Mechanisms for resolving environmental controversies: the use of alternative dispute resolution (ADR) methods in resolving environmental controversies...

Anthony James Foley
University of Wollongong

Recommended Citation
NOTE

This online version of the thesis may have different page formatting and pagination from the paper copy held in the University of Wollongong Library.

UNIVERSITY OF WOLLONGONG

COPYRIGHT WARNING

You may print or download ONE copy of this document for the purpose of your own research or study. The University does not authorise you to copy, communicate or otherwise make available electronically to any other person any copyright material contained on this site. You are reminded of the following:

Copyright owners are entitled to take legal action against persons who infringe their copyright. A reproduction of material that is protected by copyright may be a copyright infringement. A court may impose penalties and award damages in relation to offences and infringements relating to copyright material. Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.
MECHANISMS FOR RESOLVING ENVIRONMENTAL CONTROVERSIES
The Use of Alternative Dispute Resolution (ADR) Methods in Resolving Environmental Controversies: Two Case Studies.

A thesis submitted in fulfilment of the requirements for the award of the degree

MASTERS OF LAWS (Honours)

from

UNIVERSITY OF WOLLONGONG

by

ANTHONY JAMES FOLEY

Centre for Natural Resources Law and Policy

1998
I certify that this thesis has not been submitted for a university degree or for any similar award.

I certify that to the extent of my knowledge any help received in preparing this thesis, and all sources used, have been acknowledged.

..........................................................
Anthony James Foley
June, 1998
Acknowledgement

I wish to thank Professor David Farrier who made himself available for frequent consultation and who succeeded in provoking a critical response from me.

I wish to thank David Rollinson, Deputy Registrar, Land and Environment Court of NSW for allowing me access to the court's files and for his helpful suggestions.

I wish to thank Dailan Pugh, Nature Conservation Council; Col Dorber, NSW Forest Products Association and Mark Greenhill, CFMEU for kindly agreeing to be interviewed.

I wish to thank my family for their encouragement and support.

All errors and omissions remain my responsibility.
Abstract

Environmental controversies are by their nature difficult to resolve satisfactorily dealing as they do with the potentially divisive issues. At one extreme, these can be issues of land use and planning, pollution, conservation, and resource management. Such issues are of immediate and personal concern to the parties involved. At the other extreme, they can involve conflicting and polarised ideologies, strong philosophical differences and conflicting claims to represent the public interest. In addition, such controversies can involve political considerations on a local or national level.

The use of Alternative Dispute Resolution (ADR) methods has been suggested in the literature as an effective mechanism for the resolution of such controversies.

This study seeks to examine the effectiveness of these methods to resolve environmental controversies. The research is based upon two case studies of the use of ADR methods in resolving environmental controversies of widely divergent types. In order to facilitate the research, a method of classifying environmental controversies was developed.
The hypothesis of the research is that the effectiveness of ADR methods would be confined to relatively simple matters classified as environmental disputes in this research. Contrary to expectation, the research suggests that ADR methods may have a much wider application and may be a useful additional mechanism in helping to resolve major environmental conflicts.
2. CLASSIFICATION OF ENVIRONMENTAL CONTROVERSIES

Introduction

The Mechanisms of resolving Environmental Controversies

Distinguishing Environmental Disputes and Environmental Conflicts

The characteristics of Environmental Controversies

Government is a party
Multi issues
Multi parties
Scientific uncertainty
Value conflicts
Difficulties with identity and involving parties
Nature of issue may involve the public interest
Implementation Difficulties
Absence of a prior relationship
Interorganisational
Geographical uncertainties

Classification of Environmental Controversies

The Bengalla Coal Mine Controversy
The Lake Cowal Gold Mine Controversy

Conclusion
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>72</td>
</tr>
<tr>
<td>Alternative Dispute Resolution</td>
<td>73</td>
</tr>
<tr>
<td>Alternative to adjudication and externally imposed solutions</td>
<td>74</td>
</tr>
<tr>
<td>Alternative to existing dispute resolution structure or existing methods</td>
<td>76</td>
</tr>
<tr>
<td>ADR methods used in Environmental Controversies</td>
<td>78</td>
</tr>
<tr>
<td>Controversies</td>
<td></td>
</tr>
<tr>
<td>Mediation and other forms of assisted negotiation</td>
<td>79</td>
</tr>
<tr>
<td>the definition of mediation</td>
<td>79</td>
</tr>
<tr>
<td>the process of mediation</td>
<td>84</td>
</tr>
<tr>
<td>the purposes of mediation</td>
<td>86</td>
</tr>
<tr>
<td>Conciliation</td>
<td>87</td>
</tr>
<tr>
<td>Scoping</td>
<td>89</td>
</tr>
<tr>
<td>Facilitation</td>
<td>91</td>
</tr>
<tr>
<td>Neutral Evaluation/Case Appraisal</td>
<td>92</td>
</tr>
<tr>
<td>Mini Trial</td>
<td>94</td>
</tr>
<tr>
<td>Forms of Unassisted Negotiation</td>
<td>95</td>
</tr>
<tr>
<td>Negotiation</td>
<td>95</td>
</tr>
<tr>
<td>Models of Negotiation</td>
<td>96</td>
</tr>
<tr>
<td>positional bargaining</td>
<td>96</td>
</tr>
<tr>
<td>problem solving negotiation</td>
<td>97</td>
</tr>
<tr>
<td>interest based negotiation</td>
<td>98</td>
</tr>
<tr>
<td>Conclusion</td>
<td>101</td>
</tr>
</tbody>
</table>
4. THE UNITED STATES EXPERIENCE

Introduction

Stage 1-Implementation and Experimentation
   Reaction against adjudication
   ADR as a separate and distinct dispute resolution mechanism
   Should ADR be the preferred dispute resolution mechanism?
   Should Environmental Controversies be mediated?
   The growth of ADR methods in Environmental Controversies

Stage 2 - Consolidation
   Identification of Environmental Controversies suitable for mediation
   Problems of participation
      Inequality of bargaining power
      Absence of decision-making power
      Inequalities of resources
   ADR mechanisms- Independent or Ancilliary
   ADR mechanisms- Voluntary or Mandated

Stage 3 - Current Practice

Conclusion
5. **THE AUSTRALIAN EXPERIENCE**

   Introduction 141
   Appraisal of the promise of ADR methods 142
      What are the precise differences in the Australian Context? 142
      What are the potential restrictions on the role of ADR methods? 144
      Can ADR methods address the inadequacies? 149
      What concerns are raised about the use of ADR methods? 151
   Models for the Implementation of ADR methods 157
      the Integration model 157
      the Adjunct Model 163
      Choice of Model 163
   Review of Practice 164
   Conclusion 171

6. **RESEARCH METHOD**

   Introduction 174
   Research Questions 176
   Research Method 177
      Selection of method 178
   Design of Research Instrument 181
   Conclusion 185
7. REVIEW OF FORA FOR RESOLVING ENVIRONMENTAL CONTROVERSIES IN NSW

Introduction 186

Fora Reviewed 188
  Administrative or Executive Bodies 188
  Land and Environment Court 190
  Commissioners of Inquiry 193
  Australian Commercial Dispute Centre 195

The Extent of the Use of ADR Methods in the Fora Reviewed 199

Selection of Fora for Further Study 201

Conclusion 202

8. MEDIATION IN THE LAND AND ENVIRONMENT COURT OF NSW - A CASE STUDY 203

Introduction 203

Land and Environment Court Mediation Scheme 203
  An Adjunct Model 203
  Development of the Mediation Scheme 206
  Implementation of the Scheme 213

Review of the Effectiveness of the Mediation Scheme 215

  Review of Mediations 217
  Mediations Conducted 1 May - 31 December 1991 217
  Mediations conducted January 1992 - December 1994 221
  Mediations Conducted January - December 1995 228
Can the Controversies Mediated in the period January - December 1995 be classified as Environmental Controversies?

- Do the mediated matters exhibit value conflicts?
- Do the mediated matters involve questions of scientific uncertainty?
- Do the mediated matters display public interest concerns?

Conclusion

9. NEGOTIATING THE FORESTRY CONFLICT- A CASE STUDY

Introduction

The Forestry Debate: an Environmental Conflict?

The Salamanca Process

The Forestry Conflict and the Interim Assessment Process

The IAP Negotiation Process

The Implementation of the IAP Negotiated Outcome

Assessment of the Effectiveness of Negotiation in the Implementation of Environmental Policy

Case Study

Case Study Methodology
10. **CONCLUSIONS AND DISCUSSION**

Introduction 299

Conclusions 299

The Effectiveness of ADR methods in Environmental Disputes 300

The Effectiveness of ADR methods in Environmental Conflicts 301

The Effectiveness of ADR methods along the continuum 302

Discussion 303

Constraints on the use of ADR methods

Environmental Controversies

The need for confidentiality 304

The requirement of voluntariness 307
<table>
<thead>
<tr>
<th>TABLE OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brown v Environment Protection Authority &amp; Ors. (1992) 75 LGERA 397</td>
</tr>
<tr>
<td>Greenpeace Australia Ltd v Redbank Power Cpy PL &amp; Singleton Council (1994) 86 LGERA 143</td>
</tr>
<tr>
<td>Jaraslus v Forestry Commission of NSW &amp; Ors. (1988) 71 LGERA 79</td>
</tr>
<tr>
<td>Leatch v National Parks &amp; Wildlife Service &amp; Shoalhaven City Council (1993) 81 LGERA 270</td>
</tr>
<tr>
<td>Minister for Urban Affairs &amp; Planning v Rosemount Estate PL &amp; Ors. (1996) unreported CA 40127/96</td>
</tr>
<tr>
<td>D R Murphy &amp; Covehouse Australia v Queensland (1990) unreported FC 90/039</td>
</tr>
<tr>
<td>Nicholls v Dir of National Parks &amp; Wildlife Service &amp; Forestry Commission of NSW (1994) 84 LGERA 270</td>
</tr>
<tr>
<td>North Coast Environment Council Incorporated v Minister for Resources (1994) 55 FCR 492</td>
</tr>
<tr>
<td>Oshlack v Richmond River Council (1998) unreported HCA 11</td>
</tr>
<tr>
<td>Richmond River Council v Oshlack (1996) unreported CA 40120/94</td>
</tr>
<tr>
<td>Rosemount Estate PL v Cleland &amp; Ors. (1994) unreported LEC 40144/94</td>
</tr>
<tr>
<td>Rundle v Tweed Shire Council (1987) 69 LGERA 21</td>
</tr>
<tr>
<td>Sierra Club v Rogers C B Morton (1972) 405 US 727</td>
</tr>
<tr>
<td>Tasmanian Conservation Trust v Minister for Resources &amp; Gunns Ltd (1995) 127 ALR 580</td>
</tr>
</tbody>
</table>
TABLE OF STATUTES

Commonwealth
Environment Protection (Impact of Proposals) Act 1974
Native Title Act 1993

New South Wales
Aboriginal Land Rights Act 1983
Courts Legislation (Mediation & Evaluation) Act 1994
Environmental Offences & Penalties Act 1989
Environmental Planning & Assessment Act 1979
Farm Debt Mediation Act 1994
Land & Environment Court Act 1979
National Parks & Wildlife Act 1974
Protection of Environment Administration Act 1991
State Environmental Planning (Permissible Mining) Act 1996

Queensland
Courts Legislation Amendment Act 1995
Local Government (Planning & Environment) Act 1991
South Australia
Environment Resources & Development Court Act 1993

United States
Administrative Dispute Resolution Act 1990
Comprehensive Environmental Response, Compensation & Liability Act 1988
National Environmental Policy Act 1969
Negotiated Rulemaking Act 1990
INTRODUCTION

Controversies over environmental matters have become increasingly prevalent and persistent in Australia over the past 20 years. Various political and legal means have been used to attempt to resolve such controversies with varying degrees of success. Broadly speaking such controversies are resolved by adjudicative, consensual or administrative means. These three broad categories are referred to as Environmental Dispute Resolution mechanisms. The provision of satisfactory methods to resolve environmental controversies remains a significant issue for our legal and political systems. Experience in the United States suggests that the use of a range of consensual methods, usually termed Alternative Dispute Resolution (ADR) methods, within the existing legal and political systems may provide an effective solution.

The use of ADR methods in Environmental Dispute Resolution in the Australian context has occurred in various guises since the early 1980s, but no comprehensive studies of the effectiveness of such methods have been reported. This represents a serious gap in the knowledge required to determine the best means for the efficient resolution of environmental controversies in our society. This study seeks to contribute to the knowledge in this area.
Outline

The aim of this study is to examine by way of case study some of the uses now being made of ADR methods in the resolution of environmental controversies in Australia and to investigate the effectiveness of that use. The following is an outline of the approach used to achieve this aim.

Chapter 1 provides an outline of the research and introduces the concepts of environment, dispute and resolution.

Chapter 2 examines the characteristics unique to environmental controversies and uses such characteristics as a method of classifying these controversies.

Chapter 3 reviews the various ADR methods to determine which are used in the resolution of environmental controversies.

Chapters 4 and 5 review the current literature with respect to the implementation of these methods in an environmental context. This review involves a comparison of the experience in the United States and Australia.

Chapter 6 details the research methods used to achieve the aim of the study. This involved a distillation from the broad areas of enquiry to more focussed and precise research questions. A research approach based upon case studies was selected as the means to address the questions posed.
Chapter 7 examines the existing mechanisms used for the resolution of environmental controversies in New South Wales. This review provides a basis for determining where ADR methods are currently being used for the resolution of environmental controversies and as a means for selecting suitable case study examples.

Chapter 8 presents the results of the first case study examining the use made of ADR methods in the Land and Environment Court of NSW for the resolution of environmental disputes.

Chapter 9 presents the results of the second case study examining the use of ADR methods in the resolution of environmental conflicts. The study focusses on the ADR methods utilised by the NSW Resource and Conservation Council in its preparation of an interim assessment strategy for forest use.

Chapter 10 discusses these results and draws conclusions about how effectively ADR methods have been implemented in the resolution of environmental controversies. The discussion concludes with a series of recommendations as to how this use could be made more effective.
Definition of Terms

Environmental Dispute Resolution.

What is the environment?

A broad definition of "Environment" is one that defines it in terms of:
"the region, surroundings and circumstances in which any organism exists. This environment includes the natural physical aspects as well as the man-made surroundings with which the organism interacts."

This definition is broad in the sense that it is concerned with the surroundings of "any organism" rather than a more traditional approach which perceives environment in terms of 'the surroundings of man'.

The anthropocentric view

Much of Australian law applies a traditional, essentially anthropocentric, view of the environment which accepts that:

'environment' includes all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings.

---

This was a definition with wide currency throughout the 1970s and 1980s.\textsuperscript{3} It remains the definition used in the \textit{Environmental Planning and Assessment Act 1979} (NSW) (the EPA Act).\textsuperscript{4}

The anthropocentric approach has been said to involve:

\begin{quote}
"the exaltation of human beings and their particular faculties (eg reason) - the placing of the human being in a pre-eminent position with respect to the rest of, not only terrestrial phenomena, but the universe at large."
\end{quote}

Even in relatively new and updated legislation an anthropocentric definition continues to be used. The \textit{Environmental Offences and Penalties Act 1989} (NSW) was amended in 1990 to provide a more expansive definition, but one that remains essentially anthropocentric:

\begin{quote}
*environment* includes \textit{all aspects of the surroundings of human beings}, including:
\begin{itemize}
\item[(a)] the physical factors of those surroundings, such as the land, the waters and the atmosphere; and
\item[(b)] the biological factors of those surroundings, such as animals, plants and other forms of life; and
\item[(c)] the aesthetic factors of those surroundings, such as their appearance, sounds, smells, tastes and textures.
\end{itemize}
\end{quote}

\begin{footnotes}
\item[4] Section 4.
\item[6] Section 4(1). (emphasis supplied).
\end{footnotes}
What flows from a view which perceives human beings as the central focus is inevitably a perspective which sees the 'environment' in terms of a benefit or commodity for the use of humans. This perspective views any development anthropocentrically and asks what will be the extent of the development's effect on the amenity of human beings. This is essentially the perspective of much planning legislation. It helps to explain why such legislation is not primarily concerned with ecologically sustainable outcomes but more concerned with the facilitation of land development.

The mitigation of environmental impacts encouraged by the EPA Act may well be insignificant in terms of sustainability or real environmental concerns (such as climate change or maintainence of diversity) since the effect on the amenity of man of these outcomes is not perceived as immediate. While s90(1)(b) speaks of "harm to the environment" it is used in the narrow sense as an assessment of the effect on the benefit of that 'environment' to human beings not the effect on the environment per se. This assessment focusses upon the effect the development has on the amenities or interests of competing human land users. Amenity value has a much narrower and more limited focus than ecological value even though the latter will have long-term impact upon human beings.

---

The ecocentric view

By the 1990s legislative definitions used in Australia were displaying a wider ecocentric perspective. The ecocentric view gives greater prominence to ecological values, placing mankind in his surroundings rather than at the centre. A good example of this shift in perspective is the definition provided in the Local Government (Planning and Environment) Act 1991 (Qld.):

"environment" includes:
(a) ecosystems and their constituent parts including people and communities,
(b) all natural and physical resources,
(c) those qualities and characteristics of locations, places and areas, however large or small, which contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony, and sense of community, and
(d) the social, economic, aesthetic and cultural conditions which affect the matters referred to in paragraphs (a), (b) and (c) or which are affected by those matters.  

The wider ecocentric view has also received greater currency, though not always acceptance, in the courts. The High Court of Australia in D.R. Murphy and Covehouse Australia v Queensland reversed an earlier Queensland decision which had held that 'environment' in the earlier Queensland Act did not include living

---

8 Section 1.4.
9 Unreported 3 October 1990. FC90/039.
organisms (in this case turtles and their nesting areas) and so the impact of a proposed development on such organisms did not require consideration.

Attempts have since been made to have courts adopt the wider ecocentric definition. This has not always been successful. In a case concerned with the effects of logging of south coast forest areas on the environment, the Land and Environment Court of New South Wales was asked to expand the definition such that 'environment' would include:

"not only the physical environment but also include the social effects (of a development) and their impact on the relations between social groupings"\(^{10}\)

While allowing that the social effects of a development could be a relevant factor, Hemmings J stopped short of expanding 'social effects' to mean:

"that an activity which is otherwise not likely to significantly affect the environment could be seen to do so merely because it excited opposition by a section of the public."

However even to have accepted such an expansion would have been nonetheless an anthropocentric approach based upon the effects on 'a section of the public'.

---

\(^{10}\) Jarasius v Forestry Commission of NSW & Ors (1988)71 LGRA 79 at 93.
Similar attempts to widen the scope of the definition of environment are apparent on the international front. The Rio de Janiero Earth Summit of June 1992 defined "environmental protection" from an ecocentric perspective as the protection of discrete and interacting ecosystems:

"The environment is threatened in all its biotic (living) and abiotic (non-living) components: animals, plants, microbes and ecosystems comprising biological diversity; water, soil and air, which form the physical components of habitats and ecosystems, and all the interactions between the components of biodiversity and their sustaining habitats and ecosystems."\(^\text{11}\)

**The definition of the environment and dispute resolution**

The notion of competing human needs is the essence of an anthropocentric view of the environment. However an ecocentric definition of environment does not sit comfortably with the notion of dispute resolution since implicit in dispute resolution is the resolution of disputes between human beings.

This is not to say that inanimate objects could not be given status as parties in any environmental controversy. United States Supreme Court Judge W. O. Douglas in his dissenting

judgement in *Sierra Club v Rogers C. B. Morton* gave an early judicial expression of this view:

"Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."\(^{12}\)

This was not necessarily a novel idea given that other inanimate objects such as ships or corporate entities were parties to litigation. Similarly permitting a dispute resolution body to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardian ad litem, executors or administrators.\(^{13}\)

Problems do arise given the competing claims of various interest groups to represent the interests of the environment generally, or inanimate objects specifically. Taking the definition of the environment as far as proposed by Stone may increase rather than diminish the intensity of the disputes between human beings and further exacerbate the difficulties inherent in resolving such controversies.

This makes it clear that the distinction between 'environment' from an anthropocentric approach or an ecocentric approach is largely an artificial one. Strictly speaking an environmental controversy is never between the needs of human beings and the

---


\(^{13}\)Id., 81.
needs of the environment, it is always between competing human beings even when the focus is ecocentric. This is so because only human beings can 'value' the environment by attaching meaning or value to particular interests, needs or goals in relation to it.

For some, the focus is upon preservation of an ecosystem, while for others it is upon employment opportunities or economic development. But either way the perspective is anthropocentric, since it involves attaching value to potentially conflicting uses of the surroundings of human beings. Given this, the two different approaches to the environment do not provide any real assistance in classifying environmental controversies. For all practical purposes environmental controversies are anthropocentric disputes, even if one of the parties to the controversy perceives the environment from an ecocentric perspective. It is necessary to look elsewhere for a method of classification.

What is a dispute?

'Dispute' in a generic sense

According to its ordinary English meaning the term 'dispute' is simply a disagreement or difference of opinion. This is essentially synonymous with the wider but related term 'conflict' which means a clash of opposing principles. Boulle concedes this similarity but makes a distinction in terms of intensity. So while:
"a dispute involves an overt and contested claim between two or more parties over competing interests, principles or process"

A conflict refers to:

"an ongoing series of disputes of severe intensity which have occurred over an extended period of time." \[14\]

Disputes in this general sense embrace both a dispute per se (a single contested claim) and a conflict (a series of contested claims).

But in the field of dispute resolution the term 'dispute' has a distinct technical meaning which has a much narrower scope than a contested claim. So for the sake of clarity and consistency of expression, a dispute in the generic sense has been labelled as a 'controversy' and covers both disputes per se and conflicts.

'Dispute' in a special sense

Tillett\[15\] points out that in the field of dispute resolution terms such as 'dispute' and 'conflict' are used in ways that do not necessarily correlate with their ordinary English meaning.


Definitions of 'dispute' in this technical sense include:

"a dispute arises when two (or more) people (or groups) perceive that their interests, needs or goals are incompatible, and seek to maximise fulfilment of their own interests, or needs, or achievement of their own goals (often at the expense of others)."\(^{(16)}\)

Burton adapts this definition and describes these "interests, needs or goals" as "negotiable issues". He makes the assumption that the perception of incompatibility and the desire to maximise fulfilment over such interests is not fixed in the minds of the parties but open to some potential form of compromise.\(^{(17)}\)

It is this possibility of compromise or negotiability implicit in Burton's interpretation of Tillett's definition that is the distinguishing feature of a dispute in this more limited technical sense. In a dispute in this sense the maximising of goals may be achieved through bargaining or negotiating because, even though the goals may seem incompatible, "to obtain that which is more important, one party may yield to the other on that which is less important".\(^{(18)}\) These disputes are open to settlement, either by a mutually agreed settlement or a

\(^{(16)}\) Id., (emphasis supplied).
\(^{(17)}\) J Burton, Conflict Resolution as a Political System (1988) George Mason University, Fairfax, 11.
\(^{(18)}\) G Tillett, op cit., note 15 above, 4.
settlement imposed in adjudicative proceedings or administratively.

Conflict

It is this negotiability feature of a dispute that puts it in sharp contrast to Tillett's definition of a conflict:

"Conflicts exist when one or more parties perceive that their values or needs are incompatible. Values are incompatible if each contradicts or opposes the other. One need would be seen as incompatible with another if meeting that need is thought to prevent, obstruct, interfere with or in some way make meeting the other need less likely or effective."\(^{19}\)

In the case of a dispute, the incompatibility was to do with "interests, needs or goals." But as Burton pointed out, in spite of the appearance of incompatibility, a compromise was possible. In contrast, there is some different quality of the "values or needs" involved in a conflict that make the scope for compromise so much narrower.

So it must be assumed that the values and needs perceived as incompatible in the case of a conflict are different in some significant way from the "interests, needs or goals" associated with disputes. Burton distinguishes the former as "relating to

\(^{19}\)Id., 7 (emphasis supplied).
ontological human needs that cannot be compromised. "Values" in this sense are those beliefs which have significance for an individual, and he offers religious or political beliefs as examples. 'Needs' on the other hand involve both physical or psychological wants. In the case of conflict, Burton asserts the needs at issue relate to essentially psychological wants of a fundamental character not seen as amenable to compromise and he includes in these both the need for self esteem and the need for a sense of identity.

Such conflicting values and needs are seen as opposites, either objectively so or at least in the minds of the individuals involved. As Burton emphasises, these real or perceived differences are seen as non-negotiable:

"Conflict is a relationship in which each party perceives the other's goals, values, interests or behaviour as antithetical to its own."21

Controversies over these values or needs are perceived as incapable of resolution.

The other distinguishing feature of conflict is that the perceived incompatibility may often be underlying rather than overt. It may manifest itself in a superficial way in the form of a dispute over a particular issue, but the vehemence with which this incipient dispute escalates may be reflective of a depth of

conflict not previously manifested by the parties. It is the pervasive nature of this incompatibility which leads Burton to conclude:

"When we come to conflicts, however, it is not sufficient to deal with particular cases and institutionalize means of dealing with them."

This is said by way of distinguishing conflicts from disputes:

"Disputes that are over negotiable interests will always exist, as will problems of management amongst persons who have common goals and values. But both can be dealt with by applying consensus norms, and by management techniques."22

The assumption Burton clearly makes is that application of consensual norms or management techniques are not effective for the pervasive nature of conflicts.

A further point is made in the literature about both the concepts of dispute and conflict. Gregorczuk, discussing international environmental disputes, places 'dispute' in a legal context:

"as a disagreement on a point of law or fact, a conflict of legal views or interests between two parties, in which a claim or assertion of one party is met with refusal, counter-claim or denial by another."23

---

22 Burton(1991), op cit., note 20 above, 71.
There is however, nothing implicitly legal in any controversy be it a dispute or a conflict. Legal controversies are "ordinary disputes which are either governed by legal rules or followed by legal consequences".\(^{24}\) In the case of environmental controversies, the nature of the matters at issue are just as likely to be political as legal, either on a local, regional or national level. There is nothing to say that disputes or conflicts must necessarily be subject to legal norms.

The categorisation of controversies as either 'disputes' or 'conflicts' is neither clear cut nor distinct. It was considered that the concept of a continuum, with its sense of an unbroken sequence of incremental changes, could be used to trace the subtle shifts in perspective between a dispute and a conflict. This was an important step in the development of this study, because once utilised for this purpose, the device of a continuum allowed a system of classification of environmental controversies to be proposed as a basis for analysis. Controversies could be placed at some point along a continuum using the extent to which they exhibit interests, needs or goals seen as negotiable (disputes) or goals and needs seen as incompatible (conflicts).

\(^{24}\)D Easton, Introducing the Law (1982) CCH Australia Ltd, Sydney, 94.
What is resolution?

Resolution in a generic sense

Similar definitional problems arise concerning the concept of 'resolution'. Controversies, or contested claims, by definition can be the subject of some form of resolution. The distinction between a dispute and a conflict may be reflected in the manner in which these are resolved. Burton has referred to the negotiated or arbitrated outcome of a dispute as a "settlement"; while the process of dealing with a conflict in a way that satisfies the inherent needs of all parties (while not perhaps solving the conflict) has been referred to as a "resolution". For the sake of clarity and consistency of expression resolution in the generic sense needs a separate label and has been termed a 'solution'. Solution covers both a settlement and a resolution in the special senses discussed.

Settlement

When the literature on dispute resolution speaks of settlement it is generally referring to the use of a mechanism to settle or manage the actual controversy manifested. The controversy is settled if a solution is imposed by an external body, that is adjudicatively, or if it is one provided consensually by negotiation or mediation between the parties.

Resolution

When speaking of resolving conflicts, there is an implicit understanding that the conflict involves a larger degree of incompatibility between the parties. It is in order to address this degree of incompatibility that the mechanisms for resolving conflict must identify or deal with the underlying issues rather than merely settling its superficial manifestation. Conflict resolution digs deeper in an attempt to resolve the source of the conflict, often by addressing real or perceived incompatibility of values.26

The essence of the distinction that marks out resolution from settlement is the attempt made to resolve underlying conflict:

"Conflict Resolution means terminating conflict by methods that are analytical and get to the root of the problem. Conflict Resolution, as opposed to mere management or 'settlement', points to an outcome that, in the view of the parties involved, is a permanent solution to the problem."27

Tillett's view is that conflict resolution in this sense of complete solution may be impossible in many situations.28 To expect resolution of a conflict in the fullest sense suggested by Burton may exclude from the definition of resolution most

26G Tillett, op cit., note 15 above, 45.
27J Burton, op cit., note 17 above, 2.
28G Tillett, op cit., note 15 above, 10.
practical examples of conflict resolution. A less strict interpretation may allow for successful 'resolution' where the mechanism for resolving the conflict at least identifies the underlying issues (such as value conflict), even if it does not then overcome their incompatibility.

A resolution in this less exacting sense may produce a solution to the underlying conflict (such as an agreement to disagree) with which "the parties agree they can live with once they leave the neutral ground of the problem-solving forum." In this study, resolution in this less than complete sense is accepted as equating to 'conflict resolution.'

Distinguishing settlement and resolution

There are gradations in the manner in which a dispute or conflict can be solved. On the one extreme, a permanent solution where the real matters at issue are identified and addressed is a resolution in the fullest sense. At the other extreme, a temporary truce over a single issue between parties with fundamental differences in values is little more than a settlement.

'Settlement' can be seen as the reaching of a binding agreement, either mutually agreed or imposed, to which the parties adhere.

'Resolution' can be seen as the identification and addressing of overt and underlying conflict with a view to producing a permanent solution to the problem in issue within the framework of continuing competing needs or values even if no final solution is reached.

It can be seen that the aim of both settlement and resolution are essentially similar, namely achieving a permanent understanding between the parties involved in the dispute or the conflict. The distinction is that settlement of a dispute provides a solution to the problem manifested; in the case of a conflict, the settlement achieved may need to co-exist with the incompatibility of values underlying the conflict.

But it does not follow from this that disputes are always settled and conflicts are always resolved. This can be made clear if the distinctions between settlement and resolution were also plotted along a continuum, since they need not (and in many instances will not) overlap with the dispute/conflict continuum. A solution of a conflict may not be a resolution, indeed it might be more likely to be a settlement of a single issue, leaving the fundamental conflict of values unresolved. Conversely, a solution of a dispute may achieve a full closure of the controversy, because the values in dispute are not fundamental, such that it is possible to describe the solution reached as a resolution. But to then merge the two continuua would create a number of inconsistencies, since it would not be correct, for instance, to label one end of the merged continuum 'dispute settlement' and the other 'conflict resolution'.
The Mechanisms of Dispute Resolution

Preston classifies dispute resolution mechanisms into three kinds:
- managerial direction or administrative,
- adjudicative or
- consensual mechanisms.30

Each of these three mechanisms manage environmental controversies in a manner which produces solutions, ranging in various degrees from settlement to resolution.

In the case of administrative means of dispute resolution, these mechanisms encompass environmental controversies solved by both administrative and executive decision. The decision-maker is vested with authority, usually by statute, to apply the relevant criteria and to exercise the authority in accordance with administrative law principles.31 If such decision is subject to review on its merits to a court or tribunal the review is nonetheless an administrative decision or a managerial direction. A merit appeal remains a re-exercise of an administrative or executive power and in this way is fundamentally different from the judicial function of a court in reviewing a decision.32 For the purpose of this study, solution by

32B J Preston, op cit., note 30 above, 150.
either administrative or executive decision making processes are labelled as 'administrative mechanisms'.

Adjudicative mechanisms usually involve a judicial or quasi-judicial body making a judgement in relation to an issue before that body.\textsuperscript{33} The decision is binding upon the parties to it and in the case of judicial decisions establishes a precedent which may be binding upon others. An example of an issue solved by way of an adjudicative mechanism is where the decisions of government ministers or officials are judicially reviewed. The grounds of such a review must involve alleged errors of law in the manner in which the minister or official has exercised his or her powers.

Consensual mechanisms are essentially the ADR methods which are the subject of this research. These mechanisms rely on the consensus or agreement of the parties to the controversy to solve it, either alone (negotiation) or with the assistance of a third party (mediation).

It is considered that each of these mechanisms can potentially produce a solution which could comfortably sit at either extreme of the spectrum. No one mechanism has a monopoly on producing either settlements or full resolutions.

\textsuperscript{33}B J Preston, op cit., note 30 above, 150.
The Concept of a Continuum

As outlined above, the complexities associated with these definitional questions can be addressed using the concept of a continuum. Each of the three elements of environmental dispute resolution: environment, dispute and resolution can be dealt with in these terms.

The concept of a continuum between environmental disputes and environmental conflicts develops into a central theme or structure in this study. For clarity it can be illustrated by a simple diagram:

The continuum of environmental dispute resolution

Controversy

\[ \text{Controversy} \]

\[ \text{dispute} \quad \rightarrow \quad \text{conflict} \]

\[ \leftrightarrow \]
Environmental disputes in a wide generic sense are labelled as 'environmental controversies'. The continuum ranges from the one extreme of an 'environmental dispute' in the sense of a disagreement over interests, needs or goals dealing with the environment, seen as incompatible but in fact amenable to solution. At the other extreme is 'an environmental conflict' where the needs or values over environmental issues appear essentially incompatible.

**Conclusion**

The method of nomenclature adopted is designed to systemise the reporting and structuring of this research. The model of a continuum provides the flexible method necessary because it takes account of the fluidity of the concept of dispute and conflict. Arriving at some method of placing environmental controversies on some point along the continuum is the next focus of this research. This is considered an important focus as it provides a structure from which the hypotheses of this study can be effectively examined.
CHAPTER TWO

CLASSIFICATION OF ENVIRONMENTAL CONTROVERSES

Introduction

This chapter outlines the mechanisms for resolving environmental controversies and indicates that different mechanisms may be appropriate depending upon where a controversy lies on the continuum between an environmental dispute and an environmental conflict. A method of placing environmental controversies along the continuum is needed.

To achieve this purpose the nature of the characteristics of disputes and conflicts relating to the environment are examined in detail to provide one possible means of classification. Specific examples are then examined to show how the classification system might be applied.

The mechanisms of resolving environmental controversies

The distinction between dispute and conflict is important in determining the form of dispute resolution mechanisms which may be effective in environmental matters. Environmental disputes or environmental conflicts as defined may be suited to different mechanisms. So a dispute between neighbours as to
one neighbour's building extension plans can be placed at some point on the controversy continuum. It involves a perceived incompatibility between the parties' respective interests, needs or goals rather than their inherent values, and so can be placed in the 'dispute' half of the controversy continuum. The issues in contention may be negotiable between the parties on the basis, for instance, that the extensions are modified to satisfy the neighbour's concerns about privacy or loss of amenity. Alternatively, if the parties cannot find a solution, one may be imposed adjudicatively. In this research this is classified as an environmental dispute.

In comparison, a controversy involving an environmental organisation, government entities and a natural resource developer over commercial logging in native forests would be placed at a different point along the controversy continuum. It involves a perceived incompatibility of fundamental values, with the strong probability of actual incompatibility. The issues in contention appear non-negotiable: a compromise based upon agreed restrictions of tonnage or areas logged is not necessarily likely to be accepted by the parties. Some conservationists may indeed not agree to any logging of native forests. The scope of the difference in fundamental values is reflected in conflicting attitudes to forest usage:
"You can't just save half the forest. You can't save half an ecosystem, anymore than you can save half a human life or half a sacred site."^1

These value differences would place it in the 'conflict' half of the controversy continuum. In this research, this is classified as an environmental conflict.

This distinction has ramifications for the appropriateness of the mechanisms of resolving environmental controversies. The purpose of this study is to determine whether one category of these mechanisms, namely ADR methods, is appropriate and effective in solving controversies lying along all or part of the continuum

'Environmental dispute resolution' is taken to mean collectively the range of procedures used to resolve environmental controversies. As discussed in Chapter One, Preston's^2 classification of such methods is used here:

*consensual mechanisms* - those mechanisms which depend upon the consensus or agreement of the parties to the dispute. For example, negotiation, mediation, neutral intervention and the like.

---

1^K Jurd, Director, Wilderness Society quoted in H Wootten, "Environmental Dispute Resolution"(1993) 15 Adelaide Law Review 33 at 49.
**adjudicative mechanisms** - those mechanisms where the dispute is resolved by the determination of a judicial or quasi-judicial institution. For example, litigation or arbitration before a court or tribunal.

**administrative mechanisms** - those mechanisms where the dispute is determined by the direction of a decision-maker vested with managerial authority. Preston describes these as managerial direction but the simpler term 'administrative' is used here. Examples of administrative mechanisms are decisions made by a Minister, a government bureaucrat or a local council and also merit reviews by a court or tribunal.

These procedures are not mutually exclusive and can be used in combination. So, for instance, consensual mechanisms may be used as an adjunct to adjudicative or administrative mechanisms. Similarly, adjudicative methods such as public inquiries may be used as adjuncts to the administrative mechanism.

**Distinguishing environmental disputes and environmental conflicts**

As well as identifying the controversy as one involving issues relating to the environment, some method of determining whether the controversy is an environmental dispute or an environmental conflict needs to be found. This is essential before any assessment can be made as to whether consensual
mechanisms are suited to resolve environmental controversies along all or part of the continuum.

Disputes and conflicts relating to the environment have a number of special characteristics and these characteristics have been most comprehensively reviewed by Atherton & Atherton\(^3\). This review is examined in detail with a view to using these characteristics as a means of classifying controversies, into either environmental disputes or environmental conflicts.

The extent to which a controversy displays these characteristics will be used to place it on the continuum between a dispute and a conflict. In general terms the more of these characteristics which are shown, the closer that controversy is towards the environmental conflict end of the continuum.

However certain of these characteristics, it will be argued, carry greater weight in discriminating between an environmental dispute and an environmental conflict. Therefore an attempt will be made to identify those characteristics which can be used as key discriminators between environmental disputes and environmental conflicts.

The characteristics of environmental controversies

Many of the characteristics reviewed here are neither unique nor peculiar to environmental controversies. They are evident in many non-environmental controversies. Additionally, a number of the characteristics are not mutually exclusive, that is to say there is a considerable degree of interrelatedness between them. However it is considered useful to distinguish each separate characteristic.

Government is a party

A popular misconception is that environmental controversy concern only developers and environmentalists. However research in the United States dispels this view, suggesting that government in its various forms is a party to four out of every five environmental controversies. This research was the result of a study commissioned by the US Conservation Foundation in 1986 to examine the effectiveness of environmental mediation and as such is confined only to controversies subject to mediation, which was still in the embryonic stage at that time. The research reviewed 161 environmental controversies referred to mediation in the period 1974-84. These controversies were classified into two groups for analysis: site-specific and policy-level matters.

---

The study analysed the parties involved in the 115 controversies identified as site-specific. While environmental groups and developers were each only involved in about a third of these controversies, "federal and state agencies and units of local government were involved in 82% of these matters."\(^5\)

The research also disclosed that the single largest category of these site-specific matters, 19 out of 115 cases or 16.5%, were controversies between government agencies, that is to say no parties other than public agencies were involved.\(^6\) For example, in one controversy involving a regional port development, the parties consisted solely of 12 public agencies.

These results are readily embraced by other writers as reflecting the norm for all environmental controversies, though the research related only to conflicts resolved by mediated means. This generalisation may not necessarily follow if it is assumed government bodies involved in conflicts would be more likely to mediate. Atherton & Atherton however accept that such high levels of government involvement are also typically a characteristic of environmental controversy in Australia, given that these controversies directly involve the public interest and government agencies are assumed to have responsibility to represent that interest.\(^7\) Fowler also adopts this view: "experience suggests that four out of every five environmental disputes will involve government at local, state and/or Federal

\(^5\)Id., 45.
\(^6\)Id., 46.
\(^7\)T Atherton & T Atherton, op cit., note 3 above, 12.
levels. This is the view accepted here, that by their nature most environmental controversy involves some level of government involvement.

**Multiple Issues**

Environmental controversy typically involve a large range of issues. A large conflict may involve issues of land use, natural resource management and questions of air or water quality. That is not to say that a smaller dispute over a specific planning matter will not involve multiple issues. A consent authority in determining a development application is required under Pt 4 and Pt 5 of the EPAA Act to take account of a large range of issues including:

(i) the landscape or scenic quality of the locality,
(ii) any wilderness areas,
(iii) any critical habitats,
(iv) the amount of traffic likely to be generated,
(v) the likelihood of soil erosion,
(vi) the amenity of the neighbourhood. But these need only be considered "so far as they are relevant", and most will not be considered as relevant in essentially planning disputes.

---

9 See sections 90 & 111.
In the case of environmental conflicts the issues may also be interconnected and interdependent, such that a decision on one issue may influence all other environmental issues involved in the controversy. This phenomenon is described as a 'polycentric' problem:

"Polycentric problems involve a complex network of relationships, with interacting points of influence. Each decision made communicates itself to other centres of decision, changing the conditions, so that a new basis must be found for the next decision."  

