi** litigation **(Corkhill v Forestry Commission)** which has just been heard in the Land & Environment Court of New South Wales relies upon a similar provision.

Hardy: Yes.

Impact: There was also litigation against you and others personally?

Hardy: Yes. We were involved in protests to prevent Speaking Tube Cave from being blown up. Central Queensland Cement Pty Limited (CQC) took proceedings for an injunction to restrain the protests, and then contempt proceedings against me. The proceedings were settled, but I think that it was a mistake on my part to settle them.

Impact: Why?

Hardy: I should not have accepted the advice I received. I should have stood in Court, perhaps unrepresented, and said only that I was trying to protect the environment. For "middle-class" Australia, it's OK to arrest and send to gaol long haired greenies. But an accountant with a family and a home, respectably dressed, that's altogether another thing.

Impact: Surely what you did was just as unlawful as you believed the destruction of Speaking Tube Cave to be.

Hardy: The law, and especially environmental law, is always in a state of dawdling revolution. It lags twenty years behind the times. The only way to promote change is to show that the law is inadequate.

Impact: But is the law inadequate?

Hardy: I believe so. Let me give you a specific example. In Mt Etna, our case was that an activity would destroy a vital roost of the Ghost Bat colony. The Full Court of the Supreme Court of Queensland held that there was a serious case

to be tried that the activity was unlawful and that the balance of convenience favoured the making of an interlocutory order. But they held that the plaintiff, CQSS, had no standing to seek the order. That is, that Court was more concerned to ask, not, "will there be a breach of the law?" but rather "who is this that is complaining to us about the breach?". That's a totally inadequate approach. It means that there's a gulf between what the law says is illegal on the one hand, and what you are allowed to do in reality on the other, because if you want to break the law, a Court won't restrain you.

More generally, whilst a lawyer might say that a function of litigation is to resolve disputes in accordance with law, I believe that a function of litigation is to resolve disputes in a manner which accords with social values. If you apply the latter test, environmental law is also inadequate. It is twenty years behind the values. The protests which we have seen – Daintree, Mt Etna and so on – reflect this. If you give people a functional, accessible avenue to resolve their differences, there won't be a need for direct action. But, as with all of the great civil rights movements of the past, non-violent direct action is a consequence of the failure of the legal system to be in tune with existing values. As I have said, I believe the only way to promote change is to demonstrate the inadequacy.

Impact: Assuming that the law follows behind social values, can't it be argued that to do so is a great strength of the law. It permits orderly change. Unlike other nations which do not permit orderly change and thereby suffer revolutions, Australia is stable.

Hardy: Yes, that's true. In respect of many legal changes, cautious orderly change is highly desirable. But with the environment, there are physical considerations which mean that we simply don't have the time for that process. The destruction of the environment is too rapid and can't be reversed. So we need much more rapid change in environmental law.

Impact: Do you believe in environmental law?

Hardy: Yes I do. In theory, Courts are a rational forum for debate and resolution of conflict. The great challenge for lawyers, legislators, judges and litigants, is to make the law deal with the real issues. Unfortunately, that's going to be a long and difficult task.

APPLYING MEDIATION TECHNIQUES TO ENVIRONMENTAL ISSUES

From a paper delivered by James Johnson to the RAPI/LGPA seminar on Mediation and Negotiation; Alternative Dispute Resolution for the Environment, 3rd April 1991.

Introduction

It is generally acknowledged, even recently by the Treasurer , that we in Australia are in a time of recession. This is the climate for attacks on the environment to gather momentum. Some sections of the media are intent on fostering the opinion that we have gone too far in protecting the environment, that the pendulum must swing back to establish the "proper balance". This is not a new argument.[1]

It is in this climate that **Environmental Mediation** or the **mediation of public issue disputes** has become the "flavour of the month". There is concern for the financial cost, the perceived loss of oportunity and also for the lack of support for policies and government that conflict highlights.The Minister for State Development, Mr Hannaford, recently brought Dr Peter Adler from the Program on Alternative Dispute Resolution in Hawaii to address professional and community groups on various aspects of the subject. Mr Greiner gave an alarming address at a recent National Conference on Public Issue Dispute Resolution.[2] There are major conferences on the subject in the next few months.

