



Environmental Mediation Booklet

Mediation can help you to clarify issues, resolve conflicts and reach agreement without always needing to go to a Court or a Tribunal.

To assist in understanding what mediation involves, EcoDirections has put together this booklet for use principally in Australia and New Zealand.

The information provided will help you make an educated decision about whether you might like to consider mediation to resolve a planning or environment dispute.

EcoDirections thanks New Zealand Ministry for the Environment for granting us permission to use and adapt the information provided on their website.



Photos by Jianbo Kuang

What is mediation?

Mediation is one of the Assisted Dispute Resolution (ADR) processes to resolve disputes where people get together with the assistance of a third party independent person (mediator) to isolate issues, develop options, consider alternatives and reach an agreement everyone can live with, rather than having a Judgment imposed on them by a formal body such as the Court or Tribunal.

The **Dispute Resolution Guidebook** by Ruth Charlton (2000) includes the following definition:

Mediation is a process by which the parties to a dispute, with the assistance of a neutral third party (the Mediator), identify the issues in dispute, develop options around these issues, consider alternatives and endeavour to reach an agreement which encompasses the underlying needs and interests of the parties.

Advantages of Mediation

- Parties often develop and agree upon creative, constructive, achievable, workable and mutually acceptable solutions.
- Mediations can be much cheaper and far more satisfying than litigation. Potential cost savings for an appeal/application can be to the order of 25% to 85% of the ordinary litigation costs of going to a Court or Tribunal.
- The earlier ADR is used the more money is likely to be saved.
- Common ground is identified between the parties, which results in isolation of the issues.
- The parties *own* the outcome. It is their agreement. ADR can create certainty.
- The parties cannot talk to the Judge but they can talk to the Mediator.
- The confidential and without prejudice nature of mediation is an advantage. The agreement to mediate and the agreement at the end of the mediation need to be public documents for transparency and accountability reasons.
- Outcomes, which cannot be achieved in court, can result from ADR.
- The safety net of a Court or Tribunal still exists. Even if the parties have to go to the Court or Tribunal, the mediation is likely to have resulted in the dispute being better understood or narrowed.
- Mediation is a process that can help parties *get unstuck* from the stalemate of the dispute.
- Mediation allows people to explain how they see the problem and how they feel about it. Initial discussion at mediated meetings focuses on what people value and need rather than the positions they may hold or what they demand.
- By taking a step back from those positions, parties can share and gain an understanding of each other's opinions and the values that underlie their attitude to particular disputes. In this way, disputes can be looked at afresh and the perspective that parties so easily lose in litigation can be regained.

Mediation basics

Voluntary Involvement

Any party may end the process at any time. There should be no pressure to stay and be involved.

Active participation in good faith

Active participation with communication by all parties is essential if you are going to reach an effective agreement. Mediation requires good intentions on the part of all parties.

Driven by you

Mediation assumes that the parties are competent and informed and able to reach agreements that suit their needs. Control of the dispute and the terms of settlement remain in your hands. A resolution will only occur if the parties agree.

Inclusive

All parties must be present and all parties must agree to the process. The involvement of people with the authority to make settlements on behalf of others is essential. Mediation must be conducted at a time and place that is convenient to you.

Independent and impartial mediator

The mediator acts as a facilitator, communicator, motivator, and scene-setter, creating the right environment for the process to be effective. The mediator must be independent of both parties and the Court or Tribunal.

The mediator must not give legal advice, offer opinions or coerce parties into agreement. The mediator does check that all parties fully understand what they are agreeing to.

Mutual respect

The process allows the parties (including the mediator) to develop a degree of trust and confidence in themselves, in each other, and in the process.

Flexible outcomes

It is open to you to discuss matters outside the appeal. You may want to talk

Confidential process

All discussions that take place in mediation must be completely confidential. In Court or Tribunal mediations no formal record is kept, except the agreement. It can result in a Consent Order.

Protecting your right to litigate

All verbal offers and discussions that take place during the course of mediation do not affect your right to litigate, should issues remain unresolved and disputes proceed to Court or a Tribunal.

Finality of agreements

Where agreements are reached they are final and treated as binding contracts.

Fairness and equity

All parties must be given a fair hearing, and have equal access to information.

