RESOLVING
ENVIRONMENTAL PLANNING CONFLICTS
THROUGH MEDIATION
AND

CASE APPRAISAL:

AN AUSTRALIAN EXPERIENCE

By
John Haydon
Barrister at Law
and
Senior Environmental Consultant
Mediator and Case Appraiser

Brisbane
AUSTRALIA
April, 2000

©
**Introduction**

Mediation and Case Appraisal will, in the next 5 years, become an increasing part of the dispute resolution mechanisms used to resolve environmental (including town planning) disputes in the State of Queensland, Australia. This is principally because of Section 4.1.48 of the Integrated Planning Act 1997 and an increasing willingness of the Judiciary to make Alternative Dispute Resolution (ADR) Orders.

The Local Government Court in Queensland commenced in 1966. It was renamed the Planning and Environment Court in 1991 with a limited declaratory and injunctive jurisdiction added. In 1998 the jurisdiction has widened and there has been a statutory recognition of ADR.

Additionally, an increase in the use of Negotiated Rulemaking will lead to a reduction in the number and nature of environmental disputes.

A multidisciplinary approach is essential. All decisions need to be taken in accordance with ecologically sound principles.

It is often a question as to whether to regulate or not. Market force mechanisms can often be a useful alternative to a detailed regulatory regime. However, there are some limits to self regulation. There should be a public right to participation in these processes.

State of the Environment reporting and the collection of other environmental data is essential to a properly managed system. There should be a legal entitlement to access to this information. Freedom of speech is not worth anything unless there is freedom of information. We all have a right to know what is going on in the world around us, whether individually or collectively.

What does the public want? Who is to respond to what the public wants?

How do we establish facts? Is it by research or by some independent fact finding body? Should guidelines be published? What is the basis of making policy in business and industry and in government? What is the role of environmental law? These are all issues which need to be addressed as part of establishing a model or models for the legal entitlement of the public (individually or collectively) to participate in the taking of environmental decisions. The participation may be at the policy formulation stage and thereafter it is left to the “administrators” to carry out that policy.
There is a role for the public in the enforcement of environmental laws. With that principle acknowledged it is equally important to ensure that the public is involved in the making of the laws and the revision of regulations of an environmental nature.

**Background**

In 1988 and 1989 the following comments were made in respect of the future of Town Planning Dispute Resolution in Queensland:-

*Alternative Dispute Resolution (ADR) has not yet found its way into the planning process. The North American (United States and Canada) experience shows that ADR is a real alternative to costly law suits. It is being used not only in Family Law matters but also in Insurance and Commercial matters generally. At the present time, the Arbitration Act in Queensland is being reviewed. The forerunner to ADR systems operating successfully is a review of the Arbitration Act system. The importance of involving lawyers in the ADR procedure, is that legal training and experience gives those persons an ability to quickly sort out the material from the immaterial and the relevant from the irrelevant and therefore to be able to effectively provide a mediation service where disputes arise.*

*Alternative Dispute Resolution is concerned with mediation and arbitration. Mediation is a process in which a neutral person assists disputants in negotiating their own settlements. The mediator does not have authority to impose a binding decision on the parties. In arbitration a neutral person makes a binding decision that can be enforced in the courts. Both procedures are usually voluntary, but once the parties have agreed to arbitrate a dispute, they cannot change their mind. However, a party who has agreed to mediate can withdraw from the process at any time.*

*The mediation process is non adversarial and therefore it helps preserve an ongoing relationship between the parties. The experience in British Columbia is that the confidential proceedings can be scheduled quickly and they can take place after business hours and have been demonstrated to be much less costly than courtroom trials. A Commercial Dispute Resolution Service is available through the British Columbia International Commercial Arbitration Centre, which has a Queen’s Counsel as its Executive Director. The mediators*
and arbitrators for this dispute resolution service are appointed by the Centre and are independent and neutral.

Bob Vickerstaff, President of Laurentian Pacific Insurance Company (and a member of the British Columbia International Commercial Arbitration Centre’s Advisory Committee) described ADR as an idea whose time has come, and went on to say:

Arbitration in the insurance industry is not new by any means; it just is not frequently used... We want a system which is fair, inexpensive and accessible, but we have to guard against very real dangers. The first danger is that an alternative system might be bogged down with frivolous requests for dispute settlements. The second is that any alternative mechanism does not end up suffering from the same ailments which it is set out to cure. The third danger that we have to guard against is any battle for control by either the legal profession on the one side or professional arbitrators on the other.

For the future when planning becomes more complex and involved and therefore has the potential to become more expensive, there needs to be an expanded set of mechanisms in place whereby disputes which arise can be settled. Whilst the Local Government Court is performing an important function, a review of its jurisdiction will be required so that it can better handle the planning processes of the future. Alternative Dispute Resolution needs to be considered as a sensible and viable voluntary option.  

By 1990 more was being discussed in respect of ADR based on North American experience. At the National Environmental Law Association National Conference the following was said:-

There are many different techniques which constitute Additional Dispute Resolution. Philip Harter describes mediation and facilitation as a neutral third party working with the parties in helping them negotiate a settlement as one ADR technique. Another is non binding arbitration where the parties present evidence and arguments to a neutral who makes a tentative decision concerning the resolution of issues. The parties in this case may accept the decision and abide by it. Experience has shown that where the Arbitrator’s opinion is

---

1 The Judicial System and Public Interest in Queensland Town Planning by John Haydon (1989) 6 EPLJ 18 at 23 which was based on a paper delivered in August, 1988 to the Local Government Planner’s Association of Queensland Conference, Brisbane. [EPLJ is the Environmental and Planning Law Journal, Australia]
rejected it still helps the parties to resolve the issues through negotiation. A third method is fact finding where the neutral is asked to review a factual matter and provide an opinion as to the issues specified. An investigation of this nature uses informal procedures. The results can be used to provide a framework for negotiation. A fourth example is a mini trial where lawyers present summaries of their cases in the presence of representatives of the disputing parties who have the authority to settle the matter. A neutral person usually presides at the hearing. Following the presentations the representatives of the parties seek to negotiate a resolution of the issues. Sometimes those representatives are the Chief Executive Officers of the organisations in dispute.

When disputes arise, it is essential to have sufficient mechanisms available to allow for the quick and efficient resolution of those disputes or at least the identification of those matters which are required to be litigated.²

In 1995 the following was said at the Queensland Environment Law Association Inc. conference:-

**Dispute Avoidance**

With better environmental knowledge there is an opportunity to avoid disputes. The community needs to focus on dispute avoidance as a mechanism. The Court system and Additional Dispute Resolution (ADR) cannot be expected to deal with all potential disputes which are likely to arise if dispute avoidance does not become a reality. Disputes will not be eliminated completely.

Accessibility to all relevant knowledge is fundamental to any consideration of dispute avoidance. There is a need for trust so that all relevant information is recorded and available for public access.

It is an essential part of the right to public participation that that participation is based upon the best information available. Otherwise a biased result occurs. We all should trust the process which results in a publicly available ecoinformationbank. If we all have access to the same information then the level of disputation can reduce.

² **Overseas Update on Negotiation and Additional Dispute Resolution Techniques** by John Haydon, Australian Environmental Law Conference, Broadbeach,1990
Where environmental factual disputes arise, limited enquiries or "fact finding assessments" can be undertaken which are aimed at resolving the dispute. The result is then recorded in the "ecoinformationbank". Such a system can allow for amendments to be made when better scientific information becomes available. The right to public participation should be included in these processes.

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

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

Additional Dispute Resolution

This is not the place to review all the recent developments in additional dispute resolution (ADR). However, it is important to note that significant progress has been made in recent years in the level of awareness, acceptance and use of ADR. There is still more scope to develop and use ADR techniques. In the exercise of the rights to know and participate the role of ADR need to be acknowledged as important processes. Just as Negotiated Rulemaking is an example of "early intervention" and a form of ADR there is also a need to recognise that ADR can be used at any point along the way. A mediated solution to one overall small point or aspect of an environmental dispute may then allow the parties to continue negotiations without the Mediator.3

---

3 The Continuing Development of the Right to Know and the Right to Participate as Public Environmental Rights by John Haydon, 1995, Queensland Environmental law Conference, Port Douglas
Experience Elsewhere

Gail Bingham wrote in 1986 about the United States experience with environmental dispute resolution techniques.\(^4\) By that time there had been 10 years of experience in using ADR in environmental dispute resolution. Robert Fowler critically analysed the Australian approaches to Environmental Dispute Resolution in 1992 including relevant references to the United States.\(^5\)

Negotiated Rulemaking is a process for developing environmental laws and policies (including Planning Schemes) by consensus. It involves public participation, face to face negotiations amongst the stakeholders, the use of a neutral facilitator, and the encouragement of cooperative and creative problem solving. In the United States it was first recommended in 1982 and first used in 1983. Its use accelerated in the 1990s after the passing of the **Negotiated Rulemaking Act 1990**\(^6\), followed by the strong support given by President Clinton in 1993\(^7\) and 1995\(^8\). The United States Environmental Protection Agency has been leading the way for other Federal Agencies in the use of Negotiated Rulemaking. The **Negotiated Rulemaking Sourcebook** by David Pritzker and Deborah Dalton\(^9\) is a comprehensive resource for agencies containing guidance on the theory and practice of the technique.