This enthusiasm has however been given a cool reception by the conservation groups in general.

In this paper I explore:

- the factors that distinguish environmental issues from other issues which have been the subject of mediation in the past
- some prerequisites for mediation
- the pros and cons of using the process of mediation for environmental issues
- some suggestions as to where mediation might be appropriate

Definitions.

For the purpose of discussing Environmental Mediation I have taken "**mediation**" to mean

"a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no power to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences."[3]

The mediator must be impartial and trusted by all parties. The aim of the process is to achieve a solution which takes account of the **interests** of all parties and which is not a "coerced agreement."

Part of the process involves assisting the parties to identify those interests and shift from a "position" standpoint to an "interest" standpoint. An example of a position might be opposition to killing baby seals. The interest behind the position may be ensuring that the seal population remains viable. Conditions may be found to accommodate and protect the interest which is behind the position.
What do we mean by "**environmental issues**" in the context of mediation? My major concern today is with public issue dispute resolution and it is with public issues rather than private that this paper deals. Thus if an issue affects a large segment of the community, if it is of concern to the "general public", then it is a public issue. By contrast the public is unlikely to care whether neighbours in a dispute over a fence ever talk to each other again.

What can mediation achieve?

The main goal people seem to hope that mediation will achieve is a settlement of the dispute on terms satisfactory to all parties. This won't happen in many public issue

disputes for reasons that will be developed later. There are however other benefits that mediation can achieve. There can be a narrowing of the agenda, of the issues in dispute by proper information exchange. This may deal with false assumptions based on faulty or insufficient data. A mediator can help highlight cases where data has been selectively used to support an emotional bias.

Identification of the various interests involved as opposed to the public positions adopted by parties allows the values and assumptions inherent in and underlying those positions to be confronted and made explicit. In this way the public can make a more informed assessment of whether it supports these values.

One example might be where environmentalists wish to preserve an area of old growth because of its intrinsic value as wilderness and habitat and the Forrestry Commission wishes to log the area because there is no other source of supply of the particular timber and to preserve employment in the area. An examination of the interests and data may reveal that the area isn't "special" and that some other interest is behind the position adopted. Alternatively it may be revealed that alternative supplies of timber are available in less sensitive areas which could maintain supply and employment and that ideological opposition to preservation of significant areas of wilderness underlies the position adopted.

Finally, some commentators have observed that the process contributes to better relations between the parties in future disputes.[4]

What features distinguish "environmental" mediation?

Irreversible ecological effects are sometimes involved in environmental issues, such as species extinction and ecological simplification. In these cases we are making decisions on behalf of future generations, not just for ourselves.

"This is not an argument against all development or industrial expansion; rather our intention is to underscore the fact that the irreversibility of certain environmental impacts is an important agenda item in most environmental disputes and a concern that sets environmental disputes apart from other social conflicts."[5]

This is different from commercial disputes. One could even put Mr Bond's companies back on a sound financial footing if you were prepared to invest enough money. Unlike commercial or labor disputes, there are **multiple parties who have legitimate interests and who must be included** if the mediation is to be successful. The parties may include local government, state and federal government departments, private developers, local community groups, conservation groups, unions and individuals.

These groups will have **varying degrees and styles of organisation,** from total concensus to virtual dictatorial control. The organisational structure needed to negotiate effectively on behalf of constituents will often be completely at odds with the concept behind a broadly based public interest group. Organisational constraints within government bureaucracy may be even greater.[6] There are **complex social questions with a high degree of scientific uncertainty**. For example, what level of exposure to toxic chemicals is safe? While there will generally be a plethora of economic information available, ecological information will generally be poor or absent.

Information is never "value-free" and where one party provides the information it will need to be critically assessed to identify the methods, assumptions and opinions upon which it is based.[7] Bland statements don't portray the complexity or uncertainty inherent in what is asserted. Mathematical methods of standard deviation or geometric mean hide or highlight results of raw data.

