# ARTICLES

# Mediation And Planning Appeals: Jumping On The Band Wagon?

***Vicki Davies***

*[This essay won the National Environmental Law Association award in 1994 for the best student essay in Environmental Law. Vicki Davies has a Bachelor of Town and Regional Planning (Honours) from Melbourne University and is currently completing a Bachelor of Laws at Melbourne University.]*

## 1. Introduction

The 1980s saw a dramatic interest in Alternative Dispute Resolution (ADR) in Australia. It has been used to resolve both private and public disputes. There has been widespread court-based or court-annexed ADR. It has been applied to such matters as contractual disputes, neighbourhood disputes, family law, complaints lodged under statutory "social justice" programs, complaints by solicitors' clients and victim-offender reparation. There have been ad hoc uses in environmental and other public interest disputes.

There is now an impetus to apply ADR to planning appeals. In March this year (1994) the State Government released a report entitled "Mediation in Planning Disputes".[14] It is the culmination of a pilot project conducted by a consultant[15] which evaluated mediation as an alternative means of resolving planning disputes at various stages. In relation to the appeal phase the report recommends that the Administrative Appeals Tribunal (AAT) commence a "trial of the mediation conference concept" using trained "AAT member/mediators, ... currently accredited mediators, or both."

Much has been written (particularly in the USA) about mediation as an alternative to environmental litigation. There is also documentation of the use of mediation at the early stages of planning disputes. However, it seems that mediation has rarely been adopted as an alternative, or adjunct to the adjudicative role of an administrative tribunal at the appeal stage of planning disputes.

For the past five years I have been a part-time (town planner) member of the AAT. Three years ago I also trained as a community mediator and have worked intermittently with the Department of Justice's Dispute Settlement Program. Before the "trial" commences I would like to reflect on some of the nagging doubts I have about the implications of conducting mediation *within* the AAT.

* Are there real advantages or is the proposal no more than an attempt to jump onto a band wagon?
* How does the concept of a neutral mediator sit with the idea of an expert tribunal?

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14 Management Committee for the Mediation in Planning Project, Mediation in Planning Disputes, Final Report (1994), (hereafter, "Management Committee Report").

15 Keaney Planning and Research, Mediation in Planning Disputes Pilot Project, Consultant Report to the Management Committee (1993). (hereafter, "Keaney Report").

* How can a private agreement between parties to a mediation incorporate the "public interest"?
* What are the implications of a focus on agreement or compromise, rather than adjudication?

## 2 What Is Mediation ?

Mediation was defined in the Keaney Report and the Management Committee Report as follows:

> An undertaking by parties to a dispute to enter into discussions so that those parties, with the assistance of two impartial persons, can agree to resolve the dispute themselves. It is a voluntary system and entirely "without prejudice". If a party decides to withdraw from mediation and go to another forum they are entirely free to do so. No rights are forfeited by choosing mediation as an option. The process is entirely confidential. [16]

The Management Committee Report stated "Guidelines for the conduct of mediation conferences." These primarily cover procedural matters such as initiation and consent, confidentiality, timing, exchange of information and the translation of an agreement into a determination. No attempt is made to describe what would happen in a mediation conference except to say that "ideally mediation should be based on the well-established co-mediation model in use at the Dispute Settlement Centre of Victoria"[17].

In that "model" the role of the mediators is essentially one of facilitating a highly structured process. Twelve steps are rarely deviated from - See *Figure 1*. Mediators are said to be "process experts"[18] ; controlling the process of the mediation but not the content of the dispute. Mediators do not decide on the outcome or impose a resolution on the parties. Their role is to help *the parties* to articulate their "interests" (rather than principled "positions"), understand the views of others, clarify issues of concern, develop options and reach a mutually acceptable ("win-win") and workable agreement.

A few other features of the "model" are worth noting. Confidential private sessions are held with each of the parties. There is an emphasis on feelings as well as facts. A box of tissues is part of the standard equipment! However, not all sessions are highly "emotional". Mediators are not required to have expertise in the subject matter of the dispute: indeed they must suppress any expertise they may have. They do not independently suggest options for resolution of the dispute. Parties are advised to come to the mediation with relevant information on their rights and responsibilities.

Approximately 60 hours of training is required before mediators are assessed and accredited ("gazetted"). The training covers such matters as the philosophy of mediation, the conduct and control of the 12-step process and skills to encourage positive communication and deal with emotional intensity or manipulation. There is on-going training and extra training for work in specialised areas such as multi-party disputes and family disputes.

## 3 Why Think About Mediation ?

When mediation is available as an alternative to court proceedings there are obvious advantages. For example, the aggressively-named "Spring Offensive" of the Supreme Court in 1992 aimed to reduce serious backlogs in the Court's lists. The annexed mediation associated with the County Court's Building Cases List is apparently "simple and inexpensive

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16 Management Committee Report, op. cit. 8.

17 Management Committee Report, op. cit. Appendix 3.

18 Phillips, B.A., & Piazza, A.C., "The Role of Mediation in Public Interest Disputes" (1983) 34 The Hastings Law Journal 1231, 1235.

# FIGURE 1: MEDIATION STEPS

| STAGES ∇ | OBJECTIVES ∇ |
|---|---|
| INTRODUCTION | Establish role, process, ground rules, context |
| STATEMENTS | Dispute as seen by the parties |
| AGENDA SETTING | Issues identified, clarified & ordered |
| EXPLORATION | Exchange of perceptions |
| PRIVATE SESSION 1 | Hidden agendas |
| PRIVATE SESSION 2 | Future focus |
| OPTIONS | Possible settlement options created |
| NEGOTIATION | Problem-solving collaboratively |
| AGREEMENT | Offers & agreement writing |
| CLOSE | Status of agreement & agreeing what has been agreed |

**NOTES:** "Preparation" at the beginning and "De-briefing" at the close of the session are extra steps.

"Private Session 2" is not part of the neighbourhood model.

and cuts down time delays considerably."[19] In commercial disputes mediation offers an additional attraction of allowing parties the chance to resume a positive relationship after the dispute is resolved.