In 1998 Susan A Moore and Robert G Lee described their article **Creating Value: A Hidden Benefit of Environmental Dispute Resolution in Australia and the United States**\(^10\) as follows:-

> Creating value is one of the great benefits of environmental dispute resolution. This article provides practical examples of creating value from case studies of environmental disputes in the United States and Australia. Value is created by realising latent shared interests; building relationships; developing new shared interests; working with differences; and developing co-ordinated management. Key of findings were the importance working with differences as well as similarities, the importance of relationships in creating valuable outcomes, and the importance of recognising the interdependence of the ways in which value is created.

---

\(^4\) G. Bingham *Resolving Environmental Disputes: A Decade of Experience* (The Conservation Foundation, Washington DC), 1986

\(^5\) Robert J Fowler *Environmental Dispute Resolution Techniques - What Role in Australia?* (1992) 9 EPLJ 122

\(^6\) Public Law No. 101-648 (Codified at 5 USC Sections 561-570) passed by Congress with bipartisan support and signed into law by President Bush on 29 November, 1990.

\(^7\) Executive Order 12866 and a series of follow up memoranda encouraged Federal Agencies to use negotiated rulemaking

\(^8\) Regulatory Reinvention Initiative dated March 4, 1995 directed agency heads to submit a list of upcoming rulemakings that might be converted into negotiated rulemakings.

\(^9\) First published in 1990 and a revised and updated edition was published in 1995
Susan A Moore and Robert G Lee took two case studies. Firstly, the Fitzgerald Advisory Committee in Western Australia which was convened by the Western Australian Department of Conservation and Land Management (CALM) to help prepare a management plan for the Fitzgerald River National Park on the South West Coastline of Australia. The second case study was the Bob Task Force convened by the United States Forest Service to help prepare a plan for the Bob Marshall Wilderness Complex in the Rocky Mountains of Montana. The authors say that both disputes were based on conflicts between recreational user groups, private and commercial interests, and community and government agency interests. Both of these planning processes took place against a legislative background requiring public consultation. However, the land management agencies were willing to go beyond these requirements.

Susan A Moore and Robert G Lee look at the implications for Environmental Managers and Negotiators and say:-

A key feature of the negotiating environment is bringing together people for sufficient time in an environment where talking and listening are possible. In public lands disputes, managing agencies must commit time, resources and intentions to creating and maintaining these features. Such an environment is essential for realising latent shared interests and developing relationships. These two ways of creating value are linked to later ways, such as working with differences. Thus, creating value later in environmental dispute resolution, such as management plan completion and co-ordinated management, requires managing disputes to achieve earlier forms of creating value.11

John H Keogh in Dispute Resolution Systems in the New South Wales Land and Environment Court and the Role of EDR Processes in Participatory Decision-Making gives the following synopsis for the article:-

Flexibility within a system and a willingness to offer a range of dispute resolution strategies are hallmarks of a successful ADR system. The Land and Environment Court would appear to be well placed to deliver a truly integrated ADR programme within the Court’s jurisdiction. Whether local government and authorities such as the Environment Protection

10 (1998) 9 ADRJ 11 [ADJR is the Alternative Dispute Resolution Journal, Australia]
11 (1998) 9 ADRJ 11 at 19 [ADJR is the Alternative Dispute Resolution Journal, Australia]
Authority have the political will to make a commitment to ADR or appreciate its utility, remains to be seen.12

The Land and Environment Court Rules 1980 were repealed on 29 January, 1996 by the Land and Environment Court Rules 1996. Part 18 of the new rules deal with mediation and are supported by a new Practice Direction which took effect from 29 January, 1996. At the time of writing the article Mr Keogh notes that the Land and Environment Court arranges mediation sessions conducted by the Registrar, the Assistant Registrar or a mediator drawn from the Court’s then current panel of 49 independent mediators.13

In discussing the traditional mediation model adopted by the New South Wales Land and Environment Court, Mr Keogh says as follows:-

There are certain procedures or agreements between the mediator and parties to a mediation which give a recognisable structure to the process followed by the Land and Environment Court. Some are now mandatory under the 1996 Court Rules, Pt 18.

1. “At least 7 days before a mediation session is to commence, the parties are to exchange statements of issues that are in dispute between them and supply copies to the Court and the mediator.” (Rule 4, Pt 18).

2. When the mediation session commences an opening address is made by the mediator setting out his or her role as being

   (a) independent and

   (b) committed to maintaining the confidentiality of the mediation and any information received from the parties.

3. Behavioural rules are explained and although time limits are normally not imposed, they are occasionally set to encourage a resolution or to allow the “closing of an agreement” or to prevent unnecessary protracted discussions.

4. The willingness of the parties to commit their goodwill to the mediation and its continuance is called for.

12 (1996) 7 ADRJ 169
13 (1996) 7 ADRJ 169 at 170-171
5. An agreement reached at the conclusion of the mediation session may be brought into effect in a number of ways (for example, resolution of a Class 1 appeal could result in the following):

(a) The Court could grant consent orders pursuant to the 1996 Practice Direction;

(b) The Council, if it is a deemed refusal, could agree to determine the matter in accordance with the agreement; or

(c) The application may be requested to lodge a new application with the Council in terms of the mediation settlement agreement to enable the Council to redetermine the application.

6. Within 7 days of the conclusion of the mediation, the mediator must advise the Court “of the fact but not the details thereof”. (Rule 7(1) 1996, Court of rules, Pt 18).

7. Documents produced for the purposes of the mediation are returned to their respective parties at the conclusion of the mediation (presumably this includes Statement of Issues).14

David Tow and Michael Stubbs review The Effectiveness of Alternative Dispute Resolution Methods in Planning Disputes and provide the following synopsis:-

An analysis of 170 mediations conducted in the Land and Environment Court of New South Wales in the years 1992 to 1994, combined with a survey of land use decision-making processes across local government in New South Wales, indicates that there is very great potential for more extensive and more effective use of ADR methods in local government decision-making. The key challenge is to ensure that “consensus-based” models of decision-making retail the core public interest imperative of an open and accountable system of public decision-making. A major cultural shift among local government decision-makers is also required if a consensus-driven approach is to become the norm rather than the exception.15

14 (1996) 7 ADRJ 169 at 174
15 (1997) 8 ADRJ 267
The authors make the following comments in respect of their investigations:

_in May 1991 the New South Wales Land and Environment court introduced the option of voluntary mediation in all planning merit appeals registered before the Court._

………..

The mediation process may be perceived as a useful mechanism to reduce "unnecessary" appeals within the system, thereby helping to speed the decision-making process by removing a proportion of caseload otherwise the subject of full hearing in the court. However, it would be incorrect to consider mediation as just a response to an administrative desire to reduce delay. The mediation format is itself a departure from the "traditional-adversarial" approach whereby conflicting parties seek to influence the judgment of the arbitrator and are pushed away from seeking a consensus and towards defending their respective positions.

………..

The 1979 Act divides the jurisdiction of the court into seven classes. Class 1 deals with matters of environmental planning and protection; covering appeals on planning merits, comprising development applications, non-determination of such applications and conditions imposed on an application. Class 2 deals with building applications; Class 3 land tenure, rating, valuation and compensation, while enforcement matters are split between Class 4 (civil enforcement), Class 5 (summary criminal enforcement) and Class 6 (appeals from convictions relating to environmental offences). Class 7, when proclaimed, will deal with matters of native title.

………..

Of 170 disputes where mediation was sought, 73 per cent were successfully resolved. A successful resolution is defined as where agreement is reached on a mutually acceptable approval of the application (usually by way of consent orders) or by a withdrawal of the appeal.