The costs of disputes are not readily calculable, unlike commercial or labor disputes. There are difficulties if not impossibilities calculating for example the intrinsic value of an area of wilderness, of scenic beauty or of clean air or water. Dollars are an inadequate measure.

The costs of disputes are not equally born. An individual or group may commence proceedings which prevent a development proceeding until the issue raised, which gives a legal "handle" on the development, has been dealt with. The cost in dollar terms to the applicant can be far less than those imposed on the developer resulting from the delay. On the other hand, the costs imposed by the successful developer, in terms of pollution, loss of natural areas or simply inappropriate development in a locality, will have to be born by the general community, the losing party.

There are **problems of implementation of mediated agreements which distinguish environmental disputes.** There is always the possibility that the agreement will be challenged by someone who was not a party to the process. Because environmental groups are generally less cohesive than unions, there may be a "splinter group" who will interfere with implementation because they disagree with the results achieved by their representatives in the mediation.[8]

"The statutory scheme of environmental laws is often such that parties have no power to make a final and binding commitment in an agreement at the conclusion of the negotiation."[9]

A consent authority cannot fetter its decision making power, its power to consider an application as and when it comes before them. New facts may arise, the economic situation may change. State and federal governments too will always retain direct authority for making the ultimate decision.

Prerequisites for Successful Mediation

All parties with a stake in the outcome of the mediation must be identified and appropriately represented. There may well be disputes at this stage which in turn will need to be mediated. Even after the identity of the parties has been agreed, there may later be dispute about the integrity of a particular representative of a coalition of groups.

There must be an equivalence of power between the parties. Power can be equated with the ability to inflict "damage" on the other party. The right to commence proceedings, "standing", is paramount to creating an equivalence of power and thus the requisite desire to mediate.

All parties must be willing to enter the mediation in good faith. Some reasons for a party wanting to mediate in good faith are dealt with below.

Government authorities must provide reasonable assurances that they will co-operate with the mediation process. This has been discussed above.

The issues under dispute must be amenable to compromise. This has been discussed above.

The dispute must be within manageable proportions. The number of parties and interests may simply be too huge to deal with.

Why Mediate?

Parties see mediation as an attractive process when they have the chance to gain more than they might through more traditional processes of litigation or political conflict. Thus the uncertainty of other avenues is one reason to mediate; to have some control over the outcome. So also mediation may be more readily engaged in where parties would be prevented from litigating because of the cost of conducting proceedings or where it reduces the costs of litigation by narrowing the issues.

Mediation may allow solutions that litigation can't provide. There is sometimes dissatisfaction with the existing legal process because it provides an inadequate forum and/or inadequate remedies. I was recently involved in litigation on behalf of a local action group at Port Stephens which is concerned to protect the Koala population in the area. The group was a party to Class I proceedings in the Land and Environment Court to contest the need for the development and the effects on the environment resulting from the development.

The forum was inadequate to look at broader questions of urban and industrial development in the immediate area. The group would have benefited from the involvement of all major players; the local council, the Department of Housing, the various sand mining companies, residents and koala experts, in order to work out an overall and long term strategy. Instead the court is obliged to consider the development before it, which by itself might not spell disaster but in combination with other developments proposed results in "death by a thousand cuts".

Another classic example of an inadequate forum and remedy is where Class IV proceedings are commenced to give an objector to a development a "handle" to challenge the development. The real issue is most often opposition to the development for merit reasons and the intricate legal arguments are of little interest to people other than the lawyers. The aim is to stop or modify the development, or to postpone it until the economic or political climate changes and it becomes less feasible.[10]

Why Avoid Mediation?

There are some very strong reasons for not mediating environmental disputes, which can be summarised as "principles, politics and precedent."[11]

There is an interest-based risk in even agreeing to mediation. Participation will be perceived as an indication of weakness by other parties, a sign that one side is not prepared to carry the legal case to the end. This is a very real risk which the Environmental Defender's Office has had experience with recently, although in the context of negotiation rather than mediation.