The difficulty with problems of this form is that they cannot be resolved by identifying each issue at the start and then solving them in turn, since the solution of one issue will have repercussions for the others. The solution of one issue may change the nature and scope of the others.  

So, for example, in a conflict over logging a particular native forest compartment, a decision to permit or refuse logging in that area will have implications for a potentially wide list of issues. Logging will affect both fauna sanctuaries and flora diversity. The management or curtailment of logging quotas will have implications for the economic and social well being of the local community. A decision to permit logging may also have implications for these same issues in interconnected forest

---

10 J Jowell, "The Legal Control of Administrative Discretion" (1973) Public Law 178 at 213.
11 Id., 167.
areas. The conflict cannot be considered without proper regard for these and related issues.

**Multiple Parties**

As discussed, in the vast majority of environmental controversies government in some guise or other will be a party. In addition, there may be other parties, including private developers, environmental groups, local community groups, residents, unions and other affected or interested individuals.

In many complex controversies the disputants are rarely confined to 'the main parties'. At a local level, a controversy ostensibly between a private developer and a local authority may attract the attention of one or more community groups. A controversy on a regional or national level may involve several government agencies, private development interests, local community groups and environmental groups with an international focus.

While each of these interested parties or stakeholders has legitimate interests they differ markedly in degrees and style of organisation and have wide disparities in power and resources.\(^{12}\)

Additionally such controversies may also be protean, that is to say new and significant stakeholders may emerge as the dispute process takes place and escalates.

---

\(^{12}\) Atherton & Atherton, op. cit., note 3 above, 12.
So, for instance, a controversy involving the establishment of a copper and gold mine at Parkes in New South Wales involved community groups represented by the Environmental Defenders’ Office, local graziers, the mining company, local shire representatives and State government authorities. Similarly, in environmental controversies which are referred for review to Commissioners of Inquiry under section 18 of the Environment Planning and Assessment Act (NSW) 1979 (EPAA Act) "it is not unusual for party numbers to be between 30 and 60 and in one case have been as high as 400."\(^\text{14}\)

**Scientific Uncertainty**

Environmental controversies frequently raise questions of a scientific or technical nature which extend over a number of scientific disciplines. This creates the difficulty that no single discipline can provide a complete or precise answer to the scientific issues in dispute.\(^\text{15}\) In addition, even within each discipline there is seldom unanimous agreement as to the scientific implications of various decisions or developments.

The nature of this uncertainty is far reaching. Preston isolates four possible sources:

---


\(^\text{15}\)T Atherton & T Atherton, op cit., note 3 above, 13.
(1) uncertainty as to the environment: for example, does the area to be developed contain habitat of an endangered species of wildlife?

(2) uncertainty as to development: for example, what will be the volume and quality of pollutants emitted?

(3) uncertainty as to impacts of a development: for example, will a pollutant have a material impact on the local, regional or global environment?

(4) uncertainty as to the effectiveness of proposed mitigation measures: for example, how effective will habitat rehabilitation be in restoring damaged or disturbed ecosystems?  

This uncertainty can arise either because of imperfect knowledge about the consequences of environmental action and disagreement among scientists about the interpretation of the data that is available; or because of the scientific biases of various experts in the manner and methods of data collection, or in many cases simply by the lack of useful research.

So, in the case of a relatively straightforward case involving the siting of a mushroom composting plant in a rural community, questions about the existence and location of water courses and about the estimation of effluent levels produced widely divergent views among the scientific experts involved. With respect to one submission as to what constituted a

---

16B Preston, op cit., note 2 above, 161.
17L Horn, "The role of mediation in international environmental law"(1993) 4(1) Australian Dispute Resolution Journal 16 at 28.
18Narrambulla Action Group Inc. v Mulwaree Council & Ors.(1996), Unreported Bannon J, Land and Environment Court No 40165/95, 15 November 1996.
"watercourse", Bannon J said in his judgment "a number of erudite gentlemen, geomorphologists and hydrologists were called as witnesses and gave widely differing evidence on affidavit as to that issue."\(^\text{19}\)

The uncertainty is exacerbated because the scientific information or opinion that is available is seldom value free.\(^\text{20}\)

For these reasons it is simply impossible to say that environmental controversies are scientific disputes for which it is possible to obtain a 'right decision'. There is no assurance that a 'right decision' can be achieved. The disagreement among scientists as to the implications of various effects concerning the environment and the inherent difficulty in separating scientific evidence and opinion from value judgements simply prevents this occurring in contexts of scientific uncertainty.

This problem of scientific uncertainty and the related question of irreversibility has given rise, in environmental law and policy, to a protective approach to the environment, termed the precautionary principle.\(^\text{21}\) As Stein J has pointed out, the development of the principle "is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty."\(^\text{22}\)

\(^{19}\text{Id., 12.}\)

\(^{20}\text{L Susskind & A Weinstein, "Towards a Theory of Environmental Dispute Resolution" (1980) 4 Land Use and Environmental Law Review 433 at 441.}\)

\(^{21}\text{Preston, op cit., note 2 above,161.}\)

\(^{22}\text{In Leatch v National Parks and Wildlife Service & Shoalhaven City Council (1993) 81 LGERA 270 at 282.}\)
The principle had its origins in Germany in the 1970s and received expression in international environmental instruments such as the 1992 Rio Declaration on Environment and Development, Principle 15. The principle has been incorporated in the Commonwealth Strategies on Endangered Species and Biological Diversity and in the 1992 Intergovernmental Agreement on the Environment, as well as in State legislation such as the Protection of the Environment Administration Act 1991 (NSW). The statement of the principle in the following terms has now been cross-referenced in a number of other State legislative provisions:

"Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."\(^{23}\)

The formulation in the 1992 Intergovernmental Agreement on the Environment has in addition the following provisos:

"In the application of the precautionary principle public and private decisions should be guided by:
(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
(ii) an assessment of the risk-weighed consequences of various options."\(^{24}\)

---

\(^{23}\) Section 6(2)(a) & see for example the Environmental Planning and Assessment Regulation 1994 (NSW), Schedule 2, para.8(a).

\(^{24}\) Cl. 3.5.1.
Prior to its statutory incorporation in most New South Wales legislation by cross-referencing, the principle itself was considered as a general proposition in *Leatch v National Parks and Wildlife Service and Shoalhaven City Council*.\(^{25}\) Stein J considered the basis of the principle, namely "the potential for serious harm to any endangered species and the adoption of a cautious approach in the protection of endangered species" as largely commonsense and clearly consistent with the scope of the *National Parks and Wildlife Act 1974* (NSW).\(^{26}\)

The principle was applied to an application to take and kill endangered fauna in the context of the construction of a link road through North Nowra to the Pacific Highway on the south coast of New South Wales. Two species of endangered wildlife were affected, the Giant Burrowing Frog and the Yellow-bellied Glider.

Stein J said in his judgement:

"while there is no express provision requiring consideration of the 'precautionary principle', consideration of the state of knowledge or uncertainty regarding a species, the potential for serious or irreversible harm to endangered fauna and the adoption of a cautious approach in protection of endangered

\(^{25}\)(1993) 81 LGERA 270.
\(^{26}\)Id., 282-283.
fauna is clearly consistent with the subject matter, scope and purpose of the [National Parks and Wildlife] Act.  

It was accepted that the precautionary principle was most apt in the case of the Giant Burrowing Frog because it was a new addition to the endangered species schedule and therefore warranted the cautious approach suggested where there is scientific uncertainty. As regards the Yellow-bellied Glider it had been listed as either of special concern or as endangered since 1974. Though the licence was also refused for the Yellow-bellied Glider, the court considered the precautionary principle was not the crucial factor as the lack of scientific uncertainty was considerably less. The principle was thus a crucial factor in the court's view that a licence should not be granted in the case of one of the two endangered species.

The principle has not, however, been universally applied. Talbot J in Nicholls v Director of National Parks and Wildlife Service & Forestry Commission of NSW said in refusing to allow an appeal against a licence to take or kill protected fauna in relation to forestry operations near Wingham in northern New South Wales:

"while it might be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard

---

27 Id.
28 Id., 286.
29 J Segal, "The Precautionary Principle- Should it be Embraced?", paper presented to the NELA Conference Coolum, 8-12 May 1996.
30 (1994) 84 LGERA 397
could have the potential to create interminable forensic argument. Taken literally in practice it might prove to be unworkable. Even the applicant concedes that scientific certainty is essentially impossible".\textsuperscript{31}

In \textit{Greenpeace Australia Limited v Redbank Power Company Pty Limited & Singleton Council} \textsuperscript{32} Pearlman CJ in the NSW Land and Environment Court dealt with an appeal against the granting of development consent for a new power station. Greenpeace opposed the power station on the basis that it would unacceptably exacerbate the greenhouse effect through the cumulative effect of carbon dioxide emissions. The Court was asked to apply the precautionary principle and refuse development consent. The Court held that the application of the precautionary principle dictated that a cautious approach should be adopted but it did not require that the greenhouse issue should outweigh all other issues.\textsuperscript{33}

At present the use of the Precautionary Principle in Australia appears to be essentially a public policy directive rather than an operational tool.\textsuperscript{34} So, for instance, in the case of the preparation of Environmental Impact Statements (EISs) in New South Wales, the EIS is required to contain reasons justifying a proposed development having regard to "the principles of

\textsuperscript{31}Id., 429.
\textsuperscript{32} (1994) 86 LGERA 143.
\textsuperscript{33}Id., 153 and see comments of T F M Naughton, \textit{Land and Environment Court Law and Practice} (1993) LBC, Sydney, 2.663.
ecologically sustainable development", which principles include the precautionary principle. But the EIS does not need to show that the development positively satisfies ESD principles.\textsuperscript{35}

The precautionary principle developed to deal with the scientific uncertainty often associated with environmental controversies. If uncertainty exists a cautious approach is warranted. If there is uncertainty as to environmental outcomes from a development, this uncertainty extends to doubts as to whether these outcomes will be irreversible or not. The extent of current scientific knowledge does not provide an adequate basis for making such a prediction.

The clearing of certain forest compartments and thus causing habit destruction may result in fauna species destruction which is irreversible. The precautionary principle counsels that in the face of such uncertainty caution should be exercised.

It is considered that the presence of questions such as this dealing with scientific uncertainty mark out an environmental conflict from an environmental dispute. It would be reasonable to expect scientific and technical questions to arise in environmental disputes but in such a way that reasonable certainty would exist as to the environmental outcomes of the development. In the case of environmental conflicts however

\textsuperscript{35}Environmental Planning and Assessment Regulations 1994 (NSW), Schedule 2, para. 5&8.
scientific uncertainty may well exist. The presence of such uncertainty is considered to be the first critical factor in distinguishing environmental disputes and environmental conflicts.

**Value Conflicts**

Environmental controversies are at least as much disputes about values as about science. The value disputes can relate both to the divergence of values parties themselves bring to the dispute and to the value judgements scientists make in assessing ecological data. The problems associated with scientific judgements can be addressed to a large extent by a clear recognition that such judgements are seldom value-free.

The value conflicts which separate parties however may be more fundamental:

"For example, a conflict will often occur on the basis of values about the relative rights of human beings and other species, or the merits of exploiting natural resources or conserving them, or what constitutes an acceptable quality of life for people in a particular community."

36 Susskind & A Weinstein, op cit., note 20 above, 446.
This is not to say that these differences in underlying values will always surface but their existence should not be ignored. The divergence of values held by the parties may well influence the methods open to resolve the controversy. Environmentalists may, for instance, assert that in some circumstances environmental issues are simply not susceptible to compromise, for example, where they allege biological diversity is threatened or wilderness values are involved.39

It is the range of values at issue that is fundamental. If it is considered that all environmental controversies involve value issues but that the values at issue range from non-fundamental to fundamental, it is possible to use this characteristic as a further discriminator between environmental disputes and environmental conflicts.

So in the case of an environmental dispute where there are issues to do with amenity such as noise or view, a conflict over what the respective parties hold valuable may arise. Similarly in the case of an environmental conflict value conflicts over questions of sustainability may arise. But the two value conflicts are objectively speaking not of the same dimension, only the question of sustainability gives rise to fundamental value conflicts.

This is best illustrated by returning to our discussion of the two approaches to the concept of the 'environment'. These

39R J Fowler, op cit., note 8 above, 126.
approaches essentially show two differing ways of valuing the environment. The anthropocentric approach clearly views the environment in terms of its relationship to human beings and so conflicts arise as to the respective uses proposed for the 'surroundings of human beings'. This may, for instance, be the extent to which such proposals reflect or depart from principles of sustainable development. But the ecocentric approach also values the environment in terms of its relationship with human beings. It is just that from this approach it is valued differently since it is valued in terms of its value to human beings as an entity in itself to be simply admired and appreciated or to be sympathetically developed.

But while both approaches value the environment in terms of its relationship to human beings there is a wide divergence in the values that attach to the environment. At one extreme, the environment is a resource to be used and exploited for the benefit of human beings, at the other extreme the environment is a resource to be left unexploited for the benefit of present and future human beings. In the middle, these extremes are subject to a fine balance based upon the principles of sustainable development.

The extreme views mark out the fundamental value conflicts that are a key to the existence of environmental conflict. Some environmental disputes involve value conflicts but they are not of the same fundamental nature. For this reason the characteristics of value conflicts will also be one of the crucial distinguishing factors between environmental disputes and
environmental conflicts. The existence of fundamental value conflict mark the controversy out as an environmental conflict.

**Difficulties with identifying and involving participants**

In an environmental dispute the parties will usually identify and involve themselves simply by participation in the process. So, for instance, the parties to a dispute involving a development application to operate a funeral parlour in a residential area may include the applicant, the local council and affected local residents, either individually or as a group. The geographic scope of the dispute is that of the local community and a reasonable expectation would be that any affected party would be easily identified and involved in the dispute resolution process.

The position can be markedly different in the case of an environmental conflict, with the potential of a much larger scope of influence or effect. An example of such a conflict would be a proposal to grant logging licences in disputed wilderness areas. In such a situation there may be difficulties as regards numbers of participants and in balancing representation to ensure that all stakeholders participate in any resolution process. There needs to be a mechanism for identifying potential stakeholders such as representatives of communities affected socially and economically, conservation and development interests, government departments and other interested groups or individuals, such as recreational users.
One relevant consideration is the need to attempt to ensure as far as possible participatory equity between the competing interests of government, conservation and development. A further consideration is whether funding of participants perceived as having an equity disadvantage is necessary and appropriate to ensure the full involvement of such groups in the dispute resolution process.

As well as these considerations, there are certain specific restrictions with respect to environmental conflicts subject to adjudication or administrative resolution that warrant comment. Where a conflict is to be dealt with by way of adjudication or administrative resolution, participation for a particular party will depend not only upon whether the party has a right or interest affected by the conflict but also whether this right or interest is recognised by the law as being sufficient to warrant participation. In areas of public law such as environmental law this concept of locus standi, or standing to sue, may restrict the participation of some otherwise affected parties. The requirement that affected parties must not only profess an interest but that this interest be recognised at law may present problems in involving all interested parties in the conflict resolution process.

So, for instance, the interest of the Australian Conservation Foundation in the preservation of the environment generally and

---

41 Id., 70.
in upholding an environmental right or principle in a case concerning wetlands protection was classified by the court as an "emotional or intellectual interest" not sufficient to warrant standing in 1980.\textsuperscript{42}

By 1989 however, in a case concerning a licence to export woodchips from logging in the South East Forests in New South Wales, it was accepted that the ACF had a special interest in the subject matter of the application. While not giving environmental groups 	extit{carte blanche} as regards standing, Davies J said:

"While the Australian Conservation Foundation does not have standing to challenge any decision which might affect the environment, the evidence thus establishes that the Australian Conservation has a special interest in relation to the South East Forests and certainly in those areas of the South East Forests that are National Estate. The Australian Conservation Foundation is not just a busybody in this area."\textsuperscript{43}

Similarly Sackville J in \textit{North Coast Environment Council Incorporated v Minister for Resources} accepted that the North Coast Environment Council had a special interest such as to give standing to sue against a grant of a licence to export woodchips.\textsuperscript{44}

\textsuperscript{42}Australian Conservation Foundation Inc \textit{v} The Commonwealth (1980) 146 CLR 493.
\textsuperscript{43}ACF \textit{v} Minister for Natural Resources (1989) 76 LGRA 200 at 205-6.
\textsuperscript{44}(1994) 55 FCR 492..
He followed this principle in granting standing to the Tasmanian Conservation Trust with respect to the judicial review of a similar decision to grant a licence to export woodchips.45

Standing rules in the Land and Environment Court of NSW are on the face of it open. Section 123 of the EPAA Act speaks of "any person" bringing proceedings to remedy or restrain a breach of the Act and section 25 of the *Environmental Offences and Penalties Act* 1989 (NSW) allows (with leave of the court46) "any person" to take such proceedings where the breach is likely to cause harm to the environment.

However in the case of adjudicative and administrative proceedings, the permitting of participation through open standing rules raises questions over the financing of that participation. This is particularly so in the case of community groups or groups representing environmental interests. Not only are their own legal costs a consideration, the insecurities associated with costs orders and cost indemnities remain an ever present constraint. 47 These concerns received recent emphasis as a result of the anxiety engendered by the NSW Court of Appeal decision in *Richmond River Council v Oshlack* 48 recently overturned in the High Court. The Court of Appeal had departed from the line of authority that held that the public

nature of environmental proceedings was a relevant consideration in the exercise of judicial discretion to refuse an award of costs to a successful party.

The problems discussed in the identification and involvement of participants to environmental disputes need to be addressed to ensure that any resolution reached will not subsequently be jeopardised by parties not being included in the process at the outset.

*Nature of issues may involve the public interest*

One characteristic consistently attributed to environmental controversies is that they involve the public interest. However the concept of 'the public interest' presents a number of theoretical and practical difficulties itself. The primary difficulty is in defining the concept of 'the public interest' and in making provision for the competing claims of various parties to represent such interest. The extent of this difficulty is apparent from Tillett's comments:

"Two or more participants may each claim to represent public interest, community interest, national interest, or nature itself. Within a community, several groups or individuals (including elected officials and community groups) may each argue that they represent the interests, and the opinions, of the community."49

---

49 Tillett, op cit., note 38 above, 137.
An examination of the developing jurisprudence with respect to the concept of 'public interest litigation' is useful, though it has developed essentially to address questions relating to cost orders and indemnities.  

In *Rundle v Tweed Shire Council*, a case concerned with a cost order following upon an unsuccessful appeal to restrain herbicide spraying, consideration was given as to what might properly be characterised as involving the public interest. The applicant's counsel (B J Preston) submitted the following features were relevant to categorising the litigation as "public interest litigation":  

- (i) the fact of the Attorney-General's intervention in the proceedings;
- (ii) the considerable local interest in the issues raised by the proceedings;
- (iii) the applicant's proceeding represented the common concern of a number of local persons;
- (iv) the long history of the controversy concerning the second respondent's use of 2,4-D in its noxious plant eradication programmes;
- (v) the public interest served by the respondents ascertaining, by judicial decree, the extent of any relevant obligation under Pt V of the *Environmental Planning and Assessment Act*; and

---

50The 'public interest' arises in these cases on the principle that in public interest litigation the usual rule about costs following the result does not apply.  
5169 LGRA 21 at 27.
(vi) the public interest in protecting local flora and fauna.

Similar factors are considered when seeking to identify what constitutes 'public interest environmental matters' in the Legal Aid policies of the Legal Aid Commission of NSW when determining the merits of applications for legal aid. The criteria provide:

"Legal Aid is available for public interest environment matters where the activity or proposed undertaking raises a matter of substantial public concern about the environment. In deciding whether there is substantial public concern, regard will be had to at least the following:
* whether or not the activity, or proposed undertaking is likely to have a significant impact on the environment in NSW or to substantially affect public use, or enjoyment of that environment.
* the scarcity of the particular attribute(s) of that environment.
* the value of that environment to the community of New South Wales.
* community interests that may be affected including the impact on the social and cultural needs of the community."

The Legal Aid guidelines equate 'public interest' with 'substantial public concern' about developments likely to have significant effects on the environment.

---

52Legal Aid Commission of NSW, Legal Aid Policies (June 1995), 5.
Atherton and Atherton take a different view in referring to market theory to answer the question: what is the 'public interest'. Market theory attempts to quantify the relative values of competing interests:

"The mechanism for this is usually cost benefit analysis and a proposal is deemed to be in the public interest if the benefits are found to outweigh the costs."\(^{54}\)

While cost-benefit analysis has adapted methods for valuing 'unpriced social benefits'\(^{55}\) (such as the recreational value of a beach or a national park), such that the public interest can be equated to development which produces the largest net public benefit, these methods remain an essentially artificial device for showing what should be in the public interest rather than what actually is.

This brief overview shows that the concept of the public interest has proven a difficult concept to express or define. There is some merit in the often voiced proposition that the public interest is 'what interests the public'. This reflects the approach of the Legal Aid guidelines in equating the public interest with 'substantial public concern'. This is a useful shorthand approach to use in determining whether the existence of the public interest in a controversy is a discriminating factor.

\(^{53}\) Atherton & T Atherton, op cit., note 3 above, 15.
\(^{54}\) Id..
between an environmental dispute and an environmental conflict.

Because a layer of government has been shown to be involved in virtually all environmental controversy—be it local, state or national—it can be assumed that a potential public interest is involved since government is presumed to represent the public interest. The question is whether the public interest has been aroused in a particular environmental controversy, that is to say 'has the public become interested?' If it has not, the public interest can be said to be dormant; if it has, then there is an active public interest involved. It is considered that this characteristic of an activated public interest marks out an environmental conflict from an environmental dispute. In the case of an environmental dispute, a public interest factor exists but it has not been activated. In the case of an environmental conflict, it has been activated.

The difficulty remains that it is not possible to isolate a single public interest, dormant or active. There are instead a range of public interests, subject to the participants' perceptions, and such 'publics' include "environmental objects" (inanimate objects, wildlife) and future generations.

The extent of this range of 'publics' led US Justice Douglas in *Sierra Club v Morton* to say:

---

56B J Preston, op cit., note 2 above, 166.
57L Susskind & A Weinstein, op cit., note 20 above, 457.
"public interest' has so many different shades of meaning as to be quite meaningless on the environmental front."\(^5^8\)

For the purposes of this study it is not necessary to pursue this issue of the nature of the 'public interest' in an environmental dispute or an environmental conflict. All that is necessary is to find evidence that the public interest has been activated in a particular matter. If the public interest has been activated the matter is likely to be an environmental conflict. In the case of an environmental dispute, the interests that are activated are private ones, the public interest exists (hence the government involvement as the arbiter of planning standards) but it is not activated. Stereotypical environmental disputes involve competing private interests over amenity.

Environmental conflicts on the other hand involve competing public interests, for instance between the economic benefit of a development and the environmental protection benefit. Such competing public interests lead to conflicting claims by various parties to represent such interests:

"advocates of one position or another claim that they represent not just their own concerns but the public interest as well."\(^5^9\)

There is no real solution to these conflicting claims other than to concede that there is no single public interest activated in an


\(^{5^9}\)L Susskind & A Weinstein, op cit., note 20 above, 455.
environmental conflict. If this concession is made then there may be legitimacy in a number of parties claiming to represent "the interests of various publics." Such competing claims will usually arise only in environmental conflicts, environmental disputes will be characterised by competing private interests, though such interests may be just as firmly held and championed.

The activation of competing public interests is thus the third key discriminating factor between environmental disputes and environmental conflicts.

Implementation Difficulties

The implementation of agreements for resolution of environmental controversies may pose special problems. Firstly, previously unidentified problems may arise after a project is completed or well advanced which make the agreement reached or the decision imposed no longer acceptable to all the parties.

Implementation difficulties may also arise because the proposed resolution of the conflict is frustrated by individuals or bodies which were not part of the resolution process. This can arise in two ways. Firstly interest groups not party to the resolution process may attempt to block its implementation if their interests have not been accommodated. Secondly, if a government agency charged with the authority to implement a

---

60 Id., 456-7.
61 T Atherton & T Atherton, op cit., note 3 above, 15.
decision has not been a party to the process, implementation of the decision at all or in its agreed form may be dependent upon its endorsement.\textsuperscript{62}

**Absence of a Prior Relationship among Parties**

Another specific characteristic of environmental controversy is that the parties often have no relationship prior to the conflict arising. The controversy itself may bring the parties together for the first and perhaps only time.\textsuperscript{63} This needs to be seen in the context that in the majority of controversies a government agency or authority is one of the parties involved. This means that there is in fact a pre-existing relationship between the government authority and the other parties at least in the sense of elected representatives and their constituencies.

In the case of an environmental dispute the parties are likely to have been in a pre-existing relationship such as neighbours or community members. That proximity may affect their willingness to participate in various dispute resolution processes. In the case of an environmental conflict there may either be no prior relationship between the parties or there may be an ongoing relationship of an entrenched bitter nature not conductive to early dispute resolution.

\textsuperscript{62} T Atherton & T Atherton, op cit., note 3 above, 15.

Inter-organisational

Environmental controversies are usually inter-organisational rather than interpersonal.\textsuperscript{64} This produces potential problems associated with the size of the organisations and of the actual and ostensible authority of the executive to represent the interests of a broad constituency. This is particularly so in the case of environmental groups, which often purport to represent, and are perceived as representing, a far broader class of individuals than their own members.\textsuperscript{65} Preston raises the issue as to whether advocates of such groups can legitimately be said to represent the public or even their own constituency.\textsuperscript{66} It is reasonable to anticipate that an advocate will tend to represent at best the interests of a few active members of the organisation's constituency rather than the whole constituency.

Geographical Uncertainties

The complexities of ecological systems mean that it may not always be possible to deal with a dispute in isolation from its surroundings on the assumption that its effects can be localised. The approach of \textit{Agenda 21} to environmental protection reflects the interdependent nature of ecosystems by emphasising the need to protect both discreet and interacting ecosystems.\textsuperscript{67}

\textsuperscript{64} T Atherton & T Atherton, op cit., note 3 above, 16.
\textsuperscript{66} R J Preston, op cit., note 2, 166.
Because of this interconnectedness, development in one ecosystem may have repercussions for other systems, repercussions which may not be predictable with any degree of certainty. For instance, the impacts may be irreversible, involving habitat destruction or species extinction\textsuperscript{68}, which effects were not immediately apparent nor contemplated.

The effect of these complexities is that it is not always possible to set realistic geographical boundaries to a conflict. Susskind and Weinstein are of the opinion that: "There are no correct geographical boundaries for a particular environmental dispute".\textsuperscript{69} Such boundaries need to be estimated as accurately as possible in order to determine jurisdiction and to include or exclude potential stakeholders.\textsuperscript{70} But the effects and boundaries of environmental controversies are often difficult to estimate accurately in advance.\textsuperscript{71}

**Classification of environmental controversies\textsuperscript{72}**

As discussed, the term 'environmental controversy' covers a wide range of controversies dealing with the competing interests, needs and goals relating to environmental matters.

\textsuperscript{68}T Atherton & T Atherton, op cit., note 3 above, 14.
\textsuperscript{69}L Susskind & A Weinstein, op cit., note 20 above, 451.
\textsuperscript{70}T Atherton & T Atherton, op cit., note 3 above, 16.
\textsuperscript{71}G Tillett, op cit., note 38 above, 137.
\textsuperscript{72}The classification system adopted here owes much to that developed by B J Preston, op cit., note 2 above, and this debt is warmly acknowledged here.
These controversies range across a continuum between disputes over essentially negotiable interests, needs or goals, to conflicts involving essentially non-negotiable interests, needs and goals.

For the purpose of analysis it is necessary to have some method of placing an environmental controversy at some point along this continuum. The method selected essentially follows the classification system suggested by Preston:

"Environmental disputes can be classified by the extent to which they exhibit certain characteristics. The more characteristics a particular environmental dispute exhibits the more readily it can be classed as a conflict. The fewer characteristics a particular environmental dispute exhibits the more readily it can be classified as a dispute."\(^{73}\)

So, for this study, the exhibition of the majority of these characteristics mark a controversy as an environmental conflict, distinguishing it from an environmental dispute which exhibits at most a small number of these characteristics.

In addition an attempt has been made to isolate a small number of key characteristics which are considered the essence of the distinction between an environmental dispute and an environmental conflict. Three characteristics capture the

\(^{73}\)Id., 175.
essential of conflict, that is, irreconcilable disagreement over values or goals. These are the characteristics designated as:

1. Value Conflicts,
2. Scientific Uncertainty, and
3. Public Interest Concerns.

An environmental controversy displaying a majority of the characteristics but in particular these three key characteristics will be placed in the environmental conflict half of the continuum. An environmental conflict classified in this way is defined as:

"An environmental controversy dealing with competing interests, needs and goals over environmental issues, in particular the apparently non-negotiable issues of value conflict, scientific uncertainty and public interest concerns."

Conversely an environmental controversy which displays only a minority of these characteristics and in particular does not display the three key characteristics will be placed towards the environmental dispute end of the continuum. An environmental dispute classified in this way is defined as:

"An environmental controversy dealing with competing interests, needs and goals over environmental issues, but which issues deal with essentially competing amenities questions."
Distinguishing environmental disputes and environmental conflicts in this way and emphasising three of the characteristics may appear to exclude the importance of other characteristics which intuitively suggest large scale conflict. This is particularly so with the characteristics of 'multi-parties' and 'multi-issues', where the magnitude and breadth of the controversy suggest that the public interest has been activated over conflicting values or questions of scientific uncertainty. But these two characteristics while important are not considered to be as effective in discriminating between environmental disputes and environmental conflicts. This is best illustrated by an example.

Two recent large scale controversies are the Lake Cowal Gold Mine proposal in central New South Wales and the Bengalla Coal Mine proposal in the Hunter Valley. Both of these controversies involved multi-parties and multi-issues and precipitated a ministerial referral to a Commissioner of Inquiry pursuant to s119 of the EPAA Act. On the basis of these characteristics it would be expected that both controversies would be placed in the environmental conflict half of the continuum. But it will be contended that they lean towards different ends of the continuum.
The Bengalla Coal Mine Controversy

The Bengalla Mining Co Pty Limited lodged a development application with Muswellbrook Council in 1993 to establish and operate an open cut coal mine in the Upper Hunter Valley north of Sydney. The area proposed for the mine was adjacent to local residents and they together with community groups opposed the development. Particularly strong opposition came from local land users, Rosemount Estates Winery and the Dalama Horse Stud.

A Commission of Inquiry was ordered in January 1994 and reported to the Minister in August of that year. The report recommended that the Minister grant consent to the development subject to a number of conditions. Before ministerial consideration, the report was subject to an application to the Land and Environment Court of NSW seeking judicial review of the recommendations on the basis that the Commission of Inquiry had incorrectly assumed the relevant Local Environment Plan (LEP) permitted the mine. That application was upheld in the judgement of Waddell, AJ on 24 January 1995 and as such the recommendation could not be acted upon by the Minister. As a result of this judgement, the

75Rosemount Estates Pty Limited v Cleland & Ors, Land and Environment Court of NSW No. 40144/94.
Inquiry reconvened and a supplementary report of May 1995 confirmed the original recommendation of consent.\textsuperscript{76}

Nevertheless the government gazetted SEPP 45 on 4 August 1995 and the Minister then granted consent to the mine on 7 August 1995. This consent was subject to a further appeal in the Land and Environment Court of NSW. The basis of the appeal was that the process of making the SEPP was manifestly unreasonable as insufficient opportunity for public participation had been given due to the Minister's decision not to publically advertise the SEPP. The court granted the appeal and declared SEPP 45 and the development consent void. This decision was the subject of a successful appeal to the NSW Court of Appeal.\textsuperscript{77}

Before the appeal was heard the NSW Government had passed legislation specifically designed to approve the project.\textsuperscript{78} This was passed in June 1996 and construction of the mine commenced in 1997.

\textsuperscript{76}L Mather, "SEPP No.45 (permissibility of mining) declared invalid"(1996) 34(5) Law Society Journal 30.
\textsuperscript{77}Minister for Urban Affairs & Planning v Rosemount Estates Pty Ltd & Ors, NSW Court of Appeal 40127/96, 14 August 1996.
\textsuperscript{78}State Environmental Planning (Permissible) Mining Act NSW (1996).
The nature of this controversy was examined in terms of the characteristics discussed above. The results of this examination are tabulated as follows:

<p>| Table One |
| Bengalla Coal Mine Project |
| Display of the Characteristics of Environmental Controversy |</p>
<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Extent Displayed</th>
<th>Evident</th>
</tr>
</thead>
<tbody>
<tr>
<td>government is a party</td>
<td>11 government agencies</td>
<td>yes</td>
</tr>
<tr>
<td>multiple issues</td>
<td>noise, air quality, salinity, effect on viticulture, visual amenity</td>
<td>yes</td>
</tr>
<tr>
<td>multiple parties</td>
<td>76 submissions</td>
<td>yes</td>
</tr>
<tr>
<td>scientific uncertainty</td>
<td>Complex scientific issues re noise, effect on viticulture, no clear issues of uncertainty re effect on flora &amp; fauna</td>
<td>no</td>
</tr>
<tr>
<td>value conflicts</td>
<td>Conflicts as to the value of the project in economic terms as opposed to ecological effects</td>
<td>yes</td>
</tr>
<tr>
<td>nature of dispute involves the public interest</td>
<td>Essentially private interests were at stake; public interest not activated</td>
<td>no</td>
</tr>
<tr>
<td>difficulty identifying parties</td>
<td>none</td>
<td>no</td>
</tr>
<tr>
<td>implementation difficulties</td>
<td>adequate conditions were possible</td>
<td>no</td>
</tr>
<tr>
<td>absence of prior relationship</td>
<td>yes, though previous co-existence</td>
<td>yes</td>
</tr>
<tr>
<td>interorganisation</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>geographical uncertainties</td>
<td>no, geographically defined</td>
<td>no</td>
</tr>
<tr>
<td>Number of characteristics clearly evident</td>
<td>five</td>
<td></td>
</tr>
</tbody>
</table>
Lake Cowal Gold Mine Controversy

North Limited proposed in 1995 to develop a gold mine at Cowal West, West Wyalong in Central New South Wales. The proposed extraction area included part of the bed of Lake Cowal, a wetland waterbird habitat. While relevant government departments expressed concern about the potential ecological impacts, the majority of local residents supported the development. However both regional and national conservation groups opposed the development. The main environmental issues in dispute were the conservation of the ecological values of Lake Cowal and the effect of cyanide concentrations in the tailings discharging after ore processing.

A Commission of Inquiry was ordered in October 1995 and reported in March 1996 recommending that conservation and environmental considerations did not preclude the Minister granting consent to the proposed development. However in April 1996 the Minister did not adopt this recommendation and rejected the development on environmental grounds. The Minister was of the view that there could be no guarantee that "cyanide use will not damage this fragile ecosystem." 

---

80 Sydney Morning Herald, 12 April 1996, 7.
Subsequent negotiations have taken place between North Limited, environmental groups and the NSW government involving attempts to have an amended development proposal approved. A compromise plan was brokered by the NSW Labor Council involving, inter alia, the establishment of a trust fund for environmental improvements, included North Limited purchasing the whole lake area and turning it into a nature reserve. It now seems likely that the mine may proceed, either by Ministerial approval or a further Commission of Inquiry.

The nature of this controversy was also examined in terms of the characteristics of discussed above. The results of this examination are tabulated as follows:

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Extent Displayed</th>
<th>Evident</th>
</tr>
</thead>
<tbody>
<tr>
<td>government is a party</td>
<td>11 government agencies</td>
<td>yes</td>
</tr>
<tr>
<td>multiple issues</td>
<td>Effect of cyanide levels on flora &amp; fauna, water quality, noise, aboriginal sites, visual amenity</td>
<td>yes</td>
</tr>
<tr>
<td>multiple parties</td>
<td>118 submissions</td>
<td>yes</td>
</tr>
<tr>
<td>scientific uncertainty</td>
<td>As to effects of tailings leakage on wildlife breeding grounds</td>
<td>yes</td>
</tr>
<tr>
<td>value conflicts &amp; judgements</td>
<td>As to ecologically sensitive areas v. local social &amp; economic impacts</td>
<td>yes</td>
</tr>
<tr>
<td>nature of dispute involves the public interest</td>
<td>Competing public interests activated, community, environmental industrial and groups</td>
<td>yes</td>
</tr>
<tr>
<td>difficulty identifying parties</td>
<td>none</td>
<td>no</td>
</tr>
<tr>
<td>implementation difficulties</td>
<td>controls required constant monitoring</td>
<td>yes</td>
</tr>
<tr>
<td>absence of prior relationship</td>
<td>no prior relationship</td>
<td>yes</td>
</tr>
<tr>
<td>interorganisation</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>geographical uncertainties</td>
<td>no, geographically defined</td>
<td>no</td>
</tr>
<tr>
<td>Number of characteristics clearly evident</td>
<td>eight</td>
<td></td>
</tr>
</tbody>
</table>
Both of these environmental controversies are multi-party and multi-issue. On the face of it they would be expected to lie close to one another on the continuum. But in terms of the total number of characteristics each of these environmental controversies displays, there is some significant difference. The Lake Cowal project displayed eight clear characteristics, the Bengalla Mine project only displayed five.

Confining the comparison to the three key characteristics, the differences are even more significant. In the Lake Cowal controversy, the public interest is activated; in the case of the Bengalla Mine project it is not activated to any significant degree. In the case of the Lake Cowal controversy, there is scientific uncertainty as to the effect of tailings leakage on native fauna in terms of waterbird breeding grounds. There is no strong evidence of such uncertainty in the case of the Bengalla Mine project. In both environmental controversies however there are conflicting values over the uses to which the environment should reasonably be subject.

This comparison provides a useful illustration that the size of a controversy (in terms of number of parties or issues) does not necessarily satisfactorily discriminate between an environmental dispute and an environmental conflict. Both of the inquiry processes provoked a very large number of submissions and involved a large number of direct participants, yet the controversies are at different halves of the continuum. The presence or absence of these three characteristics moves a
controversy closer to either the environmental dispute or environmental conflict end of the continuum.

Conclusion

This discussion has provided a framework for the reporting of this research. Key terms have been defined. A method of classifying environmental controversies has been proposed based upon the extent to which they exhibit the characteristics of environmental controversies. This method of classification reinforces the existence of a continuum ranging between environmental disputes and environmental conflicts.

This is the first preliminary task of this research. The next preliminary stage requires a review of the mechanisms for resolving environmental controversies. The third preliminary stage is an examination of those ADR methods currently used in the consensual mechanisms.

Having completed these preliminary stages a detailed study of the use of consensual mechanisms to resolve environmental controversies can be detailed.
CHAPTER THREE

ALTERNATIVE DISPUTE RESOLUTION METHODS

Introduction

In Chapter Two the distinguishing features of environmental controversies were examined. While not implying that those features indicated that such controversies were more amenable to resolution by either adjudicative, consensual or administrative means, it was suggested that environmental controversies displayed levels of complexity which may call for innovative approaches to their resolution.

The aim of this chapter is to examine one such group of innovative approaches, namely Alternative Dispute Resolution (ADR) methods. The examination confines itself to those methods used significantly in environmental controversies.

The concept of Alternative Dispute Resolution is critically examined to determine which methods of dispute resolution fall within this description. Secondly, those methods commonly used in environmental controversies are detailed and examined.
Alternative Dispute Resolution

This discussion considers the different ways in which the concept of ADR can be said to be 'alternative'. These senses include:

(1) as an alternative to adjudication
(2) as an alternative to externally imposed solutions
(3) as an alternative or addition to existing dispute resolution structures
(4) as a bundle of dispute resolution methods alternative to existing methods.

The term ADR begs the question as in what sense these methods are said to be 'alternative'. If the term is used in the sense of an alternative to litigation then the term may still embrace other adjudicative dispute resolution methods, such as arbitration. As Gibey says, "arbitration has a long and successful history as an alternative to litigation". But Boulle points out it can be misleading to portray ADR as an alternative to litigation, simply because "litigation itself is such a rare method of managing disputes."2

If ADR methods are seen also as consensual mechanisms of dispute resolution (where the solution of the dispute is not

---

imposed upon the parties but is dependent on achieving agreement between them) then they cannot include arbitration, since it is an imposed solution. In addition the dispute resolution approach of negotiation cannot strictly be said to be an 'alternative' (other than to adjudication) it having been a method long in existence.

This provides some potential problems of expression. For the sake of clarity, the four senses of 'alternative' can be grouped together and examined in two categories: 'alternative to adjudication and alternative to externally imposed solutions' and 'alternative to existing dispute resolution structures or methods'.