Mediations which proceeded to a full hearing have been characterised as unsuccessful (27 per cent). However, it is apparent from interviews with parties involved in a large number of mediations that some partial agreement or a lessening of issues in dispute is achieved in the great majority of instances.
As a percentage of all disputes, Class 1 (planning) disputes dominated the work of the court in terms of both appeals and mediations\(^\text{16}\). Of all dispute types, they were also the most likely to go to mediation. However, mediation was attempted in only 4.5 per cent of 2,236 Class 1 disputes that were before the court between 1992 and 1994. Of all Class 1 to Class 4 matters before the court over the same period, only 3.3 per cent went to mediation.\(^\text{17}\)

Local Government Research

To establish the attitudes towards and perceptions of mediation by planning officers, a research questionnaire was sent to the chief planning officer of all 177 councils in New South Wales. A 73 per cent response rate was achieved from this questionnaire. Questions were divided into four principal areas:

Section A -- Use of mediation

Section B -- Perceptions of mediation in the Land and Environment Court

Section C -- Experiences of mediation in the court

Section D -- Future use of alternative dispute resolution.

This stage of research sought to obtain both quantitative and qualitative data to aid the interpretation of data from the court.

Use of Mediation

Of 129 responding councils, 50 had not been involved in any appeals before the Land and Environment Court since the introduction of court-based mediation in 1991 and therefore would not have been exposed to the court-annexed facility.

Ninety-nine per cent of respondents were aware of the court-annexed mediation facility and 54 per cent of council officers completing the questionnaire had themselves participated in

\(^{16}\) (Between 1992 and 1994 there were 5,205 Class 1-4 matters before the Land and Environment Court; 43% of these were Class 1 matters. Of 170 mediated disputes over the same period, 60% were Class 1 matters. This information appears in footnote 5 to the article.

\(^{17}\) (1997) 8 ADRJ 267 at 268-271
mediation. Of these, 77 per cent had been involved in a successful mediation and 61 per cent in an unsuccessful mediation.

Most significantly, 98 per cent of all respondents who had been involved in an appeal before the court had had some experience of mediation. This indicates a very high exposure rate for the court-annexed facility.

Further examination of council involvement, however, reveals that the vast majority of councils (82 per cent) had used mediation on one or two occasions only. In other words, very few councils systematically took advantage of the mediation facility provided by the court. Only six respondent councils used the facility on five or more occasions. This may help explain the very low take-up rate for the court's facility. To explore possible reasons for this, respondents were asked about their experience and perceptions of mediation, and whether the council had implemented any internal procedure to decide whether a particular appeal warranted an attempt at mediation.18

Perceptions of Mediation

To examine the perceptions of mediation that had developed within councils following involvement in mediation, respondents were asked to nominate whether they agreed or disagreed with a series of factors, often put forward as advantages and disadvantages of mediation.

Table 1 -- Perceived Advantages of Mediation in the Court (of Councils with Experience in Mediation)

<table>
<thead>
<tr>
<th>Factor proposed</th>
<th>Agree (%)</th>
<th>Disagree (%)</th>
<th>Uncertain (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saves time</td>
<td>91</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Saves money</td>
<td>100</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Assists council to understand opponent’s case</td>
<td>62</td>
<td>34</td>
<td>4</td>
</tr>
</tbody>
</table>

18 (1997) 8 ADJR 267 at 272-273
<table>
<thead>
<tr>
<th>Factor proposed</th>
<th>Agree (%)</th>
<th>Disagree (%)</th>
<th>Uncertain (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is good for small-scale proposals and minor matters</td>
<td>89</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Clarifies issues under dispute</td>
<td>81</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>Narrows issues under dispute</td>
<td>80</td>
<td>11</td>
<td>9</td>
</tr>
<tr>
<td>Reduces need for legal representation</td>
<td>52</td>
<td>34</td>
<td>14</td>
</tr>
<tr>
<td>Has procedural informality</td>
<td>84</td>
<td>9</td>
<td>7</td>
</tr>
<tr>
<td>Is less intimidatory than a full hearing</td>
<td>83</td>
<td>7</td>
<td>10</td>
</tr>
</tbody>
</table>

Table 2 -- Perceived Disadvantages of Mediation in the Court (of Councils with Experience in Mediation)
Generally speaking, there was a very high level of agreement with all of the traditional advantages of mediation, including savings in time and money, clarification of issues and procedural informality. Significantly, 88.5 per cent of respondents who had participated in mediation thought it was particularly worthwhile for small-scale proposals.

With regard to the disadvantages of mediation often forwarded by critics of the process, most significant was a perception that third parties had a reduced role (52 per cent). Although a higher number nominated "less rigour in testing evidence" as a disadvantage, this could be expected and is largely irrelevant, as there is no testing of evidence in mediation. Also significant is a relatively high perception of pressure to compromise (44 per cent) and a view that the process should be conducted independently of the court (30 per cent).

Seventy-two per cent of councils with experience in failed mediations found that the mediation had assisted them in preparing for the full hearing by narrowing the issues in dispute.

Sixty per cent found that understanding of their opponent's case was improved as a result of an unsuccessful mediation but, in comparison, only 48 per cent felt that their opponent's evidence had been previewed.

**Personal Experience of Mediation**

Respondents were asked specifically about their personal experience of the mediation process and responded as set out in Table 3.

**Table 3 – Personal Experience of Mediation**

<table>
<thead>
<tr>
<th>Experiential factors</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>At ease</td>
<td>87</td>
</tr>
<tr>
<td>Under pressure</td>
<td>33</td>
</tr>
<tr>
<td>Confused about the process</td>
<td>6</td>
</tr>
<tr>
<td>Able to comprehensively express one’s views</td>
<td>84</td>
</tr>
</tbody>
</table>
Rushed

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Well prepared</td>
<td>92</td>
</tr>
</tbody>
</table>

These results support the argument that mediation provides an informal, less intimidatory and non-adversarial forum for the exploration and resolution of conflict.

Outcomes

The examination of Land and Environment Court files found that 73 per cent of all mediations through the court-annexed facility resulted in success. Respondents were asked for their perception of the factors that contributed to a successful or unsuccessful resolution of the dispute, as set out in Tables 4 and 5.

Table 4 – The Key Factors that Contributed to Success in Mediations Where Agreement Reached

<table>
<thead>
<tr>
<th>Key factors contributing to success</th>
<th>% of officers who attended a successful mediation, identifying a factor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Council officer having full delegated authority to finalise the matter</td>
<td>73</td>
</tr>
<tr>
<td>Having legal support at mediation conference</td>
<td>57</td>
</tr>
<tr>
<td>Willingness to seek solution</td>
<td>84</td>
</tr>
<tr>
<td>Dispute over minor matter(s) only</td>
<td>19</td>
</tr>
<tr>
<td>Participants having positive attitude</td>
<td>57</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
</tr>
</tbody>
</table>

The factors most identified as the key to a successful mediation were a willingness to seek a solution, the council officer presenting the council’s case possessing full delegated authority
to finalise the matter, the existence of legal support at the mediation conference and part.
participants having a positive attitude towards the mediation.

The lack of delegated authority for participants to fully negotiate and settle the matter has long been a criticism aimed at councils taking part in mediation and is clearly still a problem recognised by council officers themselves. It would appear that council members are reluctant to forfeit their role as the decision-makers in the development control process. This reflects the often political nature of development disputes.

Table 5 – The Key Factors Causing Failure in Unsuccessful Mediations

<table>
<thead>
<tr>
<th>Key factors causing failure</th>
<th>% of officers who attended an unsuccessful mediation, identifying a factor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amended plans presented at conference</td>
<td>36</td>
</tr>
<tr>
<td>Lack of willingness to seek solution</td>
<td>75</td>
</tr>
<tr>
<td>Issues of principle at stake (rather than detail)</td>
<td>3</td>
</tr>
<tr>
<td>Lack of delegated authority to finalise matter</td>
<td>21</td>
</tr>
<tr>
<td>Other</td>
<td>14</td>
</tr>
</tbody>
</table>

The key factor identified as causing the failure of an unsuccessful mediation was a lack of willingness by the parties to seek a solution, the converse of the major factor in successful mediations. The presentation of amended plans at the conference was a significant element in the failure of a mediation. This refers to the tabling of substantive amendments during the mediation as opposed to the refinement of a proposal by agreed alterations as a part of the mediated settlement. In interview, it was mentioned that the imposition of conditions to control details was favoured, in preference to the alteration of drawings, whenever feasible.19

19 (1997) 8 ADJR 267 at 273-276
**What are the Necessary Preconditions for ADR?**

Firstly, there needs to be a genuine willingness on the part of all parties to use ADR. If one party wants to obstruct then mediation will not work. However, **Section 4.1.48** allows case appraisal to occur. Selectively used, case appraisal may well prove to be an important negotiating tool.

