

Developing and Expanding the Environmental Conflict Resolution Toolkit: Facilitation and Consensus Building for Better Environmental Outcomes

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Abstract—An eight point plan with a multi disciplinary approach has been developed to work towards achieving better environmental outcomes. This paper emphasizes that the stakeholders should have early opportunities to participate not only in the resolution of conflicts but also in the making and amending of environmental law and policies as a multidisciplinary exercise. The paper also introduces ELRANZ (Environmental Law Roundtable of Australia and New Zealand), what is it and how does it work?

Keywords-environmental dynamics, environmental conflict resolution, consensus building, public participation, institutional development, Environmental Law Roundtable of Australia and New Zealand (ELRANZ).

I. INTRODUCTION

In the 21st century, we need to encourage a greater use of environmental conflict resolution (ECR), consensus building and collaborative governance techniques to avoid, minimize and resolve conflicts.

Our research shows that it is important to not only have a multidisciplinary approach to environmental issues but also have a number of skills available to deal with environmental science, agricultural engineering and development conflicts as and when they arise. The toolkit should include third party facilitation and consensus building.

Why not have a dialogue rather than a debate? The difference is significant when looking at achieving good environmental outcomes. Collaboration is far better than polarised debate where issues remain unresolved.

The right to participate is an important cornerstone in any public interest law issue.[1] There is an even greater need to develop this right in the context of encouraging a cultural shift towards a greater consensual and collaborative development and environment system including dispute avoidance or resolution. All stakeholders need to be involved. It is not a “them and us” approach. We need to use methods which include all stakeholders no matter which part of the community they represent. The inclusive approach is built up over time and involves mutual sharing of information and trust.

Public consultation can be time and resource consuming. By using ECR (e.g. facilitation or negotiated rulemaking techniques and skills) the public consultation becomes meaningful and interactive among stakeholders who become involved in the process all along and they own the process.

The “early chance to be heard” proposal and the use of a “supervising facilitator” are designed to keep things moving through the development process by having meaningful conflict resolution processes available.[2] There is a need to work to minimize the costs passed on to the community and to see how we can continue to strive to achieve good planning and environmental outcomes.

II. PUBLIC MEETINGS OR FACILITATED FORUMS AS ECR TOOLS

Polarised public meetings should be a thing of the past. They have a greater potential to result in increases conflict and a “them and us” approach, which makes a later ECR process more complicated.

Facilitated public and private forums are to be preferred. An independent private Facilitator helps manage the consensus building process. Working with the stakeholders (or most of them) before the forum is preferred.

How do you know you have identified all of the stakeholders? You may start with 8 stakeholders. For example, ask each of those stakeholders to identify who else they think should be involved. In this way, people or organizations who may have been overlooked are included. Be flexible enough to add others who are identified later in the preparation phase and during the forum.

Where the forum is an ongoing exercise other interested parties may be identified during the first open session and they should be invited to join the subsequent sessions.

Having all interested parties “in the tent” for the forum discussion helps with the implementation of the results of the forum.

A negotiated set of ground rules (before the forum begins) may include:

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

Identifying the interest groups beforehand and discussing their concerns before the facilitated forum can help prepare the “draft agenda”.

Having those with common interests meet before the forum will assist in confirming the agenda. If stakeholders are consulted on what should be on the agenda a sense of ownership arises leading to less disruption at the forum.

There will always be something unexpected which arises at the forum so the Facilitator needs to have a flexible approach to be able to respond and keep the forum moving forward.

The Facilitator has to be unbiased but should have the opportunity to speak with the stakeholders before the forum. Those conversations are to remain confidential unless the participants agree for the information to be shared.

The advantage of confidentiality in separate sessions before and during the forum helps the stakeholders share details of their concerns and allows the concern (without the detail) being added to the "draft agenda".

During the forum separate sessions for groups with similar interests can assist with the development of options or help break deadlocks. More open discussion can occur in the separate sessions.

The Facilitator's role is wide and varied and includes negotiating a way forward. Confidential communications with stakeholders away from the open forum allows the Facilitator to have an understanding of the underlying concerns and suggesting options for the forum to consider.

Dialogue and discussions are forms of negotiation. Negotiations lead to agreements. Ideally agreements should be written and signed by all stakeholders. The written and signed agreement is not always practicable with a large group so electing a small representative group to write and sign a communiqué setting out the points of agreement from the forum is better than not having any document resulting from the forum.

III. SUPERVISING FACILITATOR

Another form of early intervention is Supervising Facilitation. By agreement it can be started as soon as the first sign of conflict arises. It can continue as required through the development process whatever form that system takes.

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

An early and real chance for the public to be heard will reduce the number of disputes. Active listening helps.