In many neighbourhood disputes the costs and uncertainties of legal action mean that some form of ADR is the only feasible option. Mediation is also seen as preferable to court proceedings if the parties have an on-going relationship and the issues are "not black and white"

Although environmental mediation has not been used in a formal way in Australia,there have been widespread applications in the USA and Canada.[20] Its proponents see it as a means of overcoming the cost, uncertainty and inadequate remedies of litigation and allowing broader and more direct participation of "interested publics".

When mediation is an alternative to adjudication by an administrative tribunal, rather than a court, the advantages or attractions cannot be so simply stated. What follows is a critical examination of some of bases for claims that mediation would be preferable to an AAT hearing.

### (a) Lower Cost

A Department of Planning and Housing report suggested that mediation "could avoid a percentage of appeals with attendant cost savings to government and to the parties."[21] On the other hand, the Keaney Report stated that some of the "motivating factors for mediation" in other forums, such as cost and the threat of costs, are absent in the AAT.[22]

With regard to cost savings to the parties, I presume that a filing fee would still be exacted for participation in a mediation conference. Each party would bear its own costs of a conference, as is the usual case with a hearing.

To a significant extent the parties' costs in either process reflect fees to professional representatives and witnesses. I discuss later the role of professionals in mediation. There would be savings if mediation meant there was not a protracted hearing with associated fees. On the other hand, Jeffrey (Chairman of the Environmental Assessment Board of Ontario) believes that it is naive to suggest that intervenors [third party objectors] will not be forced to rely heavily upon legal counsel and technical experts to understand the issues and present negotiating positions in a mediation conference.[23] If this is the case, many of the cost benefits attributed to mediation would be negated. There is also the prospect of parties having to bear the costs of both an unsuccessful conference and a hearing.

Mediation at the NSW Land and Environment Court has resulted in significant time savings for the Court.[24] It is questionable whether such savings to the government would arise at an administrative tribunal where hearing days are "cheaper". Many AAT appeals which involve relatively simple matters are heard by a single member and conducted in two or three hours. I believe that if such appeals were to be the subject of mediation conferences they would invariably require greater time. There would, however, be a saving in time required for writing a determination. The use of two member/mediators would be an additional cost. Again there is the prospect of both a conference and a hearing being required in some cases.

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19 Keaney Report, op. cit. 15.

20 See Bingham, G., & Haygood, L.V., "Environmental Dispute Resolution: The First Ten Years" (1986) 41:4 Arbitration Journal 3.

21 From control to performance (1992) 91.

22 Keaney Report, op. cit. 24.

23 Jeffrey, M.I., "Accommodating Negotiation in Environmental Impact Assessment and Project Approval Processes" (1987) 4 Environmental and Planning Law Journal 244, 248.

24 It is estimated that 100 mediations have taken about 45 days instead of > 150 court hearing days. Keaney Report, op. cit. 13.

## (b) Speedier Resolution

Planning legislation requires decisions to be reviewed in an "expeditious manner":[25] "as quickly as is consistent with the requirements of justice." [26]
The number of appeals being received by the Planning Division is declining and recent legislative changes are likely to accentuate this trend.[27] There is no real problem of a backlog of cases. The waiting time for an appeal to be heard is now approximately ten weeks for a "2 hour matter" and thirteen weeks for "a matter expected to take a day or more."[28] The Keaney Report suggests that "most appeals can be brought on within a comfortable preparatory time frame for the participants."[29]

The "Guidelines for the conduct of mediation conferences" state that "the conference is to be held as soon as possible after the last date for all appeals".[30] If time is allowed for the giving of notice to parties and "the exchange of all information relevant to the dispute" (in accordance with another Guideline), the option of mediation would not necessarily lead to an earlier resolution of the matter. The only real advantage I can see is the prospect of an immediate outcome at a mediation conference. Although an oral determination can be given at the end of a hearing, most decisions are reserved and provided in writing - mostly within a month but sometimes much later.

It is important that mediation conferences do not themselves lead to delay in the ultimate resolution of an appeal. On this matter one of the Guidelines suggests that an "appeal hearing date should be set at the same time as the mediation is set up so as to avoid delay if the mediation is unsuccessful."[31]

## (c) Procedural and Evidentiary Informality

ADR is commonly seen as a means of minimising the level of formality that characterises litigation. It is also seen as changing the focus from legal and procedural rights to the underlying or substantive issues in a dispute.[32] The extent to which the AAT already offers these features needs to be considered.