Secondly, the sharing of information is an important ingredient in the process. Better information makes better decisions. It also acts to reduce the area of conflict and promote resolution.

There are 12 Conflict Resolution Skills promoted by The Conflict Resolution Network.²⁰ These skills can be used helpfully in any ADR session. They are:

- The win/win approach
- Creative responses (transforming problems into creative opportunities)
- Empathy (developing communication tools to build rapport and use listening to clarify understanding)
- Appropriate assertiveness (apply strategies to attack the problem and not the person)
- Cooperative power (eliminate power over to build power with others)
- Managing emotions (express fear, anger, hurt and frustration wisely to effect change)
- Willingness to resolve (naming of the personal issues that cloud the picture)
- Mapping the conflict (defining the issues needed to chart common needs and concerns)
- Development of options (designing creative solutions together)
- Introduction to negotiation (planning and applying effective strategies to reach agreement)
- Introduction to mediation (helping conflicting parties to move towards solutions)

---

²⁰The Conflict Resolution Network is based in Sydney, Australia and can be found at [http://www.crnhq.org](http://www.crnhq.org)
Broadening perspectives (evaluating the problem in its broader context).

**Integrated Planning Act 1997**

This is State Legislation and it seeks to reform the Town Planning and Environmental Assessment Procedures into one Act. For the first time *Alternative Dispute Resolution* has been incorporated into Environmental Legislation as part of the Appeals procedures. **Section 4.1.48** is in the following terms:-

4.1.48.(1) The District Courts Act 1967, part 7 and the Uniform Civil Procedure Rules 1999 Chapter 9 Part 4 (together, the "ADR provisions"), apply to proceedings started under this part.

(2) However, to the extent there is any inconsistency between the cost provisions of the ADR provisions and the cost provisions of this Act, the cost provisions of the ADR provisions prevail.

(3) In applying the ADR provisions to a proceeding under this part—

   (a) a reference to the court or the District Court is taken to be a reference to the Planning and Environment Court; and

   (b) a reference to a District Court judge is taken to be a reference to a judge constituting the Planning and Environment Court; and

   (c) definitions and other interpretative provisions of the District Courts Act 1967 and the Uniform Civil Procedure Rules 1999 relevant to the ADR provisions apply.

Part 7 of the **District Court Act 1967** is set out in **Appendix A**. Much can be understood about the Court ADR processes by reading Part 4 of Chapter 9 of the **Uniform Civil Procedure Rules 1999**. A copy of which is set out in **Appendix B**. The **Uniform Civil Procedure Rules** commenced on 1 July, 1999 (**Section 2**) and apply to the Civil Procedure in the State Supreme Court, the District Court and the Magistrates Court (**Section 3**). The *philosophy* is set out in **Section 5** as follows:

**Philosophy—overriding obligations of parties and court**

5.(1) The purpose of these rules is to facilitate the just and expeditious
resolution of the real issues in civil proceedings at a minimum of expense.

(2) Accordingly, these rules are to be applied by the courts with the
objective of avoiding undue delay, expense and technicality and facilitating
the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court
and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not
comply with these rules or an order of the court.

Example—

The court may dismiss a proceeding or impose a sanction as to costs, if, in breach
of the implied undertaking, a plaintiff fails to proceed as required by these rules or an
order of the court.

The Planning and Environment Court Rules 1999 commenced on 1 July, 1999. Section 3 (2)
says that the Planning and Environment Court shall use (with necessary changes) the Rules
applying to the District Court when the Planning and Environment Court Rules are silent. The
Planning and Environment Court Rules do not provide for the procedure in respect of mediation
and case appraisal so the Uniform Civil Procedure Rules apply.

General Comments

It is important that all the stakeholders are included in the mediation process. This may well extend
beyond the parties to litigation. However, part of mediation is to develop options and there should
be no limits placed on the process. An important part of the process has been described by others as
creating value rather than claiming value.21

Attention needs to be paid to the selection of the Mediator. Arrangements need to be made in
respect of the payment of the Mediator. In negotiating the terms of payment for the mediator, it
may well be that one party pays more than an equal share of the mediation spread amongst all the
participating parties. Where enforcement proceedings are being taken and affected members of the
community are not parties to the proceedings, it is useful to include them as part of the mediation
process. In those circumstances, the applicant in the proceedings (usually the Local Government)
would benefit from having the community represented at the mediation. Therefore, it is appropriate
that the Local Government pay more than half of the cost of the mediator so as to allow the affected

21 Susan A Moore and Robert G Lee in Creating Value: A Hidden Benefit of Environmental Dispute Resolution in
Australia and the United States (1998) 9 ADRJ 11
members of the public to be part of the process and therefore be part of the agreement which results from the mediation.

The process of mediation is flexible enough to allow for more than one mediator. Co-mediation allows for different expertise to be part of the facilitation of an agreement between the parties.

The importance of developing options for the parties to consider during the mediation is an important added advantage that is not able to be achieved through litigation. The developing of options allows the parties to reach an agreement on issues which may extend beyond the subject matter of the litigation. In this manner, further disputation or conflict may well be avoided.

Whilst Section 4.1.48 of the Integrated Planning Act 1997 allows for Court appointed mediation processes to be used, the parties always have the option of voluntary mediation. Voluntary mediation has the potential advantage of being more flexible than a Court based mediation arrangement.

Because of the cost provisions in respect of case appraisal, there is an opportunity for litigating parties to look at that option as an incentive for there to be a resolution without having to resort to the Court.

**Draft Orders**

In Butterworths Court Forms Precedents & Pleadings Queensland the following draft Order in respect of mediation is published as part of a Directions Hearing Order:-

1. **IT IS FURTHER ORDERED:**

(a) Upon the parties agreeing to the name of the mediator and to the sharing of the cost of the mediation then on or before [date] all parties and their expert witnesses shall participate in, and act reasonably and genuinely in, a mediation at such place as may be agreed or as nominated by the mediator;

(b) The mediator’s role shall be as described in Rule 396 of the District Court Rules 1968;\(^{23}\)

(c) Copies of the Notice of appeal and Lists of Disputed Issues [and add any other relevant documents] shall be made available to the mediator;

(d) If the mediation is unsuccessful, then the remaining dispute may go to a hearing in the ordinary way without any inference being drawn against any party because of the failure to settle at the mediation and

---

\(^{22}\) The Uniform Civil Procedure Rules 1999 provide Forms for a Consent Order for ADR; and ADR Orders including case appraisal.

\(^{23}\) This now has to be amended to refer to the Rule 323 of the Uniform Civil Procedure Rules 1999.
such mediation shall be “without prejudice” and the evidence of the proceedings at the mediation shall not be given by or on behalf of any party to the appeal nor shall any party or witness be cross examined on any such proceedings or what was said at the mediation;

(e) The parties must pay their respective shares of the mediator’s fee to the registrar by [date];

(f) In the event that all matters concerning the mediation are not agreed by the parties, then any party may apply for the court’s direction.\(^{24}\)

In Brisbane City Council v State of Queensland\(^ {25}\) the following Orders were made by Judge Brabazon QC on 1 May, 1998 in respect of mediation:-

**IT IS FURTHER ORDERED** that:-

(a) (i) the parties to the appeal confer out of court for the purpose of agreeing on the appointment, as co mediators, of a Barrister of not less than 10 years standing with qualifications and experience in mediation and a scientist/engineer with qualifications in mediation and not less than 5 year’s experience in the management of landfill odours.

(ii) Upon the filing of a consent referral by the parties, in a form approved by the Court, the Court shall appoint as co-mediators the persons so agreed.

(iii) Failing agreement between the parties, a Barrister and scientist/engineer with appropriate qualifications and experience will be appointed by the Court.

(b) the Respondent serve any request for further and better particulars of the issues in dispute on the solicitors for the Appellant by 4.00pm on 22 May, 1998.

(c) the Appellant provide all proper further and better particulars to the solicitors for the Respondent by 4.00pm on 5 June, 1998.