Alternative to adjudication & to externally imposed solutions

These two senses of 'alternative' have much in common. In the first sense they are confined to "dispute resolution procedures which are an alternative, not just to litigation, but also to arbitration", that is to say as alternative to adjudicative methods. In the second sense they are taken to mean alternative to imposed solutions, that is to say they are consensual mechanisms which have as a common feature a solution which is agreed between the parties rather than imposed.

---

3 Id., 1.
Viewed in these senses, ADR methods can be defined as:

"Alternative dispute resolution (ADR) refers to a variety of methods, short of litigation, by which disputants may reach (their own) agreement to resolve their differences."

In shorthand form these methods are *consensual mechanisms* and in this research ADR methods in this sense and consensual mechanisms are used synonymously.

The breadth of these methods is apparent from the scope of a number of other definitions in common usage. Bingham and Haygood define "environmental dispute resolution" as referring:

"collectively to a *variety of approaches* that allow the parties to meet face to face to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation. Although there are differences among the approaches, all are voluntary processes that involve some form of consensus building, joint problem solving, or negotiation."

This definition incorporates the extension suggested by, inter alia, Clark:

---


"In addition to the established mechanisms, ADR also includes any technique which helps the parties to reach a compromise."\(^7\)

Paratz uses the convenient summary term of "managed negotiation processes" for these processes to encompass the essence of ADR procedures which "allow for parties to come to consensual resolutions of their disputes in an efficient and effective manner".\(^8\)

**Alternative to existing dispute resolution structures or existing methods**

To use the terms 'ADR methods' or 'consensual mechanisms' in the senses of 'alternative to adjudication' and 'alternative to imposed solutions' does not categorise their use as either supplementary to the institutionalised methods of adjudication and administrative procedures or as completely autonomous alternatives. So when 'alternative' is used in these first two senses it is possible, as some proponents prefer, to describe ADR as "Additional Dispute Resolution".\(^9\)

---

\(^7\) E Clark, "The role of non-litigious dispute resolution methods in environmental disputes"(1995) 2(2) *The Australasian Journal of Natural Law and Policy* 4 (emphasis supplied).

\(^8\) D Paratz "Options for environmental dispute resolution", paper presented at 9th NELA Conference, Gold Coast, Queensland, 26-28 August 1990, 274.

To describe ADR methods excludes 'alternative in the third and fourth senses of 'alternative to existing dispute resolution structures or methods.' To do this diminishes their differences and this description is not used here.

Some critics contend that ADR methods should in fact remain alternative to existing dispute resolution structures in the sense of a separate and self contained system of dispute resolution existing alongside the traditional adjudicative and administrative forms. The general consensus though has been that many of "the techniques are used not so much independently, but are incorporated into traditional judicial or administrative processes".10

For this reason 'alternative' is not used in the third strict sense as alternative to existing dispute resolution mechanisms or structures. When 'alternative' is used in this research in the third and fourth senses it is confined to the sense of a particular set of techniques for dispute resolution and not in the stricter sense of a separate and distinct consensual system of dispute resolution.

It is suggested that using ADR methods in the sense of 'alternative to existing dispute resolution methods' allows for a discussion of their use to overcome the inadequacies in traditional adjudicative mechanisms. For instance, ADR methods

can be used long before the dispute has reached an impasse. The methods can be, and often are, used for dispute prevention in the sense of mediating compromise and thus avoiding escalation of the controversy. The question of the timing of the intervention is important because it allows the scope of what can legitimately be described as ADR to be expanded significantly.

Seen in these terms ADR methods may extend to any situation of managed negotiation with the aim of preventing, circumventing or resolving an actual or potential controversy. So, for instance, participation on an advisory body setting environmental policy may fall within this expanded definition if the participation helps to manage the inherent conflict between the stakeholders over such policy.

To summarise, the sense of 'alternative' which remains from this discussion is that ADR methods are alternative to adjudication and to externally imposed solutions and alternative or additional to existing methods of dispute resolution.

**ADR methods used in environmental controversies**

In addition to defining ADR methods in the senses set out above they can also be classified into a simple division of 'assisted' and 'unassisted' negotiation. Assisted negotiations are characterised as involving an additional person in the process
who is not an immediate party to the controversy. Mediation is the main form of assisted negotiation and will be used here to describe the process of mediation itself and as a convenient summary expression to describe all forms of assisted negotiation. The other assisted negotiation forms essentially involve the use of mediation in wider contexts and these include facilitation, neutral evaluation or case appraisal, scoping and mini-trials.

Unassisted negotiation is sometimes referred to as a 'primary' dispute resolution process. Boulle indicates this is so, both because negotiation is an element in most other dispute resolution processes and because negotiation of itself is the most immediate way of dealing with a controversy. Unassisted negotiation is also a flexible process used in a wide range of contexts and forms but unassisted by a neutral non-party. The term negotiation is used here to describe all forms of unassisted negotiation.

Mediation and other forms of assisted negotiation

The definition of mediation

To Wade, mediation is a "slippery concept" having multiple meanings essentially dependent upon the context in which it is used.

---

11 Boulle, op cit., note 2 above, 66.
12 Id. 65.
used and the user.\textsuperscript{13} Wade says that at a broad level mediation can best be described as assisted negotiation or assisted decision making.

To define mediation with as much precision as possible, the best starting point is the classic definition of mediation of Folberg and Taylor:

"The process by which participants, together with the assistance of a neutral third person or persons systematically isolate dispute issues, in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs."\textsuperscript{14}

Boulle is critical of this definition, primarily because of the departures it makes from actual practice. He says, for instance, there are many instances where mediation does not systematically isolate issues nor consider options but rather involves incremental bargaining towards a compromise solution.\textsuperscript{15}

As well as the elements contained in Folberg and Taylor's definition, there is the additional important element of voluntariness. Cormick's definition is the classic statement of this approach:

\textsuperscript{15}L Boulle, op cit., note 2 above, 5.
"Mediation is a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution."

But the prerequisite of this element of voluntariness is not without its critics. Certainly mediation is not always voluntary since parties are sometimes coerced into the process. Modern litigation and administrative case management systems for instance require or compel parties to enter into the process. This is either by the imposition of cost sanctions or on the basis of fear that intransigence to participate will adversely affect any subsequent adjudicative or administrative decision.

Similarly as regards participation in the process itself the element of voluntariness implies that mediated decisions reflect the preferences of the parties and not that of a mediator. But it is not always possible to draw a clear line between consensual and imposed decisions since consensuality can be a question of degree. There are examples of mediations where the process creates its own momentum and pressures to settle and where the mediator induces parties to settle where

---

they might not otherwise have done so. Merely because of their authority, mediators may perform a quasi-adjudicative function. However consensuality should be taken in the narrow sense that the parties have the autonomy to accept or reject particular outcomes and to refuse to settle. Then voluntariness in the sense of 'consensuality of outcomes' can be regarded as a defining characteristic of mediation.

Given these considerations mediation is still no easier to define after several decades of application, "since it does not provide a single analytical model which can be neatly described and distinguished from other decision-making processes".

Nevertheless, allowing for this difficulty Boulle provides a definition and this definition is preferred for the purpose of this study:

"Mediation is a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties to reach an outcome to which each of them assent."  

Definitional questions were also addressed in the context of legislation requiring adoption of ADR methods. One common example of such legislative initiatives is the New South Wales

---

19 L Boulle, op cit., note 2 above, 3.
20Id.
enabling legislation, the Courts Legislation (Mediation and Evaluation) Amendment Act 1994 (NSW) which came into force on 14 November 1994. This Act inserted new provisions headed 'Mediation and Neutral Evaluation' into, inter alia, the Land and Environment Court Act 1979 (NSW) (the LEC Act) being Part 5A, sections 61A-61L. This amending legislation indicated that its purpose was to:

"enable the Court to refer matters for mediation or neutral evaluation if the parties to the proceedings concerned have agreed to that course of action." 21

The amendments added by the Act provide a definition of mediation:

"'Mediation' means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute." 22

This definition does not mention the essential element of voluntariness, but s 61D (1) (b) of the LEC Act provides for it in making the consent of the parties a condition precedent to the Court referring a matter to mediation.

The other condition precedent to the Court referring proceedings for mediation or neutral evaluation is that the Court consider

21section 61A(1)
22section 61B(1).
the circumstances appropriate and there is agreement by the parties as to who is to be the mediator or neutral evaluator.23

Section 61E of the LEC Act reiterates the essential element of voluntariness by providing that attendance at and participation in mediation or neutral evaluation sessions are voluntary and that a party may withdraw from the sessions at any time.

The process of mediation

Once definitional problems are addressed the next aspect to consider is the process of mediation itself. The process of a particular mediation depends amongst other things upon the nature of the controversy and the resources of the parties. Boulle isolates what can be referred to as a standard mediation process. He denotes three sequential phases which involve the following stages:

(1) preparatory matters: initiating the mediation, screening the dispute's suitability, determining the scope of the dispute and identifying relevant stakeholders;
(2) the mediation meeting: mediator's opening, parties' presentations, defining and ordering the issues, negotiating, separate meetings, decision-making and its recording;
(3) post-mediation: ratification, official endorsement by a consent authority if required and supervising implementation.24

23section 61D(1)(a)&(c).
24L Boulle, op cit., note 2 above, 91-112.
These stages are relevant for a consideration of mediation both as a stand alone method of dispute resolution and as a component in other forms of assisted negotiation.

Commentators distinguish between four models of mediation, namely: the settlement, facilitative, therapeutic and evaluative models. The point should be made that a single mediation may display the characteristics of a number of models, for instance it may begin in the facilitative mode then move into an evaluative mode. Allowing for this it is easiest to distinguish the models on the basis of the main objective they seek to achieve.

Settlement mediation seeks to encourage incremental bargaining towards a compromise between the parties' positional demands. Whereas facilitative mediation seeks to negotiate in terms of the parties' underlying needs rather than in terms of their overt positional expectations. Therapeutic mediation is similar in that it focuses upon the underlying causes of the parties' problems with a view to improving their relationship as the basis of resolution. Evaluative mediation has a narrower focus in that it essentially deals with a dispute according to the parties' entitlements and the anticipated adjudicative outcomes. In terms of the application to environmental controversies, the preferred model is the

26L Boulle, op cit., note 2 above, 29.
facilitative one since resolution of the controversy requires an examination of underlying needs and interests especially in dealing with environmental conflicts.

**The purposes of mediation**

The last aspect to consider in this review of mediation practice is the various uses to which mediation is put. A number of these uses are evident in environmental mediation. The first use to which mediation is put is for the sole purpose of defining the issues in dispute and referring the dispute to other forms of dispute resolution. Some writers refer to this as scoping mediation but the preference here is to deal with scoping as a distinct form of assisted negotiation.

The second use to which mediation is put is referred to as dispute settlement mediation. This is where the process is used in an attempt to settle the controversy between the parties through joint decision-making.

Contrasted with this is the use of mediation to manage conflict in the sense of an ongoing series of controversies, while acknowledging that the conflict itself will continue. An example of this usage is the mediated regulation of relationships between the parties involved in an environmental controversy. Boulle identifies the use of mediation in this way to formulate policy, or standards and procedures in government made rules and regulations. This reflects the use of mediation in the United
States where it is institutionalised in a form of mediation known as 'policy dialogue'. This process operates where:

"a third party convenor assists the various (and usually adversarial) interests groups to formulate consensually arrived at legislative or regulatory recommendations which are forwarded to decision-makers."\(^{27}\)

This process has been given legislative effect in the United States referred to as regulatory-negotiation or "reg-neg".\(^{28}\) The use of mediation in this policy-making fashion was recognised as a process:

"where parties, who lack power to resolve a dispute by their agreement, reach agreement by mediation on a common position to put to a decision maker."\(^{29}\)

**Conciliation**

Conciliation is another form of assisted negotiation in which the conciliator intervenes in various ways with the object of facilitating a settlement between the parties.\(^{30}\) There is,


\(^{28}\) D Pritzker, "Regulation by Consensus: Negotiated Rulemaking in the United States" (1994-95) 1 Commercial Dispute Resolution Journal 217.


\(^{30}\) L Boulle, op cit., note 2 above, 67.
however, a wide divergence of views about the definition of conciliation and its relationship to the mediation process.\textsuperscript{31}

One of the essential differences considered is that conciliation is routinely provided by public agencies and is therefore institutionalised and not alternative in the strict sense of 'alternative to existing dispute resolution structures.' But as discussed above this sense of 'alternative' is not favoured here. In addition conciliation operates 'under the shadow of the law' and as such there are limitations on the kind of settlements possible. Bryson reflects this view by defining conciliation as "mediation within a legal framework" with the conciliator acting as an advocate for the law.\textsuperscript{32}

These differences reflect the origins of conciliation as a statute-based system of dispute resolution, particularly in the area of industrial relations, but there is little real difference between mediation and conciliation in practice. For instance, Street says:

"In recent times, mediation or conciliation (the words are synonymous) has been increasingly accepted in Australia and in comparable jurisdictions as an adjunct to the adjudication of claims at law. Although we have a preference for the word mediation, we shall use in this report the word conciliation."\textsuperscript{33}

\textsuperscript{31}Wade, op cit., note 13 above, 204.
\textsuperscript{32}D Bryson, "Mediator and Advocate: Conciliating Human Rights" (1990) 1 Alternative Dispute Resolution Journal 136.
\textsuperscript{33}L. Street, Report on a Model of Conciliation for the NSW Workcover Scheme (1996) L. Street, Sydney, 8.
Because the resolution of environmental controversies also operates by necessity 'under the shadow of the law' the process of resolution by mediation in environmental matters could equally be described as resolution by conciliation. But it is considered that no useful purpose is served by making an essentially artificial distinction between mediation and conciliation. Mediation as used here encompasses this form of assisted negotiation.

Scoping

Scoping is a normal part of a mediation process but it can also be used as a distinct part of other dispute resolution mechanisms. Its aim is to determine the "scope" of the issues to be addressed and to identify the significance or ranking of such issues.

The formal origin of 'the scoping process' is the United States National Environmental Policy Act 1969 (NEPA) regulations which developed in reaction to the preparation of lengthy environmental impact statements (EISs), criticised as costly and non-evaluative. The NEPA provided instead for the mandatory use of scoping to involve interested parties such as government agencies, proponents, affected parties and others in determining matters of relevance to be addressed in the EIS at

the initial stage of its preparation with a view to realistically limiting their scope. The matters scoped included determination of the significant matters in issue, allocation of responsibility for conducting the necessary studies, arrangements for conducting consultation and methods for determining compliance with related legislation.\textsuperscript{35}

More recently the suggested use of scoping has been widened to include an initial period of scoping preceding public inquiries. This was one of the recommendations made in the consultants' report to the Resource Assessment Commission.\textsuperscript{36} It has also been recommended as the "proper role for negotiation/mediation in terms of environment dispute resolution" by the Environmental Assessment Board of Ontario.\textsuperscript{37} The general view is that scoping will be most effectively conducted with the involvement of a neutral third party.

Scoping is a modification of mediation since its use is confined to an initial tool only with the resolution of the actual controversy left to other dispute resolution methods. The benefit of scoping is that it can overcome the constraints of the public inquiry process where the emphasis is upon sequential and non-interactive consultation.\textsuperscript{38} Scoping potentially permits for a much more interactive process. This is the use suggested

\begin{footnotes}
\item[35] Id., 62.
\item[36] Id., xiv.
\end{footnotes}
for the inquiry process of the Commissioners of Inquiry for Planning and Environment in NSW.\textsuperscript{39}

Scoping can also be used to settle the process for dealing with smaller individual impact assessments and planning reviews at a local level, rather than leaving the scope of such reviews to the staff of local authorities.\textsuperscript{40}

One important difference between scoping and mediation is that the scoping process does not necessarily require confidentiality, a usual prerequisite of ADR processes. The significance of this distinction is an important issue in this research.

\textbf{Facilitation}

Facilitation overlaps considerably with mediation. The main point of difference is that facilitation has the capacity to be more flexible and open-ended than mediation in terms of its procedures and potential uses.\textsuperscript{41} The definition of facilitation reflects this difference:


\textsuperscript{41}L Boulle, op cit., note 2 above, 74.
"Facilitation is the bringing together of disputing parties with a view to clarifying issues, reducing adversity, establishing facts, confining issues and creative problem-solving."

The wider scope of facilitation is evident from the range of matters facilitators assist the parties with, including information gathering, fact finding, round table conferencing, public meetings and consultancy referrals. Facilitation is said to be particularly useful in dealing with problems involving multiple issues and multiple parties, characteristics typical of some environmental controversies. Facilitation most appropriately constitutes a preliminary step before the dispute resolution process itself commences.

Similar to scoping, facilitation is not a process that necessarily demands confidentiality.

**Neutral Evaluation / Case Appraisal**

The terms 'neutral evaluation' and 'case appraisal' are used synonymously for the process in which a controversy is referred to an independent third party who provides a view on its merits. The *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW) which introduced mediation and neutral evaluation into the procedures of six court systems in New South Wales provides a definition of neutral evaluation which reflects its differences from mediation:
Neutral evaluation means a process of evaluation of a dispute in which the evaluator seeks to identify and reduce issues of fact and law that are in dispute. The evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings.  

The equivalent Queensland legislation, which introduced ADR processes at the discretion of the court into the Queensland court system, uses the synonymous term 'case appraisal'. The definition however indicates that case appraisal has similarities with adjudicative mechanisms. Case appraisal is a:

"process under the Rules under which a case appraiser provisionally decides a dispute."  

As Clark points out this is really a variation of arbitration, except that the parties are free to decide in advance whether the determination will be binding. Given this saving clause the differences between the New South Wales and Queensland provisions are in fact slight. In NSW, the evaluator's role includes offering an opinion on a likely outcome whereas the Queensland appraiser makes a provisional determination. The use of this ADR option is usually in a controversy requiring a decision on a specific technical or scientific issue which can be determined by a neutral expert, either in an advisory or binding

---

42 Court Legislation (Mediation and Evaluation) Amendment Act 1994 (NSW), Sch 1.
43 Courts Legislation Amendment Act 1995 (Qld), section 6 (emphasis added).
43a E Clark, op cit., note 7 above, 7.
capacity. Usually it is non-binding and is intended to "constitute the voice of experience which will influence the parties in negotiating".44

The difference in roles between the evaluator / expert and a mediator is that:

"unlike a mediator, an expert is expected to provide an answer to a particular matter submitted by the parties and it is generally expected that an expert will reach a decision upon the basis of her or his personal opinion or expertise rather than on the parties' submissions or on law."45

In this sense the expert is using his or her expertise and influence to potentially affect the outcome of a controversy.

Mini-Trial

'Mini-trial' is a dispute resolution process which combines aspects of case presentation with mediation. It involves firstly a 'best case' presentation by both parties, usually to a neutral third party. The second stage is then intended to evolve into a consideration of settlement options with the third party assisting in such process.

44L Boulle, op cit., note 2 above, 72.
A mini-trial in this sense is not really a trial at all in the traditional sense but rather a structured presentation utilising a trial-like setting. Its use is mostly confined to disputes involving large corporations, with consequent limited use to date in environmental controversies.\textsuperscript{46}

**Forms of Unassisted Negotiation**

**Negotiation**

**Definition**

Negotiation refers to unassisted or direct negotiation between the parties to a controversy. There is no 'third party neutral' present. Negotiation is a traditional approach to dispute resolution but the principled or 'win-win' approach to negotiation which is said to characterise ADR methods has produced "an enormous change in the way we think about negotiation."\textsuperscript{47}

The core elements of negotiation irrespective of the approach taken have been isolated as:

(a) a verbal interactive process

(b) involving two or more parties

\textsuperscript{46}E Clark, op cit., note 7 above, 29.
\textsuperscript{47}H Wootten, op cit., note 30 above, 42.
(c) who are seeking to reach agreement
(d) over a problem or conflict of interest between them
(e) in which they seek as far as possible to preserve their interests, but to adjust their views and positions in the joint effort to achieve an agreement.48

All models of negotiation display these core elements but are substantially different in the approaches they take. The three models examined here are positional bargaining, problem-solving negotiation and interest-based bargaining.

**Models of negotiation**

**Positional Bargaining**

In positional bargaining the parties adopt extreme opening positions, and thereafter make incremental concessions bringing them closer together until they reach agreement. This is the most commonly used approach to negotiation because it is form most often familiar to litigants and their advisers.49

The advantages of this approach essentially flow from its familiarity and its relative ease of application, but it has a number of shortcomings. One serious shortcoming is that it may overlook some of the parties' needs or interests which have not

---

been clearly articulated in the claim and thereby reduce the negotiation to a single issue. A number of difficulties may flow if the negotiations become reduced to a single issue. Where the other potential issues in dispute are ignored it may sometimes be difficult to close the final gap between the parties since there is nothing left to bargain. The negotiations may break down without a settlement. Similarly where the controversy involves parties in a continuing business or other relationship the tactics often employed in positional bargaining may sour the relationship and adversely affect any future negotiations.

**Problem-solving Negotiation**

Approaches such as problem-solving negotiation attempt to promote techniques in negotiation which go beyond mere compromise. One of the salient features of such negotiation which Boulle recognises is the preparedness to probe beneath the positional claims of the parties to uncover "their real needs and interests". By placing on the negotiation table all such matters, the scope for effective negotiations is said to be therefore enhanced.

---

50 Boulle, op cit., note 2 above, 48.
51 Id., 49.
Interest-based Negotiation

One of the most influential of the recent problem-solving approaches to negotiation is that of interest-based negotiation. The main example of this approach is the principled negotiation model associated with the Harvard Negotiation Project, generally accessible through the writings of Fisher and Ury.\textsuperscript{52} Fisher and Ury's model is the basis for most descriptions of the interest-based negotiation process. The model relies upon four underlying principles summarised as:

(1) Separate the feelings of the people from the substance of the problem;
(2) Focus on interests, not positions;
(3) Invent options for mutual gain;
(4) Insist on objective criteria.\textsuperscript{53}

The first of these defining features emphasises the need to develop a working relationship between the parties based upon mutual acceptance and reliability without conceding on the substantive issues. The emphasis in such negotiations is upon separating the personal and emotional aspects of the controversy and focussing upon the substantive problem.

Secondly, parties in negotiations are encouraged not to focus upon their positions but upon the needs and interests which

\textsuperscript{53}Id, 11-12.
underlie those positions. The reason for this emphasis is that the underlying interest may be easier to negotiate and achieve in a number of ways different from that represented by the initial position.

Fisher and Ury's model encourages inventive and innovative solutions to the problem at hand. The atmosphere encouraged by once novel techniques such as brainstorming allows the development of settlement options which may not otherwise be considered nor recognised by the parties.

The fourth feature of the model emphasises the need for objective criteria about what outcomes are realistically possible or preferable. Insistence on objective criteria can avoid stalemates and breakdowns in negotiations. A difference of opinion as to options can be resolved by reference to an agreed standard and thus not become a protracted area of dispute.

Boulle's view is that despite the apparent simplicity of these principles, "they are deeply profound". They help to achieve the desired outcome of an agreement that meets the interests of the parties. Fisher and Ury describe such an outcome as a "wise agreement":

"An agreement that meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account."  

---

54 Boulle, op cit., note 2 above, 51.
55 Id., 4.
A model having these features remains the basis for the conduct of interest-based negotiations. But the model has been subject to criticism as an inadequate description of the process, particularly with reference to multi-issue and multi-issue negotiations.\(^5^6\) It remains to be seen whether the model can make adequate allowance for situations involving conflicting values, public interest concerns or scientific uncertainty which we have suggested distinguish environmental conflicts.

In these cases either interest-based negotiation is inappropriate and should be avoided or different criteria will need to be applied. Some critics argue that if negotiations do take place the parties return to the "ultimate hard bargaining" strategies.\(^5^7\) The process is then characterised by strategies "pushing for a compromise outcome" which essentially equate to positional bargaining.\(^5^8\)

It is important to remember for this reason there can be no certainty that the style of negotiation being employed in ADR processes reflects the Fisher and Ury ideal. The parties may equally be negotiating positionally as from an interest-based position and the negotiations will need to take account of the inherent differences.

---


\(^5^8\)B Wolski, op cit., note 56 above, 218.
Conclusion

The purpose of this chapter is to provide a framework for discussing the use of ADR methods in the resolution of environmental controversies. 'ADR methods' and 'consensual mechanisms' are used synonymously to describe those dispute resolution methods 'alternative to adjudication, to externally imposed solutions and to existing dispute resolution methods'.

'Mediation' is used as a shorthand description for all forms of assisted negotiation. 'Negotiation' is similarly used as a shorthand description for those ADR methods where the parties seek to reach a consensual resolution without the assistance of a neutral third party.

Using this nomenclature the research explores the use of these methods in resolving environmental controversies along the length of the continuum between environmental disputes and environmental conflicts.
CHAPTER FOUR

THE UNITED STATES EXPERIENCE

Introduction

The previous chapters have detailed the characteristics of environmental controversies and the ADR methods which may be utilised to resolve them. This chapter reviews the current United States literature on the use made of ADR methods in the resolution of environmental controversies and the extent of that usage.

In reviewing an effective 25 year history of the development and use of ADR methods to resolve environmental controversies a number of topics arise for discussion. This review seeks to address these recurrent topics.

In two classic articles in the 1970s Fuller discussed the limits and forms of two dispute resolution mechanisms, referring to mediation (or consensus mechanisms generally)\(^1\) and adjudication.\(^2\). He was concerned with controversies in general rather than environmental controversies specifically. His discussion of the limits of these two dispute resolution mechanisms involved a consideration of the characteristics of

\(^{1}\)L Fuller, "Mediation-Its Forms and Functions" (1971) 44 Southern California Law 325.

each mechanism and its capacity to resolve certain types of controversies.

Another aspect of Fuller's discussion was the form of the dispute resolution mechanism, that is the way to organise adjudication or mediation in order to be most effective. His discussion is the first clear expression of the notion that different kinds of controversies may be better resolved by different dispute resolution mechanisms. This is particularly important in the light of our earlier argument that the kind of environmental controversies requiring resolution range along a continuum between planning disputes and environmental conflicts.

Fuller provides the theoretical background for the discussion suggesting that mediation (or ADR methods generally) constitute a separate and distinct system of dispute resolution. He draws a clear distinction between mediation and adjudication as separate dispute resolution mechanisms. This is important because the growth of ADR methods is often seen as a reaction to the inadequacies of adjudication.

For the sake of clarity our discussion reviews the United States experience with ADR methods in three separate stages: implementation & experimentation, consolidation and current practice.
Stage One: Implementation & Experimentation

Reaction against adjudication

It is customary to think of adjudication as "a means of settling disputes or controversies." But more fundamentally adjudication can be viewed as a form of social ordering, "as a way in which the relations of men to one another are governed or regulated." Seen in this light, adjudication can be compared with other forms of social ordering those involving for instance, negotiation or those requiring a managerial or political solution.

Fuller considers the essential distinguishing characteristics of adjudication. Firstly, adjudication is a device that gives formal expression to the influence of reasoned argument. Secondly, the disputant must make a 'claim of right' based upon some legal principle.

The judge or arbitrator can certainly step out of this strict role of adjudicator and assume another role and therefore not be subject to these constraints. But this does not negate the fact that there are some forms of controversy which are inherently unsuited to adjudication. Fuller categorises these as 'polycentric disputes', controversies involving both a multiplicity of parties and an issue which is not sharply defined, in Fuller's words, where there is "a somewhat fluid

---

3 Id., 357.
4 Id, 366.
state of affairs". His view is that if such controversies are not suited to resolution by means of adjudication, other mechanisms such as negotiation or "administrative direction" may be more suitable.

Fuller still places adjudication in the role of the primary mechanism of dispute resolution saying that these other mechanisms may be more suitable for certain types of controversies.

Other writers are sharper in their criticism of the inadequacies of adjudicative mechanisms. One common criticism was that the inefficiency of adjudicative bodies was due to a 'litigation explosion' with which the court system had simply been unable to cope. This rise in court use was seen as a legacy of the 1960s when many legal newcomers (consumers etc.) started utilising the court system. But on reviewing the empirical research, Parmentier concludes that "this diagnosis is severely questioned and [should be] ultimately discarded." His view was that the reaction against the adjudicative system was not primarily due to its perceived inefficiencies stemming from overload.

In the case of environmental controversies the perceived inefficiency of the court system is seen more as an inability to deal with the growth of environmental legislation and the added

---

5 Id., 397.
interpretative role this places on courts and other tribunals. But as Wald points out the role of adjudication in environmental controversies is limited. The primary responsibility to formulate and apply "pertinent legal rules" is granted to executive officials and independent agencies.7 The court's role is in the exercise of review over such decisions.

If the perception of 'a legal and regulatory malaise' which was said to have characterised the view of the American legal system by the late 1970s was not primarily due to the inability of the courts to deal with a quantitative leap in 'court dockets', what was the source of the perception?8 It seems in part to be due to a realisation of the inherent restrictions of adjudication in handling controversies. Fletcher identifies the major restriction:

"Our courts are reactive bodies - like spiders, we judges wait and watch to see what controversies may fly into our webs...our obligation is to resolve the dispute presented and on as narrow grounds as possible."9

These restrictions are particularly pertinent in the case of environmental controversies where the ramifications of a decision may well extend beyond the specific controversy or parties involved. But the inherent restrictions of adjudication

---

8Ibid., 3.
do not allow courts to fill the role of reconciling essentially competing political interests. This is a role for: "the agency to which congress has delegated policymaking responsibilities...rely[ing] upon the incumbent administration's view of wise policy to inform its judgments."\(^{10}\)

On this view the reaction against adjudication is more in response to its perceived ineffectiveness in resolving complex public interest controversies than any perception of its inefficiency in dealing with a hugely increased levels of litigation. This realisation prompted a number of early writers to speculate as to whether ADR methods could effectively fill this void. A closer examination of the features of the small scale societies in which mediation in particular was said to be most effective (such as their social cohesion, the fact that the mediator was often a highly ranked member of the community representing the common values of the group and exerting pressure on the parties) convinced some critics that adequate regard needed to be made for the substantial differences between these societies and the United States.\(^{11}\)

\(^{10}\)US Supreme Court's view expressed in *Chevron, USA v Natural Resources Defence Council* - *US 104 SCt 2778 (1984)* quoted in Wald, op cit., note 8 above, 6.

\(^{11}\)Parmentier, op cit., note 6 above, 227.
ADR as a separate and distinct dispute resolution mechanism

Fuller says that "under a system of state-made law, the standard instrument of dispute settlement should be adjudication and not mediation".\textsuperscript{12} Within this context he then explores the features of mediation. The essential quality of mediation which distinguishes it from adjudication is:

"its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them achieve a new and shared perception of their relationship."\textsuperscript{13}

This distinguishing quality allows mediation to be a more appropriate dispute resolution mechanism in some circumstances. In Fuller's view the adjudicative process is only one way of bringing human relations into a workable and productive order. The difficulty is in determining what is the "proper domain of mediation".\textsuperscript{14}

Fuller proposes two tests to determine this, the first of which indicates when mediation should not be used and the second indicates when it cannot be used. The first test is applied by asking 'Is the underlying relationship best organised by 'impersonal act-oriented rules', that is, rules properly flowing

\textsuperscript{12}L Fuller, op cit, note 1 above, 328.
\textsuperscript{13}Id., 325.
\textsuperscript{14}Id., 330.
from an external authority? If it is, mediation is unsuitable as it may undermine the protection afforded by that authority.

The second test is applied by asking 'Is the problem presented amenable to solution through mediation processes?' To Fuller there are two intrinsic limitations to mediation. He considers that it cannot generally be employed when more than two parties are involved. Additionally, it presupposes an intermeshing of interests of an intensity to make the parties willing to collaborate, Fuller calls this "a felt sense of interdependence" exerting pressure to reach agreement. If this sense of interdependence is missing mediation cannot work.

But this is not to say whether mediation is or should be a separate and distinct dispute resolution mechanism. Cormick's view is that it is not. He sees the mediation process as complementary to existing social structures, not separate. In this way ADR processes exist within the framework of existing administrative, regulatory and judicial processes. On this view the processes and methods of mediation and negotiation do not require a separate mechanism to operate effectively. This view receives support from critics who assert that "informal institutions" such as mediation, should be planned as additive supplements to, and not as substitutes, for the existing legal

---

15Id..

The consensus appears to be that ADR methods will work best within these existing mechanisms.\(^{18}\)

**Should ADR be the preferred dispute resolution mechanism?**

The view that ADR methods constituted another form of social ordering was seen by some as debasing the functions of adjudication by comparison. Certainly Fuller's view was that adjudication should be the standard instrument of dispute resolution and that controversies requiring the imposition of external rules were not suitable for mediation. But to see mediation on an equal footing with adjudication was regarded as a trivialisation of the remedial dimensions of adjudication and a reduction of its functions to one of resolving private disputes only.\(^ {19}\) To see adjudication in this light does not make allowance for the public purpose of adjudication. This purpose is to articulate and interpret the rights, principles and rules that help to protect individuals and groups in society.\(^ {20}\)

Fiss' view is that if adjudication is seen only as a process of resolving controversies then the settlement that comes from mediation or negotiation achieves exactly the same purpose as

---


\(^ {19}\) O Fiss, "Against Settlement"(1984) *93 Yale Law Journal 1080* at 1085.

judgment. But he considers this is not so because it ignores the broader purpose of adjudication, a purpose which mediation does not have. To Fiss this is:

"not to maximise the ends of private parties; nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes."21

If ADR is the preferred dispute resolution mechanism, the duty embodied in this purpose may not be discharged when the parties settle, for the parties will be free to settle while leaving justice undone.22

Similar criticisms are made based upon the inherent characteristics of ADR methods themselves. Abel traces the development of "informal legal institutions" from the growth of neighbourhood justice centres in the 1970s to an expanded role in dealing with larger social issues. His criticisms are that these informal legal institutions deal with the controversy by depicting it as only a failure of communication: once lines of communication are reopened the controversy will resolve itself. Further the controversy is neutralised by individualising complaints and inhibiting the perception of common grievances.23 The effect of these two factors is that the disputants are actively encouraged to settle their separate

---

21O Fiss, op cit., note 20 above, 1085.  
22Id.  
23R Abel, op cit., note 17 above, 284-289.
To make ADR the preferred dispute resolution mechanism nullifies important protections afforded by not only the adjudicative mechanism but also by the administrative mechanism. The legal system allows class and collective actions that can result in precedent setting. The political arena is the better place to handle controversies about societal problems, such as environmental safety standards where matters of public interest are best dealt with transparently. This is not to say that both the legal and political systems are without limitations. But the point Abel and others are making is that at least the potential for abuses in these mechanisms can be limited by requiring the safeguards of due process and as such they should remain the preferred dispute resolution mechanisms.

These criticisms have considerable relevance in the case of environmental controversies. For instance, the series of judicial decisions that played a part in developing the protective role of the precautionary principle would never have occurred if these disputes had been mediated.

24Id., 293.
25S Parmentier, op cit., note 6 above, 236.
26R Abel, op cit., note 17 above, 307.
Should environmental controversies be mediated?

The argument about whether environmental controversies should be dealt with by mediation or other forms of ADR methods follows essentially the same pattern as did the argument over the use of these methods to resolve controversies generally. Firstly, there is a perception that traditional methods have failed. The federal agencies given a major role through environmental protection legislation to resolve environmental controversies administratively are seen to be unable to cope adequately with that role. The effectiveness of the 'command and control' model of government regulation as a useful approach to environmental protection was being tested. There was also doubt that the role of the Federal Courts in exercising judicial review of agency decisions provided an effective safeguard. The courts were seen to exclude many interested parties, to leave unaddressed larger issues involved in the environmental controversy and to leave unresolved the underlying conflict.

Susskind and Weinstein reported a general mood of dissatisfaction with both administrative and adjudicative means of dispute resolution such that:

---

29 Id., 441.
"many environmental conflicts exceed the decision-making capacity of our existing institutions and will require new institutional arrangements for resolution."\textsuperscript{30}

They suggest that ADR methods may be the answer, but other commentators remain unconvinced. Amy, while conceding a role for mediation in controversies of a type similar to those referred to as environmental disputes in this study, raises questions about the suitability of mediation for environmental conflicts.\textsuperscript{31} He poses a number of important questions which will be applied to the environmental conflict case study examined in this research:

- Is the mediation process politically biased in favour of the interests of developers?
- Can the public interest be protected in mediation agreements?\textsuperscript{32}

He says that questions such as these are "politically charged". By politics, he means "the issues of power, equality and democracy that are necessarily involved in any policymaking process."\textsuperscript{33}

Amy then sets out to examine mediation from the politics of environmental mediation and sees a number of disturbing aspects. He sees an imbalance of power between different

\textsuperscript{30}Id., 443.
\textsuperscript{33}Id.
stakeholders with an unequal access to the mediation table by interested parties in that only powerful stakeholder groups are parties to the process. In addition he sees an imbalance of expertise amongst the parties involved, in that some interests are better resourced than others. The politics of the process itself are characterised by an illusion of voluntariness, meaning that there are subtle pressures on the parties to participate and to produce an outcome. Amy argues that there is also the illusion of power in the participants. He says public and private stakeholders use mediation to give the illusion of significant and widespread participation, while retaining essential policy-making power. There is also a coercive element rising from the process to achieve a 'reasonable compromise' where in some environmental conflicts, for instance a compromise may involve an unwanted and unsuitable development continuing in a modified form.\textsuperscript{34}

Amy says that when mediation is seen from this perspective its inherent unsuitability as a mechanism to resolve 'public policy conflicts' is apparent. The same criticisms could not be equally made of the resolution of environmental conflicts by administrative mechanisms. His comments that consensual or administrative mechanisms rest on a false understanding of what politics is applies to both contexts:

*Politics is not simply about communication, it is also about power struggles. It is not only about common interests, but

\textsuperscript{34}Id., 6-15.
about conflicting interests as well. And it not only involves horse-trading, but competition between conflicting values and different moral visions.\[^{35}\]

Amy's argument is that there is a need amongst participants, particularly less powerful ones to face this political realism. The conclusion to be drawn from this is that environmental controversies in the nature of environmental conflicts are better resolved administratively. If they are to be dealt with by ADR methods there should at least be a clearer understanding that the mediation itself is a political process.

This is a view essentially endorsed by other commentators. MacDonnell is concerned with whether ADR methods are best suited to resolving environmental controversies involving "natural resource conflicts."\[^{36}\] MacDonnell's view is that these conflicts involve questions of values, for example the quality of air, water and land are such a fundamental part of human existence that their use is a matter of special concern. These value-centred conflicts are especially difficult to resolve and as such are best addressed through the political process, that is, through administrative means.\[^{37}\] While conceding that Amy's criticisms of environmental politics apply equally to administrative mechanisms as to mediation, administrative mechanisms are at least transparently political and not mistakenly portrayed as consensual.

\[^{35}\] D Amy, op cit., note 31 above, 228.
\[^{37}\] Id., 8.
This is not to idealise the administrative mechanisms unnecessarily. Meyers in discussing a dispute over logging old-growth forests in the Pacific North West of the United States and its impact on protected species paints a different picture of the administrative process. He says the administrative mechanism involves "political posturing in Congress, foot dragging by the executive branch..(which) will not resolve public resource conflicts."  

The theme that there are particular critical concerns about the use of ADR methods to resolve environmental controversies is picked up by Ellison in his review of the use of policy dialogues and negotiation in the Federal Government agencies' rulemaking process. The rulemaking process is the manner in which US government agencies create rules, a process usually characterised by public participation in the drafting stage. So, for example, the process was used to set penalties for vehicle manufacturers failing to meet Clean Air Act standards. Ellison is critical of this "negotiation-based approach to policy formation." He repeats Amy's criticism that environmentalists rarely examine ADR as a political phenomenon nor consider whether the "flight from politics" in the formal sense is justified or appropriate. Ellison's argument is that the

---


40ld. 246.
administrative mechanism is the preferred mechanism for dealing with environmental conflicts involving the setting of public policy. Nor is adjudication an appropriate public policy tool. Its strength lies in the resolution of controversies where there is a need to "articulate and interpret the rights, principles, and rules that help to protect individuals and groups." The role of consensual mechanisms on the other hand is ancillary to each of these processes.

Ellison's view is that this process of formulating and implementing public policy is the province of politics. Politics is a process of resolving distributional disputes requiring consensus and incremental adjustments between parties. The political process performs this function well by administrative means, and in some cases the administration will override resolutions reached elsewhere. Environmental conflicts invariably involve such distributional issues. To attempt to substitute ADR methods for this process in Ellison's view "generally serves bureaucratic purposes and only rarely the needs of democracy." The problem with this rationale is that the concept of 'stakeholder as constituency' is flawed as it potentially excludes less organised or less powerful groups which nonetheless are affected by the outcome. To equate the public interest with the interests of those participating is

\[41\] Id. 248.
\[42\] See, for example, State Environmental Planning Policy No. 47 Moore Park Showground, the effect of which excluded public participation in the development of particular land.
\[43\] C Ellison, op cit., note 39 above, 250.
flawed. In this sense the administrative mechanism may not in fact 'resolve' the conflict in the sense used here.