Informality is certainly part of the legislative intent for the AAT.[33] In principle, parties are not disadvantaged by appearing without legal or professional representation. The Tribunal must also "act according to equity and good conscience and the substantial merits of the case without regard to technicalities or legal forms."[34] The Tribunal is not bound by the rules or practice as to evidence but may inform itself in such manner as it thinks fit.[35]

In practice, the level of formality varies from case to case, depending upon the type of representation, the nature and magnitude of the proposal and the approach of the presiding member. Many appeals rely substantially on an adversarial approach typical of a court. On the other hand, the Keaney Report observed that "many members already conduct their hearings on the informal neutral basis of a mediation in an attempt to win a resolution between the parties."[36] I agree that such an approach is adopted by some members in some of "their hearings." I also accept the suggestion in the Wren Report that "because

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25 Administrative Appeals Act 1984 s. 4(a).
26 Planning Appeals Act 1980 s. 25(d).
27 The imposition of a filing fee, prevention of appeals on certain classes of development and more extensive "as-of-right" uses.
28 Discussion with Registrar 15 May 1994.
29 Keaney Report, op. cit. 25.
30 Management Committee Report, op. cit. 43.
31 Ibid.
32 Amy, D.J., "The Politics of Environmental Mediation" (1983) 11 Ecology Law Journal 1, 12.
33 Planning Appeals Act 1980 s. 25(c) and Administrative Appeals Tribunal Act 1984 s. 4(a).
34 Planning Appeals Act 1980 s. 25(a).
35 Ibid. s. 26(4).
36 Keaney Report, op. cit. 25.

proceedings...are informal quite often appeals between parties who are not antagonistic, take on the appearance of a conciliation conference rather than a hearing." [37]

Care needs to be taken not to confuse "appearance" with reality. Some hearings may be informal and some members may attempt to seek reconciliation between the parties. However, this does not amount to mediation if the member has the power to make a determination and has discretion as to how much to involve the parties in shaping the outcome.

A focus on legal and procedural matters in hearings is usually blamed on the involvement of legal representatives. Would mediation conferences avoid this? The issue of professional representation (legal or technical) is not discussed in the Management Committee Report but one of the procedural Guidelines states:

> Legal representation... cannot be banned, and indeed some parties may feel more comfortable with such representation. However, parties should be encouraged to represent themselves directly if at all possible..[38]

The Guideline seems to overlook the fact that the President of the AAT has the power to require a party to conduct his/her case in person.[39] That power has never been exercised. I would not suggest that all representation be prohibited at a mediation conference. However, an unacceptable power imbalance may exist if only one of the parties had legal representation. Strategies would be required to control the role of lawyers. For effective mediation professional representatives should "not lead the discussion but play a passive role only." [40]

### (d) Flexibility

The proponents of mediation claim that it encourages the parties to evolve creative solutions rather than compromises, so that each party is satisfied with the outcome. There is the prospect of a "win-win" outcome. This would appear to be a real advantage compared to the win-lose contests at most appeal hearings. Parties at a hearing sometimes offer compromises, in the form of permit conditions or amended plans, but there is little opportunity to negotiate "without prejudice."

With the consent of the parties the Tribunal can amend a permit application during the course of a hearing.[41] It can also include a permit condition requiring amended plans. However, these powers are constrained by the need to be certain that the proposal is not altered to the extent that parties not involved in the hearing should be given notice.

Such constraints would also apply to any "creative solution" arising from a mediation conference. However, mediation would allow the parties to agree on what would form the basis of an acceptable new application to be lodged with the Responsible Authority.

### (e) Participation

ADR is particularly attractive in environmental matters where standing before the courts is a problem. In contrast, standing has not been an issue at planning appeals. Consistent with the object to "permit a broad range of persons whose interests are affected by a decision to participate in a proceeding",[42] the AAT has rarely dismissed an appeal on the basis of an

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37 Wren, C., **Planning Appeals System Review** (1990) 77.
38 Appendix 3, Management Committee Report, **op. cit.** 43.
39 **Planning Appeals Act** 1980 s. 28(3).
40 City of Melbourne submission summarised in Appendix 1 of Management Committee Report, **op. cit.** 36.
41 **Planning Appeals Act** 1980 s. 53.
42 **Administrative Appeals Tribunal Act** 1984 s. 4(b).

Appellant Objector's lack of standing. However, "any other person" now requires the leave of the Tribunal to appear.[43]

In any event, parties to a mediation conference would be the same as those eligible to participate at a hearing. It is possible that there would be people who would not exercise their right to attend a hearing but would choose to attend a mediation conference. It is only to that extent that mediation offers any more opportunity for participation.

Yet "participation" may distinguish mediation from a hearing in less literal ways. It is likely that parties at a mediation conference would feel that they had a greater "voice" or "fair say". A mediation conference would also allow greater involvement in the outcome.[44]

### (f) Enduring Resolution

Sandford has argued that regardless of the merits of a tribunal decision, "if one or more of the parties remains dissatisfied there is every likelihood that the dispute will re-emerge in another form."[45]

If mediation conferences resulted in the promised "win/win" outcomes, or "mutual gain" resolutions, they would offer definite advantages to an arbitrated decision. The process is likely to have decreased levels of animosity and misunderstanding and if the parties have shaped an agreement it is more likely to be enduring. Planning Officers interviewed in the Keaney Report felt that the process would mean that the decision "is likely to be more 'liveable' in the long term."[46]

Compliance with the agreement (permit), the avoidance of persistent complaints to the Responsible Authority and the unlikelihood of subsequent enforcement proceedings could be direct benefits.

## 4. AAT Member/Mediators : Conflicting And Troublesome Roles

There is little indication in either the Keaney Report or the Management Committee Report as to how "mediation conferences" would be conducted and the expected role of mediators. One submission to the Management Committee had expressed concern that it was "too much to expect AAT members to switch from the role of adjudicator to that of mediator." In response, the Management Committee Report only notes "that this will depend very much on the individual" and put faith in "members interested in mediation" being "properly trained."[47]

I believe that such a simplistic response overlooks fundamental dilemmas about the role of the mediators. It could very well be difficult for a member to "switch" between days as an adjudicator to days as a mediator. However, it is likely to be much more difficult for a member to play different roles **within** a mediation conference.