(d) the Appellant and the Respondent, acting for and on behalf of the Department of the Environment, make discovery by affidavit of all documents which are or have been in their possession or power relevant to the appeals by 4.00pm on 12 June, 1998.

(e) the parties to the appeal complete inspection of discovered documents on or before 4.00pm on 19 June, 1998.

(f) the parties to the appeal exchange a summary of the views of the expert witnesses no later than 4.00pm on 7 July, 1998.

\(^{24}\) part of Precedent 450.155 under Planning and Environment Court

\(^{25}\) P & E Appeal No. 1850 of 1998
the parties to the appeal confer, without prejudice, at a mediation conducted by the co-mediators for the purpose of resolving (or, if that is not possible, limiting) the matters in dispute.

members of the public may, attend and participate, on a without prejudice basis, in the mediation. Such attendance and participation is to be entirely subject to the direction of the mediators.

the mediation is to begin no later than 10 July, 1998.

If the mediation is not entirely successful, then by no later than 10.00am on 20 July 1998, the parties shall endeavour to produce an agreed report or joint reports, of the expert witnesses.

If it is not possible to produce such reports, then, by no later than 4.00pm on 20 July 1998, the parties shall prepare joint statements of the experts detailing the matters on which the experts agree and on which the experts disagree, and

Exchange written reports of the expert witnesses, by no later than 4.00pm on 20 July 1998.

The parties confer out of court for the purpose of producing by no later than 4.00pm on 23 July 1998 a statement of final issues to be determined by the Court on the hearing of the appeal.

The above steps are to be taken with the assistance of the co-mediators.

How to reduce the Level and Number of Disputes apart from Mediation and Case Appraisal?

Better information about the environmental issues helps identify what are the problems. It also helps find solutions. The aspirations of the stakeholders are important in understanding how disputes arise. Stakeholder negotiations are important component parts of any dispute resolution.

Negotiated Rulemaking has a good track record in the United States. Australia has its own form of Negotiated Rulemaking that is not as advanced as in the United States. As Community Consultation techniques are improved in Australia there is evidence that Negotiated Rulemaking techniques are being adapted from the United States experiences. Some of the basic principles that govern Negotiated Rulemaking are worth repeating in the context of this analysis.
Negotiated rulemaking has evolved from a desire to create a new public participation process. Deborah Dalton says:-

In 1982 the Administrative Conference of the US (ACUS) and Philip Harter, an Administrative Law Professor, proposed the concept of mediated negotiations between the Government and all relevant external parties to the rule prior to publication of a proposal. This negotiated rulemaking process uses negotiation and consensus, not to avoid conflict, but to channel the energy, creativity and resources of the parties toward designing a joint solution to the issues presented.26

The negotiated rulemaking process involves two major phases. Firstly, the convening of the negotiation committee. Secondly, conducting the negotiations. A point form summary is taken from Deborah Dalton.27

(A) Convening the Negotiation Committee

(1) Begins with a feasibility study of the chances of successful negotiation;
(2) The end product of the study is a design for the negotiation or other public involvement process;
(3) The identification of appropriate external interest groups;
(4) The identification of the issues;
(5) The publication of a public report dealing with the convening study;
(6) The selection of a mediator;
(7) The selection of committee members which generally has fifteen to thirty members and has representatives from the major sectors of interest groups rather than representatives of all organisations; and
(8) Public notice of the membership of the committee and its goal (noting that the goal is to represent each different interest as opposed to each different organisation and noting that additional members can be added to the committee as a result of public comments).

27 See note 27 at pages 355 to 357.
(B) **Conducting the Negotiation**

(1) Negotiation sessions are announced in advance;

(2) Negotiation sessions are open to observers from the public;

(3) Summaries of the negotiation meetings are placed in the public record and are sent out to any interested persons;

(4) Negotiations usually involve six to ten sessions;

(5) The sessions are spaced apart:-
   (a) every three to six weeks;
   (b) so as to allow representatives of organisations to communicate with distant decision takers, assemble additional data or information and test options and alternatives;

(6) The first few sessions are usually spent reviewing existing data:-
   (a) so that the committee can reach agreement on what data to use as a basis for its deliberations;
   (b) often the committee will make a joint fact finding field trip to visit a typical site;
   (c) occasionally a committee will sponsor a scientific or technical workshop to hear from academic or other experts in certain specialised fields;

(7) Later sessions focus on:-
   (a) generating options; and
   (b) evaluating options; and
   (c) narrowing options; and
   (d) agreeing upon the final form of the rule;

(8) It is common for work groups and subcommittees to be formed and to hold meetings that are not public (note that the committee is not able to delegate its final decision taking power to these groups);

(9) Interest sector caucuses are also common and generally in private; and

(10) The goal of the negotiations is to write the actual text of the rule where possible.

The Agency is not to delegate its rulemaking authority to others and as to this aspect Deborah Dalton says:-

*EPA does not (indeed, it could not) delegate its rule-making authority to others, nor does it arbitrate the result. Rather, it uses the experience, skills and creativity of the parties to craft a joint solution that it probably could not have crafted from the*
position presentation of the parties during public comment. EPA believes the joint solution can only emerge in a setting which is as non-adversarial as possible. EPA must constantly provide the lead in the negotiations; negotiations cannot succeed if the agency sits back and expects the parties to ‘fight it out’. The negotiations cannot succeed without the impetus and deadlines supplied by EPA. Typically it supplies technical expertise through its staff and expert consultants.28

Negotiated rulemaking is not put forward as a means by which the public consultation process or public submissions to proposed legislation is substituted. Negotiated rulemaking is an additional process. With negotiated rulemaking there is an opportunity for enforcement to be less of a problem because the relevant parties have had an opportunity of participating in the process. For those who have actually participated in the process, they sign a separate agreement that they will not file negative public comments for the proposal, they will not challenge the proposal in Court and that they agree to implement the rule. The binding nature of the agreement is a matter of good faith rather than a legal issue.29

There is an opportunity for negotiated rulemaking to be an important step in a better understanding of environmental laws and their formulation and also an opportunity for a better form of participation by various members of the public either individually or collectively. It also helps to focus on various aspects of an area of activity that is sought to be regulated and to test the proposal prior to formal public comment and the passing of the legislation.

**Future Developments**

Negotiated Rulemaking will decrease the type and the level of environmental disputes which will need to be resolved. Planning Schemes and Local Laws as well as State Environmental Laws and Policies will all benefit from an improved level of public participation in the formulation of those environmental regulations. Efforts should be continued to increase the use of Negotiated Rulemaking.

There is an opportunity to mediate before and during the processing of applications under the **Integrated Planning Act 1997**. The mediation process prior to an appeal is voluntary on the current legislative arrangements. **Section 4.1.48** applies once legal proceedings have been

---

28 See note 27 at pages 356 – 357.
29 See note 27 at page 358.
commenced in the Planning and Environment Court. As David Tow and Michael Stubbs discuss, the opportunity for mediation to be used prior to Court proceedings is something that needs to be encouraged.³⁰

Local Government and all Assessment Managers should be encouraged to have a published policy on ADR giving clear guidance in respect of when mediation is to be considered appropriate and how the process will be approached.³¹

Care needs to be taken to ensure that mediation does not become institutionalised. If it does then rigid rules will start to apply more often than not and the flexibility of mediation will be lost. The risk that this will occur is higher with Court based mediation systems. However, case appraisal will still remain a valid option for a Court based system of ADR. There will always be room for a voluntary ADR system to operate outside the Court based arrangements.

The more that ADR is used, the more familiar the community and Local Government and developers will find the advantages of negotiating the settlement of disputes rather than to take every dispute to the Planning and Environment Court. In Queensland the process of using ADR has been slow to develop over the last 10 years but, nonetheless, there has been an increase in a variety of negotiations which lead to the resolution of disputes. It is expected that the process will become more popular as the Integrated Planning Act 1997 as time goes on and the number of persons exposed to Mediation and Case Appraisal increases.

³⁰ The Effectiveness of Alternative Dispute Resolution Methods in Planning Disputes (1997) 8 ADRJ 267 at 277 and 279-280
³¹ (1997) 8 ADJR 267 at 279 and 280
Appendix A

Extract from the District Courts Act 1967

PART 7—ADR PROCESSES

Division 1 - Preliminary

Objects of part

89. The objects of this part are—

(a) to provide an opportunity for litigants to participate in ADR processes in order to achieve negotiated settlements and satisfactory resolutions of disputes; and

(b) to introduce ADR processes into the court system to improve access to justice for litigants and to reduce cost and delay; and

(c) to provide a legislative framework allowing ADR processes to be conducted as quickly, and with as little formality and technicality, as possible; and

(d) to safeguard ADR processes—

(i) by ensuring they remain confidential; and

(ii) by extending the same protection to participants in an ADR process they would have if the dispute were before a District Court.