This includes the opportunity for the regulatory body and the proponent to actively listen to the concerns of stakeholders. Public participation is very important.

Many different tools are needed to be able to assist everyone, including Government, through the statutory

maze. Third party neutral persons are essential for time and money reasons as well as for stakeholders' satisfaction. The concept of the Supervising Facilitator does not require legislative intervention. At present, it can be done by agreement. All that is needed is the willingness of all participants to work positively and proactively towards a genuine improvement in how we deal with the development process and environmental issues. It is recognized that a cultural shift is required, but that is not impossible to achieve. Statutory intervention may be necessary if the idea is not voluntarily taken up across a wide conflict spectrum.

Common ground can emerge from the separate sessions. As this occurs the Supervising Facilitator encourages the separate groups to share the information with the others. For example, after having been told confidentially that group A does not object to the proposed road widening the Facilitator hears group B say confidentially in a separate session they do not object to the road widening. The Supervising Facilitator could either encourage group A or B to add to the draft open joint session agenda something like "Who objects to the road widening?" or "Is there any objection to the road widening?" Alternatively, the Supervising Facilitator says to group B would it make a difference if group A did not object to the road widening? Assume the answer is "yes" the Facilitator encourages group B to agree to the Supervising Facilitator by asking group A the question to test out if there is agreement on this point. Once group A indicates agreement their permission is sought to communicate that position to group B (in other words remove the confidentiality). Alternatively, during the discussion of the agenda item in open session the common ground emerges from groups A and B stating their positions.

It is usual to start in open session with all parties present followed by the separate sessions. There can be more than one open session and more than one separate session during the course of the negotiation. Shuttle negotiations between separate groups during the separate sessions may proceed in stages. For example, the first open session is used for information exchange relevant to the conflict; followed by the first separate session where groups with common interest discuss their attitude the shared information; the second open session is used to ask for further information and state points of agreement so far; the next separate session allows each group to develop options on how to resolve the conflict with the Supervising Facilitator moving from one separate group to the other groups to help with reality testing aspects of the options being developed; the third open session allows for a discussion of the options developed by the various groups leading to agreement.

There is no one for all method of proceeding through a negotiation. The dynamics depend on the nature of the conflict; the personalities of those involved; and how long ago the conflict started.

IV. IMPROVING ENVIRONMENTAL LAW AND POLICY DEVELOPMENT AND AMENDMENT: AN AUSTRALIAN AND NEW ZEALAND EXAMPLE

The Environmental Law Roundtable of Australia and New Zealand (ELRANZ) provides a forum for discussion

and development of proposals for the harmonization or coordination of environmental law and policy throughout Australia and New Zealand. As a multidisciplinary forum, ELRANZ is open to professionals, Government Departments and Agencies, statutory corporations, business, industry, NGOs, academics and students.

The concept is capable of being adapted to other parts of the world. Regional groupings should be considered – eg, Asian Pacific Environmental Law Roundtable (APELR) connecting with the Asia Pacific Economic Co-operation (APEC) and G20ELR developing links to the G20 Summits.

As an inclusive and multidisciplinary approach to improving environmental laws and policies across Australia and New Zealand, ELRANZ advocates the processes of public participation and consensus building. Even before harmonization of laws and policies across all 10 jurisdictions in Australia and New Zealand, a greater level of cooperation will develop out of the ELRANZ process.

The Roundtable is a joint initiative of the National Environmental Law Association Limited (Australia) (NELA) and the Resource Management Law Association of New Zealand Inc (RMLA).[3]

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

ELRANZ is project oriented. In 2011 we have started a dialogue on Biodiversity Offsets Policies as part of the United Nations International Year of Biodiversity.

There were concurrent sessions at the National Environmental Law Association of Australia conference in Canberra on 21 October 2010 which started with 3 presentations (30 minutes each) followed by a Q&A session (25 minutes of the allocated 30 minute slot was available). The second session was an interactive workshop for 2½ hours where the discussion was wide ranging.

The first speaker was Hon Rod Welford is the Managing Director, Integrated Resource Planners, formerly Queensland Minister for the Environment, Heritage & Natural Resources (1998-2001); Attorney General and Minister for Justice (2001-2005); Minister for Education and the Arts (2005-2009) and Minister for Training (2006-2009). Mr Welford set the scene for the day's dialogue in the context of the roundtable approach (seeking to establish a seamless legal platform for both Government and private sector activity); the absence of a national approach; environmental offsets and 'banking'; offsets markets; and other models for offsets/credits.