The other concern expressed by critics is with the manner in which negotiated settlements are conducted. For Ellison this is likely to occur in temporary fora protected from the pressures of dealing directly with constituencies and so regulating controversies "to these private spaces in public life." ADR methods are seen as privatising what should be a public policy controversy by limiting the participants, the issues and the audience. The controversy then becomes inappropriately depoliticised. When the matter involves an environmental controversy it should be dealt with by the administrative mechanism, involving publically elected officials or their delegates. For Ellison, negotiated approaches tend to weaken the authority and public interest committment of such officials, making them "bargain like any other stakeholder " often at the expense of previously articulated public values.

The growth of ADR methods in environmental controversies

The first recorded example of the use of ADR methods to resolve an environmental controversy was in 1973. Two mediators, G W Cormick and J E McCarthy from the Mediation Centre in Washington, were appointed to attempt to resolve a long running

44 Id. 253.
45 Id., 261.
controversy over a proposed flood control dam on the Snoqualmie River in Seattle, Washington. In fact the controversy had gone unresolved for over 14 years. After defining the parties and selecting representatives, the mediators held a number of mediation sessions. From these sessions the parties made joint recommendations to government, essentially proposing a smaller dam at a less intrusive location. The local Governor announced endorsement of the recommendations and a committee was formed to implement the agreed plan. The mediation had achieved a consensus, though in fact the smaller dam was never built. A number of the recommendations were implemented but, more importantly, the mediation showed that ADR methods could work in environmental controversies.

By 1986 the use of ADR methods in environmental controversies had a sufficient "cumulative track record" for the US Conservation Foundation to commission a study as to this effectiveness. The study was only concerned with those controversies where the ADR method used involved a mediator. The findings of this study were summarised in a paper by Bingham and Haywood, both directors of the Foundation. The abstract to the paper encapsulates the findings:

"Between 1974 and 1984 mediation was used to resolve more than 160 environmental disputes. Agreements were reached in

---

46 G W Cormick, op cit., note 16 above, 220.
78 percent of the 133 cases where that was the parties' objective.\textsuperscript{49}

On the face of it this seems an astonishing record of success.

The report said that up to the mid-1970s "the number of mediated disputes...could be counted on the fingers of one hand."\textsuperscript{50} By the end of 1979, 36 disputes had been mediated and by mid-1984 a further 126 from a total 162 cases; impressive but proportionally speaking, not a dramatic increase.\textsuperscript{51} It is useful to place these figures in the wider context of environmental controversies in the United States.\textsuperscript{52}

Further, in 30 of the 162 cases documented by Bingham, the parties' objective was only to "improve communications" rather than to "reach an agreement". Taking this qualification into account, resolution of approximately 130 controversies in a 10 year period does not equate to a substantial share of the controversies over environmental issues in the United States.

Bingham and Haywood's study does however give some insight into the types of controversies which were subject to mediation as the ADR movement gained momentum. Each category of dispute was divided into two types: "site-specific or policy

\textsuperscript{49}G Bingham & L V Haywood, "Environmental Dispute Resolution: The first ten year"(1986) 41 Arbitration Journal 3 at 3.
\textsuperscript{50}W Reilly, in the Forward to G Bingham, op cit., note 48 above, ix.
\textsuperscript{51}G Bingham & L V Haywood, op cit., note 49 above, 6.
\textsuperscript{52} In the period from the 1984 amendments to the Resource, Conservation and Recovery Act (US) (providing for citizen suits) to 1988, 1200 citizen actions alone were commenced in environmental matters in US Federal and State courts, see L Jorgenson & J J Kimmel, Environmental Citizen Suits: Confronting the Corporation (1988) Bureau of National Affairs, Washington, 19.
level disputes". Site-specific disputes involved a dispute over a particular project or plan while policy-level disputes involved questions of local, state or national environmental policy. Six broad categories were identified:

*Land Use*: 70 site-specific & 16 policy-level disputes,
*Natural Resource Management*: 29 site-specific & 4 policy-level,
*Water Resources*: 16 site-specific & 1 policy-level,
*Energy*: 10 site-specific & 4 policy-level,
*Air Quality*: 6 site-specific & 7 policy-level,
*Toxics*: 5 site-specific & 11 policy-level.

The findings indicated there was little difference in the settlement rate between site-specific and policy-level disputes. The parties were successful in reaching agreement in 79% of site-specific cases and in 76% of policy dialogues. There were significant differences in the implementation rate of the two types of disputes. In site-specific disputes the agreements reached were fully implemented in 80% of the cases, while in policy-level disputes agreements were fully implemented in only 41% of cases.\(^{53}\) The reason for this difference appears to be that while with site-specific disputes the organisations (usually public agencies) with authority to implement decisions were directly involved, in the case of policy-level disputes, when those with the authority to implement the recommendations were not at the table (for whatever reason) the terms of the agreement were either modified or rejected.\(^{54}\)

\(^{53}\) G Bingham & L V Haywood, op cit., note 49 above, 9.
\(^{54}\) Id., 12.
There is a clear message from these results that in the case of environmental conflicts all parties involved, in particular the relevant organ of government, should be party to the negotiations from the outset. There is no benefit in 'resolving' a dispute when the resolution is subsequently rejected by government.

Subsequent reviews of the use of ADR methods in the United States for environmental controversies show an increasing and established pattern. A 1989 study found 458 ADR programs operating in 45 States dealing with environmental matters. The trend has been for environmental mediation to become institutionalised. A National Institute for Dispute Resolution was formed in 1989 to create state-level and state-sponsored mediation offices to address environmental controversies, with four offices opening in that and following years.55

**Stage Two: Consolidation**

At the consolidation stage the use of ADR methods in environmental controversies was firmly established and the discussion turned to what the proper use of these methods should be. By this stage the view that the surge in the use of ADR methods was due to the inefficiency of the court system had been largely dispelled in the literature and critics now saw

it more as a question of the courts' ineffectiveness in addressing the real issues in dispute in environmental controversies. Many litigated controversies dealt only with procedural compliance rather than substantative issues as to whether the development should proceed.\textsuperscript{56}

ADR was now presented as a more effective mechanism for environmental dispute resolution rather than the only one. The view that ADR methods were the best mechanism had not been unanimously embraced and the implementation of these methods was not widespread. Though there was growing acceptance of their use to resolve planning disputes, there was significantly less support for using ADR methods to resolve environmental conflicts. The view continued to be strongly held that while adjudication was inappropriate for environmental conflicts, so too were negotiation-based approaches. The use of the administrative mechanisms inherent in the political process were still seen as the preferred method for resolving value-laden conflicts. As the use of ADR methods moved out of its initial experimental stage deeper issues arose as to the nature of their role. These issues are considered in detail here.

\textsuperscript{56}G W Cormick, op cit., note 16 above, 96.
Identification of environmental controversies suitable for mediation

The first of these issues was to determine an appropriate method of identifying those environmental controversies which were suitable for resolution using ADR methods. By the early 1980s, the use of ADR methods had sufficient currency for a number of mediators practising in the area to propose a means for evaluating the suitability of ADR for environmental controversies. These commentators do not make a distinction between planning disputes and environmental conflicts, nor do they have regard to the concept of a continuum between them. However from the examples they examine it is apparent that they are dealing with both halves of the continuum but with a strong emphasis on environmental conflicts. One experienced mediator estimated that "about 10% of environmental disputes are good candidates for ADR."\(^57\) Cormick, both a practising mediator and a theorist in the area, defined four criteria necessary for a successful mediation:

(1) a stalemate or the recognition that stalemate is inevitable,
(2) voluntary participation,
(3) some room for flexibility, and
(4) a means of implementing agreements.\(^58\)


\(^{58}\) Quoted Id., 99.
This first criterion tends to bring us back to one of Fuller's intrinsic limitations of mediation, that it presupposes an intermeshing of interests in achieving an outcome.\(^{59}\) It is a criterion also repeated by Wald when she lists as one of her preconditions, a situation "where the parties' precise objectives cannot be reached without negotiation."\(^{60}\) Patton identifies a similar precondition as 'uncertainty', where no one party can hope to dictate the outcome with any certainty.\(^{61}\) It is this recognition that the controversy has reached an impasse that is regarded as crucial. It affects the attitudes a party brings to the negotiations. Cormick does not expressly state this in his list of suitability criteria but several other commentators consider it warrants clear expression. Patton says the parties must want to "consider settlement"\(^{62}\) and Bingham says it is necessary that all parties "desire settlement".\(^{63}\) It is important to remember that this recognition is not altruistic, it flows from a realisation that a stalemate has been reached which makes the parties want to negotiate. The parties recognise the relative power of the other participants, if only in a 'spoiling' role.\(^{64}\)

This shared recognition that an impasse has been reached which then makes the parties willing to collaborate should not be

\(^{59}\) L Fuller op cit., note 1 above, 330.
\(^{60}\) P W Wald, op cit., note 7 above, 7.
\(^{62}\) Id., 553.
\(^{63}\) G Bingham, op cit., note 48 above, 10-11.
equated with mandating the process. This is Cormick's second criterion, the requirement for voluntariness. His view reflects the prevailing view that the essential character of ADR processes is that they are not coercive but consensual. There is one qualification to this as regards the necessary elements for successful negotiated rulemaking. Harter says there may be a compulsion to make a decision "lest some other agency undertakes to do so." He emphasises that there may be pressure to settle but he does not equate this to compulsion. There is also the implication that all parties can participate free from the constraints imposed by imbalances of power and resources which is subject to debate.

The third criterion is the existence of some element of flexibility in the participants so that there is scope for compromise. Bingham noted this as a crucial criterion in her review of mediated settlements. She identified the need for an ability and an authority to settle on the part of all parties in the successful mediations reviewed. This precondition may well exclude value-laden environmental conflicts. If such conflicts are to be negotiated there needs either to be a measure of agreement on fundamental values or an agreement to exclude from the negotiations, value-laden issues. In the absence of these preliminary agreements it is suggested negotiation-based solutions would not be effective in such conflicts.

---

66P W Wald, op cit., note 7 above, 7.
67G Bingham, op cit., note 48 above, 11.
68F P Grad, op cit., note 64 above, 166.
As to the fourth criterion the need for a means of implementing agreements reached is a recognition that the mediation process may offer no compulsion external to the parties to enforce a consensus outcome. This is recognised as a difficulty by Harter who lists as one of his necessary elements "a commitment to implement the agreement reached". Harter, op cit., note 65 above, 51. His comments were in the context of negotiated rulemaking where the parties know an external agency can impose a different solution if the parties do not adhere to their consensus. Another way of achieving the implementation of an agreement is to ensure that parties representing all views on an issue are joined as participants and that their representatives have the authority to enforce and implement any agreement reached.

There are other subsidiary issues to do with the effectiveness of the ADR process (such as clearly defined issues and manageable numbers of participants) but these four simple criteria have gained considerable currency as a means of identifying controversies suitable for ADR methods and they are returned to in this research.

---

69 Harter, op cit., note 65 above, 51.
70 A R Talbot, op cit., note 57 above, 99.
71 C Stukenborg, op cit., note 47 above, 1333.
Problems of Participation

The second of the issues which arise in this consolidation stage concern a number of recurrent problems to do with participation which have appeared in the United States experience of "environmental mediation." These problems are examined separately here.

Inequality of bargaining power

The first problem identified is the need to deal with the inequality of power in the mediation process between the participants. Amy had perceived a tendency in mediation to "institutionalise maldistributions of power." But Adler says this inequality of power can be managed if it is recognised that there are other types of power than economic power and that these other types of power can effectively be used by "citizen groups" to balance the equation. In this regard there is the power of public opinion which can be marshalled against unpopular development projects or the power of delay inherent in protracted litigation, particularly if the citizen groups are protected against cost orders if unsuccessful.

The first step in dealing with this problem is a recognition that the negotiation or mediation process is by its essence a process of power exchange, and therefore no different from the political process involved in the administrative mechanism. The parties

72D Amy, op cit., note 32 above, 6.
73P Adler, op cit., note 55 above, 111.
to the controversy must have some relative ability to exercise sanctions over one another for the mediation process to have a chance of success, just as they must have in the administrative mechanism.\textsuperscript{74}

Absence of decision making power

The second problem is also a question of power. There is a necessity to deal with the absence of decision-making power in the participants. This arises in two situations. The parties must first have the authority of their constituency to accept a solution. This presents difficulties for peak environmental groups such as the Nature Conservation Council (NCC) endeavouring to agree to resolutions binding upon its constituent bodies. This extends to government parties, so a government agency involved in the process must have the authority to agree to any compromise solution reached over a controversial development.

A separate aspect of the problem is that the participants must also have authority over the process and the outcome. Cormick makes the point that mediation is not a planning or information process but a decision-making process. If the consensus reached has no certainty or likelihood of implementation then the parties have been involved in no more than "some sterile participation or informational exercise."\textsuperscript{75} To achieve this will

\textsuperscript{74}G W Cormick, op cit., note 16 above, 216.
\textsuperscript{75}Id., 219.
require a commitment by decision-making authorities to implement the outcome reached, otherwise the process is futile.

Inequality of resources

The third recurrent problem of participation was the need to deal with inequality of resources between the parties. Parties with limited resources may consider these are better used in a forum likely to attract maximum public attention, such as adjudicative fora or in public protest.76

The existence of unequal resources may preclude the use of negotiation-based methods. If ADR methods are to be used, mechanisms need to be developed to provide the means to generate the scientific and technical information crucial to balanced negotiation. In its absence, this "lack of resource power" may preclude the use of ADR methods.77

ADR Mechanisms: Independent or Ancillary?

The third issue at this consolidation stage is whether ADR methods should operate as a separate and distinct mechanism or as a process ancillary to other mechanisms. The main focus of this debate has been whether the mediation services should be court-annexed or totally outside the judicial system.

76G Bingham, op cit., note 48 above, 159.
77Id., 160.
To have the use of ADR methods in environmental controversies as a court referred mechanism overcomes some of the concerns expressed by Fiss and others. They were concerned that only adjudicative mechanisms are capable of upholding normative values. Wald says that a sympathetic judicial overview would allow for the refusal of settlements not 'in the public interest'.\textsuperscript{78} Her view is that:

"the amputation of meaningful judicial review from settlements or negotiated regulations in the environmental field would make these ADR techniques far less attractive to some of the parties as instruments of justice."\textsuperscript{79}

If settlements are to embody the nearest approximation of the ideals of justice to which Fiss refers, this would allow the adjudicative mechanism to operate to ensure that mediated settlements contain just outcomes.

Bingham supports this view when she says that court-related mediation services are preferrable as they overcome the hazards of second class justice and lack of external control.\textsuperscript{80} In Bingham's view there is also the likelihood that making mediation services court-annexed would increase the range of services offered by the courts and thereby increase accessibility to the judicial system.

\textsuperscript{78} W Wald, op cit., note 7 above, 25.
\textsuperscript{79} Id., 33.
\textsuperscript{80} G Bingham, op cit., note 48 above, 151.
Conversely, making ADR methods court related may produce a loss of informality and may take from the parties the resolution of their own controversies, both positive attributes of ADR methods. Bingham suggests that the accessibility and independence questions could be resolved by the institutionalisation of mediation services on a State-wide government funded basis in the form of environmental mediation centres.\textsuperscript{81} They would be institutionalised but not controlled.

The United States experience has shown however that if ADR processes are institutionalised outside the adjudicative system, the strength of public opposition presently prevent "any widespread acceptance" of their use in the resolution of environmental controversies.\textsuperscript{82}

**ADR Mechanisms: Voluntary or Mandated?**

The final issue in the consolidation stage is whether mediation should be a mandated or a voluntary option. Voluntariness is suggested as an essential component of mediation, in the sense of contrasting it with the mandatory or coercive character of litigation at least as far as the decision-making is concerned.\textsuperscript{83}
Stage Three: Current Practice

The issues that arose in the consolidation stage had been more or less addressed by the mid-1980s with an established trend to institutionalise the use of mediation to resolve environmental controversies. This saw the formation of the National Institute for Dispute Resolution (NIDR), a Washington based non-profit organisation, which sought to create State-level and State-sponsored mediation offices to address public disputes including environmental controversies. It began with four State offices in 1989. Adler reports that the Program for ADR (PADR) formed in Hawaii conducted 39 Mediated Policy Roundtables in the period 1985-89 achieving agreement or partial agreement in 29 of these matters.

The types of matters reported as being mediated are large scale disputes, including environmental conflicts. The matters Adler gives as examples reflects this trend. So, for instance, he describes disputes about toxic waste disposal (Virginia), urban redevelopment (Minnesota), housing and historic preservation (Ohio) and industrial redevelopment (Indiana).

Two specific applications of the use of mediation-based methods show the manner in which these methods were being used. The first relates to a long running controversy between fishing and oil industries off the coast of California following

89 Adler, op cit., note 55 above, 107.
90 Id., 110.
91 Id., 106.
oil discoveries there in the 1980s. In 1983 a proposal to grant fresh exploration and production permits to the oil interests was vigorously opposed by the fishermen. Mediators from the Mediation Institute, Seattle, Washington were engaged to seek to resolve the controversy. After lengthy mediation sessions which resolved the immediate issues in dispute the parties agreed to establish permanent committees to address continuing issues and potential new areas of controversy. The agreements reached were formalised and incorporated into the exploration permits issued by the relevant government agency.\(^9\)

The second example is the implementation of a memorandum issued by the Environment Protection Authority (EPA) in 1987 "Guidelines of the Use of ADR Techniques in Enforcement Actions". The intention of these guidelines was to encourage the use of mediation to agree upon the penalty to be imposed on a violator in the case of illegal land contamination.\(^3\) The use of mediation was designed to overcome the lengthy delays in the clean up of toxic waste sites due to protracted litigation. The intention was to use mediation to agree on consensus decrees for pollution clean up obligations under the Comprehensive Environmental Response, Compensation and Liability Act 1988 (referred to as CERCLA or Superfund) and thereby overcome the lengthy delays in enforcement being experienced.\(^4\) As Peterson points out the use of mediation was also slow to be implemented and in 1989 the EPA began an ADR Pilot Project to

\(^3\)Grad, op cit., note 64 above, 175.  
\(^4\)Id., 169.
expedite its use. By 1992 the results of this pilot project showed that ADR methods could assist in the effective resolution of a large number and variety of Superfund cases.⁹⁵

Similar government interventions in the form of legislative enactments have encouraged the use of ADR methods to resolve environmental controversies. The *Administrative Dispute Resolution Act* 1990 expressly authorised and encouraged the use of ADR techniques by requiring federal agencies to consider the use of ADR methods before commencing litigation.⁹⁶

There was also the encouragement given to the use of ADR methods in the rulemaking process by the *Negotiated Rulemaking Act* 1990. The Act established a framework for the conduct of negotiated rulemaking by Federal agencies and "encouraged the use of such procedures when it would enhance conventional rulemaking procedures".⁹⁷ The purpose of the legislation was to allow agencies to settle controversies "by tailoring the requirements of a regulation to a particular dispute while still enforcing the policies behind the regulation".⁹⁸ But the process was criticised as having little flexibility and for producing regulations which often challenged adjudicatively.⁹⁹

---

⁹⁶C Stukenborg, op cit., note 47, 1329.
⁹⁷Quoted Id., 1330.
⁹⁸Id.
The processes were modified to address these problems. The incentive for interest groups to agree was that the agency retained the authority to write its own rule if the parties could not agree on one. The process had three pertinent criteria. There were limits of 20-25 participants as stakeholders, the rules for negotiation were selected so as to preclude any requirement for compromise on fundamental principles and the agency imposed a deadline to impart urgency into the deliberations. The use of negotiation in these contexts was credited with overcoming some of the impediments to producing regulations in the areas of national emission standards and performance standards which have not been subject to challenge.

The institutionalising of the use of ADR methods has ensured their continuing refinement and development in the United States and provided potentially valuable lessons for the Australian context.

**Conclusion**

This discussion has examined a number of questions which have come to prominence in the growth and development of ADR methods in environmental controversies in the United States. It is anticipated that the same questions would need to be

---

100 Id., 5.
101 Id., 6.
102 Id., 7.
addressed in the Australian context and so this discussion may provide assistance.

It is firstly apparent that a number of recurrent themes arise when the suitability of ADR methods to resolve environmental controversies is considered. Similar themes are expected to arise in the Australian context. Most importantly for our purposes, some critics suggest that there are a number of factors that will always constrain the wider use of ADR methods, particularly in the case of environmental conflicts. The conclusion is that ADR methods will therefore always have a limited role.

These factors are:

1. There will always need to be a requirement for voluntariness. Any steps to mandate the use of ADR methods are a contradiction in terms.

2. There will always be a need to consider the politics of environmental dispute resolution, in particular the inequalities of power and the illusion of decision making power and these inequalities may dictate that the use of ADR is unsuitable in many environmental controversies.

For ADR methods to be effective, it is critical to consider these two factors. These factors will always act as a permanent constraint on the wider use of ADR methods in environmental controversies. Whether this prediction has proven the case in
Australia is explored in the next chapter and in the empirical research to follow.
CHAPTER FIVE

THE AUSTRALIAN CONTEXT

Introduction

The Australian response to the high praise and promise of ADR methods in the environmental area in the United States can be traced to a period beginning in the late 1980s. There are a number of reasons for this slower development stemming from the unique character of environmental dispute resolution in Australia.

Appraisal of the Promise of ADR Methods

A number of commentators have examined the potential use of ADR methods in environmental matters in Australia. Wootten approached the issue from the familiar perspective that the usual means for resolving environmental controversies in Australia were administrative and adjudicative means. Preston adopted much the same approach labelling these mechanisms as "resolution by managerial direction" (a term incorporating both executive and administrative decision-

making) and "resolution by adjudicative decision". These two mechanisms are labelled here simply as administrative and adjudicative resolution.

While essentially accepting that ADR methods do have a role, there remained uncertainty in the eyes of these commentators as to what this role should be. Should it operate as an ancillary part of the administrative or adjudicative systems or as a separate and distinct consensual mechanism?

In addressing this issues a number of questions have arisen.

1. What are the precise differences in the Australian context which affect the use of ADR methods?

A number of differences in the Australian context were identified.

Firstly, as regards the administrative mechanisms for dispute resolution, environmental controversies have in the past tended to be dealt with outside any regulatory or adjudicative forum which could be seen as equivalent to the formalised Rulemaking Procedures adopted in the United States. This has meant there is not a widely accepted form of public participation in Australia into which ADR methods might fit. In its place Fowler identifies "a distinctive approach to the resolution of environmental

disputes in Australia" in the form of "extra legal strategies". These strategies, which had their earliest expression in the green bans of the 1970s, involve the use of devices such as large scale public protests, intensive lobbying and media coverage to attempt to influence environmental decision making outside any formalised public participation framework. Fowler's point is that this confrontationalist approach indicates a dissatisfaction with traditional administrative mechanisms similar in some respects to the dissatisfaction in the United States with judicial mechanisms.

Secondly, as regards adjudicative mechanisms, Fowler argues that courts in Australia are far less accessible to environmental litigants than in the United States, due largely to constraints on standing and costs. But conversely, in Australia, there are alternative adjudicative fora available in the form of specialist tribunals and courts to hear merit appeals. These differences have meant that many of the criticisms voiced in the United States about delay and inadequate fora are not as pertinent to the Australian context, either because limited court access has meant fewer delays or because the specialist fora cater more adequately and effectively for environmental matters.  

---

4Id., 127.
2. What are the potential restrictions on the role of ADR methods in environmental matters?

The main implementation difficulty envisaged in adopting ADR methods is a reluctance by government to relinquish a perceived electoral mandate to adopt and implement their own policies. This would particularly constrain the use of ADR methods as an adjunct to existing administrative mechanisms in resolving environmental controversies. Further, the use of ADR methods would arguably require a shift away from a confrontationalist approach by all parties to the "reasoned argument" and "detailed objective appraisal" said to be characteristic of consensual means.5

In the case of adjudicative mechanisms, the concern most often expressed is that the development of ADR methods in existing adjudicative fora would detract from a pressing need to reform and modify these mechanisms themselves, particularly as regards the limitations imposed on environmental action by legislative and practical cost-related restrictions.6

Wootten emphasises that environmental law in Australia is essentially a product of the parliamentary system rather than the common law. As such it exhibits the characteristics of this system, that is an emphasis upon "statutorily authorised executive decision making".7 The effect of this is that some

5Id. 129.
6Id.
7H Wootten, op cit.,note 1 above, 34.
environmental controversies are resolved primarily in the political system rather than in the courts. Those who seek particular environmental outcomes are thus forced to become involved in politics and to adopt political methods in order to achieve their environmental objectives.  

Accordingly when we look at ADR in Australia we are not only looking at it only as an alternative to litigation but more so as an alternative to the current forms of administrative resolution. Since environmental controversies are dealt with at various tiers of government (legislative, executive, administrative or local) the issue at stake may be resolvable not by an interpretation of the existing law (that is, adjudicatively), nor through the agreement of the parties (that is, consensually) but by the creation of a new law or the alteration or reinterpreted administratively of an existing one (that is, administratively).  

This is not to dismiss the potential use of ADR methods within either the adjudicative or administrative systems. As Wootten points out the political practice of "making issues justiciable that were once merely political" ensures that both the courts and tribunals and the administrative system do have a substantial role in the resolution of environmental controversies in Australia.  

---

8 Id., 35.  
9 Id., 36.  
10 Id., 37.
Any potential role for ADR methods thus depends upon whether the controversy is litigation-related or politically-related. In the case of litigation-related controversies, the role of ADR is favourably exemplified by the mediation service offered by the Land and Environment Court of NSW in 'settling' controversies, even though it deals with "only a few percentage of matters coming before the Court".  

In the case of politically-related controversies, the role of ADR methods is not 'settlement' or 'resolution' as defined here, because the final decision still remains an administrative or executive one. However, there is scope for ADR to be used to formulate options and recommendations to government and as a vehicle to facilitate participation. Mediation in this sense embraces "processes where parties who lack power to resolve a dispute by their agreement, reach agreement by mediation on a common position to put to a decision-maker".

Wootten gives a number of examples of mediation used in this way. He examines the mediation of the Colondale Ranges controversy in South East Queensland in July 1990. The political context to this issue was important. The Queensland Labor Government in the lead up to an election in 1989 promised to extend two existing national parks in the Conondale Ranges north-west of Brisbane, which would effect logging in the region. After its election, the government formed the Colondale Range Consultative Committee comprising representatives of all

---

11 Id., 47.
12 Id., 41, (emphasis supplied).
affected stakeholder groups to provide a plan for implementing this decision.\textsuperscript{13} The Community Justice Program provided mediation services to the Committee. After mediation sessions extending over a six month period, a joint recommendation for extending the park and limiting the areas which could be logged was put to the Queensland Government. In June 1992 the government endorsed and implemented the joint proposals.\textsuperscript{14} Wootten offers this process as an example of the effective use of ADR methods in an environmental controversy. When the necessary concurrence exists, ADR methods may come to the fore as a means of achieving a consensual recommendation to deliver to government which can then be endorsed administratively.

Preston injects a cautionary note in his appraisal of the potential role of ADR methods in Australia. In a 1989 review he considers that, particularly in the case of environmental conflicts, there are three essential preconditions for the use of mediation. These preconditions are parity of power, a real likelihood of compromise and a conflict within manageable proportions.\textsuperscript{15} In the case of environmental conflict, a parity of power in terms of economic or legal leverage or political influence is not always present. In Preston's view, if this parity is absent mediation is not suitable.

\textsuperscript{14}H Wootten, op cit., note 1 above, 72.
Preston considers that compromise is rarely possible once matters of principle which question the very development itself intrude. This is the point made in Chapter Two in relation to fundamental value conflicts. If value conflicts exist a consensual resolution may not be possible. This is consistent with the view that the political process which has "already done the balancing act between conflicting interests" is the more appropriate mechanism for resolution.\(^{16}\)

The precondition of a conflict within manageable proportions essentially concerns the need to have a workable process. A mediation involving 40 or 50 interests is likely to be too unworkable and unweildy to "develop the give-and-take upon which success depends." Preston emphasises that even if such a process reaches a 'settlement' or 'resolution' there may not be the committment amongst such a large number of participants to carry it into effect, nor the political will of the consent authority to approve the committment reached.\(^{17}\) But as discussed in Chapter Two, the size of controversies in terms of the number of parties is not necessarily indicative of the existence of an environmental conflict.

Preston considers that these characteristics of environmental conflicts make them unsuitable for resolution by ADR methods. He concludes that "most of these characteristics, if present in a particular environmental dispute, cause difficulties for

---

\(^{16}\)id., 398.
\(^{17}\)id., 401.
consensual resolution methods". He considers that adjudicative means remain more "appropriate" for resolving environmental conflicts and that the focus should remain on these existing mechanisms. The emphasis should be upon reforming the inefficiencies of the adjudicative fora instead of "encouraging parties to resolve environmental disputes by ADR". He reiterates the view that inefficiencies, such as restrictive procedural rules, the emphasis on adversarial presentation of evidence and limitations on standing, are of more pressing concern that the unwarranted attention given to less effective ADR methods.

3. Can ADR methods address the inadequacies in the existing systems of environmental dispute resolution?

As well as emphasising the inadequacies in the adjudicative fora, concerns were also voiced about adequacies of existing administrative fora. This was particularly so in the case of environmental conflicts, involving conflicting community interests. Such conflicts were seen as common but the existing means, including "political system solutions" were considered inadequate, giving as they did disproportionate weight to pressure groups, to provide an inadequate voice for other views and to produce diluted compromise solutions.

---

18 Id., 173.
19 Id., 174.
21 Id., 2.
was considered that the use of the 'negotiated consensus building model' might address these inadequacies by bringing together representatives of all stakeholder groups.

This was a view adopted at the time of the establishment of the Resource Assessment Commission (RAC) in 1989 to deal with major resource use controversies. The RAC commissioned a report on the use of mediation as an effective part of its inquiry process. In the view of one of its commissioners, the report suggested a significant role for mediation in just those terms.\textsuperscript{22}

In a similar way, ADR methods were proposed as a possible solution to the perceived inadequacies of the adjudicative system. While it was conceded that in excess of 90% of matters litigated were in fact "settled" this type of settlement was considered to be "a crude and ill defined system" which committed environmental controversies to "the culture and techniques of adversary litigation" resulting in the protraction of a dispute.\textsuperscript{23} Paratz considered that the use of some form of "managed negotiation" might also address these inadequacies.

The expectation that these methods could be effectively implemented was given encouragement by "the significant references to the use of ADR processes" in the Fitzgerald Report

\textsuperscript{22} G McColl, "Environmental Dispute Resolution"(1993) 12th NELA Conference, Canberra, 5-6 July 1993 Conference Papers.\textsuperscript{6}

\textsuperscript{23} D Paratz, "Options for Environmental Dispute Resolution"(1990) 9th NELA Conference, Gold Coast, 26-28 August 1990, Conference Papers 273.
on the mining of Fraser Island released in 1991.\textsuperscript{24} In this atmosphere Paratz predicted that it was "highly likely..that we shall shortly witness experimentation as to the use of these processes in environmental disputes in Australia".\textsuperscript{25}

4. What concerns were raised about the use of ADR methods in these systems?

In spite of this enthusiasm, concerns were raised. One strong line of criticism concerned the use of ADR methods to resolve environmental conflicts. These criticisms echo some of Amy’s criticism \textsuperscript{26} that ADR inevitably requires compromise and such compromise is not acceptable in those environmental controversies involving broad moral and philosophical differences, namely environmental conflicts.\textsuperscript{27} Rogers takes the criticism further by asserting that ADR methods "as a process" are also an unsuitable mechanism from the perspective of environmental groups. She argues this in the context of questioning the efficacy of existing administrative methods, such as public inquiries. Such inquiries tend to "diffuse a sense of crisis and create false confidence in a process" but they at least have the effect of enhancing and sustaining public consciousness.\textsuperscript{28} However ADR processes because of their

\textsuperscript{25}Id., 282.
\textsuperscript{27}N Rogers, "A Dark Green Perspective on Environmental Dispute Resolution"(1994) \textit{1 Commercial Dispute Resolution Journal} 111 at 114.
\textsuperscript{28}Id.
confidential nature may rob environmental groups of the public forum and media coverage essential to their main long term goal of achieving "an effective shift in public consciousness." She suggests the focus on compromise implicit in ADR methods will in fact tend to depoliticise and diminish the conflict.

This criticism has been a major constraint on the extended use of ADR methods, especially in environmental conflicts in Australia. The insistence that ADR processes, especially mediation, be confidential takes the resolution of such controversies outside the public forum. If the process is confidential, only the stakeholders can be apprised of the results of the decision making process. This has two disadvantages in the eyes of environmentalists. Firstly, there is the concern that controversies are being resolved in the 'private spaces' of administrative decision making. This produces a lack of transparency which tends to arouse suspicion about any compromise solution reached. Secondly, because the process is confidential it is not possible to bring the deliberations into the glare of public attention. As such it is not possible to subject the controversy to the kind of political pressure arising from perceived public opinion. This is a considerable disadvantage, because public opinion is often seen as a powerful weapon in the armory of environmentalists.

For these reasons, while so ever the insistence on confidentiality remains, it seems likely that the suspicions

---

29 Id., 115.
environmentalists have over the use of ADR methods to resolve environmental conflicts will remain strong.

Rogers also voices the concern that environmentalists may be at a disadvantage in any mediation or negotiation process due to power inequities. Since environmental controversies inevitably involve relationships with some level of government, Rogers is concerned that the power imbalances inherent in these relationships can transform mediation. The effect is then to "replicate(s) the power relationships entrenched in bureaucratic and administrative organs of the State"[^30].

Similar criticisms are made about whether ADR methods provide a better method of resolving environmental controversies than "direct action." Rogers equates direct action with Fowler's 'extra-legal techniques', involving public protest or 'environmental theatre'. She rejects the suggestion that ADR methods could replace direct action with "a more dignified form of participation". For Rogers, direct action has the potential to generate publicity and a sense of urgency sufficient at times to produce a political resolution of the controversy. But this criticism does not allow for the fact that direct action may merely exacerbate or precipitate a controversy. The view remains in many circles that "in the long term, activism may achieve more for the environmental movement than any other strategy"[^31].

[^31]: Id., 122.
Salmon speaking from the perspective of the Australian Conservation Foundation supports this view and regards some forms of ADR methods as conflict suppression rather than resolution. To see mediation as a means of quelling 'mindless conflicts' is in the eyes of the ACF "nothing so much as a side track from the main game." Salmon however allows some scope for ADR methods in making the point that the best way to avoid conflict lies with proper policy development strategies. She gives the example of the Canadian Green Plan developed in 1990 as an action plan to achieve environmentally sustainable development. This Plan was the product of an extensive 'multi-stakeholder consultative process.' She sees a potentially positive role for mediation in a similar process of policy development in Australia but is not convinced that the potential is sufficient "to direct our energy from some of the (current) processes." This potential use of ADR methods in a public participation role is discussed in detail in the second case studies in this research in Chapter 9.

James Johnson, Director of the Environmental Defenders Office (NSW), echoes this cautious tone. He is concerned with the use of ADR methods to resolve environmental controversies over issues that affect 'the general public', that is to say...

---

33 Id., 4.
34 Id., 6.
35 Id., 11.
environmental conflicts as defined here.\textsuperscript{36} He concedes that the traditional processes of litigation or political intervention provide inadequate fora to examine the broad questions of development as they impact upon the environment.\textsuperscript{37} But he remains wary of the use of ADR methods for this purpose, repeating Preston's trio of reasons not to use ADR: 'principles, politics and precedent'.\textsuperscript{38}

Examining these three reasons in turn, Johnson makes the point that where 'principles' are involved compromise is seen as inappropriate. Where philosophical beliefs or legal rights clearly encourage parties to demand proper environmental assessment or protection, compromise is not seen as an appropriate response.

Similarly where 'precedent' is involved in the sense of the need to develop and protect such principles, ADR methods may not be appropriate because a successfully mediated environmental controversy still does not provide an effective precedent which may help "to redefine the boundaries of environmental protection".\textsuperscript{39}

With respect to the issue of 'politics' Johnson voices the most concern. He is concerned with both the politics of the ADR process itself and with the wider administrative mechanism. As

\begin{flushleft}
\textsuperscript{37}Id., 7.
\textsuperscript{38}B J Preston, op cit., note 15 above, 15.
\textsuperscript{39}J Johnson, op cit., note 36 above, 7.
\end{flushleft}
regards the process itself he says that participation may be perceived as an indication of weakness by other parties. He gives an example of a response received from the NSW Government when negotiations were conducted directly between the EDO office and a mining company over a bat habitat in limestone caves at Kempsey, northern New South Wales. Johnson says that on becoming aware of meaningful negotiations, the government altered its pro-conservation position claiming "it would seem you are no longer committed to pursuing this matter through the courts." Johnson conceded there is also the risk of environmental groups losing respect and credibility in their own organisations through showing a preparedness to consider compromise. In this wider political sense, environmentalists may not wish to avoid conflict, seeing it instead as a mechanism of change and a vehicle to effect a shift in public values.

Nevertheless Johnson is not entirely dismissive of ADR methods. He also sees their potential role as being in the policy setting process. He suggests ADR in the form of a mediation policy round table would be effective if used before any major environmental legislation was introduced. Similarly the use of mediation at the planning and policy stage may help to defray potential areas of dispute rather than leaving these to be escalated on a site by site basis. It is the use of ADR methods in this context which is the focus of the second case study discussed in Chapter 9 of this research.

40Id.
41Id., 8.
Models for Implementation of ADR Methods

Scholarly attention was also directed to devising appropriate models for the implementation of ADR methods in environmental controversies. In a series of papers in 1988-91 Sandford, also identifying the forms of environmental dispute resolution as administrative and adjudicative, considered that these were essentially inadequate to address environmental issues. She suggested a model to redesign these mechanisms to incorporate mediation as an integral part of the existing mechanisms. Her approach is termed the integration model.

The Integration Model

In examining the existing appeals systems in Tasmania, Sandford looked at a number of examples. In the adjudicative system, she considered Courts of Petty Sessions where objections raised to the granting of acquaculture permits for the establishment of marine farms were reviewed. In this existing system once formal objections had been lodged the dispute proceeded to a hearing without formal negotiation procedures. Sandford considered there was a role for mediation in the pre-objection stage as a dispute prevention measure, or

at the stage of objections to mediate a solution before a hearing commenced.43

In the administrative system, she considered the Environment Protection Appeal Board which heard objections and appeals under the Environment Protection Act 1973 (Tas). Sandford saw a role for mediation in these appeals either prior to objections being lodged or before a hearing took place. Sandford foreshadowed the potential of ADR methods in these processes as "an integral part of the environmental decision-making process".

In 1990 Sandford was involved in one specific application of this integration model involving the use of unassisted negotiation. This was the Salamanca Agreement Process which evolved from "the rubble of the 1988 Helsham Inquiry" into forestry management in Tasmania.44 The Process was a result of the Tasmanian Parliamentary Accord between Labor and the Green Independents which delivered government to Labor in 1989.45 The Agreement bound all stakeholders to negotiate for a period of twelve months to develop a strategy for forest management. Round Table negotiation took place between February and September 1990 but broke down when all parties could not agree upon a joint recommendation. A non-unanimous (which significantly did not include the Combined Environment Groups) recommendation for a

43Id., 26.
45T Bonyhady, op cit., note 13 above, 23.
final strategy was put to the Tasmanian Cabinet. But as the Accord began to unravel, due in part to this breakdown, the strategy was not implemented. The Salamanca Process failed to a large measure because it was so closely tied to this Parliamentary Accord.

Though the Salamanca Process was not successful, Sandford drew a number of lessons from its failure which she provided for in her "integration model." She emphasised the need to prevent or minimise dispute escalation at the outset of any dispute resolution process. She suggested this be done by encouraging broad public participation in the form of regional advisory groups to parallel the stakeholder negotiations and provide a vehicle to constructively voice community concerns. Secondly she saw a need for mediation to assist in the initial stages of the negotiation process to develop an agreed scope and procedure for the negotiations to follow.

Sandford's model was based on the use of ADR methods as an integral part of the whole environmental decision making process as distinct from being used solely as an adjunct to the dispute resolution part of the process. Used in this way she considered ADR methods had the potential for dispute prevention or minimisation as well as dispute resolution.

This integration model was one strongly endorsed in the report to the RAC on the use of ADR methods in its Inquiry Process.