Division 2—Important terms

ADR process

90.(1) An “ADR process” is a process of mediation or case appraisal under which the parties are helped to achieve an early, inexpensive settlement or resolution of their dispute.

(2) In division 6, an “ADR process” includes all the steps involved in an ADR process, including, for example—

(a) pre-mediation and post-mediation sessions; and

(b) a case appraisal session; and

(c) joint sessions; and

(d) private sessions; and
(e) another step prescribed under the rules.

Mediation

91. “Mediation” is a process under the rules under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication.

Case appraisal

92.(1) “Case appraisal” is a process under the rules under which a case appraiser provisionally decides a dispute.

(2) A case appraiser’s decision is not binding on the parties until—

(a) the time prescribed by the rules for filing an election to go to trial has passed; and

(b) a District Court, by order, gives effect to the decision.

Division 3—Establishment of ADR processes

Approval of mediators

93. The Chief Judge may approve, or refuse to approve, a person as a mediator.

Approval of case appraisers

94. The Chief Judge may approve, or refuse to approve, a person as a case appraiser.

ADR register

95.(1) The registrar of the Supreme Court must keep a register of information about ADR processes.

(2) The register may be kept in the form (whether or not in a documentary form) the registrar considers appropriate.

(3) Without limiting subsection (2), the registrar may change the form in which a register or a part of a register is kept.

(4) The register must contain—

(a) the name and address of each mediator and each case appraiser (other than a judge); and

(b) other information prescribed under the rules; and

(c) other information decided by the Senior Judge Administrator of the Supreme Court.
(5) However, subsection (4) does not require the registrar to enter in the register the name and address of, and the other information about, a mediator under the Dispute Resolution Centres Act 1990.

**Parties may agree to ADR process**

96.(1) The parties to a dispute may agree to refer their dispute to an ADR process.

(2) If the parties agree to the referral, they must file a consent order in the form prescribed under the rules with the registrar.

(3) A consent order filed under this section is taken to be a referring order.

**Court may consider and order reference to ADR process**

97.(1) A District Court may require the parties or their representatives to attend before it to enable the court to decide whether the parties’ dispute should be referred to an ADR process.

(2) The court may, by order (“referring order”), refer the dispute for mediation or case appraisal.

(3) Without limiting the court’s discretion, the court may take the following matters into account when deciding whether to refer a dispute to case appraisal—

(a) whether the costs of litigating the dispute to the end are likely to be disproportionate to the benefit gained;

(b) the likelihood of an appraisal producing a compromise or an abandonment of a claim or defence;

(c) other circumstances justify an appraisal.

(4) If the court decides to refer the dispute to a mediator under the Dispute Resolution Centres Act 1990, it is sufficient if the order appoints the director of a specified dispute resolution centre as mediator.

**Parties must attend at ADR process if District Court orders**

98.(1) If a referring order is made, the parties—

(a) must attend before the ADR convenor appointed to conduct the ADR process; and

(b) must not impede the ADR convenor in conducting and finishing the ADR process within the time allowed under the referring order.

(2) If a party impedes the ADR process, a District Court may impose sanctions against the party, including, for example—

(a) by ordering that any claim for relief by the defaulting party is stayed until further order; and
(b) by taking the party’s action into account when awarding costs in the proceeding or in another related proceeding between the parties.

Procedure at case appraisal

99. (1) At a case appraisal, the case appraiser—

(a) must decide the procedure to be used at the case appraisal; and

(b) may adopt any procedure that will, in the case appraiser’s opinion, enable a sound opinion of the likely outcome of the dispute to be reached; and

(c) must finish the case appraisal as quickly as possible.

(2) However, the case appraiser may, in special circumstances—

(a) receive evidence; and

(b) examine witnesses, and administer oaths to witnesses, who have been lawfully called before the case appraiser.

(3) A District Court may, at any time, give directions about procedure to be used at the case appraisal.

(4) This section is subject to section 100.

Subpoenas

100. (1) A person may be subpoenaed to appear at a case appraisal only by order of a District Court.

(2) A person may not be subpoenaed to appear at a mediation.

(3) A person subpoenaed to appear at a case appraisal must not be compelled to answer a question, or produce a document, the person could not be compelled to answer or produce before a District Court.

Division 4 - Party unable to pay share of costs

Party unable to pay share of costs

101. (1) If, at any time, a District Court is of the opinion a party to an ADR process is unable, because of the party’s financial circumstances, to pay the party’s percentage of the ADR costs, the court may make an order appropriate in the circumstances.

(2) Without limiting subsection (1), the order may provide—

(a) the reference to the ADR process be cancelled; or
(b) the referring order be revoked and another referring order made.

**Division 5—What to do when ADR process is finished**

**Mediated resolution agreement**

102.(1) If, at a mediation, the parties agree on a resolution of their dispute or part of it, the agreement must be written down and signed by or for each party and by the mediator.

(2) The agreement has the same effect as any other compromise.

**Mediator to file certificate**

103. As soon as practicable after a mediation has finished, the mediator must file with the registrar of the referring court a certificate about the mediation in the form prescribed under the rules.

**Case appraiser to file certificate and decision**

104. As soon as practicable after a case appraisal has finished, the case appraiser must file with the registrar of the referring court—

(a) a certificate about the case appraisal in the form prescribed under the rules; and

(b) the case appraiser’s decision (if any).

**Orders giving effect to mediation agreement**

105.(1) A party may apply to a District Court for an order giving effect to an agreement reached after mediation.

(2) However, a party may apply for the order only after the mediator’s certificate is filed with the registrar of the referring court.

(3) The court may make any order it considers appropriate in the circumstances.

**Orders giving effect to case appraiser’s decision**

106.(1) A party may apply to a District Court for an order giving effect to a case appraiser’s decision after the time prescribed under the rules for electing to go to trial has passed.

(2) However, a party may apply for the order before the time mentioned in subsection (1) if all parties agree.

(3) The court may make any order it considers appropriate in the circumstances.

**Division 6—Confidentiality, protection and immunity**
**ADR convenors to maintain secrecy**

107. (1) An ADR convenor must not, without reasonable excuse, disclose information coming to the convenor’s knowledge during an ADR process.

Maximum penalty—50 penalty units.

(2) It is a reasonable excuse to disclose information if the disclosure is made—

(a) with the agreement of all the parties to the ADR process; or

(b) for this part; or

(c) for statistical purposes without revealing, or being likely to reveal, the identity of a person about whom the information relates; or

(d) for an inquiry or proceeding about an offence happening during the ADR process; or

(e) for a proceeding founded on fraud alleged to be connected with, or to have happened during, the ADR process; or

(f) under a requirement imposed under an Act.

**Ordinary protection and immunity allowed**

108. (1) In performing the functions of mediator or case appraiser, an ADR convenor has the same protection and immunity as a judge performing the functions of a judge.

(2) A party appearing in an ADR dispute has the same protection and immunity the party would have if the dispute were being heard before a District Court.

(3) A witness attending in an ADR dispute has the same protection and immunity as a witness attending before a District Court.

(4) A document produced at, or used for, an ADR dispute has the same protection during the ADR dispute it would have if produced before a District Court.

(5) In subsection (2)—

“party” includes a party’s lawyer or agent.
Admissions made to ADR convenors

109.(1) Evidence of anything done or said, or an admission made, at an ADR process about the dispute is admissible at the trial of the dispute or in another civil proceeding before a District Court or elsewhere only if all parties to the dispute agree.

(2) In subsection (1)—

“civil proceeding” does not include a civil proceeding founded on fraud alleged to be connected with, or to have happened during, the ADR process.

Division 7—Miscellaneous

Revocation of approval as mediator or case appraiser

110.(1) The Chief Judge may revoke the approval of a person as a mediator or case appraiser.