Secondly, Dr Hugh Lavery is the Adjunct Professor of Environmental Systems, Institute for Sustainable Resources, Queensland University of Technology; Executive Counsel at Meridien; Chairman, Community Reference Group, Port of Airlie Development; and Environmental Practitioner of the Year 2007-2008. Dr Lavery illustrated site selection for an Environmental Bank and the functional lift factor in

measuring net environmental benefit. Dr Lavery has had 33 years experience in public sector land management including Director of Research and Planning in the Queensland National Parks and Wildlife Service and Environmental protection agency before moving to the private sector where Dr Lavery has had 14 years experience as Principal Adviser to AMP on private/corporate sector land management and for the past 6 years as Executive Counsel with Meridien (a new style developer).

Finally, Gerry Morvell is a Consultant advisor on climate change, energy and environment issues and Chairman of the Board of Conservation Volunteers Australia and New Zealand since 2007; until mid 2007 Gerry was a senior executive in the Australian Greenhouse Office; has held positions with international organizations including Co-Chair of the Asia Pacific Partnership Renewable Energy and Distributed Generation Taskforce, & Head of business liaison and communications in the United Nations Secretariat for the 2002 World Summit on Sustainable Development. Mr Morvell gave practical project examples of community involvement through Conservation Volunteers Australia and New Zealand (a not for profit community based organization recruiting and managing 12,500 volunteers each year) showing capacity building; land management programs; wild futures; local action on the global climate change issue; carbon reduction strategies; and the enormous opportunity for biodiversity offsets.

The facilitated interactive workshop was an innovative approach to conferencing. Before the conference background materials [4] were distributed to delegates that included 3 questionnaires. Even although there was a limited response to the questionnaires the information assisted the speakers and the facilitators in their preparation. As delegates become more used to these types of processes we expect there to be higher preconference participation levels.

Delegates were well prepared from their own professional experience and after having read the background materials, so the discussion was free flowing from the outset. The whole day was informative.

The discussion process will be ongoing through the ELRANZ Biodiversity Offsets Policy Project.

The ongoing processes have begun and we will be continuing to communicate with the delegates and widen our audience to other Stakeholders interested in this policy area.

There are differences between Bush Broker and Native Vegetation Offsets Program (in the Australian State of Victoria) and Bio Banking Program (in the Australian State of New South Wales) and the Environmental Banking proposal (Michelle Gane) but there are some common aspects.

While recognizing environmental diversity across Australia and New Zealand there is a case for a common legislative approach.

The post conference discussions will build on the common ground towards consensus and the seamless legal platform concept raised by Hon Rod Welford. All

stakeholders and their advisers will have the opportunity to participate in the ongoing dialogue. Consideration is being given to a series of interactive seminars across Australia and New Zealand to continue to build a consensus.

There is a role for Australian Ministerial Councils with their New Zealand participation in the consensus building process.

V. THE ELRANZ MANUAL

The ELRANZ Manual is a concise document describing the essential elements of the Roundtable and is available by emailing johnhaydon@ecodirections.com

The table of contents of the ELRANZ Manual is:

Foreword.

Why ELRANZ?

How to raise an issue for ELRANZ consideration.

What will ELRANZ do with your issue?

Process Design.

Sample Approach 1: The Blank Page approach encourages the regulatory authority to seek out public input early before a policy or law is considered for drafting, rather than holding back on public consultation until a discussion paper has been developed by the Government. The purpose of the blank page approach is to bring stakeholders into the policy creation process early. Building relationships of trust and cooperation are key components of public participation and consensus building. Common ground can be identified early in the process.

Sample Approach 2: Discussion Paper. This approach is to draft a discussion paper with the identified interest groups and then to publish and distribute the paper, requesting feedback from interest groups and other important parties who may be identified after the paper is published.

Sample Approach 3: Visioning is looking at a preferred future or a set of conditions to be realized over time. In this example the cross-section of stakeholders who are involved are predominantly residents. Visioning is said to mobilize citizen participation in political decision making. Community wide visioning also creates expectations amongst residents that similar consultation will be implemented in the future, and that certain actions will be taken.

Sample Approach 4: Joint Fact Finding allows all parties to participate in identifying the issues, the experts, and the questions to ask the experts. This can be a very important means of resolving factual disputes that may arise if different interest groups have different experts with varying information on the issues at hand.

Sample Approach 5: Best Use Information Technology is using available technologies to communicate with potential stakeholders as well as to disseminate information. This may seem simple, but the power of communication is exponentially increased with the use of the Internet. The possibility of harnessing this mechanism of communication for environmental regulation is tantalizing and should not be ignored.

Members Only Information and Appendix A - Bibliography.

