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The ADR Bulletin

Environmental dispute resolution

Environmental mediation in Australia: comparisons and contrasts with the US

Neil Sipe

'One reason for the differences not addressed in the literature is the role that private foundations have had in promoting the use of EDR in the US.'

The use of environmental dispute resolution (EDR) for settling disputes has been used extensively in the US and Canada for several decades. However, its use in Australia is still in the developmental stages and mediation has only been used in a few environmental disputes.[1] This brief review provides some thoughts as to why the Australian EDR experience has followed a different path than that of other overseas countries, particularly the US.

The origins of environmental dispute resolution in the US can be traced to Foster,[2] who suggested the use of conciliation to resolve environmental disputes in 1969. The use of these approaches in the environmental area was promoted by the Ford and Rockefeller Foundations which began to support trial efforts in the early 1970s. Building on the ideas of Foster, Cormick and McCarthy received foundation support to use mediation in an attempt to resolve a dam dispute in the state of Washington. This resulted in the first documented case of environmental mediation in 1973.[3]

The growth of environmental mediation in the US coincided with the growth of federal environmental protection legislation including the *National Environmental Policy Act*,[4] the *Clean Air Act*,[5] the *Clean Water Act*[6] and the *Resource Conservation and Recovery Act*.[7]

Thus the history of EDR in the US spans about 30 years. The number of cases grew from one in 1973 to more than 30 per year by 1984.[8] Since 1984 there has been no accurate account of the cases, but there is evidence that the number has grown substantially.

In Australia, EDR history begins in the early 1990s, when the Australian Resource Assessment Commission considered using mediation in its inquiry process; later, however, it decided not to pursue the process.[9] At about the same time, the ADR Branch of the Queensland Department of Justice began mediating public issue disputes.[10] The NSW Land and Environment Court began to offer optional mediation in 1991.

In 1992, the Victorian Department of Planning and Development initiated a pilot project aimed at evaluating the use of mediation as an alternative means of resolving land use planning disputes.[11] The literature documents two EDR cases — the Tasmanian 'Salamanca Agreement Process'[12] and the Victorian Muckatah Drainage Scheme.[13]

The main question this brief overview raises is why the Australian development of EDR has lagged behind that of other countries.

To some extent, this question has been addressed in the literature. Wooten argues that ADR mechanisms have impacted on Australian lawyers only since the late 1980s. The most affected areas have been in commercial law, personal injury and insurance claims.[14] Wooten suggests that those involved in commercial disputes have been quick to use ADR because of the international nature of these disputes. However, the legal and institutional framework for environmental law tends to be highly individualised and is very different from the US.

Fowler[15] and Wooten[16] outline some of the main differences between environmental disputes in the US and Australia. First, US courts are far less accessible to environmental disputes due to restrictions on standing and different rules in relation to costs. Second, Australia provides alternative avenues of dispute resolution for site specific issues in the form of specialist tribunals. Third, in Australia broader environmental policy issues ➢

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➢ tend to be dealt with outside of any regulatory or adjudicatory forums.

These differences contribute to providing reasons why the courts have not moved to EDR — Australian court dockets are not as crowded as are some overseas. Some of the biggest proponents of EDR in the US are the judges. Their dockets are crowded and they see EDR as a way of reducing their caseloads.

One reason for the differences not addressed in the literature is the role that private foundations have had in promoting the use of EDR in the US. As noted above, the Ford and Rockefeller Foundations were instrumental in getting the EDR movement started in the early 1970s. In 1983 the National Institute for Dispute Resolution (NIDR), a non-profit corporation, was created with private foundation funding.[17] In turn, NIDR offered matching funding and technical assistance to encourage state governments to design and create mediation offices that were publicly funded and sanctioned.

One of the primary goals of these programs was to encourage the states to use collaborative approaches in resolving public policy disputes.[18] Initially, NIDR funding lead to the establishment of four state offices of mediation in 1984. NIDR continued to fund new state programs until 1994. As of that time, 12 programs were established with NIDR funding.[19]

In part, the NIDR funding of state dispute resolution centres prompted other states to establish their own centres. As of 1998, 28 such centres had been established throughout the US. While such programs have been popular in the US, Wooten notes that only Queensland has such a program — the Dispute Resolution Centre, housed in the Attorney General's Department.[20]

Another important initiative in helping to establish EDR and promote its use was the funding provided by the Hewlett Foundation. In 1984, they began supporting academic centres for 'theory building' on conflict resolution. 'The goal of the "theory center" initiative was to strengthen the conceptual framework of the conflict resolution field, reasoning that philanthropic investment in theory building could aid the advancement of practice and of policy formulation regarding dispute resolution'.[21] Presently there are 19 of these theory centres in the US.