The Code of Ethics applicable to the "model" proposed in the trial states that "Mediators should be impartial, objective and fair and independent of the parties and the issues throughout the process."[48] envisage no problems for member/mediators with bias, or impartiality between the parties. However, the requirement to be "independent of...the

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43 New s. 82B of **Planning and Environment Act** 1993.

44 These degrees of participation have been examined in relation to conciliation conferences and adjudicative hearings at the Victorian Intellectual Disability Review Panel. Carney, T., & Akers, K., "A Coffee Table Chat or a Formal Hearing?" (1991) 2 **Australian Dispute Resolution Journal** 141, 147-148.

45 Sandford, R., "Environmental Dispute Resolution in Tasmania: Alternatives for Appeals Systems" (1990) 7 **Environmental and Planning Law Journal** 19, 20.

46 Keaney Report, **op. cit**. 67.

47 Management Committee Report, **op. cit**. 25.

48 Inner South Dispute Settlement Centre Inc. "Mediator's Code of Ethics" (1992).

issues", or the planning framework, raises serious questions about the role of member/mediators within an "expert" tribunal.

### (a) The Use of Expertise

The pilot project raised the question of what skills and knowledge in the planning field mediators needed to have. The Keaney Report notes that some planning officers expressed "frustration ... at the incomplete knowledge of the mediators."[49] However, the Report concluded that mediators "did not need to be specialists in the field". The important element was "not planning knowledge but neutrality ; and an ability/willingness to listen."[50]

If non-AAT members are used as mediators in the AAT trial this question will remain alive. However, I am more interested in how AAT member/mediators are expected to treat their "experience".[51]

In making a determination the body of learning or experience acquired by a member before or during their tenure is relevant.[52] Some members have specialised expertise in areas such as traffic engineering, historic buildings and environmental health. Is it reasonable to expect that a member/mediator would not only withhold judgment but suppress their skills and knowledge? More importantly, would the denial of expertise serve any useful function in a mediation?

The Mediator's Code of Ethics states that "mediators can share ordinary information or common knowledge with the parties" but where a party needs specific information or assistance they are referred to "an appropriate source." My involvement in one of the pilot project mediations leads me to believe that it would be useful for AAT member/mediators to be a source of "specific information or assistance." The mediation concerned car parking at a block of flats. Although I was breaking the rules governing the role of a mediator, my suggestion of a design solution that could satisfy the interests of all parties was the crux of the resolution.

There is a fine line between offering "information or assistance" and making a recommendation. Maybe my suggestion of a design solution was really the latter. Newton has noted that

> "crucial to the pure mediation process is the fact that the neutral third party does not make recommendations ... this being more within the scope of independent expert appraisal ... However, one person could play both the roles of mediator and independent expert.[53]"

There is substantial confusion in the debate about what distinguishes mediation from other forms of ADR.[54] Most writers see the making of recommendations as fitting within the idea of "conciliation". For example, Bryson notes that in contrast to a mediator "the conciliator acts more as 'an inventor of solutions' which are presented to the parties ..."[55] Spencer claims that "conciliators benefit the parties with their expertise, and they are not necessarily impartial (as are mediators."[56]

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49 Keaney Report, **op. cit**. 67.

50 **Ibid**. 75.

51 Except where there is an express requirement for the Tribunal to be constituted by (or include) a lawyer, there must be at least one member "who has experience in town and country planning." **Planning and Environment Act** 1987 s. 148(a).

52 **City of Camberwell v Cherry Nicholson, unreported judgment of Ormiston, J of 2 December 1988.**

53 Newton, D., "The Potential and Prospects of Environmental Mediation and Other Means of Alternative Dispute Resolution in Environmental Matters in Australia". Paper presented to International Conference on Environmental Law, Sydney, June 1989. 4.

54 Authoritative writers, asserting that a distinction exists between conciliation and mediation, have provided a "direct reversal of polarity as to which word describes which process." Street, Sir L., "The Language of Alternative Dispute Resolution" (1982) 66 Australian Law Journal 194, 195.

55 Bryson, D., **Neighbourhood Mediation Centres. Mediation Training Course Manual** (1988).

56 Spencer, K., "ADR - an introduction" (1991) 65 **Law Institute Journal** 40, 41.

Ultimately, it does not matter what the role is called. I believe that the role of AAT member/mediator needs to depart from the neutral role in the "model" at least to the extent of offering advice and assistance and making recommendations. Other departures from the "model" are considered below.

### (b) Mediating Within a Legal Framework

I believe there is a major weakness of the "model" when applied to neighbourhood disputes. Statutory rights and obligations are not often directly raised and there is the potential for agreements which are "unlawful". It is encouraging to see that the Management Committee Report acknowledges that mediation conferences would need to consider "the law." The Report notes "the distinct advantage" of using at least one AAT member/mediator in that

> he or she can provide their knowledge to the mediating parties on the legality (in a planning sense) of any settlement, as well as ensuring that wider community and environmental interests are protected.[57]

That comment recognises that the parties could not entirely define a settlement. Disputes would have to be resolved legally; that is, according to a complex framework including legislation, Planning Schemes and policies. Unfortunately, the Report gives no clues as to how this very onerous role would be, or could be, performed by a mediator.

The role reminds me of Astor and Chinkin's description of the conciliation of discrimination disputes as occurring "in the shadow of the law." By that they mean that the conciliator is a "guardian" of the standards established by the legislation.[58] Bryson has noted that while "impartial to the parties" the conciliator in such disputes is "both accountable to the law" and "an advocate for the law".[59] Bryson has suggested that this may involve playing the "devil's advocate". The conciliator can give the parties "an idea of what they could expect" if the matter went on to a hearing. This can be used as a "bargaining chip."[60] Such a role is very different to the neutral role in the "model." It borders on manipulation of the parties and would need to be played cautiously (if at all) by AAT mediators.