46R Sandford, op cit., note 44 above, 7.
47R Sandford, op cit., note 48 above, 8.
This report looked at a wide range of approaches and models for the use of non-adversarial methods as an effective means of public participation.\textsuperscript{48}

The models reviewed included the Harvard MIT model \textsuperscript{49}, the US Environment Protection Authority's Regulatory Negotiation Project, the Canadian Round Tables, the Salamanca Agreement Process itself and the Pitjantjatjara model used for negotiating clearances over Aboriginal sacred sites in the Northern Territory and South Australia prior to mine exploration.\textsuperscript{50}

Following this review the report suggested implementation of ADR methods into the inquiry process. The consultants saw a role at the commencement of each new inquiry for the use of mediation to determine the scope of the main issues, the required research and the likely participants. Additionally they saw clear benefits in integrating mediation into the inquiry process itself as part of a public participation strategy.\textsuperscript{51}

Boer et al saw a role for ADR methods but not as a dispute resolution strategy since this was beyond the RAC's jurisdiction. Instead they saw their use as a means of dealing with process issues, such as the scope and procedure of inquiries. To this extent they endorsed Sandford's model since they gave ADR methods a role integral to the whole

\textsuperscript{48}B Boer et al., \textit{The Use of Mediation in the Resource Assessment Commission Process} (1991) AGPS, Canberra, ix.


\textsuperscript{50}B Boer et al, op cit., note 48 above, 24-42.

\textsuperscript{51}Id., 60-64.
environmental decision making process. Much of the perceived effectiveness of ADR methods in this context was considered to be that the usual strict confidentiality was not required. This aspect warrants further exploration and is examined in detail in the second case study carried out for this research.

The emphasis in Sandford's model on ADR methods as an early intervention tool is considered the best strategy for controversies concerned with Environmentally Sustainable Development (ESD) questions.\(^{52}\) Christie emphasises that implementation of ESD principles may not be achieved through one resource management option only, but that a range of options along a continuum may each achieve the goal to differing degrees. So, for example the Fitzgerald Report on logging on Fraser Island provided four options, all consistent with ESD principles.\(^{53}\) Christie said that adjudicative processes consider whether a particular proposed usage is "environmentally acceptable" and will not seek alternative uses which may prove more suitable. ADR processes on the other hand can fully evaluate each option on the continuum and reach an informed view as to which is preferrable in ESD terms.\(^{54}\) The use of ADR methods can thus be an essential first step in the decision making process where questions of ESD are in focus.\(^{55}\)

\(^{53}\) Id.
\(^{54}\) Id., 268.
\(^{55}\) Id., 270.
The Adjunct Model

The other model of the use of ADR methods in environmental dispute resolution emphasises their use as a distinct part of the dispute resolution mechanism, rather than as an integral component of the broad environmental decision making process. Weir in considering the recommendations of Fitzgerald's Report suggested that the use of ADR methods in administrative and adjudicative mechanisms should be as an essentially adjunctive one.56 He supports a single adjudicative forum to decide all development and environmental matters with the use of ADR at pre-hearing conferences being "firmly established within the court system".57 Additionally, if a controversy is to be dealt with administratively by way of an inquiry then ADR should be involved to "encourage public participation (and) to allow a broad range of views to be considered".58

This adjunct role for ADR methods was one implemented in the Environment Resource and Development Court, South Australia established in January 1994 by the Environment Resources and Development Court Act 1993 (SA). This role was supported by one of its founding judges who considered that the most appropriate environmental dispute resolution mechanism was adjudicative with ADR methods operating in a supportive role.59

57 Id, 236.
58 Id.
This is also the role of mediation in the Land and Environment Court of NSW's Mediation Scheme.

**Choice of Model**

The model for ADR methods as an adjunct to other dispute resolution mechanisms is a more limited role than that expounded by Sandford. Her model gives ADR methods essentially a 'beginning-to-end' role in the environmental decision making process. In this sense ADR has a dispute prevention role or as Roberts describes it "a dispute management role." The breadth of this role extends to conflict anticipation, equivalent in some respects to the role performed by "regulation negotiation" in the United States and also to the scoping of issues requiring resolution prior to administrative processes. The model allows the development of a role in other stages of "the regulatory lifecycle". It is this integration model that may "convince environmentalists that mediation does have a role" in environmental dispute resolution. This research examines the extent to which either roles has been implemented.

---

61 Id., 156.
62 Id., 158.
Review of Practice

In looking for evidence of the use of ADR methods in environmental controversies in Australia the difficulty which confronts the researcher is on the one hand the sparcity of empirical information, and on the other anecdotal evidence which suggests significant implementation. Clark points out this area remains "under-theorised, under-researched and little evaluated." Nevertheless he can say "the reality is that there has been a significant growth in Australia in the use of various ADR techniques."

The evidence of such growth is less than persuasive. While recognising that environmental controversies are most often encountered at the local government level, Clark is only able to say that Sandford's model of integration is being re-emphasised and that local government will "increasingly be conflict managers" to prevent controversies before they begin. But there is little cogent evidence of this promise coming to fruition.

Clark refers to the court-annexed Mediation Service offered by the Land and Environment Court of NSW. But he says "more often,

63E Clark, "The Role of Non-litigious Dispute Resolution Methods in Environmental Disputes" (1995) 2(2) Australasian Journal of Natural Resources Law 1 at 42.
64Id., 43.
66E Clark, op cit., note 63 above, 6.
mediation is entered into privately without supervision by a court. But there is no evidence provided for this assertion.

With respect to institutionalised mediation there are examples of the Community Justice Programs both in New South Wales and Queensland and the Conflict Resolution Service in the ACT. But there is no clear evidence that these institutions are properly equipped to facilitate environmental mediations due to the technical and specialised nature of these controversies.

Clark notes that one of the contextual differences in the Australian situation affecting implementation of ADR methods is the lack of legislation expressly authorising ADR, such as the Negotiated Rulemaking Act 1990 (USC) in the United States. The only example Clark provides of administrative agency use of ADR is the Department of Urban Services including conditions of mandatory negotiation in new building industry standard forms of contract. Similarly there are no legislative initiatives in the environmental area similar to the Farm Debt Mediation Act 1994 (NSW) and the Native Title Act 1996 (Cth) mandating mediation before enforcement action. There are only examples of legislation where its use is encouraged, for example the Land and Environment Court Act 1979 (NSW) and the Planning, Environment and Development Assessment Act 1995 (Qld).

---

67 Id., 12.
69 E Clark, op cit., note 63 above, 20.
O'Dea looks at planning disputes and suggests that mediation at local government level is being used to some degree.\textsuperscript{70} The potential for such usage exists both at what O'Dea terms Stage One, essentially equivalent to Sandford's integration model, and at Stage Two, the adjunct dispute resolution role, when the matter is before the Court for review. He sees Stage One as a pre-emptive action by local councils instigating mediation before the approval process begins. But the potential at Stage One is currently not being realised, and its development in many councils is largely an ad hoc affair.\textsuperscript{71}

O'Dea's Stage Two mediations are a reality in the form of the Mediation Service offered by the Land and Environment Court of NSW. But its usage among local councils, which are parties to virtually all such merit appeals is not overwhelming. In 1992 figures obtained by O'Dea show only 25\% of local councils involved in matters before the court chose to use mediation, which related to about 8\% of all merit appeals.\textsuperscript{72} O'Dea considers mediation is used in only a few cases either because of a fear of it as an unfamiliar concept or a mistrust or bias against mediation in councillors or council solicitors.\textsuperscript{73}

O'Dea suggests that early intervention usage would be encouraged by the establishment of an independent environmental service. This idea was considered in a pilot project co-ordinated by the Australian Dispute Resolution

\textsuperscript{70}J O'Dea, op cit., note 68 above, 217.
\textsuperscript{71}Id..\textsuperscript{72}Id., 216.
\textsuperscript{73}Id., 216-217.
Centre (ACDC) and funded by the Commonwealth Government in 1996. In this pilot project six large multi-party controversies were subject to attempted resolution by mediation or facilitation. The controversies involved diverse developments, such as the relocation of an iron foundary to a rural residential area, a subdivision, a concrete crushing plant, a retail development, the extension of working hours on a development site and the proposed construction of a school hall.

Following the pilot mediations ACDC developed a model dispute resolution program which it provided to all councils in NSW. This model essentially duplicated Sandford's integration model. The expectation was that "the dissemination of outcomes will encourage councils to adopt consensual rather than adversarial approaches to development issues" and implementation of these procedures is continuing.

Spiegel also considered the scope for the use of ADR methods in an integration role. She saw they had a use at the stage of early intervention to ensure that the application was ready for submission in a form both economically and environmentally feasible. Secondly, she saw ADR methods as useful for the

---

75 Id., 18. See Chapter Seven following for a detailed review of these controversies.
76 Id., 43-57.
79 Id.
creation of policies and programs in the controversial areas of pollution control and resource management, for instance in the setting of urban consolidation policy. She was however unaware of any implementation in these areas.\textsuperscript{80}

The example and success of the Mediation Scheme in the Land and Environment Court of NSW which is examined in detail in Chapter Eight has encouraged similar developments in using mediation in an adjunct role in other States, in particular in Victoria. An investigation into the use of mediation in the Administrative Appeals Tribunal (Victoria) for planning disputes recommended a trial of the mediation conference concept.\textsuperscript{81} This institutionalisation was motivated in part by the cost savings based upon the NSW example.\textsuperscript{82} Concerns were raised at the time as to whether AAT members would conduct such mediations themselves and the effect this might have on their independence and the safeguards which could be implemented to ensure the public interest was addressed.\textsuperscript{83}

This Victorian review considered whether mediation would be more conducive to resolving minor controversies between neighbours "on a fairly even footing" but where there were "few cost savings" or controversies over multiple issues which involved the prospect of extended hearing time saved.\textsuperscript{84} While

\textsuperscript{80}E Speigel, Personal comments, 17 April 1996.
\textsuperscript{81}Management Committee for the Mediation in Planning Project, \textit{Mediation in Planning Disputes, Final Report} (1994) Department of Planning & Development (Victoria), Melbourne.
\textsuperscript{82}V Davies, "Mediation and Planning Appeals: Jumping on the Bandwagon?" (1994) \textit{2 Australian Environmental Law News 1995} 65 at 68.
\textsuperscript{83}Ibid., 72-73.
\textsuperscript{84}Ibid., 80.
the pilot project itself concentrated upon essentially smaller disputes, the arguments for extending mediations to larger more complex controversies were cogent. It was argued that these controversies could benefit from scoping to refine the issues and independent expert appraisal to advise on particularly contentious technical issues, such as traffic flow or effluent disposal even if full resolution could not be achieved. Following a review of the report the President of the AAT advised in June 1995 that mediations would be offered once a planning appeal had been lodged.

Other examples have also come from Victoria. In 1991 Fisher successfully mediated a controversy involving the expansion of the facilities for a tourist resort which included both amenity questions and environmental questions dealing with threats to local wildlife habitats. This appears to be an example of the successful resolution of a controversy in the environmental conflict half of the continuum.

Another example was the resolution of an environmental controversy concerning an application to amend a planning scheme to allow for larger rural subdivision in the Shire of Hastings, south of Melbourne. This controversy in the view of the two mediators was "at heart a value conflict" involving a large number of parties but was instead successfully mediated.

---

85 Management Committee, op cit., note 82 above, 5-9.
86 Id., 82.
by not directly confronting this conflict and concentrating upon the negotiable amenity issues.  

There is also evidence of the use of ADR methods in the resolution of other environmental conflicts. In addition to the use of mediation to resolve the controversy over the Conondale Ranges in south-east Queensland discussed by Wootten and others earlier, Boulle cites other successful examples of the use of "policy making mediation" to negotiate environmental standards practice.

Other examples of the use of mediation to resolve environmental conflicts include the management of a waste disposal site and conflicts over tourism in World Heritage sites. In addition there are suggestions that ADR methods may have provided resolution of some conflicts that were dealt with adjudicatively. Naughton provides two examples where adjudicative decisions to refuse proposals for new quarry sites might have been more effectively dealt with by negotiated solutions which allowed for some compromise.

---


89 H Wootten, op cit., note 1 above, 72 & T Bonyhady, op cit., note 13 above, 23.


The use of ADR methods have also been suggested as a more effective mechanism for community participation in environmental decision making. Much was made of the promise of community participation in the formulation and implementation of public policy in the 1980s. This was particularly so in the case of environmental policy. But the promise often failed to materialise when the consultation tended to be little more than community education.\textsuperscript{94} It was considered that ADR methods might provide a more meaningful vehicle for participation given that "a participatory style is more likely to build awareness, perhaps consensus"\textsuperscript{95} This use of ADR methods in this role is examined more closely in the second case study.

Conclusion

This review has demonstrated that there is some support for the promise of ADR methods as a useful environmental dispute resolution mechanism. Two models have been suggested for the implementation of ADR methods in this area. The first is the integration model where ADR methods are used as an integral part of the whole environmental decision making process. This model assigns to ADR methods a dispute management or conflict resolution role. The second model gives ADR methods a reduced role as an adjunct to

\begin{quote}
\textsuperscript{94}P Alviano, "Environmental Conflict and the Failure of Community Participation" (1995) \textit{Alternative Dispute Resolution Journal} 33 at 34.
\end{quote}
existing administrative or adjudicative dispute resolution mechanisms. This model places ADR methods in a dispute settlement role.

This discussion of the Australian experience confirms a number of the concerns voiced in the United States literature as to the suitability of ADR methods in the resolution of environmental controversies. In particular the critics reiterate the concern over the political nature of environmental dispute resolution. These critics contend that the use of ADR methods fails to take adequate regard of the political nature of the process itself or the absence of decision making power in the stakeholders.

In addition the Australian experience has shown the importance of two further issues placing constraints on the wider use of ADR methods. The first issue discussed is the negative effects of the insistence upon the confidentiality of the process.

The issue of confidentiality is a recurrent theme in ADR practice in environmental matters. A persistent view is that the need for confidentiality conflicts with other important issues, such as the need for transparency of decision making. Whilesoever confidentiality remains a crucial requirement of ADR it will continue to act as a significant constraint on the expanded use of these methods in environmental controversies, especially in environmental conflicts.
The second issue is the perceived need to protect the public interest. This is seen as a crucial factor in the resolution of environmental controversies. Since the public interest is potentially present in all environmental controversies (either dormant or activated), this poses another significant constraint on the use of these methods. The literature to date suggests that controversies involving an activated public interest will always tend to be unsuitable for consensual resolution.

Given this review, the next step is to devise a research method to examine the implementation of ADR methods and the effect of these concerns.
CHAPTER SIX

RESEARCH METHOD

Introduction

The aim of this research is to investigate the use made in Australia of alternative dispute resolution (ADR) methods for the resolution of environmental controversies. The scope of such investigation needs to be confined in some manageable way. It is neither feasible nor possible to investigate all jurisdictions and contexts.

Chapter Two provided a method of classifying environmental controversies by the extent to which they exhibited a number of characteristics. Three of these characteristics were highlighted as being key determinants of the nature of the environmental controversy: value conflicts, questions of scientific uncertainty and public interest concerns. Those controversies which exhibited these three key characteristics were considered more likely to sit towards the environmental conflict half of the continuum. Conversely, controversies which did not exhibit these three key characteristics were more likely to fall in the environmental dispute half of the continuum. The classification method was not presented as being a definitive method of categorisation. Rather environmental controversies were said to be graduated along a continuum between the two extremes depending upon the full or partial exhibition or non-
exhibition of all the characteristics considered. This investigation aims to examine the use of ADR methods in resolving environmental controversies towards opposite ends of the continuum.

In addition, the discussion in Chapter Five provided one other ancilliary matter which warranted investigation. This review identifies two models of the use of ADR methods:
- an integration model, and
- an adjunctive model

As a secondary objective, the research will consider the prominent of each of these models in the introduction of ADR methods in the solution of environmental controversies in Australia.

Using these preliminary bases a series of hypotheses or research questions can be set. It is then necessary to select appropriate and manageable methods to test the questions raised.

The first function of this chapter is to clearly identify the research questions set. The second function is to detail the methods selected to test these questions and to justify the selection. The chapter also describes in outline the design of the research instruments used to carry out specific parts of the research.
Research Questions

Drawing from the literature review a number of expectations arise about the effectiveness of ADR methods in resolving environmental controversies. These expectations arise in particular from the nature of the response in Australia to the United States experience with ADR methods. In the United States there appears (in spite of some strongly voiced misgivings) to be an expectation that ADR methods can be effective in resolving controversies towards the environmental conflict end of the continuum. Indeed a great deal of the United States literature seems to equate "environmental disputes" (as they are referred to there) with environmental conflicts as described in this research, with little regard to the environmental dispute half of the continuum.

But this expectation is not reflected in the Australian experience. In Australia, the expectation appears to be that ADR methods can work well for environmental disputes but will rarely be effective in environmental conflicts. This expectation is said to be because of the differences in the nature of the environmental protection regime between the two countries. The assumption is made that because environmental conflicts in Australia are in the main dealt with administratively, ADR methods will prove to be unsuitable.
The hypothesis that arises as a result of these assumptions is:

*ADR methods will be effective in solving controversies towards the dispute end of the continuum but not controversies towards the conflict end.

**Research Method**

In order to test this hypothesis it is first necessary to review the fora in which environmental controversies are resolved in Australia to gauge the extent to which ADR methods are employed. This results in a very broad area of inquiry from which emerge three questions:

(1) Where are environmental controversies resolved in Australia?

(2) Do ADR methods play a significant part in the resolution of environmental disputes in Australia?

(3) Do ADR methods play a significant part in the resolution of environmental conflicts in Australia?

The focus of these broad questions needs to be refined to a more manageable scope for the purposes of this study. To make the research project manageable the focus has been reduce to the following questions:
(1) In what fora are environmental controversies resolved in New South Wales?

(2) How successful are ADR methods in the solution of controversies towards the dispute end of the continuum?

(3) How successful are ADR methods in the solution of controversies towards the conflict end of the continuum?

Selection of Method

It has proven extremely difficult to select suitable methods to test the second and third of these research questions. ADR methods by their nature are alternative to traditional means. As a result there is no institutionalised recording system for the number and nature of controversies dealt with nor the results obtained, as there is for instance in the case of matters dealt with by adjudication.

In addition, an essential characteristic of most ADR methods is confidentiality. This feature has added to the difficulties of the research in obtaining examples of controversies dealt with and results obtained. These access problems were compounded when controversies dealt with in a non-court annexed system were examined.
A further difficulty arose from the lack of transparency evident in controversies resolved by administrative means. These restrictions made it difficult to determine the extent of the use of ADR methods in this context.

The methods selected attempt to address these problems. Two specific case studies were conducted. The case studies selected are not necessarily typical of the use of ADR methods and indeed may be atypical. The case studies are not presented as representative of such use but merely illustrative.

Allowing for these restrictions the following methods were selected to address the research questions set:

**Question 1**

In what fora are environmental controversies resolved in NSW?

A review was undertaken of all known public and private fora dealing with environmental controversies in NSW. This review is reported in Chapter Seven and provides a context from which the case studies were selected. The case studies were specifically chosen to illustrate the use of ADR methods in dealing with what are hypothesised to be environmental disputes on the one hand, and what are hypothesised to be environmental conflicts, on the other. In addition, the case studies are chosen to illustrate the use of these methods as part of what are hypothesised to be adjunct and integration models.
Question 2
How successful are ADR methods in the solution of controversies towards the dispute end of the continuum?

Empirical research was undertaken in the form of a case study of the Mediation Scheme in the Land and Environment Court of NSW. All matters mediated in the period May 1991-December 1995 were examined. For the period May 1991-December 1994 the results of previous research was reviewed. The records of court files of all matters mediated in the period January to December 1995 were personally examined and substantially more data was extracted from such files than had been the case with the earlier research.

The first stage of the case study was to examine the characteristics of the cases mediated in the Land and Environment Court to seek to confirm the hypothesis that they could be classified as environmental disputes. The second stage of the case study was to assess the effectiveness of mediation as used in the Scheme.

This case study was chosen in the expectation that it would provide an example of ADR methods used in the form of an adjunct model.
Question 3
How successful are ADR methods in the solution of controversies towards the conflict end of the continuum?

Empirical research was undertaken in the form of a case study of the Interim Assessment Process (IAP) negotiations conducted by the NSW Resource and Conservation Assessment Council (RACAC) in its preparation of an interim assessment strategy for forests in NSW in 1996. In particular all Non-Government Organisation (NGO) participants in the process were interviewed.

The first stage of the case study was to examine the characteristics of the forestry controversy to test the hypothesis that it could be classified as an environmental conflict. The second stage of the case study was to assess the effectiveness of negotiation in the Interim Assessment Process.

This case study would chosen in the expectation that it would provide an example of ADR methods used in the form of an integration model.

Design of Research Instruments

In addition to selecting appropriate methods to test each of the research questions posed, it was necessary to design suitable
research instruments to carry out this testing using illustrative case studies. The following designs were developed.

**Case Study review of the Mediation Scheme in the Land and Environment Court of NSW.**

The Mediation Scheme offered by the Court has been in operation since May 1991. Access to quantitative data previously compiled by other researchers was available for a substantial part of this period. Additionally direct access was obtained to the Court's files for mediated matters for a further 12 month period of the Scheme's operation to update the information available to December 1995. This direct access allowed the collection of much more comprehensive information than previously obtained.

In summary, the Scheme was examined using the following data:

(a) Data from the Young Lawyers' survey\(^1\) conducted by questionnaires administered to participants in the 42 mediations conducted in the period May-December 1991.

(b) Data from Tow & Stubbs' court file analysis\(^2\) for the 140 mediations conducted in the two year period 1992-94.

---


Data from a review of court files for the 73 mediations conducted in the period January-December 1995.

The data reviewed was examined to test the hypothesis that the environmental controversies mediated could be classified as environmental disputes and to determine the effectiveness of such mediations.

**Case Study review of the Interim Assessment Process conducted by the Resource and Assessment Council of NSW.**

The use made of negotiation in the Interim Assessment Process (IAP) conducted by the Resource and Conservation Assessment Council (RACAC) during April 1996 was examined in detail.

RACAC was formed with the overall function of assisting the relevant Minister in the exercise of his administrative dispute resolution function to resolve issues concerned with the formulation and implementation of a comprehensive forestry policy in New South Wales.

The stated aim of the IAP was to identify those forests which would be set aside for inclusion in a reserve system on an interim basis. The aim of the negotiations was to allow stakeholders to participate in the selection of those parts of State Forests which would be deferred from logging to fully or
partially meet the reservation targets derived from the Commonwealth-State agreed conservation criteria.\(^3\)

The objective of the negotiation process was to produce options providing varying levels of satisfaction of conservation and resource targets.\(^4\) In the course of negotiations these were reduced to four conservation / wood supply scenarios for each of ten regions in eastern NSW.

The IAP negotiations were a series of face-to-face negotiations conducted between the major stakeholders in the forest controversy. Representatives of the following stakeholders were included:

Commonwealth Government
State Forests of NSW
National Parks and Wildlife Service
*NSW Forest Products Association
*Construction, Forestry, Mining and Energy Union
Aboriginal Communities
*Conservation Groups represented by the Nature Conservation Council\(^5\)

The review was conducted by way of a series of interviews with the three NGO participants (marked * above) conducted in 1996-97. These interviews focussed upon the parties' perception of

\(^4\)Ibid., 18.
whether the negotiation process constituted an effective method to resolve or manage environmental conflict over the forestry issue.

The Process was reviewed to test the hypothesis whether the forestry controversy could be classified as an environmental conflict and to determine the effectiveness of the negotiation process.

Conclusion

The methods selected are intended to provide a means of testing the hypotheses. It was anticipated that the two case studies would examine fora dealing with controversies located towards the opposite ends of the continuum. The first hypothesis was that the ADR methods used in the Land and Environment Court would be effective. The second hypothesis was that the ADR methods used in the Interim Assessment Process would not be effective. The extent to which these hypotheses were confirmed is the subject of Chapter 10.
CHAPTER SEVEN

REVIEW OF FORA FOR RESOLVING
ENVIRONMENTAL CONTROVERSIES IN
NEW SOUTH WALES

Introduction

This chapter examines the fora used to resolve environmental controversies in New South Wales to determine whether ADR methods are used and whether this use is on an integration or adjunct basis. The fora reviewed seek to cover bodies resolving environmental controversies both adjudicatively and administratively.

In the case of administrative fora, the decision-maker is vested with authority, usually by statute, to apply the relevant criteria and to exercise the authority in accordance with administrative law principles.\(^1\) If such decision is subject to review on its merits to a court or tribunal the review is nonetheless an exercise of administrative function. So a merit appeal remains a re-exercise of an administrative or executive power and in this way is fundamentally different from the judicial

function of a court in reviewing a decision.\(^2\) The administrative fora to be examined would thus include administrative or executive bodies, quasi-independent advisory bodies and courts or tribunals when dealing with merit appeals.

Adjudicative mechanisms usually involve a judicial or quasi-judicial body making a judgement in relation to a controversy or issue before that body.\(^3\) The decision made is binding upon the parties to it and in the case of judicial decisions establishes a precedent which may be binding upon others. An example of a controversy resolved by way of an adjudicative mechanism is the judicial review of the decisions of government ministers or officials.\(^4\) The grounds of such a review must involve alleged errors of law in the manner in which the minister or official has exercised his or her powers.

Within these two broad categories the fora to be reviewed can be listed as follows:

(1) Administrative or Executive Bodies
(2) The Land and Environment Court of NSW
(3) Commissioners of Inquiry for Environment & Planning
(4) The Australian Commercial Dispute Centre (ACDC).


\(^3\) Id., 150.

\(^4\) See for example Friends of Hinchinbrook Society Inc. v Minister for Environment & Ors. (1997) 142 ALR 632.
Fora Reviewed

Administrative or Executive Bodies:
Local Councils, State Government Ministers and Officials

These individuals or bodies have executive or administrative authority to resolve environmental controversies. The decision made by ministers or government officials or other consent authorities such as local councils may be to grant or refuse various consents or approvals. Additionally, they issue or withhold licences or permissions to carry out various activities which have an environmental impact.

Clearly the principal dispute resolution mechanism used by these bodies is administrative. In addition, there is some evidence of the use of consensual mechanisms. In the case of local councils, for instance, this may purely be on an ad hoc basis. North Sydney Council, for example, had formulated a specific policy to recommend mediation of environmental controversies by way of an integration model. Similarly, the pilot project conducted by the ACDC included as one of its recommendations the establishment of a mediation based process for resolving environmental

---

controversies at an early stage as a standard part of the Councils' approval processes.⁶

At state government level, consensual mechanisms have been considered and adopted as an adjunct to the administrative mechanism. A notable example is the use made of negotiation in the Interim Assessment Process conducted by the NSW Resource and Conservation Assessment Council previously referred to. The Council was established to assist the NSW Government in its decision making process to resolve the environmental controversy over the use of State Forests for logging. As outlined in Chapter 6, this is the focus of a case study reported in Chapter 9.

The decisions made by these bodies are subject to judicial review by a court or tribunal such as the Land and Environment Court of NSW. In addition some decisions are subject to a re-exercise of the administrative or executive power by way of an appeal on the merits, for instance by the Court exercising its administrative power. Such reviews have been the subject of considerable controversy.⁷

---

⁷Appeals are available under s.20 for the court to exercise judicial review power; under s.17 for merit appeals by applicants and under s.87 & 98 for third party appeals with respect to designated development.
Land and Environment Court of NSW

The Land and Environment Court of NSW (the Court) has power to resolve environmental controversies within its jurisdiction; in doing so it exercises judicial and administrative power and thus acts as both an adjudicative and administrative mechanism.

The Court was established under the provisions of the *Land and Environment Court Act 1979* (NSW) and commenced operations on 1 September 1980. The Court was described at the time of its enactment as a "somewhat innovative experiment in dispute resolution mechanisms" combining as it does both the exercise of judicial and administrative power".8

The Court was an innovative forum in the manner in which it had jurisdiction to exercise both these powers. Importantly, the tribunal was not subject to the doctrine (applicable to federal tribunals) separating the exercise of these powers. It could exercise administrative functions, as it does in merit appeals under classes 1, 2 and 3 of its jurisdiction (ss17-19), heard by judges or assessors. In addition, its judges could hear and determine class 4 civil enforcement proceedings, class 5 summary criminal prosecutions and judicial reviews.

---

generally. This combination was viewed positively in the early years of the Court:

"the new court exercises a more comprehensive jurisdiction in relation to planning and environmental matters than has hitherto been vested in any one appellate body."9

Class 1 generally relates to development appeals. Such appeals include applications against a consent authority's refusal of a development application or against the conditions imposed on a consent. This Class also includes appeals under the Environmental Planning and Assessment Act 1979 (NSW) by third parties in relation to "designated developments". These are matters which, by the nature of their operations, are likely to have a significant impact on the environment.10

Class 2 relates to building applications and orders issued by Councils for demolition and the like. Class 3 is the miscellaneous jurisdiction including cases relating to compensation, valuation and land tenure matters including claims under the Aboriginal Land Rights Act 1983 (NSW).

---

Class 4 relates to the civil enforcement of environmental laws. Such proceedings may be brought by consent authorities to restrain environmentally harmful acts or to enforce compliance with conditions of consent. This Class also allows a third party to seek judicial review of a decision by a relevant authority, such as a council or government Minister, to grant consent to a particular development. Such right is available primarily pursuant to s123 of the *Environmental Planning and Assessment Act* 1979 (NSW) but also under ancilliary Acts. However the majority of such third party appeals are made by commercial competitors rather than environmental objectors.11

Class 5 is the summary criminal enforcement of environmental laws and Class 6 is appeals against Magistrate's decisions in Local Courts in relation to environmental offences.

As well as these adjudicative and administrative mechanisms, the Court has introduced the use of consensual mechanisms in the form of mediation and conciliation in an adjunctive role. The Court commenced a Mediation Scheme initially as a pilot project in May 1991. As a result of the success of this pilot project, mediation was confirmed as part of the Court's procedure in December 1991. As outlined

---

in Chapter 6 the Mediation Scheme is the focus of the case study reported in Chapter 8.

**Commissioners of Inquiry for Environment and Planning**

The Commissioners of Inquiry as constituted under section 119 of the *Environmental Planning and Assessment Act 1979* (NSW) have power to inquire, inter alia, into environmental aspects of any proposed development the subject of a development application. The matters referred to the Commissioners are in the main matters "of State or regional significance, and generate considerable public debate".\(^{12}\) The Commissioners deal with both "designated developments" (principally different forms of heavy industry specified in Schedule 3 of the Regulations\(^ {13}\)) and other forms of significant development. This has the effect of widening the scope for public participation in the inquiry process. But at the same time it removes the appeal rights available to "any person" under s87 and s98 of the Act with respect to designated developments.\(^ {14}\).

The Commissioners' Inquiry does not lead to the resolution of the controversy as the final decision remains with the

---


\(^{13}\) The category has now been broadened beyond this to include certain non-industrial activities.

\(^{14}\) See section 101(9) as to the manner in which the Minister can exercise 'call-in' powers.
government. The function it provides is clearly an administrative one.

The fact that the inquiry process is non-determining has led to criticism of the process as "an expensive charade so as to give the appearance of fulfilling the public involvement objectives of the Act" and "an expensive means of enabling participants to 'let off steam'."\(^\text{15}\)

There is evidence of the Commissioners adopting ADR methods "alongside the traditional inquiry procedures".\(^\text{16}\) The particular methods said to have been used or encouraged are round table specialist conferences, directed negotiation and informal discussion between the parties.\(^\text{17}\) The use of these methods remain at present limited. As Wootten points out:

"They (inquiry processes generally) must be recognised as an important part of the context in which environmental mediation would operate in Australia, and may to some extent be seen as reducing the need for it."\(^\text{18}\)

The established nature of the Inquiry process, particularly in respect of public interest matters, shapes the way in

\(^\text{15}\) Taylor, "Public Scrutiny of Planning Decisions through the Legal System" (1989) 6 Environmental and Planning Law Journal 156 at 158.
\(^\text{17}\) Id., 5.
which environmental conflict, in particular, is resolved in New South Wales. The process has operated since 1980 and in that time conducted approximately 300 Inquiries, often dealing with contentious matters. Recent notable contentious examples are the Bengalla Coal Mine and the Lake Cowal Gold projects discussed and compared in Chapter 2.

**Australian Commercial Disputes Centre (ACDC)**

The ACDC was established with the support of the New South Wales Supreme Court and Government in 1986. Its purpose is "to assist all commercial disputants to resolve their disputes outside the court system".\(^{19}\) This purpose has been expanded from strictly commercial disputes to a wider range of disputes, including public interest and environmental controversies. The ACDC has been involved in a number of environmental controversies.\(^{20}\)

The ACDC cannot be strictly seen as a forum for resolving environmental controversies because that is not its main function, environmental controversies only coming before it on an ad hoc basis. Nonetheless its charter encourages the use of consensual mechanisms to resolve environmental controversies.


\(^{20}\) Wootten, op cit., note 18 above, 72-3.
To extend its role in this area the ACDC undertook in 1995 a pilot project under the Federal Government's "Strengthening Local Economic Capacity" (SLEC) funding scheme. The aim of the pilot project was to select a number of environmental controversies, subject these to facilitation or mediation and utilise the results as case studies to promote the benefit of ADR methods.21

A draft report was released in October 1996 detailing the five mediations conducted. The four controversies resolved are as follows:


The controversy involved a Development Control Plan (DCP) for a 29 lot subdivision at Forster. 21 objections had been received and 3 public exhibitions held over 15 years. A facilitation was held after the application for subdivision was lodged. Mediation occupied approximately 8 hours with prior separate meetings of opposing parties. The 100 people who attended the public meeting were reduced to 6 representatives and 6 observers. There were issues of privacy, traffic and noise. The facilitation addressed the meaning and scope of the DCP and the implications of this were examined by the stakeholders. It was accepted the subdivision could proceed under existing planning law. An agreement as to

---

acceptable conditions was reached and the controversy settled.
The subdivision was subsequently approved by the council subject to conditions which addressed the issues raised.


The controversy involved an application by a developer for the development of a landmark site for use as a supermarket, shops and restaurants. There were 20 objectors.
The issues were traffic, parking, the scale of the development and heritage issues.
A facilitation was held and opposing viewpoints were heard. Smaller meetings were held between the developer and particular objectors before a mediation session was conducted. Following the mediation agreement was reached to allow the development to proceed. Settlement was reached as all parties accepted the alternative to be protracted litigation and expense for the council and local community.
The development was approved at the next council meeting.


The controversy involved an application to extend construction hours to 24 hours, 7 days per week on a large construction site at East Circular Quay. The application
attracted an objectors' letter campaign and involved a conflict between the council's 'Living city' concept and the need for developers to meet deadlines. A large number of residents and resident action groups were involved. A facilitation was held and the objectors indicated they were prepared to negotiate and that they accepted that the project had to proceed. At issue were questions of noise and the risk of setting a precedent of lengthy construction hours. An agreement was reached on extended working hours subject to a number of agreed conditions. A recommendation put to a meeting of the Central Sydney Planning Committee was approved.


The controversy involved a government department plan to build a school hall on an existing school site to accommodate 600 primary school children. The local community was suspicious of the hall's potential functions and the effect it may have in terms of loss of green space, traffic and noise. A facilitation was held and a list of suggested conditions for development were distributed. This narrowed the issues but it was considered too late in the process to substantially amend the plans and the development was modified only marginally and subsequently approved.
Following the success of the pilot project, a recommendation was made that Councils proceed to implement a dispute resolution program using ADR methods as part of the standard Development Application/Building Application process. It was suggested that the use of ADR methods at this early stage would work to prevent further escalation of the controversy often engendered by methods such as public meetings.22

The extent of Use of ADR methods in the Fora Reviewed

It was reported in a recent seminar into the use of ADR methods that to date these methods had "not embraced wholeheartedly".23 The focus of the seminar was essentially on the mediation of those controversies which would be classified as environmental disputes in this study. A number of explanations were proffered.

Justice Lloyd of the Land and Environment Court of NSW on reviewing the high success rate of the Court's Mediation Scheme, asked rhetorically in relation to mediations, "Why are there so few of them?". He said he suspected one of the reasons was a reluctance on the part of Local Councils

22Id., 3.
to authorise their legal representatives or General Manager or Mayor to settle or compromise proceedings.\cite{24}

The limiting effect of this lack of authority was raised by a number of speakers who saw it as a major constraint to the fuller use of ADR methods. Others saw the reasons more in procedural terms, citing either the introduction of ADR methods too late in the dispute resolution process or a lack of knowledge in government circles about the availability and effectiveness of these methods.\cite{25}

It was reported to the seminar that a recent survey of Councils in the Sydney/Newcastle area showed "60% were starting to use mediation", though more than half of these had only been involved in 1-3 mediations to date.\cite{26}

Additionally, about 40% of these Councils were using their own staff trained in mediation, rather than using the preferred method of independent accredited mediators.

Other reasons offered touch upon some of the issues raised already in this study. Some Councils were reported as being concerned that the confidentiality aspects of mediation were inimical to the proper processes of dispute resolution for an elected body. This same concern was expressed in different terms by delegates of other Councils who said that mediation, with its required delegation of authority to compromise, involved an

\begin{footnotes}
\item[24] Id., 14.
\item[25] Id., 40-44.
\item[26] Id., 60. The survey was carried out by Carleen Devine, Sydney City Council.
\end{footnotes}
abrogation of their political responsibility. These concerns centred upon whether "the public good or the public interest" is being adequately taken into account by the negotiating parties when any compromise solution is reached.

Suggestions made to enhance the use of ADR methods, particularly the use of the Court's Mediation Scheme, included the viability of making participation mandatory. Favourable comparisons were made in this regard with the mediations conducted under the *Farm Debt Mediation Act 1994* (NSW) which "has been a very successful mandatory mediation offer". 

**Selection of Fora for Further Study**

From this review, fora were selected as the source for case study analysis of the use of ADR methods to resolve controversies. The case studies were selected in anticipation that they would be towards the ends of the continuum between environmental disputes and environmental conflicts.

The fora selected were:

(a) For environmental dispute issues- the use of mediation in the Land and Environment Court of NSW

27*Id.*, 66.
28*Id.*, 83.
(b) For environmental conflict issues- the use of negotiation in the Resource and Conservation Assessment Council's Interim Assessment Process.

Conclusion

This review has canvassed the fora in which environmental controversies are resolved in New South Wales. The review has provided an overview of the use of ADR methods in such fora. It is now intended to examine the case studies selected from these fora in order to determine how effectively ADR methods are used in their dispute resolution procedures.
CHAPTER EIGHT

MEDIATION IN THE LAND AND ENVIRONMENT COURT OF NSW - A CASE STUDY

Introduction

The aim of this chapter is to examine the use of ADR methods in the resolution of environmental disputes. This aim is addressed by examining the use of mediation in the Land and Environment Court of New South Wales (The Court). The types of controversies dealt with will be examined to determine if they fall in the dispute half of the continuum of environmental controversies. Having made a determination as to the nature of the matters mediated, an investigation will be made as to the effectiveness of such use.

Land and Environment Court of NSW Mediation Scheme

An Adjunct Model

As outlined in Chapter 7, the Court has specific jurisdiction which is divided into Classes. Controversies coming before the Court are dealt with in various ways depending upon the Class into which they fall. The role of mediation is as an option at defined stages in this process and so it operates in an adjunctive mode rather than in an integrative one.
The Court in exercising its jurisdiction to determine merit appeals pursuant to section 20(1)(e) and section 71 of the Land and Environment Court Act 1979 NSW (LEC Act) is exercising an administrative or executive power as distinct from a judicial power. Thus an appeal on the merits in Class 1-3 proceedings under the Act involves resolution by an administrative rather than by an adjudicative mechanism. In such proceedings, ADR methods are operating as an adjunct to administrative dispute resolution. In this form mediation is being used to resolve the controversy to finality, subject only to a supervisory overview by the administrative or executive body.

In comparison, when the Court conducts civil enforcement proceedings or judicial reviews in Class 4 matters pursuant to section 20 of the LEC Act it is exercising an adjudicative function. The first aspect of this jurisdiction is the civil enforcement of rights, obligations or duties imposed by a planning or environmental law as defined in section 20(3) of the Act. Additionally, the Court has jurisdiction "to review, or command, the exercise of a function conferred or imposed by a planning or environmental law" under section 20(2) of the Act. When mediation is used in Class 4 matters this involves the use of consensual methods as an adjunct to the exercise of an adjudicative function.

Mediation has had only a very small role to play in Class 4 matters. Mediation was conducted in only a small number of Class 4 matters (approximately 20 matters) up to
March 1995.¹ In the revised Land and Environment Court Rules 1996, mediation was specifically extended to all Class 4 matters.

Mediation in the form of an adjunct to an adjudicative function is more akin to the classic role proposed for mediation in the United States literature. However, in this light it is well to recall the comments of the then Chief Judge about the rationale behind a large proportion of Class 4 matters:

"Many people who object to developments on merit grounds have recourse to actions under s123 to change proposals on legal grounds. Such challenges sometimes have about them an air of unreality, with all parties pretending that they are concerned with legal niceties rather than the merits."²

With these comments in mind it may well be that a number of Class 4 mediations are merit reviews "in disguise" and are really no different in kind to the Class 1-3 mediations. If this is so, then for all practical purposes the use of mediation in the Court is as an adjunct to its purely administrative dispute resolution function.