The EDO is currently involved in proceedings to protect an area of limestone karst near Kempsey. The caves in the system are habitat for important species of bat. Bats are sensitive to disturbance in general and blasting in particular. With extensive expert assistance in the areas of mining engineering and bat ecology our client put a without prejudice offer of settlement to the mining company.

The Minister for Minerals and Energy was made aware of these "without prejudice" negotiations by a party other than our office and seized upon this without prejudice offer, which was not accepted, to renege on an undertaking he had earlier given not to issue a mining lease to the company. He stated

"It would therefore seem that you are no longer committed to pursuing this matter through the court. Owing to these changed circumstances, the principal reason for me to withhold approval for the grant of a mining lease would seem to have been withdrawn."[12]

It appears that if you give an inch you are deemed to have given a mile. This must dictate against making any concessions and has been an important lesson for those of us who have seen at first hand the results of genuinely attempting to consider all interests.

Government authorities also face an interest based risk and may be more inclined to allow an adjudicated decision to be made rather than having been part of the process of mediation. Thus the authority can distance itself from what may be an unpopular decision locally. The is repeatedly seen when proceedings are brought before the court because of "deemed refusals".

There is a personal risk of losing respect and credibility within one's own organisation.

"Those who advocate negotiation, whether they are working within a corporate heirachy or the most chaotically democratic of grassroots groups, run the risk of losing power and status within their own organisation by proposing the use of a process that depends equally upon their intentions and behaviour and those of their opponents for its success."[13]

Some parties to a dispute may not want to avoid conflict. Conflict is a mechanism of change, both preceding and encouraging it.

"It indicates a shift in public values, a recognition of what we are losing, and the displacement of "development" from the pedestal it occupied in the 1950s and 60s. It is powerful incentive to better practice."[14]

The dispute may thus be part of a broader political campaign, serving to keep an issue in the public's eye and maintain political pressure.

Mediation may not be appropriate where the law is clear in giving specific rights to environmental assessment or protection.

"Parliament has already done the balancing act between the conflicting interests. The legislation represents the results of that balancing process. The citizens are entitled to stand firm and accept nothing less than what Parliament has set as the standard."[15]

The recent NEFA litigation against the Forestry Commission is a good example. The Commission was openly flouting the law.

Preston argues that the interpretation and enforcement of the law should only be determined by adjudication and that the use of mediation could result in the functional breakdown of the law.

"A pervasive use of mediation could here obliterate the essential guideposts and boundary markers that men (sic) need in orienting their actions towards one another and could end by producing a situation in which no-one could know precisely where he stood or how he might get where he wanted to be."[16]

This has turned out to be a most prophetic opinion. An examination of the policy and conduct of the SPCC over the last 20 years shows that the tendency to negotiate has led to failure of the system with licence levels bearing no resemblance to actual pollution output and little enforcement of breaches of the law.

Another reason for avoiding mediation involves circumstances where the litigation is of a "test-case" nature. The aim here is to redefine the legal boundaries and cast light on some grey areas.

There has traditionally been no equality between the representation of environment and exploitation interests. Thus if environment representatives disagree with the process or decide to withdraw after attempting the process they can be misrepresented as a minority preventing concensus.[17]

Finally, as mentioned above in the discussion of criteria to be met for a successful mediation, mediation will not be appropriate where there is a moral question which cannot be compromised. That is, where parties are philosophically opposed, by definition agreement can't be reached.

Where could mediation be used?

Mediation could be used before major environmental legislation is even introduced to reduce the level of potential conflict that will result. One method suggested is "mediated policy round table" which can be seen largely as an information interchange, and serves to overcome the inefficiencies and difficulties of communication between numerous groups. Individual consultation does not serve the same purpose.

Mediation at the planning and policy stage, especially allocation of natural resources, could help to head off potential areas of dispute and it is in this area that I see the greatest need for a serious attempt at mediation, rather than on a site by site basis.

Mediation could be used in the EIS process for specific developments too, to identify the scope to be covered and content expected by those affected. Many of the inquiries we receive relate to designated development concern objections to the EIS and associated processes more than the merits of the development. If the development won't have detrimental effects, let the information be there to establish the fact.