(2) The Chief Judge must give the person a statement of reasons for the revocation.
Appendix B

Extract from the Uniform Civil Procedure Rules 1999

CHAPTER 9
PART 4

ALTERNATIVE DISPUTE RESOLUTION PROCESSES

Division 1—Preliminary

Definitions for pt 4
313. In this part—
"ADR costs" include—
(a) for a mediation—the extra cost mentioned in rule 328; and
(b) for a case appraisal—the extra cost mentioned in rule 337.
"referred dispute" means a dispute referred to a case appraiser under Rule 328 (Mediator may seek independent advice) Rule 337 (Case appraiser may seek information)
"registrar" means—
(a) for a Magistrates Court—the registrar nominated by the Chief Stipendiary Magistrate under the Magistrates Courts Act 1921, section 27(1); or
(b) for rules 319, 321, 323, 327, 328, 334, 343, 348, 349 and 350—the registrar of the court that referred the proceeding to mediation or case appraisal.
"senior judicial officer" means—
(a) for the Supreme Court—the Senior Judge Administrator; or
(b) for the District Court—the Chief Judge of the District Court; or
(c) for a Magistrates Court—the Chief Stipendiary Magistrate.

Division 2—Establishment of ADR processes

Approval as mediator
314.(1) A person seeking approval as a mediator must—
(a) apply in the approved form; and
(b) pay the prescribed fee; and
(c) satisfy the appropriate senior judicial officer of the court of which the person is seeking to become a mediator that the person is a suitable person to be approved as a mediator.
(2) However, the fee is not payable if—
(a) the person has already been approved as a mediator of the Supreme Court; or
(b) for an application for approval as a mediator of the Magistrates Courts—the person has already been approved as a mediator of the District Court.

(3) If the appropriate senior judicial officer decides not to approve a person as mediator, the senior judicial officer must give the person a statement of reasons for the decision.

(4) If a person is approved as a mediator of the Supreme Court, the Senior Judge Administrator must inform the registrar of the approval.

(5) If a person is approved as a mediator of the District Court, the Chief Judge of the District Court must inform the registrar of the Supreme Court of the approval.

(6) If a person is approved as a mediator of the Magistrates Courts, the Chief Stipendiary Magistrate must inform the registrar of the approval.

Approval as case appraiser

315. (1) A person seeking approval as a case appraiser must—
(a) be a barrister or solicitor of 5 years standing; and
(b) make application in the approved form; and
(c) pay the fee prescribed by regulation; and
(d) satisfy the appropriate senior judicial officer of the court of which the person is seeking to become a case appraiser that the person is a suitable person to be approved as a case appraiser.

(2) However, the fee is not payable if—
(a) the person has already been approved as a case appraiser of the Supreme Court; or
(b) for an application for approval as a case appraiser of the Magistrates Courts—the person has already been approved as a case appraiser of the District Court.

(3) If the appropriate senior judicial officer decides not to approve a person as case appraiser, the senior judicial officer must give the person a statement of reasons for the decision.

(4) If a person is approved as a case appraiser of the Supreme Court, the Senior Judge Administrator must inform the registrar of the approval.

(5) If a person is approved as a case appraiser of the District Court, the Chief Judge of the District Court must inform the registrar of the Supreme Court of the approval.

(6) If a person is approved as a case appraiser of the Magistrates Courts, the Chief Stipendiary Magistrate must inform the registrar of the approval.

ADR register

316. The ADR register must contain the fees notified to the registrar under rule 317.

Information to be given to registrar by ADR convenors and venue providers

317. (1) A person intending to provide a venue for ADR processes for a
court must give notice to the registrar in the approved form of the person’s name and address and the address of the venue.

(2) A person intending to act as a mediator, case appraiser or venue provider for ADR processes must give notice to the registrar of the fee the person intends to charge for providing the services or venue.

(3) If a person intends to change the fee notified to the registrar, the person must give notice of the change to the registrar in the approved form at least 4 weeks before the change is effective.

(4) Notice of the fee may be given by notifying the way the fee may be worked out, including, for example, an hourly or daily rate of charge or another way approved by the registrar.

(5) In this rule—
“registrar”, for a mediator or case appraiser of the Supreme Court or District Court, means the registrar of the Supreme Court.

Form of consent order for ADR process
318. For the Supreme Court of Queensland Act 1991, section 101, the District Court Act 1967, section 96 and the Magistrates Courts Act 1921, section 28, the consent order must be filed in the approved form.

Registrar to give notice of proposed reference to ADR process
319. (1) The court may direct the registrar to give written notice to the parties (the “referral notice”) that the parties’ dispute is to be referred, by order, to an ADR process to be conducted by a specified mediator or case appraiser.

(2) A party may object to the reference by filing an objection notice in the registry.

(3) The objection notice must—
(a) state the reasons why the party objects to the referral; and
(b) be filed within 7 days after the objecting party receives the referral notice.

(4) If an objection notice is filed, the court may require the parties or their representatives to attend before it (the “hearing”).

(5) The court may make an order at the hearing it considers appropriate in the circumstances.

When referral may be made
320. The court may also refer a dispute in a proceeding for mediation or case appraisal—
(a) on application by a party; or
(b) if the proceeding is otherwise before the court.

§6 These provisions provide for a consent order to be filed referring a dispute to an ADR process.
Proceedings referred to ADR process are stayed

321. Subject to an order of the court, if a dispute in a proceeding is referred to an ADR process, the dispute and all claims made in the dispute are stayed until 6 business days after the report of the ADR convenor certifying the finish of the ADR process is filed with the registrar.

When does a party impede an ADR process

322. A party impedes an ADR process if the party fails to—
(a) attend at the process; or
(b) participate in the process; or
(c) pay an amount the party is required to pay under a referring order within the time stated in the order.

Division 3—Mediation

Referral of dispute to appointed mediator

323.(1) A referring order for a mediation must—
(a) appoint as mediator—
(i) a specified mediator; or
(ii) a mediator to be selected by the parties; or
(iii) if all parties agree, a person who is not a mediator; and
(b) include enough information about pleadings, statements of issues or other documents to inform the mediator of the dispute and the present stage of the proceeding between the parties; and
(c) set a period beyond which the mediation may extend only with the authorisation of the parties or estimate how long the mediation should take to finish; and
(d) state how the mediator is to be informed of the appointment; and
(e) require the parties, if the mediation is not completed within 3 months of the date of the referring order, to provide a report setting out the circumstances of the matter to the registrar who may refer the matter to the court for resolution.

(2) The order must also—
(a) set the ADR costs or estimate the costs to the extent possible; and
(b) state the percentage of ADR costs each party must pay; and
(c) provide to whom and by when the ADR costs must be paid.

(3) Instead of setting or estimating the appointed mediator’s fee, the order may direct the parties to negotiate a fee with the appointed mediator.

(4) A person appointed as mediator under subrule (1)(a)(iii) is taken to be a mediator for the mediation and issues incidental to the mediation.

(5) The order must be made in the approved form.

(6) A mediator must have regard to an amended pleading, including amendments made after the referring order.

When mediation must start and finish

324. A mediator must start a mediation as soon as possible after the
mediator’s appointment and try to finish the mediation within 28 days after
the appointment.

**Parties must assist mediator**

325. The parties must act reasonably and genuinely in the mediation and
help the mediator to start and finish the mediation within the time estimated
or set in the referring order.

**Mediator’s role**

326. (1) The mediator may gather information about the nature and facts
of the dispute in any way the mediator decides.
(2) The mediator may decide whether a party may be represented at the
mediation and, if so, by whom.
(3) During the mediation, the mediator may see the parties, with or
without their representatives, together or separately.

**Liberty to apply**

327. The mediator or a party may apply to the court at any time for
directions on any issue about the mediation.

**Mediator may seek independent advice**

328. (1) The mediator may seek legal or other advice about the dispute
from independent third parties.
(2) However, if the advice involves extra cost, the mediator must first obtain—
(a) the parties’ agreement to pay the extra cost; or
(b) the court’s leave.
(3) If the court gives leave, the court must also—
(a) order the parties to pay the extra cost; and
(b) state to whom and by when the payment must be made.
(4) The mediator must disclose the substance of the advice to the parties.

**Record of mediation resolution**

329. (1) Unless the parties otherwise agree, the mediator must ensure that
an agreement mentioned in the Supreme Court of Queensland Act 1991,
section 107, the District Court Act 1967, section 102 or the Magistrates
Courts Act 1921, section 34 is—
(a) placed in a sealed container, for example, an envelope; and
(b) marked with the court file number; and
(c) marked ‘Not to be opened without an order of the court’; and
(d) filed in the court.
(2) The container may be opened only if the court orders it to be opened.
(3) No fee is payable for filing the agreement.