Development of the Mediation Scheme

On 1 May 1991 the Court first introduced a mediation scheme in Class 1 and 2 proceedings. The history of the introduction of a mediation scheme into the Court is instructive.

One catalyst for the scheme's introduction was the report by the Public Accounts Committee of the Parliament of New South Wales following its "Inquiry into Legal Services Provided to Local Government in New South Wales". This inquiry commenced in September 1990 and the Smiles Report (as it became known) was issued in May 1991. One finding of the Report, anticipated from the outset, was to suggest that Councils were deliberately refraining from determining politically contentious development applications. The failure to determine such applications within a specified period then triggered appeal mechanisms to the Court under section 96 and section 97 of the EPAA Act as "deemed refusals" and Councils were spared the need to make a politically unpopular decision on the original substantive merit application. The Report noted the consequences of this approach in terms of the costs of legal services:

---

"The Land and Environment Court is clogged with cases that are appeals from council decisions that may well have been settled in a more speedy fashion and without the tens of thousands of dollars of legal costs incurred if only an alternative dispute resolution process was available."^5

As the then Registrar of the Court said, "the inquiry consolidated the debate"^6, and in April 1991, shortly before the release of The Smiles Report, the Court issued a Mediation Practice Direction to commence on 1 May 1991. In its report, the Committee acknowledged this development:

"The committee notes with enthusiasm the Court's initiatives put into place during the course of this inquiry"^7.

It is interesting to note that in the initial phase it was envisaged that outside mediators from the Australian Commercial Disputes Centre would be appointed by the parties to conduct the mediations.^8. But this proposal was not followed and the scheme became, and remains, a court-annexed one.

---

^5The Smiles Report, note 3 above, ix.
^7The Smiles Report, note 3 above, 95, par 5.102.
^8M Connell, op cit., note 6 above, 1.
The Practice Direction commenced on 1 May 1991 and provided for voluntary court-annexed mediation using the Registrar or Deputy-Registrar of the Court as mediators in Class 1-3 matters. This Practice Direction further provided that if objectors were involved it was anticipated they should attend "so that the views of all interested parties may be taken into account in any mediated settlement."^9

The Rules provided that "at callover the Registrar will where appropriate refer proceedings to mediation or conciliation in accordance with the Practice Notes."^10

It was under these joint provisions that court-annexed mediations were commenced in the Court, initially as a pilot program (from May-December 1991) and thereafter as a routine option offered between callover and hearing of a matter. The 1991 Practice Direction was replaced by Clause 12 of Practice Direction 1993 which came into force on 1 November 1993. Clause 12 headed 'Mediation' differed from the 1991 Practice Direction in that it more strongly emphasised the voluntary nature of the mediation. It said in part:

---

^9Land and Environment Court of NSW, Practice Direction, April 1991.
^10Division 6A Rule 2.
"It is a fundamental tenet of mediation that it is voluntary, therefore each party will be required to indicate that it wishes a dispute to be mediated."\textsuperscript{11}

The Practice Direction 1993 made the following further provisions:

(i) The option of a mediation session with the Registrar or Deputy-Registrar was available in Class 1-3 proceedings,
(ii) It was expected that mediation could be requested any time up to the first call over,
(iii) Mediation would usually be conducted at the Court,
(iv) Objectors could attend,
(v) It was anticipated that persons appointed to act on behalf of any party would have the ability to resolve the dispute,
(vi) Legal representation was not seen as necessary but would be allowed by leave,
(vii) At least one week before the mediation, the parties were required to serve on the other a statement of position and issues no more than 2-3 pages long,
(viii) On filing an initiating application in the Court a statement setting out the option of mediation could be handed to the lodging party who was required to serve a copy of the statement on the other side
(ix) In Class 3 (compensation matters) it was anticipated that parties would seek mediation after the exchange of

expert reports and that parties' valuers and other experts would be present at the mediation,
(x) Where agreement had been reached at mediation, effect to the agreement would involve one of the parties giving consent or both agreeing to be bound by the terms of settlement, necessary consent orders being placed before the Court for consideration.

A year later the Court was one a number of tribunals effected by the Courts Legislation (Mediation and Evaluation) Amendment Act 1994 (NSW) which came into force on 14 November 1994. This Act inserted new provisions headed 'Mediation and Neutral Evaluation' into, inter alia, the LEC Act being Part 5A, sections 61A-61L. This amending legislation indicated that its purpose was to:
"enable the Court to refer matters for mediation or neutral evaluation if the parties to the proceedings concerned have agreed to that course of action."\(^{12}\).

These provision were seen as "effectively formalising the court-annexed mediation conducted in this Court since 1991."\(^{13}\)

The definition of mediation provided for in the amending legislation does not mention the essential element of voluntariness, but section 61D(1)(b) makes the consent of

---

\(^{12}\)Section 61A(1)

\(^{13}\)Land and Environment Court of NSW, Annual Review 1994, 8.
the parties a condition precedent of the Court referring a
matter to mediation. Section 61E reiterates the essential
element of voluntariness by providing that attendance at
and participation in mediation or neutral evaluation
sessions are voluntary and that a party may withdraw
from the sessions at any time.

The amending legislation extended the scope of the ADR
methods available to the Court by adding that of Neutral
Evaluation, defining it as:

"a process of evaluation of a dispute in which the
evaluator seeks to identify and reduce the issues of fact
and law in dispute."\textsuperscript{14}

The other conditions precedent to the Court referring
proceedings for mediation or neutral evaluation are that
the Court considers the circumstances appropriate and
there is agreement by the parties as to who is to be the
mediator or neutral evaluator.\textsuperscript{15} This person may or may
not be a person whose name appears on a list compiled by
the Chief Judge of the Court under section 61H. In line
with the pre-existing mediation scheme in the Court the
first two names on the list are the Court's Registrar and
Deputy-Registrar. In order to be entered upon the list
persons were required to satisfy the following
qualifications:

\textsuperscript{14}Section 61B(2)
\textsuperscript{15}Section 61D(1)(a)&(c).
(1) completion of a recognised mediation training course 
including the satisfaction of any evaluation component of 
that course; and
(2) completion of a minimum of 10 mediations as either 
sole or co-mediator, with ongoing mediation experience 
preferably in local government, planning, building, 
community and environmental matters.\textsuperscript{16}

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

Implementation of the Scheme

In the early days of the mediation scheme a number of "designated development" matters were identified as being successfully mediated and approved by the Court.\textsuperscript{17} These were principally different forms of heavy industry specified in Schedule 3 of the Regulations to the EPA Act involving controversies which might well be classified as environmental conflicts in this research. Examples of mediation of substantial designated development matters were evident in the Court's Pilot Mediation Program. The Chief Judge indicated:

*Mediation has been successful in reducing time and costs. This is particularly evident in some very large multi-party designated development cases. For example, successful mediations have included a goldmine at Parkes, a mine at Tumut and an extractive industry at Cecil Park.*\textsuperscript{18}

The goldmine referred to was the Adovale Mine dispute over the impact of mining on grazing and farmland, mediated in mid 1991. It was referred to in the NSW State Parliament as "probably the most successful mediation to date".\textsuperscript{19}

\begin{footnotes}
\end{footnotes}
It was anticipated that controversies such as these, involving as they do a number of parties and a number of issues such as noise, vibration, dust, traffic, water quality, site rehabilitation and visual amenity would be particularly amenable to mediation.\textsuperscript{20} Such controversies might also exhibit the key characteristics of value conflicts, scientific uncertainty questions and public interest concerns. But this expectation was not borne out by the subsequent history of the Scheme.

Further minor modifications to the practice of mediation in the Court occurred with the repeal of the Practice Direction 1993 and Division 6A Rule 2 of the \textit{Land and Environment Court Rules 1980}. These provisions were repealed with the introduction of the new \textit{Land and Environment Court Rules 1996} (Part 18-Mediation). These rules were effective from 29 January 1996 and essentially repeat the provisions of Practice Direction 1993, providing that mediation is available in Class 1-4 of the Court's jurisdiction and that "parties may apply to the Court for referral to mediation of a matter arising in proceedings."\textsuperscript{21} This is subject, however, to the provisos in the legislation as to voluntariness (section 61G) and the Court's supervisory role (section 61G).

\begin{flushright}
\textsuperscript{20}F.M Naughton, op cit., note 4 above, 386. \\
\textsuperscript{21}Part 18 Rule 2.
\end{flushright}
Review of the Effectiveness of the Mediation Scheme

From the summary of the legal framework and practice of the Mediation Scheme, it can be seen that the Court has had a system of mediation in Class 1, 2 and 3 proceedings (and to a lesser extent Class 4 proceedings) operating since May 1991. As at June 1996, the mediation scheme at the Court had been in operation for a period of five years. In that time, 311 mediations have been conducted. Data is available from the Court for the first four and a half years of that period, during which time 285 mediations were conducted.

Two prior studies of this data are available:

(1) Survey by the Young Lawyers' Section of the Law Society of NSW of mediations conducted in the period 1 May to 31 December 1991.23


In addition a review of the Court files for matters referred to mediation in the period 1 January to 31

22D Rollinson, Deputy-Registrar, personal communication, 20 June 1996.
December 1995 was undertaken for the purposes of this study. From a review of this data it is anticipated that the operation of the scheme will be found to be an example of the use of ADR methods to resolve environmental disputes.

Environmental disputes are concerned with environmental issues dealing with competing amenities between human beings. An environmental dispute has been defined as:

"An environmental controversy dealing with competing interests, needs and goals over environmental issues, but which issues deal with competing amenities questions."

A method is needed to determine whether the controversies referred to the Court's mediation scheme can properly be classified as environmental disputes. For this purpose, it was proposed to use the review of the characteristics of the 73 mediations conducted in the period 1 January-31 December 1995. This period was chosen because the Court files for these matters were examined by the author and all information available as to the nature of the controversies was extracted. In the earlier research this issue had not been looked at in any detail. However, it is important to note that the data available on the files was for most purposes insufficient and inadequate.

The results for the three period reviewed will firstly be presented.
Review of Mediations

Mediations conducted 1 May – 31 December 1991

The Young Lawyers' study was conducted as a review of the first seven months of the scheme's operation, during which time the scheme operated as a pilot project. The purpose of the survey was to monitor the effectiveness of mediation in the Court. The survey method was by way of distribution of written surveys to parties to mediations in the period May-December 1991. The response rate was said to be approximately 50%.

The survey did not reach all parties. "About 50 surveys were distributed by the Court to parties to a mediation" and 26 responses were returned, whereas a total of 42 mediations were actually conducted in this period.

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

25 J Muller, op cit., note 23 above, 8
26 Id.
28 D Rollinson, note 22 above.
responses to deduce that approximately 75% of the responses were from lawyers.

The survey consisted of 12 questions, some with several parts. Responses were by way of simple Yes/No answers with an opportunity for additional open-ended comments. The report drew a number of conclusions from particular responses which have gained wide currency in the literature concerning the effectiveness of the Court's scheme. The most important of the conclusions the report drew were that:

(1) A substantial majority of the participants considered the mediation successful, and
(2) A high level of 'user satisfaction' was evident.

For the purpose of examining the validity of these conclusions only a select number of questions and answers are considered pertinent.29 These are examined in detail as follows.

Responses upon which a conclusion of 'success' were based.

In response to a question which asked: "Do you consider the outcome of your mediation as successful? (Whether or not

---

29For a full list of the questions and responses see Appendix A.

218
it proceeded to a hearing), 19 out of 26 respondents or 73% said Yes.

In response to a question which asked: "Which of the following factors do you consider added to the success?", 9 of the 19 or 47% indicated "total resolution/settlement of the dispute" and 3 of the 19 or 16% indicated "partial resolution of the dispute".

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

Firstly, the 'success' was not equivalent to resolution or settlement of the dispute, in the sense of a closure to the legal proceedings. There was no basis on which to say that 73% of matters referred to mediation were resolved or settled. This is clear from the responses to the second question referred to which suggest that a "total resolution/settlement of the dispute" occurred in less

\[30\text{Muller, op cit., note 23 above, 8.}\]
\[31\text{Young Lawyers', op cit., note 27 above, 14.}\]
than a majority (47%) and a "partial resolution" in a further 16%.

The nature of these responses provide an insufficient basis on which it is valid to compare the "73% successful" rate with other studies which are measuring 'success rates', in terms of resolution or settlement of disputes. This has, however, been the use routinely made of the survey results. 32

Responses upon which a conclusion of 'user satisfaction' were based.

From the responses to a question which asked in part: "If you are a lawyer did you experience any difficulties convincing your client to participate in the mediation?, it was apparent that only 6/26 or 23% of respondents were unrepresented and therefore completing the survey themselves.

It follows that more than three-quarters of the surveys were completed by legal representatives. As such there is no basis on which it is valid to draw the conclusion that the parties participating in the mediations were satisfied

with the process. The results can only support a conclusion that the legal representatives were satisfied, not the parties. However the data has consistently been cited as a measure of 'user satisfaction'.

The conclusion that this review draws is that the data does not support the two main published findings, namely that the scheme was achieving a 73% 'success rate' and that it was displaying a high level of 'user satisfaction'. The 'successful outcome' expressed as "73% of respondents" does not equate to the settlement of the controversy but to some lesser outcome short of resolution. Similarly, since less than a quarter of the respondents to the survey were direct parties the claim that the results of the survey provide evidence of "a high level of acceptance of the process" is not reliable.

Mediations conducted January 1992 - December 1994

The second survey reviewed consisted of an examination of "all Court files for matters that were the subject of mediation in the period January 1992 to December 1994". One hundred and seventy files were examined in that study. Its purpose was to review the success of the

---

33Pearlman J, Letter to the Editor 67 Australian Law Journal 941..
34Id..
35D Tow & M Stubbs, op cit., note 24 above, 1; note however D Rollinson, note 22 above, records 178 mediations conducted in this period.
The research method consisted of transcribing details from the front of Court files of matters referred to mediation and analysing the information obtained. The following details were recorded:

(1) the nature of the parties involved, local government, State authority, development/real estate company, planning consultant, third-parties (i.e. objectors), environmental group and private individual (as applicant).
(2) the location of the dispute, either the Sydney metropolitan area, coastal or regional.
(3) the Class of the dispute.
(4) the nature of the dispute, such as the determination of a development application, building applications, injunctions or compensation determination.
(5) the outcome of the mediation, in terms of "successfully mediated", "partially resolved" or "unresolved".

For the purpose of this study the raw data entries made by these researchers were re-examined to obtain information to answer the following questions:
(1) What was the Class of the dispute mediated?
(2) Who were the parties to the dispute?
(3) What was the nature of the dispute?
(4) What was the outcome of the mediation?\textsuperscript{36}

Findings
The following results were tabulated to answer these four questions.

**CLASS OF DISPUTE**

<table>
<thead>
<tr>
<th>Class</th>
<th>Mediations 1992 - 4</th>
<th>Total Matters before the Court 1992 - 4</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number %</td>
<td>Number %</td>
</tr>
<tr>
<td>1</td>
<td>102 60</td>
<td>2236 43</td>
</tr>
<tr>
<td>2</td>
<td>37 22</td>
<td>1015 20</td>
</tr>
<tr>
<td>3</td>
<td>23 13</td>
<td>1267 24</td>
</tr>
<tr>
<td>4</td>
<td>8 5</td>
<td>687 13</td>
</tr>
<tr>
<td>Total</td>
<td>170 100</td>
<td>5205 100</td>
</tr>
</tbody>
</table>

It can be seen that Class 1 disputes dominated the work of the Court in terms of mediations (60%), and less so in terms of hearings (43%) However the proportion of Class 1 disputes going to mediation is small, at only 4.5%.

Similarly the proportion of disputes in all Classes being mediated (successfully or otherwise) is small, at 3.3%.\textsuperscript{37}

\textsuperscript{36}Data examined courtesy of D Tow, personal communication, 30 May 1996.

\textsuperscript{37}D Tow & M Stubbs, op cit., note 24 above, 3 (NB. the 'total matters' figure is that registrations in the Court in the relevant period).
PARTIES

Table 2
Parties Involved

<table>
<thead>
<tr>
<th>Party</th>
<th>Number</th>
<th>Percentage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>local government authority (as respondent)</td>
<td>141</td>
<td>83</td>
</tr>
<tr>
<td>state authority (as respondent)</td>
<td>25</td>
<td>15</td>
</tr>
<tr>
<td>development/real estate co. (as applicant)</td>
<td>21</td>
<td>12</td>
</tr>
<tr>
<td>planning consultant (as applicant)</td>
<td>21</td>
<td>12</td>
</tr>
<tr>
<td>third party (as either)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>environmental group (as either)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>private individual (as applicant)</td>
<td>120</td>
<td>71</td>
</tr>
<tr>
<td>other (as either)</td>
<td>20</td>
<td>12</td>
</tr>
</tbody>
</table>

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

38 Id., 2.
Table 3
Nature of the Dispute

<table>
<thead>
<tr>
<th>Nature of the Dispute</th>
<th>Number</th>
<th>Percentage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DA involving dual occupancy</td>
<td>19)</td>
<td>11) total</td>
</tr>
<tr>
<td>DA involving medium density</td>
<td>11)</td>
<td>6) residential</td>
</tr>
<tr>
<td>DA involving other residential</td>
<td>7)</td>
<td>4) total</td>
</tr>
<tr>
<td>DA involving commercial</td>
<td>11</td>
<td>6</td>
</tr>
<tr>
<td>DA involving industrial</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>DA involving other unspecified</td>
<td>33</td>
<td>19</td>
</tr>
<tr>
<td>Appeals over conditions of consent (DA)</td>
<td>21</td>
<td>12</td>
</tr>
<tr>
<td>Matters pertaining to BA</td>
<td>31</td>
<td>18</td>
</tr>
<tr>
<td>Injunction/restraining orders</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Compensation</td>
<td>17</td>
<td>10</td>
</tr>
<tr>
<td>Others</td>
<td>16</td>
<td>9</td>
</tr>
<tr>
<td>TOTAL</td>
<td>17739</td>
<td>100</td>
</tr>
</tbody>
</table>

It can be deduced from this data that approximately half of the disputes were concerned with the determination of Development Applications, either for residential use (21%), commercial use (6%) or industrial development.

---

39Some mediations involved more than one issue.
(4%). The data recorded did not permit an allocation of the remaining 19%.

The emphasis on residential disputes was reflected in the proportion of mediations concerned with matters pertaining to residential Building Applications for construction or modification of dwellings (18%).

It is possible to deduce from the data that a significant proportion of the matters mediated involved disputes over residential, commercial or industrial land use. But to conclude that such disputes are consistent with disputes over competing amenities and are therefore environmental disputes must be only very tentative.

RESULT

<table>
<thead>
<tr>
<th>Table 4</th>
<th>Outcome of mediations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
</tr>
<tr>
<td>Resolved</td>
<td>124</td>
</tr>
<tr>
<td>Not Resolved</td>
<td>46</td>
</tr>
<tr>
<td>Total</td>
<td>170</td>
</tr>
</tbody>
</table>

These results show that a total of 73% of disputes mediated were "successfully resolved". A successful resolution was defined as a matter in which agreement was reached on a mutually acceptable approval (usually by way of consent orders) or where the proceedings were withdrawn. Matters which subsequently proceeded to a

hearing were classified as unsuccessful and 27% of disputes were in this category. It was noted that the data on the court file did not allow a determination as to whether there had been some partial agreement in the sense of lessening the areas of dispute. 41

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

(a) there was no evidence of any partial agreement
(b) there was no evidence of participants other than those on the record.
(c) there was no evidence as to whether any agreement reached was implemented.

41 Id., 5.
These restrictions hampered the methodology of Tow & Stubbs study. More adequate records of the mediations conducted would have assisted more comprehensive analysis of the effectiveness of the Mediation Scheme. Steps to address this inadequacy will be addressed later in this study. To overcome these restrictions, the Tow & Stubbs methodology was modified when examining mediations in the Court in the 12 month period to December 1995.

Mediations conducted January 1995-December 1995

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

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

With the co-operation of the Court registry, the files of all matters the subject of mediation in this 12 month period were examined. Notations recorded on the front of the file were read and the body of the file was examined.

---

4273 files were examined; D Rollinson note 22 above, records 74 mediations conducted in this period.
to peruse pleadings, affidavit material and expert reports filed. Details were then transcribed and recorded in the categories, using a data entry sheet adapted from Tow and Stubbs, to provide data on the following matters:

**Class:**
Whether the dispute was in Class 1-4 in terms of the Court's division of jurisdiction.

**Parties:**
Whether the parties consisted of only an applicant and a respondent or whether objectors or third parties were involved; whether the respondent was a local or state government authority.

**Nature:**
Where the dispute involved a development application whether it involved a residential or commercial / industrial development and the type of developments involved; what kinds of building application disputes were mediated; what type of compensation disputes were mediated.

**Outcome:**
Whether the dispute was solved by mediation. Solution was taken to have occurred in two situations:

(a) where consent orders were agreed to by the parties to provide for the approval of an amended or substituted application; or
(b) where the appeal was discontinued on the basis that agreement as to a course of action had been reached between the parties.

Unsolved mediations were taken to be those which subsequently proceeded to a hearing in the Court.

By using this methodology significantly more information was available for analysis than was available in the Tow & Stubbs study. The data collection went further than that of Tow & Stubbs in two important respects.

Firstly, more details were collected as to the nature of the dispute. The extent of Tow & Stubbs' data collection in this area went to listing the matters as development application, building application, injunction or compensation. Data collection in the present study extended this to include whether the development application related to residential, commercial or industrial development and the type of development involved in terms of single dwelling, dual occupancy, medium density, subdivision (for residential) and business premises, factories and plants (for commercial/industrial). Similar data was collected as to the type of building applications made. It was anticipated that from this additional data some tentative conclusions could to be reached as to the nature of the matters mediated.
Secondly, further data was collected as to the nature of the outcome reached. Tow & Stubbs collected data to determine whether the dispute was "successfully resolved, partially resolved or unresolved". They conceded there was no data on which matters could be classified as "partially resolved". Data collection in the present study attempted to extend this to determine whether the nature of the settlement reached equated to a 'solution'. From this additional data, it was anticipated that it may be possible to draw some conclusions as to the extent to which the outcomes reached equated with some objective measure of success.

Findings

The following results were tabulated in relation to these matters.

CLASS OF DISPUTE

<table>
<thead>
<tr>
<th>Class</th>
<th>Mediations 1995</th>
<th>Total Matters before the Court 1995</th>
<th>Mediation/total matters</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>%</td>
<td>Number</td>
</tr>
<tr>
<td>1</td>
<td>40</td>
<td>55</td>
<td>1038</td>
</tr>
<tr>
<td>2</td>
<td>20</td>
<td>27.5</td>
<td>225</td>
</tr>
<tr>
<td>3</td>
<td>12</td>
<td>16.5</td>
<td>208</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>1</td>
<td>256</td>
</tr>
<tr>
<td>Total</td>
<td>73</td>
<td>100</td>
<td>1727</td>
</tr>
</tbody>
</table>

43 The Land and Environment Court Annual Review, Year Ended 31 December 1995, Annexure A "Caseflow in the Court, Registrations".
The vast majority of matters were in Classes 1 or 2 (82.5%).\textsuperscript{44} Class 3 matters relating to compensation and valuation accounted for a further 16.5%. Of the matters mediated there was one Class 4 matter, which was an objection to a development consent for a restaurant extension. The 73 mediations conducted in 1995 represented only a small proportion, 4.2%, of all matters registered in the Court in that year.

**PARTIES**

<table>
<thead>
<tr>
<th>Table 6</th>
<th>Parties Involved</th>
<th>Number</th>
<th>Percentage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>local government authority (as respondent)</td>
<td>61</td>
<td>83.5</td>
</tr>
<tr>
<td></td>
<td>state authority (as respondent)</td>
<td>12</td>
<td>16.5</td>
</tr>
<tr>
<td></td>
<td>individual (as applicant)</td>
<td>54</td>
<td>74</td>
</tr>
<tr>
<td></td>
<td>developer (as applicant)</td>
<td>19</td>
<td>26</td>
</tr>
<tr>
<td></td>
<td>objector/third party (as either)</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

There was no formal notation on the file as to parties attending. In only 3 of the 73 matters (4%) was there any evidence of objectors or third parties attending the mediation as a party. One case involved a third party appeal where the applicant opposing a development

\textsuperscript{44}The proportion of overall matters in Class 1 as compared with Class 2 had changed significantly over the period 1992-95, essentially reflecting a trend in the Court for a predominance of matters to be filed as Class 1 proceedings.
consent and the developer was present at the mediation, not yet having been added as a party. In the second case, the objector was an adjoining owner supporting a demolition order against his neighbour. In the third case, a group of community objectors were noted as attending to oppose a development application for a concrete batching plant on the North Coast of New South Wales.

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

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

**NATURE**

<table>
<thead>
<tr>
<th>Table 7</th>
<th>Nature of the Dispute</th>
<th>Number</th>
<th>Percentage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DA - dual occupancy</td>
<td></td>
<td>10)</td>
<td>14)</td>
</tr>
<tr>
<td>DA - medium density</td>
<td></td>
<td>9)</td>
<td>total 12) total</td>
</tr>
<tr>
<td>DA - subdivision</td>
<td></td>
<td>4)resident'1</td>
<td>5)resident'1</td>
</tr>
<tr>
<td>DA - single dwelling</td>
<td></td>
<td>9)</td>
<td>32 12) 44</td>
</tr>
<tr>
<td>DA - commercial</td>
<td></td>
<td>7)</td>
<td>10</td>
</tr>
<tr>
<td>DA - industrial</td>
<td></td>
<td>2)</td>
<td>3</td>
</tr>
<tr>
<td>BA - residential</td>
<td></td>
<td>13)</td>
<td>18</td>
</tr>
<tr>
<td>BA - commercial or industrial</td>
<td></td>
<td>0)</td>
<td>0</td>
</tr>
<tr>
<td>Compensation - residential</td>
<td></td>
<td>12)</td>
<td>16</td>
</tr>
<tr>
<td>Other - demolition/remedial</td>
<td></td>
<td>7)</td>
<td>10</td>
</tr>
</tbody>
</table>
Of the 73 files examined, 41 of these, or 56%, related to Development Applications, either in terms of appeals against the planning authority's refusal to approve the application or against the conditions of approval. As a proportion of all the files examined, 32 of these matters (44%) were concerned with development applications for residential use (dual occupancy, medium density, subdivision, single dwellings); 7 mediations involved commercial developments (10%) and 2 mediations concerned industrial developments involving a factory and the concrete plant referred to above (3%).

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

"Other matters", relating to demolition or removal orders, constituted 10% (7) of mediations. The balance of 12 matters (16%) dealt with claims for compensation due to highway construction. All of the demolition orders and all the compensation disputes related to residential properties.

The total number of matters which could be classified as "residential" was 64, or 87.5% of all disputes referred to mediation.

RESULT
| Table 8  
Outcome of mediations |
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>Solved</td>
</tr>
<tr>
<td>Not Solved</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

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

**Can the controversies mediated in the period January to December 1995 be classified as environmental disputes?**

The method suggested for classifying an environmental controversy as a dispute is to use the characteristics detailed in Chapter 3. For simplicity sake, the comparison is confined to the three key characteristics which are said to capture the essence of the irreconcilable conflict over values or goals.

The three key characteristics are:

* value conflicts
* scientific uncertainty questions
public interest concerns.

A controversy which does not display these three characteristics is classified instead as an environmental dispute.

A review of the characteristics of the 73 mediations conducted in the period January-December 1995 is used to determine whether these controversies exhibit the three key characteristics. It is to be emphasised that the data obtained from the files does not allow this classification to be made in any conclusive fashion. Allowing for limitations as to the extent and nature of the information available a tentative conclusion is offered.

Do the mediated matters exhibit value conflicts?

Any distinction in value conflicts is really one of degree. To the participants the values in dispute may be perceived as fundamental, though objectively they might not be of the fundamental nature necessary to equate to an environmental conflict.

Nothing in the information available supports a conclusion about whether the controversies mediated involve such fundamental value conflicts. There is no data available as to the subjective considerations of the parties involved in

---

For full details of the characteristics disclosed see Appendix B.
the matter. But the nature of the subject matter of the controversies certainly does not suggest matters involving conflicting fundamental values.

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

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

Do the mediated matters involve questions of scientific uncertainty?

---

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

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

**Do the mediated matters display public interest concerns?**

It will be recalled from our discussions in Chapter Two that all environmental controversies involve the public interest. The distinction was made however between those in which the public interest was dormant (environmental disputes) and those in which the public interest was
aroused (environmental conflicts). All of the respondents in the matters mediated were government bodies, implicitly representative of, and responsive to, public interest. But there was nothing in the subject matter of the controversies, nor in the information gleaned from the court files, to suggest that the public interest had been aroused. In only one case, namely the concrete batching plant referred to, did the file indicate public interest concern. This was apparent from the fact that resident groups were noted as being involved and expert reports were only on the Court file in this one matter.

In the case of residential developments the public interest may be dormant. In larger designated development matters, involving for example extractive industries, the public interest may well be aroused. But such subject matter was not evident in any of the 73 files of mediated matters examined.

The conclusion reached following this review is that the controversies subject to mediation in the Court's mediation scheme do not exhibit the key characteristics of environmental conflicts. The matters mediated were therefore classified as disputes. This conclusion can at best be tentative in view of the sparsity of information available on the files. The controversies are analysed as examples of the effectiveness of ADR methods in the resolution of environmental disputes.
Conclusion

From the data obtained for the 12 month period to December 1995, the results can be summarised as follows:

1. In a small number of the matters coming before the Court the parties agree to mediation.

Of the 1727\textsuperscript{47} matters registered in the Court in Class 1-4 in 1995, 4.2% were subject to mediation.

Mediation is 'offered' by the Court in all Class 1-4 matters but it is difficult to determine how rigourously the policy is policed. Parties are issued with a document when they first lodge proceedings in the Court setting out details of the mediation service. This document must be served on the other party when serving the initiating process to draw that party's attention to the availability of the alternative.\textsuperscript{48} The parties are reminded at the first call-over that mediation is available and they are asked to indicate if they wish to mediate. As the Court's emphasis is on strict voluntariness, if both parties do not indicate

---

\textsuperscript{47} The Land and Environment Court Annual Review, Year Ended 31 December 1995, Annexure A "Caseflow in the Court: Registrations".

\textsuperscript{48} In this regard see the comments of Lynn Taylor, Solicitor, who said that in addition to sending the prescribed form her firm also sends a letter making overtures as to using ADR methods, "To date, we have never had an answer- ever -from the council" in Parliamentary Accounts Committee, Proceedings of the Interactive Seminar on "Dispute Management in Local Government" (1998) PAC Report No. 24/51, NSW Parliament, 1998, 30.
consent at this time the alternative of mediation seems to be pursued no further.

2. Mediation is being effectively used to resolve environmental disputes, the subject of administrative proceedings in the Court.

Using agreement rates as a tangible measure of effectiveness, the data for the 1995 year disclosed a 'success rate' of 73% which was identical to the earlier study. Without overstating the empirical findings, on the limited data available it has been asserted that the matters mediated in the Court satisfy the definition of environmental disputes. The data does not allow a conclusion as to whether the solutions reached equate to a 'settlement' or a 'resolution' of the matters in dispute in the sense of satisfying all or some of the needs of the parties.

3. Mediation is used primarily for residential disputes

The data only allows this conclusion to be made tentatively. It discloses that 87.5% of matters mediated could be classified as disputes relating to residential matters. The 'success rate' for such disputes at 61% was lower than the average of 73%. One tentative explanation for this discrepancy is that the option of mediation may be
taken up in more 'difficult' residential disputes than is the case with 'difficult commercial/ industrial disputes.

Drawing together the results of the review of the two earlier studies and the study carried out for this research some further tentative conclusions can be made. The results show that an effective mediation scheme has been developed in the Court since its introduction in May 1991. The scheme resolves about 75% of the matters referred with the consent of the parties to mediation. These matters represent a small proportion of the controversies which are dealt with by the Court, either administratively or adjudicatively. In the vast majority of the controversies dealt with mediation is operating as an adjunct to an administrative dispute resolution function.

The controversies mediated do not exhibit the key distinguishing characteristics of conflicts and have been classified as environmental disputes. It was anticipated that disputes by their nature had the potential to be negotiated, even though the perception of incompatibility of interests existed. The hypothesis advanced was that such disputes would be amenable to mediated settlement. This was confirmed by the empirical results obtained, subject to the caveat that the matters mediated could only tentatively be classified as environmental disputes.

Yet mediation has not become the preferred method of resolving such disputes. Disputants still prefer the
dispute to be resolved by the Court exercising its administrative function as distinct from a settlement the parties reach themselves. The reason for this continued reluctance and whether it is the reluctance of applicants, government respondents or the court itself has been considered in Chapter Seven and warrants further attention. The Court sees the scheme as a "customer service" but it remains at present a largely under-utilised one. The suggestion that "given sufficient resources the Court could potentially introduce a range of ADR methods to supplement" the formal system may indicate that the basis of the limited use is funding.\textsuperscript{49} It may be that the Court's own agenda is suited by minimising the use of mediation in the absence of increased funding.

\textsuperscript{49}J H Keogh, "Dispute Resolution Systems in the NSW Land and Environment" (1996) 7(3) Alternative Dispute Resolution Journal 169 at 180.
CHAPTER NINE

NEGOTIATING THE FORESTRY CONFLICT
- A CASE STUDY

Introduction

The aim of this chapter is to examine the use made of ADR methods in the resolution of environmental conflicts. Environmental conflicts are defined as:

"Environmental controversies dealing with competing interests, needs and goals over environmental issues, in particular the apparently non-negotiable issues of value conflicts, questions of scientific uncertainty and public interest concerns."

Environmental conflicts include major conflicts over uranium mining and land use. The main ADR method adopted in this area has been direct negotiation rather than assisted negotiation methods, such as mediation.

This aim is addressed by an examination of the use of negotiation in the resolution of an environmental conflict. The controversy over forest use was chosen on the intuitive expectation that it represented an environmental conflict. This expectation is tested by an examination of the characteristics of the forest controversy.
Two examples of the use of negotiation in forestry controversies are examined. The first is a review of the use of negotiation in the Salamanca Process conducted in Tasmania in 1989-1990 which produced a negotiated outcome. A more detailed case study approach is used to examine a series of stakeholder negotiations in the Interim Assessment Process (IAP) conducted in New South Wales in 1995-96 to resolve conflict over the implementation of forest policy.

It is intended to examine the use of negotiation in each process. In the case of the Salamanca Process, this is confined to an overview of the negotiation process. In the case of the IAP, the assessment draws upon responses obtained in a series of interviews with the participating parties at the time these negotiations were conducted in April 1996.

The resolution of environmental controversies is usually by an administrative mechanism, either by ministerial or bureaucratic action. Accordingly, the examples reviewed consider the use of negotiation as an adjunct to the administrative mechanism of dispute resolution.

The Forestry Debate: an environmental conflict?

The forestry debate is a long standing controversy over the use of environmentally significant native forests, centred particularly on the forests of the North East and South East coasts of New South Wales and in Tasmania. The controversy centred on logging for timber and woodchips and the
environmental consequences of this practice. The significant issues in dispute include the effect on habitats considered crucial for endangered species, the benefits of preserving old growth forests and the need to balance long term security of wood supply to the timber industry with the requirements of ecologically sustainable forest management.

In order to determine whether the forest controversy can be classified as an environmental conflict, it is necessary to see if it displays the characteristics of environmental controversy. In particular, does it display the three key characteristics isolated as indicative of the irreconcilable disagreement which marks an environmental conflict namely: value conflicts, questions of scientific uncertainty and public interest concerns?

A value conflict clearly exists between conservationists and the forestry union and the timber industry. Conservationists, on the one hand, value forests in terms of their biodiversity, the irreplacability of old growth forests and the ecological, social and cultural benefits of the remaining wilderness areas and endangered species habitats. The timber industry and the forestry union, on the other hand, value forests in terms of protecting the collective worth of forest industry employment, the social and economic well being of communities reliant on the timber industry and the benefits of maintaining a sustainable timber industry supplying a renewable resource. Both sides profess to value the forests in environmental terms but the aspects they value are diametrically opposed.
Questions of scientific uncertainty centre upon the interpretation of what ecologically sustainable forest management entails. There is a wide divergence of views as to what constitutes old growth forest and wilderness areas and the extent to which they exist in native forests and their importance in preserving biodiversity. Both sides accept that old growth forests should no longer be logged and that such forests are an irreplaceable resource, but the debate rages over the nature of the timber resources which satisfy this classification. There are also questions of scientific uncertainty in terms of the effects of disturbance of endangered species habitats and the destruction of forest biodiversity. Hence questions of scientific uncertainty clearly arise in forestry controversies.

Both sides of the debate vehemently assert that they represent the public interest. The effects of any long term resolution of the forest controversy is widely reported in the media. Thus forestry controversies generate and activate public interest concerns.

On the basis of this brief examination, it is assumed that this conflict satisfies the three key characteristics of environmental conflicts. This conclusion can be reached with more certainty than was possible in the case of the controversies mediated in the Land and Environment Court. Accordingly, for the purposes of this study, the forest debate is classified as an environmental conflict.
The Salamanca Process

The Salamanca Agreement Process (so called after the venue of the original negotiations) is a negotiation process which "evolved from the rubble of the 1988 Helsham Inquiry". The process began with some informal discussions held before the 1989 Tasmanian State election between members of the Tasmanian Farmers and Graziers Association and conservationists over the long running forest conflict.

A Parliamentary Accord between Labor and the Green Independents put the Field Labor government into power in May 1989. Part of this Accord was an agreement to attempt a non-traditional approach to resolving forest conflict. The formal Salamanca Agreement to conduct such negotiations was entered into on 31 August 1989. The parties to the agreement to negotiate were representatives of the Forest Industries Association of Tasmania (FIAT), the Tasmanian Trades and Labor Council (TTLC), the Tasmanian Farmers and Graziers Association (TFGA), the Tasmanian Forestry Commission (TFC), the Wilderness Society and the Australian Conservation Foundation [the latter two to later combine as the Combined Environment Groups (CEG)] and the Tasmanian Government. The Agreement bound the parties to work together for 12 months to develop a draft strategy for forest management.

The Agreement was institutionalised by the establishment of the Forests and Forest Industries Council of Tasmania (FFIC) in February 1990. It was the task of the FFIC to develop a final Forests and Forest Industries Strategy (FFIS) by 1 September 1990. Essentially the FFIS was intended to provide a strategy which would guarantee security of resource supply, security of employment and security and protection of conservation values. The wide ranging scope of the FFIS saw the membership of the Council expanded to include further representatives from the Commonwealth Government, the Municipal Association of Tasmania, the Woodcraft Guild and the Tasmanian Guild of Furniture Manufacturers. Subsequent additions were made to include representatives of the Tasmanian Logging Association, Tasmanian Beekeepers Association and the Tasmanian Traditional and Recreational Land Users Federation.

The Council formed the following subgroups:

1. "Technical/Scientific Working Groups" within the FFIC to focus on specific issues and areas of dispute,
2. "A Balanced Panel of Experts" to advise on the conservation values of contentious areas,

---

3 Sandford, op cit., note 1 above, 4.
4 Id., 5.
At the same time broader public participation was encouraged through an extensive consultation process involving the formation of 14 "Regional Advisory Groups".

On 1 June 1990 the draft "Key Issues and Principles Likely to Shape a Forests and Forest Industry Strategy for Tasmania", was agreed to and adopted by all parties. A period of two months of public consultation then followed. On 14 September 1990, the recommendations for the final FFIS was released in the form of a final strategy "Secure Futures for Forests and People". However the CEG did not agree to the final strategy as they considered it would have allowed export woodchipping to increase by up to 50%. The Environmental Groups then withdrew from the process.\(^5\)

The Tasmanian Labor Cabinet endorsed 'in principle' the recommendations in the final strategy on 1 October 1990. The Green Independents considered this a breach of the Parliamentary Accord and for this and other political reasons the Labor/Greens Accord was broken. The Salamanca Agreement Process effectively ceased from that time.

The exercise was not successful in the sense that it did not reach a consensus agreement which was subsequently implemented. However Sandford pointed out in 1991 that:

"the Salamanca process is not about failure. A lot of common ground has been identified and there are many issues of economic, social and environmental importance that have been or are still being, worked on by the parties."^6

Similar sentiments are expressed by Wootten^7 and Bonyhady^8, namely that the use of negotiation to resolve environmental conflict was an ambitious endeavour which warranted revisiting.