Councils could use mediation at the decision making stage for appropriate developments.

Finally mediation could of course be appropriate once litigation has commenced.

Mr Greiner's Proposal

It was with great interest that our office reviewed Mr Greiner's recent proposals for dispute resolution. It is a fundamental obligation of government to deal with conflict, which is imposing a cost on society in both dollar and environmental terms. However imposing a decision without accomodating community attitudes and allowing community participation does not sit well with a "sophisticated" democratic society.

Establishing a mediation forum for those disputes which can appropriately be dealt with by mediation is a positive step. It will only work however where adequate standing to bring legal proceedings is provided outside the mediation process and where all parties with an interest in the issue are represented in the mediation. Limiting parties artificially flies in the face of mediation principles and limiting standing is itself a source of conflict. Talking of mediation, Cormick says:

"...the process can be misused. The inexperienced or unscrupulous can structure the process to limit public access and the involvement of all parties."[18]

Conclusion

While negotiation has always been a part of settlement of environmental disputes, our office and most people in Australia have had little experience in **mediating** environmental disputes in the true sense. Even the FFIC/ Salamanca process was negotiation, not mediation.

Experience of the system in NSW and review of experiences overseas indicates that some environmental matters may be appropriately dealt with by a process of mediation. It must be remembered that mediation is not a panacea for settling public issue disputes and that there are very good reasons for parties not wanting to mediate.

Footnotes

1 L. Susskind and A. Weinstein, Towards a Theory of Environmental Dispute Resolution (1980) in 9 **Boston College Environmental Affairs Law Review** at p311. "Although the extent of popular support for pollution abatement and environmental protection has not diminished substantially, government and private industry have managed recently to win substantial sympathy for their claims that environmental protectionism has "gone far enough".

2 Public Issue Dispute Resolution Conference, Brisbane 18 – 19 February 1991.

3 L. Susskind and A. Weinstein, Towards a theory of Environmental Dispute Resolution (1980) in 9 **Boston College Environmental Affairs Law Review, 311 at 314.**

4 For example, Boer, Craig, Handmer and Ross in "The Potential Role of Mediation in the RAC Inquiry Process", discussion paper 1991.

5 Ibid. at 327

6 D. Paul Emond, Accommodating Negotiation/ Mediation within Existing Assessment and Approval Processes, in "The Place of Negotiation in Environmental Assessment", Canadian Environmental Assessment Research Council

7 See for example Sharon Beder, "Toxic Fish and Sewer Surfing" for a discussion of results of testing of water from three of Sydney's beaches during summer 1988-89. The Department of Health found that the beaches were unsatisfactory for swimming for a large proportion of the time; the Water Board found they were clean on all occasions.

8 Susskind and Weinstein, op cit, p 336

9 Preston, op cit, at p 20

10 L. K. Patton, Settling Environmental Disputes: The Experience With and Future of Mediation in Newsletter of Environmental Law Vol 14:547 at p 550. "The classic circumstances is a suit over some procedure. People care about due process and procedural protections but that is not what really motivates them to commit the resources to fight. They are concerned about substantive issues."

11 Preston, op cit, at p 15

12 Letter to EDO from Pickard dated 18 December 1990

13 Patton, op cit, at p 551

14 Helen Ross, Conflict Resolution and Mediation, Presentation to IUCN 1990

15 Preston, op cit, at p 16

16 L. L. Fuller "Mediation – Its Forms and Functions" (1971) 44 Southern californian Law Review, 305 at p 328

17 Joint letter (ACF, NCC, TEC, NPA) to Min for State Development, dated 29 January 1991

18 G.W. Cormick, "Alternative Dispute Resolution..." paper presented to International Conference on Environmental Law, Sydney 16 June 1989 at p 14

EPA SEMINAR

On 18 June 1991, the Environmental Defender's Office in conjunction with the Environment Institute of Australia (NSW Division) and the National Environmental Law Association held a successful seminar entitled "Environment Protection Authorities – Replacing Red Tape with Green?".

There were over one hundred participants and speakers included the Hon. Tim Moore MP, NSW Minister for the Environment and representatives from government, environment groups & industry and academia.