Endorsements

The Land and Environment Court Working Party Report (New South Wales) recommended that *Councils are encouraged to make appropriate delegations, including the power to negotiate and settle matters, so as to enable their representatives to*



*participate effectively in alternative dispute resolution facilitated by the court (that is, preliminary conferences and mediation).*¹

According to the Queensland Attorney General, Hon Rod Welford in 2002:

*...there is an enormous untapped potential for ADR processes to be applied to environment and planning disputes. ... Some of the more sophisticated local governments routinely seek to negotiate the resolution of planning disputes even before proceedings are issued. Nevertheless, I believe we have barely begun to scratch the surface in terms of the potential for an expanded role for ADR.*²

Legislation allows Courts and Tribunals to refer disputes to mediation. Voluntary mediation can occur by agreement before Court or Tribunal proceedings are commenced.

The Local Government Association of Queensland (LGAQ) amended its Policy in August 2002 to include:

6.1.1.5 Local Government support creation of alternative dispute resolution mechanisms to provide more effective, responsive and lower cost resolution of planning disputes.

What triggers mediation?

The possibilities for mediation may arise in a number of ways:

- Before legal proceedings are commenced by a mediation agreement.
- Where there is a potential dispute, early mediation can avoid the dispute or escalation of the dispute.
- Once public notice is given of a proposed development and before Local Government makes a decision.
- As soon as the Local Government or other statutory body decision is known.
- Before substantial litigation costs are incurred.
- Once legal proceedings have commenced then voluntary mediation by agreement or by Court or Tribunal Order or Directions can be commenced.

Committing to Mediation

Before entering mediation you should consider these benefits and limitations:

Benefits

- The process is confidential and avoids undesirable publicity and attention. Sensitive cultural and



¹ September 2001

² Queensland Environmental Law Association Conference, 2 May 2002.

commercial information can be shielded.

- Mediation can start at any time after legal proceedings are lodged. You can wait considerably longer for a Court/Tribunal hearing date.
- Mediation creates an early chance to be heard (even before the decision is taken).
- The atmosphere in meetings is informal and topics for discussion can be as wide as need be. This allows people to get *things off their chests* and move beyond narrow polarised positions in a face-saving way. It can result in creative and flexible solutions.
- Helps get negotiations started without the fear of showing weakness.
- Often cheaper than Court/Tribunal appearances. Disputes can be resolved or narrowed sooner.
- Many planning and environment disputes involve multiple issues and multiple parties. The complexity of a dispute does not preclude the use of ADR. Its flexibility and informality allows the Mediator to design a specific set of processes to handle each particular dispute.

Possible Limitations

- It is not helpful where the parties view the dispute as a heroic battle, or where the conflict is infected by extreme irrationality.
- The process can rely heavily on the skill and appropriateness of the mediator.
- There are no guarantees of avoiding Court/Tribunal actions. You may not perceive some interests and values to be negotiable, issues raised in an unsuccessful mediation may need to be revisited in Court/Tribunal hearings.
- The greatest level of resource investment is *upfront*. You need time to prepare and go to meetings. You need to be ready and willing to understand the other person's point of view.
- Participation can be reactive if you have not clearly identified your needs, the way the meetings(s) will be run and how best to participate.

Other Considerations

- Several reasons have been put forward on why environmental disputes should not go to mediation. For example, in conflict between members of the community with strongly held views. In fact, mediation will give opposing parties a better understanding of their opponents' values and the opportunity to consider common ground. Common ground between disputing parties provides an opportunity to resolve the dispute satisfactorily for all involved.
- Another reason given for why mediation is not suitable for planning and environment disputes is that these disputes are not like ordinary litigation between private citizens (such as a breach of contract or negligence). The Court or Tribunal is not asked to determine rights, but to determine, in the light of relevant policy criteria, whether a development approval (a privilege) should be granted - and upon what terms. There is no reason, in principle, why these matters cannot be referred to ADR. The

development industry and other interested parties make representations relevant to particular proposals in an attempt to influence the decision of Local Government. The New South Wales experience with a limited number of Local Governments shows that early intervention by using ADR saves time and money for all concerned.

Over the last 20 years, town planning and environmental legislation has become more complex in response to community demand for a better set of policy criteria. This has and will continue to increase disputation. It is in the best interests of the community for there to be mediation available. Access to information is an important component of dispute avoidance and dispute resolution.