The two aspects of the mediators' role envisaged in the Management Committee Report are considered below.

### (c) The "public interest" and private agreements

Planning disputes are not merely disputes between the parties. A primary function of the AAT is to seek an answer in the public interest. The Tribunal is required to consider "different" publics, all of which may or may not be represented at the hearing. The "public interest" includes not only the interests of the public at large but also the interests of a proponent (and those served by the development) as well as the interests of those opposing.[61]

A particular problem in the planning area is that there are few "standards" to be applied, interpreted and enforced. On the other hand, there is much policy and discretion.

To the extent that the AAT is bound to "give effect to", "have regard to", or "take account of" various matters set out in in s. 27 of the **Planning Appeals Act** 1980, or consider the matters set out in s. 60 of the **Planning and Environment Act** 1987, the Tribunal's discretion is constrained. Furthermore, legislation, Planning Schemes and policies increasingly include objectives. It could be argued that such provisions mean that the balancing between

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57 Ibid. 25.

58 Astor, H., & Chinkin, C., Dispute Resolution in Australia (1992) 271.

59 Bryson, D., "Mediator and Advocate : Conciliating Human Rights Complaints" (1990) 1 Australian Dispute Resolution Journal 136, 139-141.

60 David Bryson, Address to Law and Discrimination class, 7 October 1992.

61 Jeffrey, op. cit. 248.

conflicting interests has already been done by the government. However, such provisions are never in a format allowing them to be used as a checklist to ensure the "public interest" is served. Judgments are required.

With reference to environment dispute resolution, Jeffrey has argued that where the "public interest" is at stake an open public hearing offers advantages over private negotiation/mediation. The positions taken by all parties can be critically examined and tested using long-established adversarial techniques within a framework of rules and procedures. Jeffrey believes that vigorous critical evaluation of the technical aspects of complex proposals is particularly important.[62]

Jeffrey's view is indirectly supported by some of Planning Officers interviewed in connection with the mediation pilot project. They expressed concern with "agreements reached which were exclusive of any 'public interest' considerations".[63] Despite this concern the matter was only briefly addressed in the Keaney Report. It was suggested that an issue of "community interest...only arose in any significant way in one case" which was mediated. It stated that

> "..whilst the mediators were well aware of the "community interest" consideration, the presence of the planner at the sessions ... provided an appropriate check on this important issue.[64]"

The planner was seen as able to "advise on the critical balance between the private interests of the disputants and the wider public interest."[65]

I am surprised that only one mediation in the pilot project raised an issue of "community interest." This may be a function of the types of cases selected. It could also be a definitional question. In a study I did about the role of policy at the Tribunal, members estimated that fifty percent of all hearings involved some form of policy. If Planning Scheme objectives and "implicit policies" were included, then almost all appeals had a policy component.[66]

Even if one accepts that a Council planner could adequately play the role mentioned above, this would not be an acceptable situation at a mediation conference. The Responsible Authority would be a party, "defending" its decision.

As envisaged in the Management Committee Report the AAT member/mediator would necessarily have the task of "ensuring that wider community and environmental interests are protected." The implications of that simple statement are enormous. How would this occur without submissions on, or an independent inquiry about, the "public interest"? Would the mediator be playing a purely adjudicatory role? Could the "public interest" be isolated as some type of given limit within which the parties would be free to negotiate? I have no answers.

### (d) Endorsing Agreements

Jeffrey considers that "the most serious impediment to the negotiation/mediation process" is how it is to be integrated with the provisions of existing approval processes and a tribunal's statutory obligations.[67] He highlights that:

> "There is no authority for a tribunal to dispense with any statutory requirement of specific legislation simply because the parties have reached a mediated settlement.[68]"

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62 Jeffrey, **op. cit**. 249.
63 Keaney Report, **op. cit**. 66.
64 Keaney Report, **op. cit**. 74.
65 **Ibid**. 76.
66 Research Assignment for Advanced Administrative Law 1992.
67 Jeffrey, **op. cit**. 249-250.
68 **Ibid**. 250.

The proposal to have AAT members as mediators is clearly aimed at overcoming this impediment. For instance, the Keaney Report recognises that mediation would be part of process that requires "an answer to the application" not just a settlement. There must be a

> "nexus between the mediation process and the ... AAT process ... so that there can be the certainty that the **answer** will be one that will obtain the ratification of ... the AAT.[69]"

The Management Committee Report simply notes the "considerable advantages - in terms of the efficiency of the process" if AAT member/mediators "were able to immediately ratify a mediated settlement."[70] Legislative amendment would be required to achieve this.[71]

There is no indication in either of the Reports as to how this "ratification" would occur. The WESTURB Report noted the need for a mediated agreement to be "checked and endorsed" to ensure it "meets planning requirements".[72] The assumption seems to be that this would be a simple process ; applying a "rubber stamp."

It would be difficult, but not impossible, to check that an agreement complied with some planning requirements (for example, a Council Flat Code or a statutory level of permitted emissions). However, how would an agreement be "checked" against broader policy considerations (for example, urban consolidation objectives or the enhancement of an historic streetscape). Is it implied that a mediator would be predicting what the outcome would be if the matter were the subject of an appeal? Or is it expected that a mediator would just be checking that an agreement was not obviously unacceptable? The latter would be the equivalent of a community mediator assessing (per the Mediator's Code of Ethics) whether an agreement is "obviously illegal".[73] Either of these expectations would be problematic.