The roles of environment protection authorities at both the State and Federal levels were examined. The seminar also provided an opportunity for the audience to raise issues and respond to presentations.

In discussion regarding State Environment Protection Authorities some of the major points raised included:

- whether human-centred definitions of the environment are appropriate
- the need for planning and pollution control to be integrated in NSW legislation
- restrictions of the right to prosecute under NSW environmental legislation
- the scope for extending the application of the polluter pays principle
- recent developments concerning environmental audits in Victoria and appropriate accreditation procedures
- the need for long-term planning regarding pollution and a phased introduction of decreases in emission levels, the need to implement the precautionary principle
- the benefits of an interactive process of standard setting involving the public as well as industry
- the major problems of current environment impact statement procedures, including the lack of independence in the preparation of statements and of the monitoring of outcomes of projects to deter the accuracy of statements.

Discussion on the proposed Federal EPA and its relationship with state EPA's covered matters such as:

- whether the Commonwealth has sufficient environmental powers without a referendum
- whether the proposed accountability arrangements for federal EPA are adequate
- the need to change corporate attitudes towards the environment and appropriate means of achieving this
- the need to streamline legislation and government environment authorities.

There was wide support for a follow-up seminar a year later when NSW, other state and Federal EPAs would be further developed.

Thursday 18 June 1992 has been set as the date for a follow-up seminar at the Powerhouse Museum.

EPA Papers now available

Papers from the 1991 seminar "EPAs: Replacing Red Tape with Green?" 119pp, are available from the EDO for $25.00.

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THE RELATIONSHIP BETWEEN THE COMMONWEALTH AND STATE EPAS

"Commonwealth Environment Protection Agency", Nelson Quinn, First Assistant Secretary, Commonwealth Department of the Arts Sport the Environment Tourism and Territories

"Issues Facing the New EPA in NSW", Professor John Niland, Chairman State Pollution Control Commission/ Chairman-Designate NSW Environment Protection Authority

"The Relationship between the Commonwealth and State EPAs – An Industry Perspective", Patrick Medley, Manager, Environmental Management Services, Coopers and Lybrand Consultants

"The Relationship between the Commonwealth and State EPAs – A Conservation Organisation Perspective", Paul Rutherford, National Liaison Coordinator, Australian Conservation Foundation

CONFERENCE SUMMARY, Professor Ben Boer, Environmental Law Research Centre, Macquarie University

SEMINAR PARTICIPANTS

EDO NEWS

The last quarter has been a busy one for the EDO with a large number of conferences attended by various staff members on a range of issues together with the usual substantial advice and casework load.

In July, Maria Comino was asked to speak at a conference of ornothologists in Queensland about legislation for facilitating conservation of birds and their habitats. Maria also went to the National Community Legal Centre Conference held in Adelaide in late July. While there she attended a meeting of people from community legal centres interested in the concept of the Environmental Defender's Office. We have now expanded the mailing list of people around Australia who are interested in working towards establishing an EDO in their respective states and intend to follow up proposals in this area.

In August, David Robinson spent a fascinating few days at the National Environmental Law Association's International Environmental Law Conference held in Bangkok. His report appears elsewhere in this edition of IMPACT. Nicola Pain was fortunate to spend a week in the Solomon Islands attending a conference on Ecoforestry. There was a great deal of enthusiasm for the concept. The conference was organised by SOLTRUST, a Solomon Islands development non-government organisation and the Foundation for the Peoples of the South Pacific. The week provided an excellent opportunity to meet a large number of people in the Solomon Islands and discuss the EDO's legal training programme. There was much interest in the project and we hope to have our first participants at the EDO before the end of the year.

We had a very interesting talk by Dr Warwick Pearse, Director of the National Industrial Chemical Notification & Assessment Scheme (NICNAS) at the Law Reform & Policy Group meeting in August. Dr Pearse provided a very useful overview of the NICNAS scheme and where it fits into the existing regulatory framework for chemicals. We hope to invite Dr Pearse back to the EDO to discuss the regulation of agricultural chemicals early in 1992. Another issue which Dr Pearse alerted us to was the opportunity for the public to nominate industrial chemicals currently in use to a NICNAS committee for assessment. The committee can make recommendations about the limited use or banning of chemicals.