The use of negotiation was revisited in the successful 1991 Conondale Ranges Agreement over the management of native forests in South East Queensland^9 and in the 1996 Interim Assessment Process designed to implement revised forest policy in New South Wales. It is the latter which is examined in detail here.

The Forestry Conflict and the Interim Assessment Process

The origins of the Interim Assessment Process lie in the framework set by the joint Commonwealth and State Governments' National Forest Policy released in 1992. This policy set a number of benchmarks and its adoption was agreed to by the Commonwealth, State and Territory Governments in a

^6Sandford, op cit., note 1 above, 5.
^7Wootten, op cit., note 2 above, 75.
^8Bonyhady, op cit., note 5 above, 23.
^9Id., and see earlier discussions in Chapter 5.
joint National Forest Policy Statement (NFPS) later that year. In particular, the NFPS provided for the establishment of "a comprehensive, adequate and representative (CAR)"\textsuperscript{10} forest reserve system on public land by the end of 1995, supplemented by relevant private forests by 1998.

The CAR forest reserve system as implemented in New South Wales was interpreted to mean:

(1) "Comprehensive": a network of forest parks protecting the full range of native forest communities found in NSW
(2) "Adequate": a reserve system large enough to protect the vast range of forest dwelling plants.
(3) "Representative": a reserve system including all natural varieties within each forest type or species.\textsuperscript{11}

The political will to ensure the implementation of this policy was laid through a series of pre-election commitments made by the then Labor Opposition prior to its election to government in March 1995. Post-election pressure to meet these commitments was substantial and on 13 June 1995 the NSW Government announced the NSW Forestry Policy which included adoption inter alia of the CAR reserve system.

\textsuperscript{10}National Forest Policy Statement (1995) AGP, Canberra.
\textsuperscript{11}Intergovernmental Technical Working Group, Report: Broad Criteria for the Establishment of a Comprehensive, Adequate and Representative Forest Reserve System (July 1995) JANIS, Canberra and see also The Joint Commonwealth-NSW Government Report, Deferred Forest Areas (December 1995) AGP, Canberra.
Following this, in July 1995 specific criteria for achieving the CAR forest reserve system were proposed by the Commonwealth Government. The Commonwealth's criteria were developed by an advisory panel of scientists chaired by Australia's Chief Scientist. These criteria included:

* a broad benchmark of 15 per cent of the pre-1750 distribution of each forest community to be protected within conservation reserves;
* the retention in reserves of at least 60 per cent of existing old growth, increasing up to 100 per cent for rare old growth;
* the protection of 90 per cent or more, wherever practicable, of high quality wilderness; and
* endangered species protection.\(^\text{12}\).

These criteria were endorsed as a "broad benchmark" by the NSW government in the Scoping Agreement signed with the Commonwealth on 25 January 1996. However given the long-standing dispute between stakeholders in the forestry debate particularly in New South Wales, implementation of these benchmarks on a regional basis were considered likely to produce further conflict. Accordingly, it was necessary to find an acceptable implementation mechanism to achieve these criteria.

Progressing to a full CAR reserve system in one step was not considered feasible and so a short-term, interim protection for

\(^{12}\text{National Forest Conservation Reserves, Commonwealth Proposed Criteria, A Position Paper, July 1995, AGP.}\)
areas which might be required for the CAR reserve system was required. The NSW Government policy allowed for an initial Interim Assessment Process (IAP) to provide this temporary solution to the implementation problem. This was an interim arrangement to ensure that any areas which might be needed for the reserve system were not logged before the CRAstage took place.

Implementation methods were to be addressed through the formation of a Resource and Conservation Assessment Council (RACAC). Following its creation RACAC was to adopt a three stage process for identifying those forest areas which would be reserved from logging and those which would be released.

The first phase consisted of the formation of a Steering Committee and a number of Working Groups. The Conservation Working Group (CWG) was formed to develop methodologies and guidelines for applying the reserve criteria. In so doing the group was to establish forest type and fauna databases for all public land tenure areas in NSW. The CWG was supported by specialist "Flora and Fauna Panels". The panels comprised representatives of the National Parks and Wildlife Services, the State Forests and two independent experts. In addition, a Social-Economic Working Group (SEWG) was formed to provide information and advice on the social and economic implications of the adoption of a CAR reserve system.

---

14Id., 15.
The second stage of the process was the IAP negotiation stage, anticipated to be completed by mid-1996. In the negotiation stage representatives of all stakeholders were to negotiate the specific implementation of the conservation targets set in the Scoping Agreement on a regional basis utilising the data bases established by the Working Groups.

The third phase was termed the Comprehensive Regional Assessment process (CRA), an extended series of data collection exercises and further negotiations and public consultations expected to be concluded by the end of 1998 which would finalise the reserve system.

It is the second of these phases, the negotiation process itself, upon which this study focuses.

The IAP Negotiation Process

The IAP negotiations were a series of face-to-face negotiations conducted between the major stakeholders in the conflict over forest use in New South Wales. Representatives of the following stakeholders were included:

The Commonwealth Government
State Forests of NSW
National Parks and Wildlife Service
NSW Forest Products Association
Construction, Forestry, Mining and Energy Union
Aboriginal Communities
Conservation Groups represented by the Nature Conservation Council

The aim of the IAP was to identify those forest areas which would be set aside for interim protection while they were being considered for inclusion in a CAR reserve system. The negotiations would allow stakeholders to participate in the selection of those parts of State Forests which would be deferred from logging to fully or partially meet the reservation targets derived from the Commonwealth-State agreed conservation criteria.¹⁶

Before the negotiations, the targets required under the conservation criteria had been set in terms of hectare areas of forest types, biodiversity targets, old growth reservation targets and habitat area reservations for endangered species (so for example a reservation of 200 ha was set for each breeding area of the sooty owl species). Forest areas reserved were also to consider the need for adequate allowance for wood supply targets to meet existing mill quotas. The stakeholders were thus set the task of negotiating both conservation and resource outcomes but within defined parameters.

In order to be able to take account of all these factors RACAC developed a computer modelling system capable of predicting the likelihood that a particular forest compartment would need

¹⁵RACAC News, Issue No.3 May 1996.
¹⁶RACAC, Draft Interim Forestry Assessment Report, note 13 above, 3.
to be conserved to meet the reservation targets. This was quantified in terms of an "Irreplaceability Index". Conversely the importance of a particular forest compartment for a sustainable wood supply was measured in terms of a "Wood Sustainability Index".\textsuperscript{17}

A refinement of this system allowed the data produced to be used "interactively", in the sense that the satisfaction of the two indexes could be recalculated each time a decision on a compartment of forest was made. The system also allowed a continuous review of the extent to which a conservation or a resource criteria had been met at any stage in the process.\textsuperscript{18}

Prior to the negotiations the conservation representatives consulted with local environmental groups as to forest compartments they considered should be subject to reservation. Additionally representatives of the relevant regional conservation groups attended the negotiations when that region was being examined.\textsuperscript{19} This was an important preliminary stage because the Nature Conservation Council (NCC) operated as a peak body representing some 100 regional organisations and affiliates. Similarly the NSW Forest Products Association (FPA), representing small to medium timber industries consulted with their members on a regional basis \textsuperscript{20}, as did the employee

\textsuperscript{17}Id., 12-15.  
\textsuperscript{18}Id., 13.  
\textsuperscript{19}Personal comments of Dalian Pugh, Conservation Representative, 3 October 1996.  
\textsuperscript{20}Personal comments of Col Dorber, FPA, 25 February 1997.
The objective of the negotiation process was to produce outcomes providing varying levels of satisfaction of conservation and resource targets. This allowed the government adequate flexibility when it considered adopting the recommendations made. In the course of negotiations, these levels were reduced to four conservation/wood supply scenarios for each of ten regions in eastern NSW. It is crucial to recognise that these four scenarios were imposed upon the negotiators by the NSW Government from the outset. The effect of this was to dictate the whole scope of the negotiations. The negotiators were never free and unfettered but were always confined to reach a decision within the parameters set by the government. The first scenario was based essentially upon achieving as far as possible the criteria set for the CAR reserve system. This was the 'preferred conservation option' for the conservation groups. This option was achieved by progressively building up a deferred forest area using the databases in order to satisfy all conservation targets as far as possible, and minimising where possible the effect on timber volumes but primarily seeking to satisfy the CAR reserve system.

The three other scenarios were based upon a 'rollback' or scaling back of the first scenario to allow for continued logging at

21 Personal comments of Mark Greenhill, CFMEU, 9 April 1997.
22 RACAC, op cit., note 13 above, 18.
24 RACAC, op cit., note 13 above, 2.
three different levels relative to quota allocations as at July 1995, but calculated with wood supply from identified wilderness areas excluded.

In summary the four scenarios provided for the following outcomes:

1. *Conservation Criteria Outcome*: Meeting the conservation criteria as fully as practicable.

2. *30% Wood Supply Outcome*: Meeting the conservation criteria as fully as possible while preserving wood supply at approximately 30% of current (July 1995) quota log allocation.

3. *50% Wood Supply Outcome*: Meeting the conservation criteria as fully as possible while preserving wood supply at approximately 50% of current quota log allocation.

4. *70% Wood Supply Outcome*: Meeting the conservation criteria while preserving wood supply at approximately 70% of current quota log allocation (this corresponded to the Government's stated policy for a reduction to this level for quotas in 1995/6).^25

In some instances the full range of outcomes were not developed for each region. This was either because the starting point as disclosed by the database was less than one or more of the yield

---

outcomes (usually in the case of substantially cleared areas) or because one or more of the yield outcomes fully satisfied the full conservation outcome (usually in the case of relatively uncleared areas).26

The exception to this process was the Eden Management Area which was subject to separate later negotiations conducted in November 1997. These negotiation were subject to resolution of two specific outcome requirements, namely the proposing of additional national park reserves to produce a maximum 90,000 hectare reserve and the ensuring of the supply of a minimum sawlog quota of 26,000 cubic metres per year27. The first requirement was in order to satisfy the Government's electoral promise and the second to facilitate a proposal for a new sawmill at Eden.28

Negotiators in the IAP were provided with computer models showing the location of reserved areas and colour coding of State Forest compartments according to their Irreplaceability Index (for instance areas considered totally irreplaceable were coloured 'dark red'). As the negotiations proceeded, compartments selected for deferral or deselected to be made available for logging were identified by a colour change on the screen to indicate partial fulfillment of a conservation or resource criterion.29

26Id., 18.
27Id.
29RACAC, op cit., note 13 above, 19.
The negotiation process itself involved the following sequence of events:

1. The negotiations were conducted over a four week period from 23 April 1996.

2. The Eastern Forests of NSW were divided into 11 regions and approximately two days of negotiations were conducted on each region.

3. A position statement was made by each of the stakeholders at the start of negotiations for each new region indicating the stakeholder's preferred conservation or resource outcomes in that region.

4. The first step in negotiations on each region involved the use of the databases' interactive system to make an agreed number of automatic selection steps to select or deselect forest compartments based upon conservation criteria or resource outcomes.

5. For the conservation criteria outcomes, these steps were based upon a combination of features described as:
   a. high overall irreplaceability
   b. high summed irreplaceability of individual features
   c. significant contribution to forest type targets
d. significant contribution of percentage area of old growth forest.\textsuperscript{30}

6. For the resource outcomes, these steps were based upon a combination of features described as:
   a. moderate to high timber values
   b. low summed irreplaceability of individual timber types
   c. low contribution to forest type targets
   d. low percentage contribution to old growth forest.

7. The second stage of the negotiations involved the use of the computer model to make manual selections for the three rollback scenarios. These scenarios set at timber supply of approximately 30\%, 50\% and 70\% of 1995 quota allocations and equated to a decreasing achievement of the conservation criteria targets. These reductions were achieved by agreed deselection of forest compartments known to be important for factors such as continuity of operations, the occurrence of plantation areas, the extent of regrowth or the existence of over-reserved forest types. \textsuperscript{31}

8. The adapted data was then examined by RACAC to determine whether the selections made were in accordance with the Commonwealth Proposed Criteria for Reserve design. These criteria provided for a number of factors to be considered in formulating reserve options including size, ecological integrity

\textsuperscript{30}Id., 19.
\textsuperscript{31}Id.
and refugia location but subject to the overriding consideration that,
"where information is limiting, the precautionary principle should be applied in the form of conservation land use decisions".\textsuperscript{32}

Ancillary to this negotiation process, social and economic impact studies were undertaken by the SEWG. However the results of these studies were not factored into the negotiation process as "the data obtained was not of a nature that could be formally considered in determining outcomes."\textsuperscript{33} The studies conducted were said to be primarily intended to be considered subsequently by the government when reaching its decision on RACAC's recommendations for the implementation of the CAR reserve system.

Two specific studies were undertaken. Firstly a pilot social impact assessment was undertaken to determine the effect of the reorganisation of the timber industry on dependent communities and the mitigative measures necessary to minimise these effects.\textsuperscript{34}

Secondly an economic impact analysis to determine the economic effect of adopting forest reform policy was carried out. Its preliminary results suggested:

\textsuperscript{32}Quoted Id., 20.
\textsuperscript{33}Id., 18.
\textsuperscript{34}Id., 33-36.
1. If the reduction in log supply was 30%, most mills would make internal adjustments; there would be limited structural change and the overall reduction in activity and employment would be less than 30%.

2. If the reduction in log supply was 50% or higher, substantial structural change would occur, including mill rationalisations producing significant loss in employment.  

It was in anticipation of such economic effects on the implementation of the CAR reserve system that part of the Government's Forestry Policy announced in July 1995 was the Forestry Structural Adjustment Package which provided for $60 million (matched in a similar sum by the Commonwealth Government) for timber industry restructuring and worker relocation.  

At the end of the negotiation period the outcomes were considered by RACAC and a draft Interim Assessment Report was released for public comment in June 1996. The recommendations within the report are described under the heading "Consultation" as:

"the result of input from key stakeholders representing a range of viewpoints and providing a basis for rigorous and transparent decision-making processes."  

---

36 RACAC, op cit., note 13 above, 38.
37 Id., 8.
Following the release of the report a consultation period was allowed during which the RACAC visited communities in the affected areas and sought submissions. This period closed on 11 July 1996 and the final report in essentially the same terms was then issued to the NSW Government for decision.

It is apparent from this summary that while the parties to the negotiations were able to negotiate over how policy was to be implemented on a regional basis, the scope of the negotiations did not extend to the policy contents itself. The parties were asked to devise four options, not to choose the options, this was left to an administrative determination.

Implementation of the IAP negotiated outcome

One of the criteria used to measure the effectiveness of any negotiation process is whether the outcome reached meets with the approval of all stakeholders. For this reason it is important to follow the events that occurred after the IAP negotiations to assess whether the outcome produced met with stakeholder approval.

Strenuous political lobbying occurred between the submission of RACAC’s report to the NSW government in July 1996 and the NSW Cabinet decision which provided the final outcome on the issue on 23 September 1996. In this period the major NGO stakeholders took up more entrenched positions that was the case in the negotiation process.
The environmental lobby in the form of 12 environmental groups made a joint submission as the "Forest Parks Countdown" to the government in the form of a 'Forest Reserve Plan'. The environmental lobby were now advocating their preferred option in seeking:

1. A logging moratorium over the areas covered in Scenario One of the IAP Report (ie rejecting the other 3 options as inadequate)

2. Immediate declaration of a number of new national parks and wilderness areas (ie permanently embargoing some of the areas in scenario one rather than on an interim basis)

3. Rejection of the timber industry's call for 'resource security' (the industry had sought guaranteed 5 year wood supply contracts).³⁸

The NCC has estimated that some 22,000 submissions principally in the form of a letter of support for the 'Forest Reserve Plan' were lodged with RACAC.³⁹ In addition, in July 1996 a letter seeking support for the 'Forest Reserve Policy' was sent to all Members of the NSW Parliament by this environmental alliance.⁴⁰

---
⁴⁰Id.
The industry lobby through its peak body, the Forest Product Association, made a submission to the government in the form of "A Sustainable Management Option" seeking:

1. Wood supply quotas set at 70% of 1995 allocations (ie, scenario 4)

2. Term agreements for renewable 5 year contracts set at a minimum of 60% of 1995 allocations

3. No wilderness declarations being made without independent analysis to identify genuine undisturbed old growth forests, with shortfalls in resource allocations being met from compartments established as being 'extensively disturbed'.

The industry groups engaged political lobbyist and former politician Peter Anderson to lobby on their behalf. The industry position emphasised the need for immediate 'resource security' rather than leaving it to be determined in the Comprehensive Regional Assessment (CRA) to be completed in 1998. The industry lobby sought early provision of the guarantee of renewable 5 year contracts to mills for wood supplies from mid-1996.

The union lobby through the CFMEU lobbied the NSW Labor Council to also support scenario four, ie wood supply at 70% of

\[41\text{NSW Forest Products Association, unpublished Briefing Note No.3, 30 July 1996, 3-5.}
\[42\text{The Australian, 15 May 1996, 29.}
\[43\text{see C Dorber, in Sydney Morning Herald, 21 June 1996, 12.}
1995 quota levels. To strengthen their position the union was claimed to have released to the media the consultant's report prepared for the SEWG detailing prospective job losses which made headline news ("Thousands of timber jobs at risk")\textsuperscript{44} In addition, threats to march on Parliament House by unionists heightened the political pressure.

It can be seen at this lobbying stage that the two major stakeholder groups were expressing diametrically opposed views. The conservation lobby sought implementation of the scenario which equated to full CAR reserve system implementation. The resource lobby sought implementation of a reduction of the full CAR reserve system equal to the existing forest policy position announced in June 1995, that is the 30% reduction provide for in the Government's Forest Policy as a trade off for the Forestry Structural Adjustment Package. The CFMEU essentially endorsed the industry position.

The positions of each of the major stakeholders were markedly different from the breadth of options in the Report. Each had plainly taken a much more entrenched position. The negotiations had given the government a number of options from which to choose. The need to choose between different options remained a matter of political judgement, with such choice influenced by all the aspects of the political process. This in particular involved traditional political lobbying, in which the

\textsuperscript{44}Sydney Morning Herald, 20 July 1996, i.
stakeholders from the negotiation process now pressed for their preferred option.

The political process involved the preparation of a recommendation for Cabinet by its Forestry Subcommittee comprising the Environment, Planning and Forests Ministers. The lobbying by all stakeholders was intense before this recommendation was formed:

"Just a week ago, the Government was set to lock up nearly 70% of the State's forests in what was regarded as a significant environmental victory.

Furious lobbying from the timber industry and key Labor unions have forced the Government to retreat, particularly as it became clear that many ministers were being persuaded to the industry cause.

Senior Government sources said the turning point came when a consensus position was reached by the members of the Cabinet's forestry subcommittee..."After that, all the lobbying became irrelevant' one source said."\(^{45}\)

The Government's decision was released on 23 September 1996. It provided for moratorium levels essentially in terms of scenario two, that is at 30% of 1995 allocations but at the same time providing for the possibly contradictory provision of term agreements for renewable 5 year contracts set at 50% of 1995 allocations. This involved setting aside for conservation

\(^{45}\text{id., 19 September 1996, 4.}\)
approximately 670,000 hectares of State Forest on an interim basis with an additional 320,000 hectares permanently reserved by way of national park or wilderness area creation.\textsuperscript{46}

The attempt to satisfy both criteria, however, left serious doubts as to whether the allocations allowed could be filled from forest compartments outside the moratorium areas. There was a fundamental contradiction in the decision. It allowed logging to continue at levels which could not realistically be met from the reduced wood supplies provided. The policy decision also provided for community based Harvesting Advisory Panels to be set up in each of the 11 regions to monitor logging compliance pending the completion of the Comprehensive Regional Assessment (CRA) process in 1998.

Following the Government's decision, the major stakeholders affirmed their commitment to the negotiation process but were highly critical of the outcome announced. The NSW Forest Products Association, decried the decision in their press release ("Another win for the Greens"), but concluded:

"The RACAC Interim Forest Assessment Process has been a valuable lesson for this industry and we have today recommitted ourselves to working within the Process"\textsuperscript{47}

Similar qualified support was expressed by the Nature Conservation Council on behalf of conservation stakeholders:

\textsuperscript{46}Id., 24 September 1996, 4.
"the IAP...has been the best process ever applied in Australia for determining the areas of public forest most likely to be needed for CAR reserves".48

Assessment of the Effectiveness of Negotiation in the Implementation of Environmental Policy in the IAP

It should be remembered that it was not the case that stakeholders to the IAP had agreed upon a settlement in relation to logging or conserving State Forests and that the government had then adopted this resolution. The form and scope of the decision remained at all times with the Government. The decision making process could be crystalised into the following sequence:

1. The intergovernmental agreement set the broad parameters of Forest Policy;
2. A negotiating process was created with the stakeholders presented with a number of options detailing the implementation of these broad parameters (ie the IAP);
3. The negotiators were required to select particular areas to be logged or conserved to satisfy such parameters;
4. A report issued from this process detailing how the criteria could be met in four possible scenarios;

5. A period of political lobbying followed; and
6. A Cabinet decision choosing one of the options and including qualifications was released by the Government in apparent resolution of the environmental conflict.

**Case Study**

The balance of this chapter is concerned with gauging the effectiveness of the use of negotiation in resolving the environmental conflict over forest use. The review of effectiveness is based upon a survey of the main participants through a series of interviews conducted at the conclusion of the negotiations.

**Case Study Methodology**

The purpose of the evaluation project was to assess the success of the use of negotiation as a dispute resolution method in this process.

The methodology used in the evaluation project was to interview the representatives of the three Non Government Organisations (NGOs) who attended the negotiation sessions (industry, union and environmental groups) and obtain responses to a series of evaluation questions.
Rationale for Method

The number of stakeholders in the IAP was small, consisting of twelve participants plus a chairman. Eight of the twelve were government representatives, one was a scientific representative and the remaining three were NGO representatives. The evaluation was limited to these three NGO representatives. The small size of this sample was compensated for by the fact that these representatives were not part of the normal administrative dispute resolution process and thus could be expected to show a fresh perspective. Secondly, they had had first hand experience of the use of negotiation in the IAP in that they were all the key negotiator for their constituency. Additionally, the use of an interview technique allowed for substantial depth and detail of response. However, because of the small sample, the analysis of the data is limited to descriptive comments and a liberal use of quotes to substantiate observations made.

Format

A semi-structured interview schedule (See Annexure D) was used to elicit comments on broad issues dealing with the research questions:

1. Whether the IAP represented an interest-based or position-based negotiation process
2. Whether the real issues in dispute were subject to negotiation
3. Whether the process was effective
4. Whether the subsequent government decision reflected the agreed outcome.

**Focus of Inquiry**

The focus of the evaluation project was to determine whether negotiation was used effectively.

There are substantial difficulties involved in defining and measuring effectiveness and success. One useful definition of effectiveness is "the achievement of a certain group's goals".\(^49\) Another commonly used yardstick for measuring the effectiveness of mediation has been agreement rates. This is not considered an appropriate measurement for negotiation because the purpose of negotiation may not always be final agreement.\(^50\) Bardow and Gibson provide a number of other indicators of success. They list five "indices of effectiveness", agreements rate, client satisfaction, level of compromise, stability of the mediated agreement and cost savings.\(^51\)

Choosing and adapting from these to allow for the nature of the IAP process, this evaluation project focuses on an assessment of the effectiveness of negotiation as measured by the indices of:

---


\(^{50}\) S. Bardow and J. Gibson, *Evaluation of the Family Court Mediation Service* (1994) Family Court of Australia Research and Evaluation Unit, Canberra, 76.

\(^{51}\) Id., 76.
* Participant satisfaction
* Level of compromise
* Level of implementation of the negotiated agreement.

Participants

Three stakeholders from the IAP negotiations participated in the interview process. Each of the participants had been the stakeholder representative conducting negotiations on behalf of their constituency and as such had first hand experience of the negotiation process. Each interview followed the format of the semi-structured interview schedule with the interviewer eliciting comments on the four issues selected.

The representatives were:

Col Dorber, Executive Director of the NSW Forest Products Association who was interviewed as the industry representative.

Dailan Pugh who was interviewed as the non-Government conservation representative on behalf of the Nature Conservation Council.

Gavin Hillier, NSW Branch Secretary, Construction, Forestry, Mining and Energy Union (CFMEU) was the union representative on RACAC but the IAP negotiations were conducted by Mark Greenhill, a union organiser. He was interviewed as the main union representative.
Responses

Question 1.

Whether The IAP Represented An Interest-Based or A Position-Based Negotiation Process

(a) Nature of Negotiations

For the purposes of this evaluation, the broad concept of negotiation is understood to be:

"an attempt by parties to reach agreement concerning some matter in dispute between them."\(^{52}\)

The literature\(^{53}\) suggests there are essentially two major strategic approaches to negotiation: position-based and interest-based.

Position-based negotiation involves positional bargaining in which each party begins by advocating a single and usually extreme solution. Agreement can therefore only be reached by the parties successively conceding to new positions. It is suggested that in the process of maintaining successive positions, parties may lose sight of their real objective and any


agreement reached may not be reflective of the interests of the parties, this may in turn lead to implementation difficulties.\textsuperscript{54}

Interest-based negotiation, on the other hand, involves a focus not on positions but on the underlying interests or needs of the parties in order to understand why they have adopted a particular position.\textsuperscript{55} The rationale for focussing on interests is said to be that for every stated interest, there may exist several possible solutions. Therefore it may be feasible to find one that meets the interests of all parties.\textsuperscript{56}

Fisher and Ury's model of interest-based negotiation relies upon four principles:

1. Separate the people from the problem
2. Focus on interests, not positions
3. Generate a variety of options for mutual gain
4. Insist that the results be based upon some objective criteria.\textsuperscript{57}

Applying these principles, RACAC's framework for the negotiations suggests a negotiation process modelled upon the principles of interest-based negotiation.

Using data obtained in the interviews, the four principles appear to be addressed as follows:

\textsuperscript{54} B Wolski, "The Role and Limitations of Fisher and Ury's Model of Interest-Based Negotiation in Mediations" (1994) Alternative Dispute Resolution Journal, August 1994, 210 at 211.
\textsuperscript{55} R Fisher & W Ury, op cit., note 53 above, 11.
\textsuperscript{56}B Wolski, op cit., note 54 above, 211.
\textsuperscript{57}R Fisher & W Ury, op cit., note 53 above, 11-12.
1. Separate the people from the problem.

NGO stakeholders were provided with 'guidelines for behaviour' prior to the commencement of the negotiation process emphasising the need to avoid personalising the debate. Negotiators were told to satisfy other's interests as well as their own.\textsuperscript{58}

2. Focus on interests, not positions.

The process provided for each of the stakeholders to make statements prior to the negotiation sessions on each separate Forest Area. In this statement they set out their constituency's needs and interests with respect to that particular area.

3. Generate a variety of options for mutual gain.

Implicit in the negotiation process (and acting as a constraint upon the negotiations) was the imposition of a range of scenarios by the New South Wales Government, involving differing levels of satisfaction of each stakeholder's interests.

4. Insist that the results be based upon some objective criteria.

There were comprehensive attempts in terms of the CWG and the SEWG to provide objective forest and fauna databases, and also

\textsuperscript{58}RACAC, Guidelines for Negotiations in the Interim Assessment Process, 1996.
data on the social and economic implications of each option considered. The level of data available was considerable, though there were doubts expressed by the stakeholders about its reliability.\textsuperscript{59}

In view of the way RACAC sought to address the four principles of Fisher and Ury's model, it is considered that the use of interest-based negotiation was encouraged by the process. It is necessary to review the stakeholders' responses given in the interviews to determine whether they, as participants, considered the process represented interest-based negotiations.

(b) Stakeholders Responses\textsuperscript{60}

The perception of the industry representative was that the FPA had entered into the IAP with a "complete sense of cooperation". At the start of the process, he considered that "nothing was on the table". His organisation considered the process was to deal with the satisfaction of broad forest policy outcomes only. More specific options based on certain levels of reduction of Wood Supply Quotas were then provided and the parameters of the negotiations and subsequent negotiations remained constrained within these parameters.

Given these constraints, this representative considered that five weeks of "extremely effective negotiations" involving

\begin{itemize}
\item[D Pugh, "Major Findings of 'An Appraisal of the Reliability of State Forests' Wood Resources Study" (1996) unpublished paper, September 1996, 1.]
\item[These summaries are based upon file notes of the interviewees' responses to the questions in the Interview Schedule, see Appendix D.]
\end{itemize}
"massive horsetrading sessions" then ensued. These sessions involved "hard bargaining" which produced an agreed range of outcomes within the specified parameters for each forest area. He considered this "a consensus process", where "we both had to give a lot of ground". He considered the negotiation process centered upon the problem not the personalities and that the focus was upon interests. He was not satisfied that the ability to generate options was given sufficient scope given the constraints of the four scenarios. These scenarios were presented to the parties as a fait accompli, forcing them to work within them. He was satisfied the results were based upon objective criteria provided by the CWG and the SEWG groups.

The conservation representative from the NCC indicated that their involvement was influenced by "a political imperative" set by the New South Wales Government. The Government wished to implement its Forest Policy which had in part delivered it to government in 1995. The conservation representative considered that the stakeholders could "either agree on a method of implementation" or "have one imposed on them". They considered the need to produce an outcome was crucial to their and the other stakeholders active participation in negotiations.

He considered genuine negotiation took place, "quite tense, quite hard, quite heated at times". However, he considered that both industry/union and conservation representatives "thought we would win in the sense that we would get the outcome we wanted politically, that is outside the IAP", later on. He considered this made both sides "more flexible than we might
otherwise have been prepared to be". If this belief had not existed "the negotiations would have been a lot tougher".

Nevertheless he was of the opinion that if one scenario rather than four had been negotiated to provide "one outcome over State Forests" to the government, the Government would have accepted it without substantial amendment but "it was not possible to ever get a single agreed criteria".

He also agreed the focus was upon the problem and not personalities and upon interests and not positions. He agreed to allow options to develop even though they departed from full compliance with the conservation criteria. He was not satisfied that the results were always based upon objective criteria. For instance, he considered one of the objective criteria used (the Wood Resource Study prepared by State Forests) "grossly over-estimated resources".61

The union representative from the CFMEU came new to this form of negotiation. He had had previous good relations with industry, less experience dealing with Government Departments and a "very cool" relationship with the conservation movement. He considered that the negotiation process was marked by "a lot of theatrics early on" and "lots of stunts". He was of the opinion that what happened "at the time looked like real negotiation but in fact it wasn't". The representative always expected the RACAC report issued following the negotiations would not be

---

61D Pugh, op cit., note 58 above, 1.
accepted as the basis for a final decision. He was of the view that negotiations would continue "on a political level". In fact he reported that there were a series of concurrent lobbying sessions which paralleled the negotiation process. He said this was well known to the other participants. When stalemates arose, the union representative reported that he would routinely say "all this will be sorted out politically later on".

The tenor of his comments did not suggest that he considered true interest-based negotiation was taking place in the IAP.

Question 2.
Whether the Real Issues in Dispute were Subject to Negotiation

(a) Real Matters at Issue

The stakeholders were asked to evaluate the extent to which the real issues as perceived by them were addressed in the negotiation process. For the industry and union representatives, the real matters at issue were the need to maintain the viability of the forest industry. Their aims were closely allied, being to minimise as far as possible the effect on the industry and forest workers of any reduction in supply quotas. The conservationist considered the real matters at issue were the need to preserve, initially temporarily but in the long term permanently, as many high conservation value forest areas as possible.
(b) Stakeholder Responses

The real issue for the industry representative was the likely impact on forestry industries' quotas due to reduction of wood supply. Industry sources wished to negate or minimise any reduction in wood supply quotas. But the representative considered a proper airing of this issue was constrained by the negotiation parameters set:

"We wanted to see economic and social impact assessment at 10% increments of reduction of 1995/96 wood supply quotas. (We were) told (this) couldn't be done by the consultants, so then (the options were) reduced to 30-50-70% levels."

These reduction options then became the only options discussed. The effect of this was that discussion of the real issues ("maintenance of a viable timber industry") as far as the industry representative was concerned, was subject to an imposed constraint.

The conservation representative considered that the New South Wales government had indicated there was a need to produce "an outcome over State Forests" and by his involvement the representative sought to produce an outcome which was acceptable to his constituency. His aim was "to achieve the full conservation outcome as far as was possible."

Realistically, he also "expected that Resource Security would be given" but he hoped to achieve conditions in logging licenses.
which could be monitored by conservationists. However, he considered that the imposition of the four scenarios "served another purpose". It locked the stakeholders into giving the government a breadth of options through which it could produce an outcome which departed significantly from the real issues negotiated by the stakeholders.

There was an acceptance by the conservation representative that the real issues under negotiation were not the specifics of government forestry policy since this had already been politically determined but its "implementation in specific forest areas." The negotiation process gave the opportunity to the stakeholders to "agree on a method of implementation only". This level of consultation not been granted in other States, such as Victoria and Western Australia, "where there was no NGO consultation."

The real issue so far as the union representative was concerned was the maintenance of adequate resource security to protect its members' jobs. The unions had consented to a prior government decision to reduce the resource allocation to 70% of pre-1995 quotas. The union representative wished to prevent any increase on this agreed 30% reduction. Equally important, he wished to see a corresponding land base (ie wood supply) being guaranteed to avoid the situation of quotas being set at 70% and yet inadequate supply being available to fill the quotas. Like the other stakeholders, the union representative was not content with the four scenarios set, but considered "we had no choice on these stages."
These 'real issues' from the union representative's perspective were the subject of negotiation, however he shared the view of the conservation representative that the negotiation process would not be conclusive of the outcome: "I said, all this will be sorted out politically later on." As indicated previously, with this in mind the unions maintained "lots of meetings concurrent(ly)" to lobby the NSW Labor Council and government members.

**Question 3.**
**Whether the Process was Effective**

**(a) Measures of Effectiveness**

The stakeholders were asked to evaluate the effectiveness of the negotiation process. The indices of effectiveness used were participant satisfaction, level of compromise reached and level of implementation achieved. The participants interviewed were asked to consider whether the negotiations were effective in terms of each of these indices.

**(b) Stakeholder Responses**

*Participant Satisfaction*

On the basis of the interview data, all of the stakeholders considered the process effective in terms of the indicia of participant satisfaction.
The industry representative's view was that the process was successful, "it assisted us in develop(ing) an understanding of each other's positions", "we learned to work together without personalising the debate" and "we felt that if left to our own devices we could (have) come up with an agreed position".

Similarly, the conservation representative considered the process successful in terms of the indicia of participant satisfaction, considering that the "dynamics of the negotiations" were good, "lots of good feeling, (it) has improved communications, (we) understood where (the) other party (was) coming from." He was less concerned with effectiveness measured in this sense, since he considered success in terms of outcomes a more important measure of effectiveness.

The union representative had "never done this form of negotiation before" and remained sceptical of the process and less forthcoming than the other stakeholders in assessing the process as effective in terms of participant satisfaction. He considered it more in the context of "groundwork for the political lobbying later on." He conceded:

"the other representatives- conservation and industry- were more enamoured with the processs, but I knew that there had been tactics, such as media leaks throughout the process, and I knew this would escalate after the interim decision and before the Cabinet decision."
Level of Compromise

Using the indicia of level of compromise, the industry representative evaluated the process as effective: "we agreed on a range of outcomes which took into account the resolving in each area of the specific environmental dispute." This represented "a consensus process- we both had to give a lot of ground."

As regards the indicia of level of compromise, the conservation representative considered there had been a high level of compromise but that this was essentially artificial, since each party believed that compromises made could be abandoned or modified in the subsequent political lobbying period. For instance, the conservation representatives considered their unique form of strong grass roots political lobbying ("16,000 of the 20,000 subsequent public submissions were from conservation groups") would win the day for them in the end.

In this sense, the level of compromise reached was not an accurate measure of the effectiveness of the process because the compromise reached was not truly genuine. Compromises made were not subsequently adhered to. The conservation representative conceded:

"In the political phase our focus changed, (we were seeking) moratorium areas, opposing Resource Security, (seeking) declaration of National Parks now."
This approach to the negotiation process on the part of the conservation representative exhibited a political pragmatism which was not apparent in the industry representative. The industry representative admitted in this regard that his "constituency thought me politically naive" in the level of compromise to which he committed them during the process.

As regards the indicia of effectiveness in terms of level of compromise, the union representative considered the compromise evident in the process was artificial. Though "at times it looked like real negotiation" the outcome when finally announced by the government did not reflect the arguments or compromises reached. He was in no doubt that the negotiated agreement represented by "the RACAC report wouldn't be accepted". Again, he considered (rightly so) that the real solution would be one "sorted out politically later on."

*Level of Implementation*

In terms of the indicia of level of implementation, no single negotiated agreement was reached. A range of options for implementing government policy was presented to the relevant administrative authority for consideration. The industry representative's view was that:

"RACAC was presented as a body which would take the results of the negotiations and incorporate the(se) in one comprehensive recommendation to government, not as four scenarios."
His view was that "RACAC had failed to present a solution to government", so in terms of a durable agreement the negotiation process was a failure. He concluded that "the process was a success, the outcome was a failure."

In terms of the indicia of producing an agreed outcome, the conservation representative considered the process effective. Specifically, he believed that "getting an agreed data base was a big achievement...the biggest success" and that this had been "generally achieved, with some disagreement." Further, he considered that the agreed outcome was effective in that the "majority of high conservation areas (were) identified as moratorium areas."

As to whether the process was effective in terms of the level of implementation, his comments are again indicative of a political pragmatism:

"I think it was not possible to produce an outcome everyone would be happy with, because there is just not enough resource to satisfy both interests, (there is) not enough room there for compromise (given) the size of the resource."

Nevertheless, he expressed the global view about the effectiveness of the process, "I think it is an ideal process."

The union representative's view was markedly different. He considered the outcome was a product primarily of the lobbying process and not of the negotiations in any significant sense.
Question 4.
Whether the Subsequent Government Decision Reflected the Agreed Outcome.

(a) The Government Decision

The negotiation process did not produce an agreed compromise resolution which could be then implemented. It operated only as an advisory process to assist in an administrative dispute resolution.

The Government decision released on 23 September 1996 did not duplicate any of the four scenarios. Rather it reflected an attempt to placate all interests. It provided for a moratorium from logging, pending the CRA process, equivalent to 30% of July 1995 log quota allocations. There was thus substantially less areas available for logging, this was seen as a 'win' for conservationist interests. It also provided for resource security by the grant of renewable 5 year log supply agreements to sawmills set at 50% of 1995 allocations. As these benchmark allocations were commonly regarded as grossly excessive this was seen as a 'win' for industry and union interests. However, the decision in attempting to produce a 'win-win' solution in fact left the conflict unresolved. Since by quarantining large areas of State Forest from logging, (ie., leaving only 30% of the supply source previously available), the effect would be that loggers would be either forced to virtually denude approved areas of all timber or alternatively push for permission to enter
forests under moratorium in order to fully exploit the logging quotas allowed (ie., 50% of previous log numbers).

(b) Stakeholder Responses

The industry representative's view was that the Government decision did not reflect the negotiated outcome. The Cabinet Subcommittee produced "a political solution unrelated to our negotiated settlement." The Cabinet decision was "a hotchpotch", while it allowed logging at 50% 1995/96 supply levels (scenario three), it did not then provide the corresponding resource required to achieve the supply permitted.

He called it a "bastardisation of a mediation process, a deliberate act of political cunning." He considered it did not reflect any of the agreed outcomes and did not provide the resource base necessary for "the maintenance of a viable timber industry."

The conservation representative was also firmly of the view that the subsequent government decision did not reflect the agreed outcome. He considered giving resource security at levels above the wood supply permitted, ensured that "inevitably there will be a need to log into moratorium areas to achieve the quotas." The result of this in his view was that "the political outcome, attempting to placate both sides, has not resolved the conflict over the limited resource."
He expressed some confidence that the ongoing CRA process might remedy this deficiency but considered that to date "the political decision pre-empted the process" and thereby robbed it of much of its effectiveness.

For the union representative, the government decision also did not reflect the agreed outcome but this was never expected. For him, particularly as a Labor government was in power, the real resolution of the conflict was always going to be one brought about by political persuasion.

He outlined a concerted political campaign after the RACAC report was presented to the Cabinet subcommittee. There was "lots of political pressure at State Conference to have the ALP embrace the union post-IAP position" which was 60% of 1995 quotas with resource security. The union lobby presented a "very strong hardline position..lots of media, lots of party lobbying, then lobbying of parliamentary committees." This mounted in the last two weeks prior to the Cabinet decision to a team of unionists lobbying each member of Cabinet individually.

The union lobby used the socio-economic reports on the effects of logging reductions to create concern, particularly amongst politicians in marginal seats centred on timber towns ("Thousands of timber jobs at risk"^62). The Labor Council of NSW lobbied parliamentary members on a factional basis to support adoption of the union post-IAP position.