Jeffrey argues that any negotiated settlement should be reviewed by the appropriate adjudicative body.[74] If this were the case in planning appeals, many of the benefits of having mediation would be foregone. Ultimately, a mediated agreement would be in the public arena in the form of a planning permit. However, this does not amount to review. The proposal in the Management Committee Report attempts to kill two birds with one stone: to have the mediator act as the reviewer. I consider that it is a major flaw with the proposed scheme.

### (e) Confidentiality

It is obvious that to avoid actual or perceived breaches of the rules of natural justice a member participating in a pre-hearing mediation should not then adjudicate on the matter if no mediated settlement is reached. This is covered by one of the procedural Guidelines in the Management Committee Report.[75]

The Code of Ethics applicable to the DSC "model" stresses confidentiality. Mediators take a vow of silence about all matters raised in a mediation.[76] Any notes are shredded.

These measures would not be adequate according to Naughton who has written about mediation at the NSW Land and Environment Court. Naughton is strongly of the view that mediation should be independent of the court structure as there is a danger that the perceived

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69 Keaney Report, **op. cit**. 74.

70 Management Committee Report, **op. cit**. 23.

71 s. 59 of the **Planning Appeals Act** 1980 provides for only the President to determine an appeal without a hearing, with the consent of the parties.

72 Western Region Urban Environment Advisory Centre, **You're going to build What?! : Mediation for Planning Disputes** (1991) 32.

73 Inner South Dispute Settlement Centre, **op. cit**.

74 Jeffrey, **op. cit**. 250.

75 Management Committee Report, **op. cit**. 43.

76 Confidentiality is required **except** to the extent that matters are already public or to such an extent as may be agreed between all the aprticipants, as required by law, or as needed for supervision by the staff.

independence of the court is put in question. He argues that if a mediation "breaks down" and a hearing occurs

> "might it not be difficult to convince some parties, witnesses, objectors and observers that the court decision was not influenced by knowledge obtained in strict confidence by one of the court's own officers during the preceding mediation?[77]"

Naughton argues that "the public sees the court as an integrated institution". Therefore, "rostering barriers and distinctions between the functions of the judges and registrars will not dispel the likelihood" of a losing party feeling "that the court as an institution was, or may have been, prejudiced by poison privately fed in by the other side during mediation." Further, he argues that an expectation could build up in the community that a private session with a judge or registrar is a normal part of the court procedures.[78]

Naughton thinks organisations outside the court system should provide mediation services. In a final broadside he warns of the use by a court "of a procedure that is in its very substance antithetical to the maintenance of public confidence in the integrity, and inaccessibility to external influence, of the court system."[79]

Such issues would be equally relevant to the perceived independence of the AAT. They will need to be addressed if the trial goes ahead.

## 5. Parity Of Power

The Keaney Report notes that in "some of the reported appeal mediations ... there was a manifest imbalance" and suggests that mediation within the AAT structure "will assist in having the parties 'in balance'".[80] There is some discussion in the Report on the nature of the "imbalance" but there is no indication of why mediation within the AAT would "assist.".

Many of the "intake workers" and mediators involved in the pilot project argued that the objectors held the "balance of power" in that

> "(they) had everything to gain and nothing to lose before and during the mediation. They would explore mediation to ascertain what concessions may be made, but that if none were forthcoming the case would not settle and go forth to appeal.[81]"

However, the Keaney Report also notes that once an appeal was pending Applicants were willing participants in the pilot mediations. The reason for this is thought to be that

> "... the applicant feels that a **permit** in some shape or form, will be the outcome of a mediation. The "shape and form" of that permit will be the matter for the discussion at the mediation. The applicant has much to gain therefore from mediation. There is a near **certainty** of a permit. There is the elimination of the **risk** of appeal. There is considerable **time savings**. And there is also **financial** advantage by way of holding costs whilst awaiting appeal, and the actual expense of running the appeal.[82]"

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77 Naughton, T.F.M., "Mediation and the Land and Environment Court of New South Wales" (1992) 9 Environmental and Planning Law Journal 219, 221.

78 Ibid. 222.

79 Ibid.

80 Keaney Report, op. cit. 85.

81 Ibid. 66.

"The prevailing theme" of comments by planners, intake workers and mediators associated with the pilot project was "that the applicant could be assured of certainty of permit subject to additional matters being done. This was inevitably agreed to."[82]

The Keaney Report suggests that those objectors who did participate "achieved a great deal" (for example, a new plan or extra permit conditions).[83] However, it notes a "very disappointing" acceptance by objectors of mediation. One of the main reasons for objectors declining "was that they too felt that in most cases it was implicit in agreeing to mediation that a permit would be the outcome." They declined to participate "unless their position was that they conceded a permit but wished to negotiate conditions."[84]

The Keaney Report acknowledges that that "there is a danger in this from the planning point of view in that it reduces the mediation to a trade-off." Further, the Report states that "if mediation is to be true to the principle of getting the parties together, on an equal footing, to try to resolve their dispute, then the balance of powers has to be similar."[85]

Some interesting questions are raised by the above observations. Why would an applicant be so confident of settlement at a mediation and see "no risk of appeal"? Is an applicant making a calculation about the likely consequences of a hearing and seeking a "better deal" from a mediated settlement (both in terms of the costs of going ahead to a hearing and the outcome)? Does an applicant hold all the cards? Would the "balance" between an objector and an applicant be different if a mediation of a pending appeal followed the issue of a Notice of Refusal rather than a Notice of Decision to Issue a Permit (as was primarily the case in the pilot project mediations)?

Some insights on such issues are offered in Amy's essay on "The Politics of Environmental Mediation".[86] Amy questions the assumption that the voluntary nature of the process ensures that no party is forced into a disadvantageous agreement. His discussion about the various forms of bias and co-optation that are potentially present in mediation is the most interesting material I have come across. Amy's arguments are summarised below under the headings he uses.