Nicola was very pleased to attend the first annual general meeting of the Victorian Environmental Defender's Office in August. She gave a paper about the development of public interest environmental legal practice throughout the world.

Several talks have been given by staff members to promote the HSC textbook the EDO is now finalising for release in 1992.

James Johnson attended a workshop run by the Department of Planning and attended by many environmental lawyers from around Sydney. Representatives of the National Environmental Law Association, the Bar Association, academics from several universities and the Chief Judge of the Land & Environment Court participated. This was part of a series of workshops looking at legal and administrative aspects of the planning and development system in NSW. There has been substantial criticism by conservation groups of other workshops conducted by the Department because of a pro-development bias in the agenda.

In early September, David, Nicola and Maria participated on panels at the Public Interest Law Conference on Social Movements and the Law held at Macquarie University. Later in the month, Maria attended the ACFOA and AIDAB/NGO Co-operation Program Annual Meetings in Canberra. Don Henry made an important contribution to the conference in a presentation entitled "Making Common Cause" which emphasized the need to recognize the "interconnectedness" of environment and development issues most recently highlighted in preparations for the upcoming UNCED conference.
We've also had several court hearings in relation to the Yessabah Bats case. The Court of Appeal is now deciding on the appeal by our client in relation to the existing use and Part 5 provisions of the Environmental Planning and Assessment Act. The Office also applied for an urgent injunction on 24 hours notice from a resident action group, URGE, and was able to obtain an ex-parte injunction concerning roadwork in a Crown Land reserve. The group's later interim application for continuation of the injunction was refused by the court, although the council is now paying closer attention to its own consent conditions.

AN EDO TRIP TO THE NORTH COAST

James Johnson and Nicola Pain recently returned from an 8 day trip to various locations on the North Coast made during September. The purpose of the trip was to conduct workshops for anybody interested in learning more about environmental law, to meet some of the people we have been talking to over the phone and never met, to meet local solicitors who are willing and able to provide local advice and accept referrals and to inspect locations which are or may become the subject of dispute.

Workshops were held in Taree, Coffs Harbour, Grafton, Murwillumbah, Lismore and Armidale. We were encouraged by the degree of interest and the depth of knowledge of environmental law and procedure already existing.

The opportunity was taken to inspect Yuraygir National Park. The EDO is challenging the decision by the Minister for the Environment and the Director of the National Parks and Wildlife Service to reopen the road to Shelley Beach. It is the only beach in the Park which is not accessible by vehicle and a group calling themselves the "traditional users" wish to change this situation. They unfortunately have the support of Ian Causley MP and the Premier of NSW. Evidence of human activity is still all too readily apparent in this section of the park. Despite blocking of access along the Shelley beach road we came across several recent wheel marks and a firepit filled with broken glass, close to obvious erosion damage.

Other inspections highlighted widespread problems with the existing use rights of mining and quarrying operations. Having escaped Sydney for some fresh air, it was hard to find with much of the coast ablaze due to random and uncontrolled burning.

The EDO wishes to thank those people in each area who organised events locally and took time out to keep the "show" on the road. We look forward to working on some of the issues which became apparent from our discussions, maintaining a better network in the North and extending this network to the rest of NSW.

LEADR MEDIATOR TRAINING

Nicola Pain and James Johnson attended a LEADR Mediator Training Course from 10 – 13 July 1991. Their attendance was made possible by the Law Foundation. The theory and practice of mediation were developed over four days, through a combination of lectures, discussion, group exercises and simulated mediations.

One point that was made clear is that the process is all important and is the responsibility of the mediator. It must be transparent, fair and responsive to the needs of the parties. This is to allow the feelings of the parties to be dealt with as well as the substantive or factual matters.

In a mediated settlement the parties have the dignity of making their own decision as opposed to the indignity of an imposed decision. This gives a higher chance of preservation of the relationship between the parties after the dispute and increases the understanding of each party of the other parties' positions.