---

The political pressure was further escalated in the final week before the Cabinet decision was due. "Lots of media, (an) editorial in the Sydney Morning Herald, press conferences, picket lines on the Wilderness Society in three States..a big political exercise." He said that, at the eleventh hour, the unions were:

"contacted by a Carr staffer who said 'what do you really want? Would 60% and Resource Security do?' We said 'Yes, but we must have a corresponding land mass' and that's essentially what the decision of 23 September 1996 was."

Given that he considered political lobbying won the day, it was his view that the level of implementation of the negotiated outcome achieved was minimal.

Conclusions

Using this analysis of the interview data, it is possible to draw some conclusions about the effectiveness of the use of negotiation in the IAP process.

These conclusions can be summarised as follows:

63"Division on forests" Sydney Morning Herald, 17 September 1996 which concludes "the promises now being made to the industry are modest and the demands of the conservationists unreasonable."
Interest-based negotiation rather than position-based negotiation took place

The focus of all the stakeholders was on the underlying interests of their constituency: respectively timber industries, conservationists and timber workers. The negotiation were identified as non-personalised. While there was eventually a focus on positions (resource security for industry and union and full conservation criteria for conservationists), this was after the negotiation process had concluded. A variety of options were generated but these were essentially preordained by RACAC and not of the stakeholders' choosing. However, it seems apparent that no agreed recommendation would have been reached without some artificial framework being imposed. It is concluded that the negotiations exhibited the key features of interest-based negotiation.

Negotiation was used in an integrative form in the administrative mechanism of dispute resolution

The administrative mechanism for resolving the environmental conflict was resolution by a sub-committee of the NSW Labor Cabinet to which RACAC reported following the negotiation process. Negotiation was integrated into this administrative mechanism.

The negotiation process did not produce an agreed outcome which was implemented
The negotiated outcome was not a single recommendation. The range of options would always be subject to selection and modification by the administrative mechanism. The role of the negotiation process was an thus advisory or consultative one not a dispute resolution one.

The negotiation were perceived by the stakeholders as artificial

There were two reasons for this. Firstly, no matter how successful the negotiations were in reaching an agreed outcome, it was always subject to approval by the administrative decision maker. Secondly, the stakeholders, especially the union representative, were always confident that traditional methods of influencing an administrative decision maker outside the negotiation process (lobbying, media attention etc.) would always succeed over any carefully negotiated outcome. This confidence was borne out by the resolution imposed.

The negotiation process was considered effective as measured by the indicia of participant satisfaction

The two stakeholders who had been in the most confrontationist relationship prior to the negotiation process (industry and conservationists) considered the process had tended to normalise relationships and improved communications. By this measure, it was considered a success.
The negotiation process was considered effective as measured by the indicia of level of compromise reached.

Both the industry and conservationist representative considered substantial compromise occurred, the union representative less so. The compromise perceived was that the implementation of government policy in terms of conservation and resource criteria was agreed on an area by area basis. This required a balance of the stakeholders' competing needs and interests. However, the level of compromise reached was not such as to permit one single agreed outcome being recommended to the administrative decision maker.

The negotiation process was not considered effective as measured by the indicia of level of implementation of the negotiated outcome.

No single negotiated outcome was ever attempted nor envisaged at the start of the process. The implementation of the negotiated agreement was never likely. Therefore in terms of the level of implementation, the negotiations were not a success.

The negotiated outcome was not reflected by the subsequent administrative decision.

The Cabinet decision reached on the recommendation of its subcommittee was much more a product of the traditional political system of influencing administrative decision-making,
than of the negotiation process. Knowing this, following the negotiations, the stakeholders returned to their position based approach and influenced the outcome much more effectively politically. This was particularly so in the case of the union representative, who saw the negotiation process as preparatory only to traditional position-based negotiations.

Interest-based negotiation played a significant, but subsidiary, role in the dispute resolution process

The negotiation process was always an advisory or consultative vehicle for public participation. It was never guaranteed the role of producing an agreed outcome. Its role remained a subsidiary one throughout.

The interest-based negotiation process did not solve the environmental conflict

The negotiation process contributed only to a solution reached administratively. Whether the outcome can be said to represent a solution of the environmental conflict over native forests remains to be seen.

In summation, the hypothesis proposed was confirmed in a number of respects. The forestry debate was identified as an environmental conflict. The ADR method of interest-based negotiation was seen to be used in the form of an integrative model. Surprisingly, and contrary to expectations, the use of
CHAPTER TEN

CONCLUSIONS AND DISCUSSION

Introduction

This research sought to critically examine the use of ADR methods in resolving environmental controversies. A system of classifying environmental controversies based primarily upon three key characteristics was developed. Controversies were classified in this way and placed along a continuum ranging from environmental disputes to environmental conflicts. This method of classification made it possible to systematically examine the use of ADR methods along the continuum. A case study method was used and the results of both case studies have been presented in detail.

Conclusions

The results of the two case studies show that ADR methods can have an effective role in the resolution of environmental controversies. Achieving the full potential of ADR methods in the resolution of environmental controversies is hindered by a number of constraints. Some of these constraints are based upon misconceptions. It is argued that properly addressed these concerns can be overcome with a view to the wider adoption of ADR methods.
The conclusions reached are summarised as follows:

The effectiveness of ADR methods in environmental disputes

When mediation was used to resolve environmental disputes in the Land and Environment Court of NSW it was highly effective, but under-utilised. It may be that the system is operating at the optimum level, with non-mediated disputes being unsuitable for mediation and appropriately subject to due process in the Court. Alternatively, the lack of effective measures to encourage reluctant parties, particularly government respondents, to participate may be more the explanation for under-utilisation.

The case study provided no data to determine which of these two explanations is correct. It was suggested that a checklist for gauging the suitability of environmental disputes for mediation and a Mediation Report for reporting the results of successful mediations be devised. These guides would be suitable for circulation to local government bodies and other parties with a view to encouraging participation to develop.

It is further suggested that the requirements that participation in mediation be voluntary and the process be confidential be reviewed. These suggestions are discussed below.
The effectiveness of ADR methods in environmental conflicts

Environmental conflicts are predominantly the subject of administrative resolution. The use of ADR mechanisms as part of the resolution of these conflicts can be accommodated provided it does not involve the delegation of decision-making power. The role of ADR methods in the resolution of environmental conflicts has developed in an integrative role in these administrative mechanisms.

It is suggested that this is the proper role of ADR methods in environmental conflicts. Within this context, the use of ADR methods should allow the stakeholders to reach an agreement on a resolution to be presented to government and endorsed. Provided the requirements of voluntarism and confidentiality are relaxed, it is considered there are adequate safeguards that can be imposed to ensure effective protection of the public interest.

There needs to be a realistic understanding of the limitations of the role of ADR methods in administrative processes. Both the process and the resolution are subject to political constraints and some environmental conflicts will not be suitable for ADR methods and should be left to existing mechanisms.
The effectiveness of ADR methods along the continuum between disputes and conflicts

The hypotheses set predicted that ADR methods would be effective in resolving environmental controversies in the environmental dispute half of the continuum but essentially ineffective for controversies in the environmental conflict half of the continuum.

These predictions were not fully borne out by the research. The case study on the Land and Environment Court's Mediation Scheme tended to confirm the expectation. The Scheme successfully mediated what were tentatively concluded to be environmental disputes. But the case study on the Interim Assessment Process confounded the expectation. The forest conflict which could be more confidently classified as an environmental conflict was also amenable to solution using ADR methods.

Without overstating the empirical basis for this research, these findings suggest that ADR methods have a potential role in environmental controversies along the whole of the continuum.
Discussion

Constraints on the use of ADR methods in environmental controversies

From the review of the literature on the theory and practice of ADR methods in environmental controversies in the United States and in Australia, it appears that there are a number of critical factors that are restricting the wider application of ADR methods in resolving environmental controversies. The review of the practice has shown that in Australia the approach to ADR methods is still one of considerable caution. Wider implementation of these methods is constrained by these critical factors. These constraints are critically examined here.

The constraints on expanded implementation have been identified in the literature reviews as concerns about:

* The need for confidentiality
* The requirement of voluntariness
* The politics of environmental conflict resolution
* The need to protect the public interest

The results of this research challenge whether these constraints are real or artificial. It is suggested that they can be accommodated to allow for wider adoption of ADR methods, if these methods are have the opportunity to fulfil their earlier promise.
The need for confidentiality

One of the constraints on allowing the role of ADR methods to expand is the perception that a requirement of all ADR processes is a need to maintain strict confidentiality.

This is viewed as an impediment to participation, particularly in the case of environmental conflicts. Solving the conflict in the public eye is seen by some parties as a necessary prerequisite for gaining the support of the community. Additionally, confidentiality is viewed as conflicting with other important values such as the transparency of decision making and the community's 'right to know'.

It is suggested that since in the case of traditional adjudication and administrative dispute resolution methods, confidentiality is not normally a requirement, ADR processes should also be free of this constraint on the transparency of the process.

Putting aside the question as to whether adjudicative and administrative methods are in fact transparent, we should consider whether the requirement of confidentiality in ADR processes, particularly with respect to mediation, is essential in the case of environmental controversies. If it is not, there is no reason why the requirement cannot be abandoned or at least significantly relaxed.

Firstly, the requirement for confidentiality as to the result and to matters arising in the process is usually only of significance
after an abortive mediation or negotiation. If the process is successful in producing an agreed outcome, confidentiality in most cases is really no longer an issue. This being so, the commitment to confidentiality given at the outset could be modified to allow for publication of the result or the subject matter of any successful outcome.

If this relaxation is conceded, it leaves only the question of the necessity for confidentiality where the process is abortive. This abortive result need not, and in practical terms probably cannot be, confidential as it will be apparent from the need to take further dispute resolution steps that ADR methods did not work. This leaves open the question as to whether the process itself should, in terms for instance of allowing attendance by the general public or by interested parties, be made open. The usual response is to deny attendance, on the presumption that in order for the flexibility necessary for ADR methods to work the parties must be allowed to participate in the process frankly and freely. Critics assert the parties should be free to reveal confidential information, to concede weaknesses in their case and to make and receive concessions different from their avowed positions or interests if mediation is to be allowed its full scope. If this was done in an open or semi-open arena, it is asserted, the necessary frankness or forthrightness would substantially disappear.

This concern is not borne out by the experience in the two case studies. In the Mediation Scheme of the Land and Environment Court, known objectors were invited to attend the mediation.
process. In the RACAC negotiations, regional organisations were free to attend, and did attend, the negotiations when particular forest compartments were the subject of discussion.

The reason this relaxation was possible was that not all of the mediation or negotiation processes required confidentiality. An essential feature of the process of mediation, for instance, is the private caucusing that takes place between the mediator and the respective parties. It is here that the mediator is made privy to confidences of strengths and weaknesses and potential degrees of compromise that do require confidentiality. It may be sufficient for the purposes of effective mediation if the confidentiality is confined to these sessions alone. If the non-necessity of confidentiality in other instances is conceded, a number of advantages could arise.

Firstly, if the result of the mediation or negotiation can be reported (as was the case of the RACAC proceedings) a number of positive benefits may accrue. Outcomes achieved by ADR methods have no value as precedent, but they may have value in terms of convincing other disputants of the effectiveness of the process aor in enticing participation by other parties or stakeholders in similar controversies.

In the case of the Land and Environment Court, a solved matter is returned to the Court to deal with to finality by way of consent orders. The fact of the mediation and its success is

---

1D Rollison, Deputy Registrar LEC, personal communication, 20 June 1996.
2D Pugh, NCC, personal communication, 3 October 1996.
recorded and it forms part of a published list of statistics concerning the efficacy of the mediation scheme. But nothing further is published. There is no reporting device through which the success might be circulated because there is no decision summary device on the file in which a result can be reported. This is considered a serious deficiency. As outlined in the case study, the scheme is effective, but seriously under-utilised. An effective reporting system documenting the success of the scheme might induce further participation, particularly by reluctant government respondents.\(^3\)

Secondly, if the requirement for confidentiality remained in place for caucasing sessions and private negotiation sessions, the concern about confidences being revealed could be allayed. The necessary confidentiality could still be balanced with the need for transparency and one major reason for the reluctance to use ADR processes, particularly among environmental groups, would be removed.

**The requirement of voluntariness**

A further constraint on the effective use of ADR methods is the perception that these methods should only be used when they are entered into voluntarily and that participation should never be mandatory. The effect of this is that, whilesoever their use is optional, wider implementation remains unlikely.

\(^3\)With this in mind a draft of a suitable mediation summary reporting form has been prepared, see Appendix E
The insistence upon ADR processes remaining voluntary fails to take account of the role ADR methods perform in environmental controversies. A common assumption is that environmental controversies are resolved adjudicatively and that therefore the proper role for ADR methods is court-annexed.

There are two flaws in this reasoning. Firstly, as the answer to the first research question shows, environmental controversies in New South Wales are resolved almost exclusively by administrative mechanisms in various guises. They are not primarily resolved by adjudication. Secondly, as the review of practice generally and the case studies specifically shows, when ADR methods are used it is in an adjunctive, not an alternative, role. So it is not correct to assert that if controversies are compulsorily referred to mediation, the parties have been forced into an alternative mechanism not of their own choosing. Their compulsory participation is still in the administrative form of dispute resolution wherein the final resolution will be made.

This is borne out by the comments of one of the stakeholders in the RACAC negotiation, the subject of the second case study. It was made clear to the parties that if they did not participate in the process and endeavour to reach agreement, a solution (of which they may not have approved) would be made administratively. There was a strong element of compulsion, but this did not affect the quality of their participation. It was

---

4D Pugh, personal communication, 9 April 1997.
not essential for the effectiveness of the process for their participation to be wholly voluntary.

Based on this example, a cogent argument can be made that the requirement of voluntariness is unnecessary and that consideration should be given to removing it. If it was removed or modified the use of ADR methods could be increased substantially.

This argument is given impetus when the concept of voluntarism itself is analysed more closely. Boulle concluded from his analysis of the concept that "although the ideology of voluntarism is an important element in the promotion and marketing of mediation, it cannot be taken at face value".5

Participation is seldom strictly voluntary since there are subtle pressures compelling involvement. The increased participation that may flow would have the effect of removing many of the misconceptions and suspicions now constraining the use of ADR methods.

The Politics of Environmental Conflict Resolution

Wider political considerations arise when dealing with the solution of environmental conflicts. Environmental conflicts are by their nature political, involving as they do a struggle between stakeholders with competing interests, needs and goals.

attempting to influence the dispute resolution process. This is well illustrated by the RACAC case study where the "political mechanisms" both in the traditional forms of lobbying and non-traditional forms of direct action and media campaigns were used by all parties in parallel with the negotiation process.

If the premise that environmental conflict resolution is a political process is accepted, then the reluctance to participate in ADR processes because they are also political processes (involving the usual imbalances of power and resources) is difficult to understand. If the ADR processes are just as politically charged as the usual administrative mechanism of environmental dispute resolution, then the reluctance loses much of its validity.

It follows that if ADR processes are seen as an integral part of an administrative dispute resolution mechanism, which itself is political, then there needs to be an acceptance that the ADR process will also be politicised. Participants need to be aware of the usual features of a political environment such as power struggles, power imbalances, distributional questions and irreconcilable value positions. Once the participants concede that they are involved in a political process already, much of the basis of the concern disappears and the parties can enter into the ADR process without any illusions.

One of the criticisms of ADR is that it gives to parties the illusion of power. This is not strictly correct. While the process gives the appearance of significant and widespread
participation, the administrative mechanism retains at all times the essential policy-making power.

The RACAC case study is an example of this reality. The final power to resolve the environmental conflict over forest use remained at all times with the NSW Government. The parties knew this, and knew that the solution of the conflict would have devolved to the government if they did not participate in the ADR process. The parties' protection was this political realism.

Is it enough though to recognise the political features of the ADR process? The criticism of opponents of ADR methods is that this is not enough. They say that in environmental conflicts the political constraints make participation itself a needless waste of scarce resources and energy. They argue that there can be no meaningful participation in a process where one party actually retains decisive power. The best response to this is that any non-ADR form of stakeholder participation in the administrative dispute resolution mechanism can be equally as illusory.

During the lobbying stage after the RACAC negotiation process, each of the three NGO participants sought to 'flex their political muscle.' The aim of each was the same, namely to influence the Cabinet decision, though their methods were different. The environmental groups sought to give the impression that public consciousness had been raised to a level of urgency and crisis and that the government would ignore this shift in public opinion at its electoral peril. The union and industry groups similarly sought by more traditional lobbying to persuade
parliamentarians that electoral risk would flow from ignoring their constituencies' demands. Yet, even in this stage of "using the political mechanism", it still remained a matter of attempting to *influence* ultimate dispute resolution power. There was never any realistic expectation in the stakeholders that they were *exercising* that power themselves.

In this respect the political mechanism is just as much subject to the constraints of politics as ADR processes are. If there is an illusion of power, it exists in both processes.

The constraints of environmental politics are very real, but the effect should not be to exclude the use of ADR methods. As the RACAC case study has shown, ADR methods can play a useful and significant role.

**The need to protect the public interest**

A further constraint on the use of ADR methods is the perception that these processes do not provide an adequate protection for the public interest and therefore should not be used.

This is no such problem in the case of environmental disputes where the public interest usually remains essentially dormant, and if it is aroused there is a local council to represent it. In the Mediation Scheme case study, the situation was addressed, if it arose, by enabling interested objectors to attend the mediation and allowing them a voice. There was also the
additional protection potentially available in the Court's overseeing role to reject mediated solutions if these were seen as contrary to the public interest.

But where the public interest is an activated element in a conflict, consideration needs to be given to whether the public interest can be satisfactorily protected in ADR processes.

This concern again raises an issue of visibility. Mediation, and to a lesser extent negotiation, are normally private and invisible. There is not usually the opportunity to see how the public interest is treated. But as the RACAC case study shows this can be addressed by imposing a requirement that specified information about the process and the nature of any resolution reached be publicly available and subject to public comment and review.

This is well short of the visibility that adjudication allows, but as noted adjudication is not the mechanism by which most environmental controversies are resolved. Usually the resolution is administratively reached, by Ministerial or Cabinet decision or by bureaucrats theoretically accountable to the public through their Minister. The proper comparison is thus between the visibility and the protection of the public interest available in ADR processes and in administrative decision making processes. It is a question of comparing the adequacy of the participation opportunities available in each mechanism to monitor the protection of the public interest.
The concern expressed about ADR processes is that the parties may reach an agreement which satisfies their competing private interests but at the expense of the wider public interest. In the case of environmental conflicts however, this is largely an illusory concern. Whilst it is theoretically possible for the stakeholders to have delegated to them decision-making power, it is extremely unlikely that the administrator would do. The mediation or negotiation will remain part of the deliberative process only and the decision-making function will not be abdicated. Therefore if the public interest is neglected in this situation, it is not the fault of ADR methods.

In fact, ADR processes may allow for a real improvement in the quality and scope of participation in environmental conflict resolution. The improved opportunities for input that arise may increase the participants' ability to have a voice in protecting the public interest. ADR processes allow for the implementation of innovative solutions formulated by the stakeholders themselves. They therefore have the capacity to ensure administrators adequately address questions of public interest in their decisions. In this sense, ADR methods may simply be a more effective form of public participation. Nonetheless, their role can be a significant one.
Appendices

Appendix A  Land and Environment Court Young Lawyers' Survey Questions

Appendix B  Land and Environment Court Matters Referred to Mediation 1995

Appendix C  Tow & Stubbs' Land and Environment Court Research Record

Appendix D  Resource Assessment Council Participants Interview Schedule

Appendix E  Land and Environment Court, Proposed Mediator Report
Appendix A

MEDIATION IN THE LAND AND ENVIRONMENT COURT

The Young Lawyer’s Environmental Law Committee is monitoring the effectiveness of mediation in the Land and Environment Court.

In an attempt to look at this issue in more detail the group requests that you give us 5 minutes of your time to complete the questionnaire set out below.

We thank you for your assistance. (Please tick the appropriate box.)

**QUESTION 1**

Do you consider the outcome of your mediation successful? (Whether or not it proceeded to a hearing)

[ ] Yes [ ] No

**QUESTION 2 (a)**

If you answered YES to Question 1 then, which of the following factors do you consider added to the success? (Please tick as appropriate and as many as you wish.)

[ ] skill of the mediator
[ ] narrowing of the issues
[ ] total resolution/settlement of the dispute
[ ] partial resolution of the dispute
[ ] less formal procedure
[ ] a better understanding by you of the other parties position/needs

**QUESTION 2 (b)**

Do you consider any other factors contributed to the success of your mediation? Please give details below.

**QUESTION 2 (c)**

How many mediation sessions were required to reach settlement and how long was the total time spent in mediation sessions?

Number of sessions = ________________
Total time spent = ________________
Period of time between first and final sessions (if more than one) = ________________

**QUESTION 3 (a)**

If your answer to 1 was NO ie you did not think your mediation was successful: (a) How far towards resolution did you get?

[ ] Nowhere at all
[ ] Partial resolution
[ ] Narrowing of the issues
[ ] A better understanding of the other parties resolution
[ ] Other (please specify)
QUESTION 3 (b)

(b) Can you give a reason why?

QUESTION 3 (c)

Can you suggest any improvements to the present system?

QUESTION 4

Do you consider that the legal costs of your application were lower than they would have been if the matter had gone to a full hearing?

[ ] Yes [ ] No
[ ] About the same [ ] Higher

QUESTION 5(a)

Do you consider that the other party to the mediation:
(a) Had the authority to settle the matter?

[ ] Yes [ ] No

QUESTION 6 (a)

Did you experience any difficulties with:
(i) Arranging a suitable time for the mediation to take place?
   [ ] Yes [ ] No
(ii) Having the other party agree to participate in the mediation?
    [ ] Yes [ ] No
(iii) If you are a Lawyer, convincing your client to participate in the mediation?
     [ ] Yes [ ] No

QUESTION 6 (b)

How would you do things differently to overcome these problems?

QUESTION 6 (c)

How long after you filed your Application with the Court did you go to the first call-over?

__________________________ Days/weeks/months

QUESTION 6 (d)

Was your matter set down for mediation at the first call-over?

[ ] Yes [ ] No

QUESTION 6 (e)

Why was your matter not referred to mediation at the first call-over?

QUESTION 6 (f)

How long was it between the date of the call-over and the date of the mediation?

__________________________ Days/weeks/months
QUESTION 6 (g)
If this matter was originally set down for hearing, how many days was it set down for?
____________________ Days

QUESTION 7 (a)
Did you (and your client, if appropriate) understand that mediation remains a voluntary process at all times, and that a party may pull out of the process at any stage?
[ ] Yes [ ] No

QUESTION 7 (b)
Do you feel that you received adequate information from the Court about mediation before you had to decide to take this option?
[ ] Yes [ ] No

QUESTION 8
In your opinion, is it likely that this matter would have settled sometime before the hearing even without the mediation process?
[ ] Yes [ ] No

QUESTION 9 (a)
Do you think that the current recession has influenced:
(a) You or your clients decision to agree to mediation?
[ ] Yes [ ] No

QUESTION 9 (b)
The amount of pressure the parties felt to achieve a cheaper and/or quicker resolution to their dispute than is offered by a normal hearing?
[ ] Yes [ ] No

QUESTION 9 (c)
The coming of a mediated resolution (if one was reached)?
[ ] Yes [ ] No

QUESTION 10
Any further comments you would like to make?

QUESTION 11 (a)
Are you satisfied with the way your mediated agreement was put into effect?
[ ] Yes [ ] No

QUESTION 11 (b)
How was your agreement put into effect?

QUESTION 11 (c)
If your answer to (a) is NO, can you suggest a better method of putting the agreement into effect?
QUESTION 12 (a)

If you did not resolve you matter at mediation, did you enter into negotiations after the mediation which resulted in settlement of the matter?

[  ] Yes  [  ] No

QUESTION 12 (b)

If YES (ie to a) do you think that the mediation session helped with the settlement?

[  ] Yes  [  ] No
<table>
<thead>
<tr>
<th>DISPUTE</th>
<th>SUBJECT MATTER</th>
<th>PARTIES</th>
<th>RESOLUTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Class One</td>
<td>Conditions re restaurant</td>
<td>GH v BSC</td>
</tr>
<tr>
<td>2</td>
<td>Class One</td>
<td>Dual occupancy conditions</td>
<td>T v SSC</td>
</tr>
<tr>
<td>3</td>
<td>Class One</td>
<td>Subdivision refusal</td>
<td>H v WCC</td>
</tr>
<tr>
<td>4</td>
<td>Class Two</td>
<td>Erection of new dwelling- landscape detriment</td>
<td>F v WCC</td>
</tr>
<tr>
<td>5</td>
<td>Class One</td>
<td>Alterations to dwelling</td>
<td>F v NSC</td>
</tr>
<tr>
<td>6</td>
<td>Class One</td>
<td>Dual Occupancy refusal</td>
<td>H v LCC</td>
</tr>
<tr>
<td>7</td>
<td>Class Two</td>
<td>Erection of new dwelling-building alignment</td>
<td>S v SSC</td>
</tr>
<tr>
<td>8</td>
<td>Class One</td>
<td>Erection of townhouse</td>
<td>C v SSC</td>
</tr>
<tr>
<td>9</td>
<td>Class One</td>
<td>Erection of townhouse</td>
<td>F v LSC</td>
</tr>
<tr>
<td>11</td>
<td>Class One</td>
<td>Retail outlet</td>
<td>JT v PC</td>
</tr>
<tr>
<td>12</td>
<td>Class One</td>
<td>Concrete Batching Plant- contrary to public interest of objectors and zoning</td>
<td>L v NC</td>
</tr>
<tr>
<td>13</td>
<td>Class Three</td>
<td>Compensation payable for land acquisition</td>
<td>D v SRA</td>
</tr>
<tr>
<td>14</td>
<td>Class One</td>
<td>Dual Occupancy refusal</td>
<td>M v NSC</td>
</tr>
<tr>
<td>15</td>
<td>Class One</td>
<td>Dual Occupancy refusal</td>
<td>H v WCC</td>
</tr>
<tr>
<td>16</td>
<td>Class One</td>
<td>Erection of pontoon and jetty</td>
<td>R v RSC</td>
</tr>
<tr>
<td>16</td>
<td>Class Two</td>
<td>Building Approval</td>
<td>PC v PC</td>
</tr>
<tr>
<td>17</td>
<td>Class One</td>
<td>Dual Occupancy refusal</td>
<td>B v RC</td>
</tr>
<tr>
<td>18</td>
<td>Class Two</td>
<td>Refusal to obey Notice</td>
<td>J v SSC</td>
</tr>
<tr>
<td>19</td>
<td>Class One</td>
<td>Erection of dwelling</td>
<td>M v LC</td>
</tr>
<tr>
<td>20</td>
<td>Class One</td>
<td>Conversion of office space</td>
<td>B v LC</td>
</tr>
<tr>
<td>DISPUTE</td>
<td>SUBJECT MATTER</td>
<td>PARTIES</td>
<td>RESOLUTION</td>
</tr>
<tr>
<td>---------</td>
<td>--------------------------------------</td>
<td>--------------</td>
<td>------------</td>
</tr>
<tr>
<td>21</td>
<td>Class One</td>
<td>Childcare Centre</td>
<td>C v PCC</td>
</tr>
<tr>
<td>22</td>
<td>Class One</td>
<td>Medium density residential</td>
<td>L v TC</td>
</tr>
<tr>
<td>23</td>
<td>Class One</td>
<td>New residence</td>
<td>J v LC</td>
</tr>
<tr>
<td>24</td>
<td>Class One</td>
<td>Demolition &amp; reconstruction</td>
<td>Gv LC</td>
</tr>
<tr>
<td>25</td>
<td>Class One</td>
<td>Subdivision</td>
<td>C v SCC</td>
</tr>
<tr>
<td>26</td>
<td>Class One</td>
<td>Retaining wall</td>
<td>H v BMC</td>
</tr>
<tr>
<td>27</td>
<td>Class One</td>
<td>Construction of verandah</td>
<td>A v RCC</td>
</tr>
<tr>
<td>28</td>
<td>Class One</td>
<td>Residential</td>
<td>M V SSC</td>
</tr>
<tr>
<td>29</td>
<td>Class One</td>
<td>Commercial</td>
<td>B v BMC</td>
</tr>
<tr>
<td>30</td>
<td>Class Two</td>
<td>Demolition order (objectors)</td>
<td>G v WC</td>
</tr>
<tr>
<td>31</td>
<td>Class Two</td>
<td>Swimming pool</td>
<td>G v SSC</td>
</tr>
<tr>
<td>32</td>
<td>Class Two</td>
<td>Demolition order</td>
<td>B v SSC</td>
</tr>
<tr>
<td>33</td>
<td>Class Three</td>
<td>Compensation</td>
<td>WH v RTA</td>
</tr>
<tr>
<td>34</td>
<td>Class Three</td>
<td>Compensation</td>
<td>C v RTA</td>
</tr>
<tr>
<td>35</td>
<td>Class Three</td>
<td>Compensation</td>
<td>D v RTA</td>
</tr>
<tr>
<td>36</td>
<td>Class Three</td>
<td>Compensation</td>
<td>H v RTA</td>
</tr>
<tr>
<td>37</td>
<td>Class Three</td>
<td>Compensation</td>
<td>W v RTA</td>
</tr>
<tr>
<td>38</td>
<td>Class Three</td>
<td>Compensation</td>
<td>S v RTA</td>
</tr>
<tr>
<td>39</td>
<td>Class One</td>
<td>Residential</td>
<td>A v NSC</td>
</tr>
<tr>
<td>40</td>
<td>Class One</td>
<td>Medium density</td>
<td>J v NSC</td>
</tr>
<tr>
<td>41</td>
<td>Class One</td>
<td>Rural subdivision</td>
<td>J v TC</td>
</tr>
<tr>
<td>42</td>
<td>Class One</td>
<td>Subdivision</td>
<td>B V BMC</td>
</tr>
<tr>
<td>43</td>
<td>Class One</td>
<td>Residential</td>
<td>BMDH v BMC</td>
</tr>
<tr>
<td>44</td>
<td>Class One</td>
<td>Consent to commercial advertising</td>
<td>D v MC</td>
</tr>
<tr>
<td>45</td>
<td>Class One</td>
<td>Dual occupancy</td>
<td>P v MC</td>
</tr>
<tr>
<td>46</td>
<td>Class One</td>
<td>Dual occupancy</td>
<td>S v CC</td>
</tr>
<tr>
<td>DISPUTE</td>
<td>SUBJECT MATTER</td>
<td>PARTIES</td>
<td>RESOLUTION</td>
</tr>
<tr>
<td>---------</td>
<td>----------------</td>
<td>---------</td>
<td>------------</td>
</tr>
<tr>
<td>47</td>
<td>Class One</td>
<td>Dual occupancy</td>
<td>F v BMC</td>
</tr>
<tr>
<td>48</td>
<td>Class One</td>
<td>Medium density</td>
<td>SRU v WCC</td>
</tr>
<tr>
<td>49</td>
<td>Class One</td>
<td>Medium density</td>
<td>CM v NSC</td>
</tr>
<tr>
<td>50</td>
<td>Class One</td>
<td>Medium density</td>
<td>T v BMC</td>
</tr>
<tr>
<td>51</td>
<td>Class One</td>
<td>Dual occupancy</td>
<td>CMP v NSC</td>
</tr>
<tr>
<td>52</td>
<td>Class One</td>
<td>Industrial</td>
<td>TPH v SSC</td>
</tr>
<tr>
<td>53</td>
<td>Class One</td>
<td>Dual occupancy</td>
<td>W v CC</td>
</tr>
<tr>
<td>54</td>
<td>Class One</td>
<td>Medium density</td>
<td>S v AC</td>
</tr>
<tr>
<td>55</td>
<td>Class Two</td>
<td>Demolition order</td>
<td>P v SSC</td>
</tr>
<tr>
<td>56</td>
<td>Class Two</td>
<td>Addition/alteration</td>
<td>CC v DC</td>
</tr>
<tr>
<td>57</td>
<td>Class Two</td>
<td>Garage</td>
<td>K v SSC</td>
</tr>
<tr>
<td>58</td>
<td>Class Two</td>
<td>Rural water connection</td>
<td>W v CC</td>
</tr>
<tr>
<td>59</td>
<td>Class Two</td>
<td>Demolition order</td>
<td>C v SSC</td>
</tr>
<tr>
<td>60</td>
<td>Class Two</td>
<td>Additions</td>
<td>J v KC</td>
</tr>
<tr>
<td>61</td>
<td>Class Two</td>
<td>Additions</td>
<td>L v PC</td>
</tr>
<tr>
<td>62</td>
<td>Class Two</td>
<td>New dwelling</td>
<td>L v KC</td>
</tr>
<tr>
<td>63</td>
<td>Class Two</td>
<td>Additions</td>
<td>S v LC</td>
</tr>
<tr>
<td>64</td>
<td>Class Two</td>
<td>Demolition order</td>
<td>N v BC</td>
</tr>
<tr>
<td>65</td>
<td>Class Two</td>
<td>New dwelling</td>
<td>P v KC</td>
</tr>
<tr>
<td>66</td>
<td>Class Two</td>
<td>New dwelling</td>
<td>K v WC</td>
</tr>
<tr>
<td>67</td>
<td>Class Two</td>
<td>Carport</td>
<td>BPA v DC</td>
</tr>
<tr>
<td>68</td>
<td>Class Three</td>
<td>Compensation</td>
<td>M v RTA</td>
</tr>
<tr>
<td>69</td>
<td>Class Three</td>
<td>Compensation</td>
<td>C v RTA</td>
</tr>
<tr>
<td>70</td>
<td>Class Three</td>
<td>Compensation</td>
<td>G v RTA</td>
</tr>
<tr>
<td>71</td>
<td>Class Three</td>
<td>Compensation</td>
<td>U v RTA</td>
</tr>
<tr>
<td>72</td>
<td>Class Three</td>
<td>Compensation</td>
<td>R v RTA</td>
</tr>
<tr>
<td>73</td>
<td>Class Four</td>
<td>Obj. to development consent (Objector.)</td>
<td>BH v BMC</td>
</tr>
</tbody>
</table>
APPENDIX C

- ALTERNATIVE DISPUTE RESOLUTION RESEARCH

Background Research - Land & Environment Court.

File No: ____ (numerical order)

1. Parties Involved at mediation conference (circle)

   A. Local Government                B. State Authority/Department
   C. Development/Real Estate Company  D. Planning Consultant
   E. Objector(s)                      F. Environmental Group
   G. Private Individual (as applicant) H. Other

   (note where there is legal representation with 'L')

2. Location of site in dispute (circle)

   A. Sydney Metropolitan Area
      (i) City/Inner City             (ii) Suburban
      (iii) Fringe
   B. Coastal
   C. Other Regional

3. Class of Dispute (1-4)
4. **Nature of Dispute (circle)**

   A. Determination of development application.
      
      (i) dual occupancy                     (ii) medium density residential
      (iii) other residential                (iv) commercial
      (v) industrial                         (vi) other

   B. Appeal over conditions of consent (DA).

   C. Matters pertaining to building application.

   D. Injunction/restraining orders sought.

   E. Compensation determination.

   F. Judicial review of decision/consent.

   G. Other.

5. **Outcome (where possible)**

   A. Dispute successfully mediated.

   B. Partial agreement achieved - areas of dispute lessened.

   C. No area of agreement - matter to proceed to litigation.
RESEARCH QUESTION A.

Was the IAP negotiation process an example of the use of ADR to resolve environmental disputes?

1. What was your organisation's involvement in the IAP process generally & the negotiations specifically?

(PROMPT: how were you invited to participate?
Were you a willing participant?
Was it just a continuation of an ongoing consultative process?)

2. What was being negotiated in the IAP negotiation sessions?

(PROMPT: What was your wish list in terms of conservation or resource outcomes?
What did you hope to achieve?
Were the 4 scenarios on the table?
A negotiated settlement that government would rubber stamp?)

3. What happened at the negotiations in terms of achieving these aims?

(PROMPT: Real negotiations in the sense of hard bargaining, compromises, heated exchanges?
Or essentially a consultative process?
Did what you did or said really matter?)
RESEARCH QUESTION B.

Was the negotiation process effective in resolving the conflict?

1. How do you rate the success of the negotiation process?

(PROMPT: What is your measure of success?
Durable agreement implemented by government?
Reduction of conflict?
Improved communication?
Greater understanding of other party's perspective?)

2. If the negotiations did not produce a successful outcome [= implementing the scenarios], why not?

(PROMPT: What intervened- lobbying, political intervention? Is it a failure? Did you want the government to adopt each of the 4 scenarios?)

3. Did the cabinet decision of 23/9/96 (essentially scenario 3: logging @ 50% plus 5/5 contracts) resolve the conflict over logging in State Forests?

(PROMPT: Can it be resolved? Are stakeholders irreconcilably opposed? Can negotiation resolve such disputes?)
APPENDIX E

LAND AND ENVIRONMENT COURT

MEDIATOR REPORT

Case Number:

Class:

Number of Sessions:

Total time in Session:

Number of Parties:

Local Council / State Authority as Respondent (tick):

Number of Objectors / Third Parties:

<table>
<thead>
<tr>
<th>Issues Mediated</th>
<th>Degree of Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Full</td>
</tr>
<tr>
<td>2.</td>
<td>None</td>
</tr>
<tr>
<td>3.</td>
<td>Partial</td>
</tr>
</tbody>
</table>
Factors Contributing to Agreement:

Factors Contributing to Lack of Agreement:

Level of Conflict: High / Moderate / Low

Factors Contributing to Conflict:

Balance of Power Held by: Applicant/ Respondent/ Third Party / Not an Issue

Type of Agreement: Verbal / Written / None

Further Action: Consent Orders to be filed
Application to be Withdrawn
Hearing Date to be Allocated
BIBLIOGRAPHY


Abella, R.S., "Canadian Administrative Tribunals: Towards Judicialisation or Dejudicalisation"(1988) 2 Canadian Justice and Legal Practice 1.


Bingham, G. & Mealey, T.J. "A Decade of Experience with Environmental Dispute Resolution: Lessons Learned for Environmental Professionals" (1986) 8(4) Environmental Professional 295.


Dinkins, C.E., "Shall We Fight or Will We Finish: Environmental Dispute Resolution in a Litigious Society" (1984) 14 Environmental Law Reporter 10398.


Doyle, K. & Hall, M.D. "Negotiating Agreements to Environmental Problems" (1984) 16(3-4) The Environmental Professional 203.


Fowler, R.J., "Environmental Mediation-'EDR'"(1992) 3(3-4) *LEADR Brief* 11.


Galligan, B. & Lynch, G. "Integrating Conservation and Development-Australia's RAC and the Testing Case of


Jowell, J., "The Legal Control of Administrative Discretion" (1973) Public Law 178.


Klug, M., "Public Interest Dispute Resolution: A Role for Lawyers"(1991) 2(3) LEADR Brief 1.


Neumann, R. (ed.), Resolving Environmental Disputes in the Public Interest, Environmental Institute of Australia (South East Queensland Division), Brisbane, 1992.


Pengelly, W., "Alternative Dispute resolution: The Philosophy and the need" (1990) *1 Australian Dispute Resolution Journal* 81.


Roberts, J., "Environmental Mediation: Dispute Resolution or Dispute Management?" (1993) 4 Australian Dispute Resolution Journal 150.


Rogers, N., "A Dark Green Perspective on Environmental Dispute Resolution" (1994) 1 Commercial Dispute Resolution Journal 111.


Stone, C.D., Should Trees have Standing? Towards Legal rights for Natural Objects, W Kaufmann; Los Altos, California, 1974.


Street, L., "The Court System and Alternative Dispute Resolution Procedures" (1990) 1 Australian Dispute Resolution Journal 5.

Street, L., Report on a Model of Conciliation for the NSW Workcover Scheme, NSWGP, Sydney, 1996.


Tow, D. and Stubbs, M., "The Effectiveness of ADR Techniques in the Resolution of Planning Disputes" (forthcoming) University of Western Sydney, Hawkesbury.


Weir, M.J., "Alternative Dispute Resolution in Queensland Environmental Law"*(1991) 2* *Australian Dispute Resolution Journal* *November 224.*


West, L. "Mediating Settlement of Environmental Disputes: Grassy Narrows and White Dog Revisited"*(1987) 18(1)* *Environmental Law 131.*

White, J.J., "The Pros and Cons of 'Getting To Yes' and Comments by R. Fisher"*(1984) 34* *Journal of Legal Education 115.*

Wilcox, M., "The Role of Environmental Groups in Litigation"*(1985) 10(1)* *Adelaide Law Review December 41.*

Wolski, B. "The Role and the Limitations of Fisher and Ury's Model of Interest-Based Negotiation in Mediation"*(1994) 5* *Australian Dispute Resolution Journal 210.*

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