### (a) Mediation as Seduction

There is a common charge that co-optatation is built into the mediation process itself. Subtle conciliation techniques to "diffuse hostility and minimise personal animosity" and the goal of promoting "an atmosphere of cooperation, reasonableness and understanding" can "seduce" environmentalists into compromising their ideals and granting overly generous concessions to their opponents.

Proponents of mediation argue that rather than being attempts at seduction such techniques are attempts "to clear away the emotional and psychological obstacles that often get in the way of rational negotiations."
Amy concludes that even if the tendency towards seduction is inherent in the conciliatory aspects of mediation, it is difficult to deny that a large part of the responsibility for any concessions must ultimately lie with the negotiators themselves. The problem is not intractable: environmentalists need to gain more experience at mediation and learn to be tougher negotiators.

### (b) The Problem of Power

Amy notes that pro-development groups (whether private concerns or public agencies) typically have greater power (financial, political and economic) than environmental groups,

82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
86 (1983) 11 Ecology Law Quarterly 1.

especially local ones. An imbalance of power undermines the assumed neutrality of the mediation process in the following ways:

Firstly, imbalances can effect who is allowed, or able to participate. They can also determine "who has the upper hand" in the negotiations: for example, powerful interests may see mediation as the most efficient means to their ends and actively embrace it as a way of co-opting their weaker opponents.

Secondly, superior resources can give pro-development groups the advantage of superior technical analysis.

Thirdly, environmentalists' lack of power can make their participation less than voluntary. For example, a local environment group that cannot sustain a prolonged court battle may have little choice but to mediate. It will be "bargaining from a position of weakness" and will be inclined to accept only slight modifications (the developer's "crumbs") of an undesirable project. At the same time, participation in mediation may give the developer an "air of legitimacy and reasonableness" that may be difficult to come by otherwise. Powerful public and private organizations may be willing to grant concessions on details, but their basic policy decisions are likely to remain non-negotiable.

Amy concludes that while mediation cannot be responsible for the maldistribution of political and economic power in our society, it must be held responsible for its built-in tendency to institutionalize and perpetuate that maldistribution. By conferring an air of fairness to inequitable or co-optive agreements, mediation may actually tend to legitimize imbalances.

(c) **Definitional Bias**

Amy suggests that mediators usually try to have an amoral perspective on conflict. This approach reflects a desire to remain neutral. It also lays a conceptual groundwork favourable to compromise. There is no "right" and "wrong" ; rather, parties have clashing but equally valid interests. From this perspective, "splitting the difference" is the fair and just solution because each party gets some of what it wants.

This may work to the advantage of pro-development interests if the logical compromise is some form of "responsible development". While this can be seen as a reasonable integration of environmental and developmental interests, it can be seen as pro-development if the environmental issues involve choices between development and non-development: two incompatible paths. For example, the "responsible development" of a nuclear power plant or oil drilling in a national park would be victories for pro-development interests.[87]

Amy believes that "politically sophisticated mediators" should be able to recognize and avoid disputes where conflicts are non-negotiable. However, this could be difficult. He concludes that mediation works best in disputes that are "primarily local and that do not involve basic value conflicts or structural choices."

Amy considers that it may be useful for environmentalists to actually embrace co-optation. For example, where there is a good possibility of losing entirely it may be prudent to accept a mediated compromise which gains only token concessions. He concludes that mediation "should not be entered into naively or precipitously but neither should it be eliminated automatically because of its inherent political biases."

Amy's comments are generally relevant to mediation of planning appeals and represent a warning to objectors about the dangers of co-option. The need for "responsible development" is becoming a catch-phrase in planning, particularly when revival of the State's economy is stressed as the major priority. In many appeals it is not merely the manner of operation of a development that is in dispute, but the very nature of the development itself.

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88 Preston, op. cit. 396 mentions a tourist resort in a wilderness area as a similar non-negotiable situation.

When applied to planning appeals, Amy's analysis would not be as relevant with respect to access to mediation and the selection of parties. As the alternative to mediation is not a prolonged court battle, but a relatively informal AAT hearing, it is not as likely that local groups would be "bargaining from a position of weakness" and only able to accept "crumbs."

I agree with Amy's argument that resources often allow pro-development groups to have superior technical analysis. However, in many planning appeals local environment groups are able to draw on considerable expertise. Amy does not seem to acknowledge other sources of "power" that can often be used very effectively by community groups: for example, local knowledge of environments and potential impacts, the "moral high ground" on ecological issues..

It is not easy to see how imbalances of power could be redressed in mediation conferences. If Amy's advice is heeded, appeals involving non-negotiable matters should not be the subject of conferences. Objectors may also learn to "toughen their negotiating abilities", though there would be little opportunity for one-off participants to do so. Jeffrey notes that it has become accepted in Ontario that "intervenor funding" is necessary to encourage effective public participation.[88] In Victoria this would be the equivalent of "third party funding". If it were to be available, it would be equally applicable to tribunal hearings and mediation conferences.