Because many mediators come from legal backgrounds, it is important to recognise that they sometimes do think with legal blinkers. Because of this they may be tempted to isolate the facts they hear as they listen to parties in the mediation to identify causes of action, omitting those which are not "legally" relevant. They may also want to take control of the process and make the decision.

Since the course we have used the mediation process in a case before the Land and Environment Court, obviating the need for a four week hearing. The benefits of the process were not lost on the court or the parties. We have current cases which we consider could benefit enormously from mediation. We therefore are doing the following:-

1. Establishing criteria to enable early identification of matters appropriate for mediation, both at the telephone enquiry stage and in the course of casework conducted by the office.
2. Exploring with community groups the possibility of using mediation through informal seminars on the subject. We will be targeting environmental dispute resolution particularly. There is presently little specialist mediation provided in this field. There is clearly a need for the development of techniques appropriate to public dispute resolution in the environmental field. We will discuss with LEDR and other interested mediation groups such as the Conflict Resolution Network planning a specialist course focussing on conflict resolution in environmental disputes.
3. Referring appropriate matters to Community Justice Centres to encourage disputes to be resolved.

The EDO would like to thank the Law Foundation for the grant which allowed us to attend the course. Both James and Nicola found it highly rewarding and have already started to apply the skills and knowledge gained in their work.

THREATENED SPECIES CONSERVATION ACT

To be introduced into State Parliament.

CALL FOR ACTION FROM THE THREATENED SPECIES NETWORK

YOUR urgent letters are needed to give it a fighting chance!

Australia has one of the highest rates of species extinction in the world. In NSW, over 700 species of plants and animals are presently threatened with extinction. Extinctions will significantly diminish the bio-diversity and natural heritage of NSW and disinherit future generations.

The introduction of legislation aimed at ensuring the survival of all remaining species of flora and fauna native to NSW, throughout their range, has been promised by both the Labor and Liberal parties. The NSW Government had promised to introduce legislation but reneged in December 1990 after pressure from the National party. This was despite the National Parks and Wildlife Service having prepared a draft Bill and all the promotional material necessary for the launch of the Act.

However, the Labor Party has worked with the Threatened Species Network to prepare a Bill and has undertaken to introduce it in the coming session of Parliament (August-December). The existence of a threatened species would trigger strong protection measures and recovery plans.

The NSW Threatened Species Network is embarking on a major campaign to support the Threatened Species Conservation Bill.

The NSW Labor Party will introduce the threatened Species Conservation Bill 1991 in the next two months. In order to ensure the best prospects for its success, we need to convince the Independents and environmentally sympathetic members of the Government to support the Bill.

YOUR URGENT LETTERS OF SUPPORT FOR STRONG LEGISLATION TO:
Mr John Hatton on behalf of the Independents; Micheal Photios, Chairperson of the Environment Committee; Nick Greiner; Premier of NSW; Bob Carr, Leader of the Opposition and your local MP -
c/- Parliament House, Macquarie Street, Sydney NSW 2000.

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"Tasmania – EPA and Planning Appeal System -- EDO Submissions"
June 1991. Nicola Pain and James Johnson. 6 pp. $2.00.

"Pollution Control and Public Interest Litigation"
29 June 1991. David Robinson. Characteristics of public interest litigation; description of criminal and, in particular, civil laws to control pollution. 22 pages. $10.00

"EPAs – Replacing Red Tape with Green?"
Papers from EDO – EIA(NSW) – NELA Seminar 18 June 1991$25.00 – Details see p9.

"Australian Coastal Management: A North American Perspective"
Paper by Dr Richard Hildreth, Co-director of the Ocean & Coastal Law Center, University of Oregon, June 1991 $10.00

"Organochlorines, Pulp Mills & Wiser Approach to the World"
Paper by Mary O'Brien, Staff Scientist for Environmental Law Alliance Worldwide, US Office, May 1991 $15.00

"Legal Organisation for Nonviolent Action"
Handbook by David Mossop, May 1991, 82pp $10.00

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"Towards a New Forestry Act for NSW"
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