87 These provisions provide for a written mediated resolution agreement signed
by
each party and the mediator.
Abandonment of mediation

330. (1) The mediator may abandon the mediation if the mediator considers further efforts at mediation will not lead to the resolution of the dispute or an issue in the dispute.

(2) Before abandoning the mediation, the mediator must—
(a) inform the parties of the mediator’s intention; and
(b) give them an opportunity to reconsider their positions.

Mediator to file certificate after mediation

331. (1) For the Supreme Court of Queensland Act 1991, section 108, the District Court Act 1967, section 103 and the Magistrates Courts Act 1921, section 35, the mediator must file a certificate in the approved form.

(2) The certificate must not contain comment about the extent to which a party participated or refused to participate in the mediation.

(3) However, the certificate may indicate that a party did not attend the mediation.

(4) No fee is payable for filing the certificate.

Unsuccessful mediations

332. If a mediation is unsuccessful, the dispute may go to trial or be heard in the ordinary way without any inference being drawn against any party because of the failure to settle at the mediation.

Replacement of mediator

333. (1) The court may, by further order, revoke the appointment of a mediator and appoint someone else as mediator if the court is satisfied it is desirable to do so.

(2) When appointing a substitute mediator, the court may decide the amount (if any) to be paid to the retiring mediator for work done.

These provisions require a mediator to file a certificate about the mediation as soon as practicable after a mediation has finished.

Division 4—Case appraisal

Referral of dispute to appointed case appraiser

334. (1) A referring order for a case appraisal must—
(a) appoint as case appraiser—
(i) a specified case appraiser; or
(ii) a case appraiser to be selected by the parties; and
(b) state what dispute is referred; and
(c) include enough information about pleadings, statements of issues or other documents to inform the case appraiser of the dispute and the present stage of the proceeding between the parties; and
(d) set a period beyond which the case appraisal may extend only with the authorisation of the parties or estimate how long the case...
appraisal should take to finish; and
(e) state how the case appraiser is to be informed of the appointment; and
(f) require the parties, if the case appraisal is not completed within 3 months of the date of the referring order, to provide a report setting out the circumstances of the matter to the registrar who may refer the matter to the court for resolution.

(2) The order must also—
(a) set the ADR costs or estimate the costs to the extent possible; and
(b) state the percentage of ADR costs each party must pay; and
(c) state to whom and by when the ADR costs must be paid.

(3) The order may be made even if the dispute has been referred previously for a mediation.

(4) Instead of setting or estimating the appointed case appraiser’s fee, the order may direct the parties to negotiate a fee with the appointed case appraiser.

(5) The order must, as far as practicable, be made in the approved form.

(6) A case appraiser must have regard to an amended pleading, including amendments made after the referring order.

Jurisdiction of case appraiser
335.(1) The case appraiser for a referred dispute has the power of the court referring the dispute to decide the issues in dispute in the referred dispute.

(2) However, the case appraiser—
(a) may only give a decision that could have been given in the dispute if it had been decided by the court; and
(b) cannot punish for contempt.

(3) Subrule (1) is subject to rules 341 and 343. 89

Appearances
336.(1) A party appearing before a case appraiser has the same rights to appear by lawyer or otherwise the party would have if the appearance were before the court referring the dispute.

(2) For a proceeding in a Magistrates Court, this rule is subject to rules 514(1)(e) and 519.

Case appraiser may seek information
337.(1) A case appraiser may ask anyone for information and may obtain, and act on, information obtained from anyone on any aspect of the dispute.

(2) However, if obtaining the information involves extra cost, the case appraiser must first obtain—
(a) the parties’ agreement to pay the extra cost; or
(b) the court’s leave.

(3) If the court gives leave, the court must also—
(a) order the parties to pay the extra cost; and
(b) state to whom and by when the payment must be made.

4. The case appraiser must disclose the substance of the information to the parties.

Case appraisal proceeding may be recorded
338.(1) A case appraiser may have the case appraisal proceeding recorded if the case appraiser considers it appropriate, in the special circumstances of the proceeding.

(2) If the proceeding is to be recorded, the case appraiser must decide the extent to which, and the way in which, the recording may be done.

Case appraiser’s decision
339.(1) A case appraiser’s decision must be in writing, but the case appraiser need not give reasons for the decision.

(2) However, a case appraiser may, at any stage of a case appraisal proceeding, decline to proceed further with the proceeding.

Example of subrule (2)—
The dispute proves to be unsuitable for case appraisal.

(3) A copy of the decision must be given to each party.

Case appraiser’s decision on costs in the dispute
340.(1) In a referred dispute, a case appraiser has the same power to award costs in the dispute the court that referred the dispute would have had if it had heard and decided the dispute.

(2) A case appraiser’s decision under rule 339(1) must include a decision on costs in the dispute.

Effect of case appraiser’s decision
341.(1) A case appraiser’s decision has effect only to the extent specified in this division.

(2) If an election under rule 343 is not made, the parties are taken to have consented to the case appraiser’s decision being binding on them and the decision then becomes final and binding.

Case appraiser to file certificate and decision
342.(1) For the Supreme Court of Queensland Act 1991, section 109, the District Court Act 1967, section 104 and the Magistrates Courts Act 1921, section 36, the case appraiser must file a certificate in the approved form.

(2) If the case appraiser makes a decision about the dispute or any issue in the dispute, the case appraiser must—
(a) place the written decision in a sealed container, for example, an envelope; and
(b) mark the container with the court file number; and
(c) mark the container ‘Not to be opened without an order of the court’; and
(d) file the container in the court.
(3) The container may be opened only if the court orders it to be opened.
(4) No fee is payable for filing the certificate and decision.

Dissatisfied party may elect to continue
343.(1) A party who is dissatisfied with a case appraiser’s decision may elect to have the dispute go to trial or be heard in the ordinary way by filing an election in the approved form with the registrar.
(2) The election must be filed within 28 days after the case appraiser’s certificate is filed in the registry.
(3) If an election is filed—
(a) the case appraiser’s decision has no effect other than as provided by rule 344; and
(b) the dispute must be decided in a court as if it had never been referred to the case appraiser.

Court to have regard to case appraiser’s decision when awarding costs
344.(1) If the court’s decision in the dispute is not more favourable overall to a challenger than the case appraiser’s decision in the dispute was to the challenger, the costs of the proceeding and the case appraisal must be awarded against the challenger.
(2) However, the court may make another order about costs if the court considers there are special circumstances.
(3) If all parties are challengers, the case appraiser’s decision has no effect on the awarding of costs.
(4) In this rule—
“challenger” means a party who filed an election under rule 343.

Replacement of case appraiser
345.(1) The court may, by further order, revoke the appointment of a case appraiser and appoint someone else as case appraiser if the court is satisfied it is desirable to do so.
(2) When appointing a substitute case appraiser, the court may decide the amount (if any) to be paid to the retiring case appraiser for work done.

Division 5—ADR costs

Payment of ADR costs
346. Each party to an ADR process is severally liable for the party’s percentage of the ADR costs in the first instance.

Party may pay another party’s ADR costs
347.(1) If a party to an ADR process does not pay the party’s percentage of ADR costs, another party may pay the amount.
(2) If another party pays the amount, the amount is the other party’s costs in any event.
If ADR costs paid to registrar

348. If an amount is paid to the registrar for a convenor’s fee or a venue provider’s fee, the registrar must, if appropriate, pay the amount to the convenor or venue provider.

When ADR convenor or venue provider may recover further costs

349. (1) If a referring order deals with ADR costs by setting a fee rate and period for which the rate is to be paid, an ADR convenor or venue provider may recover an amount for any additional period only if the parties authorise the ADR process to continue beyond the period set in the order.

(2) If a referring order deals with ADR costs in another way, an ADR convenor or venue provider may recover an amount that is more than the amount stated or estimated in the order or negotiated only if the parties agree in writing to the payment of a greater amount.

(3) The parties are severally liable for an amount recoverable under subrule (1) or (2).

(4) The amount may be recovered as a debt payable to the convenor or provider.

Court may extend period within which costs are to be paid or grant relief

350. (1) A party may apply to the court for an order—

(a) extending the time for payment of ADR costs; or

(b) relieving the party from the effects of noncompliance with any requirement about costs.

(2) The court may make any order it considers appropriate.

 Costs of failed ADR process are costs in the dispute

351. Unless otherwise ordered by the court, each party’s costs of and incidental to an ADR process not resulting in the full settlement of the dispute between the parties are the party’s costs in the dispute.