In addition, the Hewlett Foundation provides conflict resolution funding in a number of other areas, including:

- practitioner organisations;
- promotion of the field;
- consensus building, public participation, and policy making;
- international conflict resolution; and
- emerging issues.[22]

The total amount of funding provided in 1998 for conflict resolution was $US9.3 million (approximately $A14.3 million).

The role of this foundation support cannot be underestimated. It got the ball rolling in the early 1970s, it prompted state governments to get involved through the establishment of the state offices of mediation in the mid 1980s, and it continues to provide significant funding to further the development of the field in the 1990s.

Thus the differences in legal and institutional frameworks between the US and Australia can partially explain the reduced role of EDR in Australia. However, the lack of private foundation support to establish, promote and further EDR and public policy dispute resolution generally is a critical factor that is missing in Australia. Without this support in the US, the use of EDR today would have a much reduced profile. ❖

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Endnotes

1. See Sandford R A, *Conflict Management, Dispute Resolution and Ecologically Sustainable Development* unpublished report prepared for Department of the Arts, Sport, the Environment, Tourism and Territories, Canberra 1991; Fowler R, 'Environmental dispute resolution techniques – what role in Australia?' (1992) 9 *Environmental and Planning Law Journal* 122-131; Turner B and Saunders R, 'Mediating a planning scheme amendment: a case study in the co-mediation of a multi-party planning dispute' (1995) 6 *Australian Dispute* ➢

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➢ *Resolution Journal* 284-296; Moore S A, 'Defining successful environmental dispute resolution: case studies from public land planning in the United States and Australia' (1996) 16 *Environmental Impact Assessment Review* 151-169; Saunders R and Turner B, 'Mediating environmental conflict: the Muckatah Drainage Scheme mediation' (1997) 4 *Australian Journal of Environmental Management* 8-25; Moore S A and Bache S, 'Spatial scale and environmental justice in Australian environmental dispute resolution: does it matter and to whom?' paper presented at the Environmental Justice Conference 1999.

2. Foster C H W, 'A case for environmental conciliation' paper presented at the annual meeting of the American Institute of Biological Sciences 1969.

3. For a description of this case see Cormick G, 'Mediating environmental controversies: perspectives and first experiences' (1976) 2 *Earth Law Journal* 215-224.

4. See 42 USC ss 4321-4361.

5. See 42 USC ss 7401-7642.

6. See 33 USC ss 1251-1376.

7. See 82 USC ss 6901-6992.

8. See Bingham G, *Resolving Environmental Disputes: A Decade of Experience* The Conservation Foundation, Washington DC 1986.

9. See Boer B, Craig D, Handmer J and Ross H, *The Potential Role of Mediation in the Resource Assessment Commission Inquiry Process*, discussion paper No 1, Australian Government Publishing Service Canberra 1991.

10. Condliffe P, 'The Mediation of Public Issue Disputes: Seven Key Elements (1998) *Australian Dispute Resolution Journal* 9 257-264.

11. Turner B and Saunders R, above note 1.

12. Sandford, above note 1. It should be noted that this was not a mediated case but one of unassisted negotiation.

13. See Saunders and Turner, above note 1.

14. Wooten H, 'Environmental Disputation: The Common Law and the Environment' 1993 15 *Adelaide Law Review* 33-77.

15. Fowler R, above note 1.

16. Wooten H, above note 14.

17. Support was provided by the Ford Foundation, the William and Flora Hewlett Foundation, the John D and Catherine T MacArthur Foundation, the American Telephone and Telegraph Company and the Prudential Foundation.

18. Purdy J *An overview of the state dispute resolution programs* (1998) A report prepared for the Policy Consensus Initiative; Bismark, N D see <http://www.agree.org/statements/jill.html>.

19. As above, p 2.

20. Wooten H, above note 14.

21. Bush R A, *Report on the Assessment of the Hewlett Foundation's Centers for 'Theory Building' on Conflict Resolution* Hofstra University School of Law (1995). See <http://www.hewlett.org/bushreport/execsummary.htm>.

22. See the Hewlett Foundation 1998 Annual Report for Conflict Resolution at <http://www.hewlett.org/grants/AnnualReport98/cres_fin.pdf>.

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