Mediation can be successful in a wide range of situations. Some examples of environmental disputes where mediation may be appropriate include:

- The allocation of water rights.
- The appropriateness of conditions attached to the granting of development approval.
- Proposals for infill housing or dwellings close to neighbouring properties in residential areas.
- Development applications for major projects such as landfills, lifestyle block subdivision and intensive animal farming.
- Complaints arising from environmental policies.
- Enforcement of development conditions where there are environmental impacts on neighbourhoods.
- Vegetation clearing disputes.
- Establishment of new industries on Greenfield sites.
- Clean up or new uses for Brownfield sites.

Mediation checklist

Should I agree to mediation?

If you agree with more than two of these questions, then mediation is right for you.

- ✓ Do you have an important relationship that you wish to protect or improve (eg. With a neighbour or local council)?
- ✓ Do you have enough knowledge to have some influence over the outcome of mediation?
- ✓ Do you think enough goodwill exists to try and reach an understanding? You must not see mediation as a means to delay or obstruct, to attract support or membership, to secure leadership, or to establish a principle.
- ✓ Do you think the issues are tangible enough for practical solutions to be found?
- ✓ Would a compromise solution be acceptable to you?
- ✓ Is a safe and confidential environment needed to explain your values?

- ✓ Do you want to avoid adverse publicity or attention?
- ✓ Would you gain or lose anything by entering into mediation?,
- ✓ Is the timing appropriate?
- ✓ Are you sure that the issues do not require an *umpire* to make a decision?
- ✓ Will litigation serve your real needs and interests? How?

Getting Ready

Who should represent you?

It is often of assistance to have a lawyer assist you through the mediation. This is especially so when the agreement is being formulated at the end of the mediation. You may represent yourself. However, an expert (like a Town Planner) may be of assistance in particular disputes.

EcoDirections Mediators

A successful outcome relies on the goodwill of the parties and the skills of the mediator.

John Haydon, Managing Director

John is the Managing Director of EcoDirections with more than 25 years as an Environmental Lawyer and involvement in the Non Government Organisation sector. John has practiced as a Barrister since January 1977 and was an active President of the Associations mentioned in John's [curriculum vitae](#).

John has represented many clients in a variety of environmental and town planning disputes in the Local Government Court (now Planning and Environment Court), Land Court and Supreme Court in Queensland, Australia.

Dr Jianbo Kuang, Senior Environmental Consultant

Jianbo has had more than 19 years experience as a Research Scientist in Agriculture Science, Plant Environmental Physiology, and Biotechnology. This has included the designing, conducting researches and publishing results.

Employment has taken Jianbo from China to Australia and to the United States. Dr Kuang is now an Australian citizen who speaks both English and Mandarin. He is qualified as a Mediator having completed that course at Bond University (Queensland).

What can I expect from the Mediation process?

- Exchanging documents before the mediation is encouraged.
- A neutral venue should be selected.

- On the day of the mediation session, the Mediator will commence with an opening statement. This is followed by an opening statement from each of the parties. These statements can be oral or partly written.
- We encourage each party to suggest, as part of the pre-mediation process or as part of the opening statement, some options for resolving the dispute. Other options will be developed during the mediation.
- Once the first joint session has been conducted, the opportunity arises for private sessions for each party with the Mediator. This will include any advisers who are with the party. It is important that the person who attends the mediation is authorised to settle the dispute. When agreement is reached at mediation, it is important to record that and have it signed by the parties.
- In separate private sessions, the issues can be further explored. The facilitation process may involve the Mediator moving from one private session to the other to keep the discussion moving.
- Reconvening a joint session (or a number of joint sessions) during the mediation process may also be an option.
- It is often said *expect the unexpected* during the mediation process. This emphasises the flexibility of the process.
- The exciting part of mediation is its ability to allow the parties to develop options, which cannot always be achieved in the win/lose Court/Tribunal situation.
- We ask the parties how much time they have available as part of the pre-mediation discussion.
- The solutions may not be obvious at first. Or they may not be obvious to everyone. The mediation process should look forward and find options that will lead to a solution. The challenge for all those involved in ADR is to have the parties move forward.

EcoDirections emphasises pre-mediation processes to help you get ready. These are tailored to suit the circumstances of the mediation being conducted.

We have a mediation video for loan and a sample mediation agreement for litigation disputes is available at www.ecodirections.com/litigation_mediation_agreement.html. We also have a draft agreement for a non litigation dispute.

For further information please email John Haydon on johnhaydon@ecodirections.com