VI. GOOD ENVIRONMENTAL OUTCOMES

Achieving good environmental outcomes requires the combination of a number of different efforts. These efforts are integrated within an ecological sustainability discourse. Setting broad policy and law frameworks is part of the process. ELRANZ promotes greater stakeholder involvement, through consensus building and public participation, in making improvements in environmental law and policy in Australia and New Zealand. There is a need to raise awareness of best practice facilitation, creative visioning, meaningful stakeholder participation and other consensus building techniques.[5]

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

The Roundtable includes the following concepts:

- 1 Corporations, associations, organizations and individuals can register as ELRANZ Associates and initiate roundtable issues;
- 2 Project Teams are established to assist in ELRANZ projects;
- 3 Associates may engage in research, consultation and brainstorming with respect to a project on the ELRANZ agenda and actively participate in neutral third party facilitated conferences, seminars and meetings;
- 4 Suggested projects will be prioritized within the ELRANZ agenda. The results may include draft legislation, a new policy approach or a protocol for industry;
- 5 Issues suitable for resolution through consensus building processes may be recommended to the Australian and New Zealand Judicial and Intergovernmental Ministerial meetings;
- 6 Some ELRANZ projects could be managed through adaptations to the negotiated rulemaking process; and
- 7 Seminars, public forums and other educational activities can be included as Roundtable events to ensure the involvement of individual and corporate NELA and RMLA members as well as to continue building support for the growing network of ELRANZ Associates.

VII. DISPUTE AVOIDANCE AND MINIMIZATION

ECR should also be involved in encouraging dispute avoidance and dispute minimization. With better environmental knowledge there is an opportunity to avoid disputes. The community needs to focus on dispute avoidance as a mechanism. The Court system and Alternative Dispute Resolution (ADR) cannot be expected to deal with all potential conflicts that are likely to arise if dispute avoidance does not become a reality. Disputes will not be eliminated completely. It is how we deal with conflict that can make a difference to the quality of the discourse.

Accessibility to all relevant knowledge is fundamental to any consideration of dispute avoidance. There is a need for trust so that all relevant information is recorded and available for public access. It is an essential part of the right to public participation that that participation is based upon the best information available. Otherwise a biased result occurs.

We all should trust the process which results in a publicly available ecoinformationbank. [6] The bank holds environmental information gathered together as part of an environmental impact assessment or similar processes which is available for future reference. If we all have access to the same information then the level of disputation can reduce.

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

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

Negotiated rulemaking is a process which brings together representatives of various interest groups and a government department or agency (including, if necessary, each of the different spheres of government) to negotiate the text of a proposed law (wide enough to cover new or amended legislation including delegated legislation). This model can be adapted to suit different situations and tailored for the particular ELRANZ issue.

It is important to emphasize that the type of participation needs to be meaningful otherwise sections of the public will come to distrust the process and then look for a confrontational approach. The methodologies will vary with the circumstances. The challenge is to work positively at the issues. Dispute avoidance will follow. Not all disputes will be avoided. However, by concentrating on trying to avoid disputes those that do arise will be limited in scope. If that does not work then ECR techniques (separate from or during the litigation process), properly used, will help to narrow or better define the scope of the dispute.

VIII. CONCLUSIONS

Here is an eight point plan which is a multi disciplinary approach to work towards achieving better environmental outcomes.

- 1 Provide an early and meaningful chance to be heard for stakeholders because public participation is important.
- 2 Dispute avoidance through sharing of information and consensus building by seeking out and identifying common ground.
- 3 ECR needs to be developed further through the recognition of the importance of the third party neutral Facilitator and Supervising Facilitator.
- 4 Look at using a third party neutral for new format public meetings.
- 5 Improve participation in the making and amending of environmental laws and policies by consensus building and dialogue not debate.

- 6 Improve the dialogue during the processing of the development applications and/or assessing development proposals by increasing the opportunities for dialogue.
- 7 Work with stakeholders to achieve cultural shifts necessary to have a greater use of ECR techniques. The development of ECR policies will help. Holding dialogues at interactive seminars will assist.
- 8 Encourage a greater use of mediation and other ECR techniques both before and after litigation has commenced. Both public and private mediation services need to be encouraged. Reducing the amount of litigation is in the public interest especially when the cost of public interest litigation is passed onto the public in various ways.

REFERENCES

- [1] J. Haydon, *The Continuing Development of the Right to Know and the Right to Participate as Public Environmental Rights* presented to the Queensland Environmental Law Association Inc (QELA) conference (1995) unpublished.
- [2] Both developed through EcoDirections International Pty Ltd in 2003 for the early chance to be heard (Dr Kuang and John Haydon) and in 2004 the supervising facilitator concept (John Haydon).
- [3] The Environmental Law Roundtable concept was created by John Haydon who is now the Convenor.
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