## 6 Limitations And Prospects

Cormick warns "of the danger that mediation can and will be used to replace or short-circuit existing processes." He considers that

> "mediation must remain an extraordinary process applied to carefully selected situations in order to maintain its credibility and viability. Should it ever become another hoop to jump through, it will inevitably be destroyed.[89]"

It is obviously not the aim to have all planning appeals mediated. An indication can perhaps be taken from the NSW Land and Environment Court. In the first year or so of its mediation scheme around 8 percent of appeals were mediated. According to the Keaney Report, around 70 percent of these cases were "settled" and "in most of the remaining cases many of the outstanding issues [were] ... refined."[90]

The Keaney Report notes difficulties in itemising the characteristics which make a case best suited to mediation: "In planning, each case is notoriously different with so much depending on the identity and personalities of the parties".[91] Nevertheless, the Report lists disputes "which do not lend themselves to mediation." These include

* where there are matters of "principle" and a party will use every forum available to promote (oppose) a cause;
* legal disputes which inevitably require an interpretation;
* commercial disputes where one party aims to stop a competitor;
* where the motive of a party appears to be delay;
* where there is "an obvious power imbalance between the parties";
* where the number of parties suggests that agreeing to even attempt mediation will not be unanimous; and
* where a Notice of Refusal has been issued and Council representatives would not have delegated authority to negotiate.

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89 Jeffrey, **op. cit**. 248.

90 Cormick, G.W., "Mediating Environmental Controversies: Perspectives and First Experience" (1976) 2 **Earth Law Journal** 215, 217.

91 Keaney Report, **op. cit**. 13.

92 **Ibid**. 79.

I have no disagreement with those criteria. Given my discussion of the role expected of the AAT mediators perhaps a few more restrictions could be suggested. The case should not involve significant policy considerations and it should not be of a precedential nature (for example, the first development considered under new provisions).

The above criteria beg the question of what types of cases are left that could be suitable for mediation. They also highlight the problem of selecting appeals for mediation.

The Management Committee Report notes that mediation is more likely to be accepted "if neither party feels certain of 'winning' in the formal planning process."[92] The Keaney Report also notes the potential "where there is evidence from the parties that a solution is achievable" (for example, constructive comments in objections).[93]

There seems to be a widespread view that mediation is only relevant to "minor" disputes between neighbours, or at least cases where there are not many parties involved and parties are "on a fairly even footing".[94] It is also suggested that the parties need to have an on-going relationship. All residential cases would not satisfy these criteria. For instance, numerous objectors may not have an on-going relationship and not all may be willing to attempt mediation. "Minor" residential appeals may be the easiest cases to mediate but they would offer few cost savings.

An alternative view is that mediation has greater potential in the more difficult cases: large-scale appeals where there are multiple parties, numerous issues and the prospect of an extended hearing. I note that some Planning Officers interviewed in the pilot project saw the prospects for mediation in "long running complicated cases". They considered the potential "for an impartial fresh look at a protracted dispute regardless of its size."[95]

The Keaney Report notes that even if a settlement is not reached, mediation can allow the areas in dispute to be "refined for debate at a subsequent Tribunal hearing."[96] This is a version of pre-hearing "scoping"; consultation aimed at defining the issues and/or settling. Agreed upon positions can be documented and presented to a hearing.[97]

There is also the possibility of employing other ADR techniques, such as "independent expert appraisal". An independent third party could be engaged by the parties to review material and advise on a particular issue (for example, can a subdivision contain its effluent? How much traffic will be generated?) or give an independent opinion as to how the dispute should be resolved. In contrast to arbitration, the views of the third party would not be binding.

Such approaches have been adopted in environmental mediations concerning large projects. They inevitably involve a prolonged, highly-structured process of mediation.[98] In the planning arena, Fisher's documentation of the mediation of a planning permit dispute within the Shire of Eltham gives an indication of the time and effort required for a complex dispute. In that case there was fourteen hours of formal mediation over a number of weeks.[99]

It may not be appropriate to attempt mediation in relation to complex disputes in an initial trial at the AAT. Nevertheless, such applications may offer the most benefits in the long-term.

Lastly, there is the prospect of introducing mediation **techniques** into AAT hearings. For instance, an approach "characteristic of mediations" is adopted at the NSW Consumer Claims

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93 Management Committee Report, op. cit. 15.
94 Keaney Report, op. cit. 80.
95 Western Region Urban Environment Advisory Centre, op. cit. 26.
96 Keaney Report, op. cit. 67.
97 Keaney Report, op. cit. 9.
98 Jeffrey, op. cit. 250.
99 See Bingham & Haygood, op. cit. and Phillips & Piazza, op. cit.
100 Fisher, T., "Mediating a planning permit dispute" (1992) The Australian Municipal Journal 4.

Tribunal.[100] It has also been suggested that the AAT should "provide guidelines and training for its members on the methods for conducting hearings [and] on conflict resolution.."[101] The formulation of permit conditions is one obvious area where mediation techniques would be useful.[102]

## 8. Conclusions

The Management Committee Report contains various recommendations about the use of mediation by Councils early in the planning process. This reflects the view in preceding reports that mediation should be attempted as early as possible, before the parties' positions become too entrenched.

There seems to have been little interest among AAT members for the introduction of mediation at the appeal stage. However, the AAT President and two of his Deputies have recently returned from a visit to the NSW Land and Environment Court with enthusiasm for the "trial." .

If the trial goes ahead there will be an opportunity to consider many of the issues I have highlighted. Unfortunately other jurisdictions offer little guidance on how to integrate mediation **within** an administrative tribunal. At the NSW Court mediation plays a different role and and has greater cost-saving benefits. After a two-year trial the Ontario Environmental Assessment Board withdrew from an environmental mediation role.[103]

Cormick has warned of the need "to take care to provide conflict resolution processes which 'fit' particular situations and not fall into the trap of trying to force situations to fit processes with which we might be enamoured."[104] I do not think that the DSC "model" of mediation should be forced to fit within an expert tribunal.

The use of AAT members as mediators seems to have been recommended to address the administrative problem of getting agreements ratified, rather than as a matter of principle. The implications have not been considered, especially as to the required modifications to the neutral third party in the "model". AAT member/mediators must be able to use their expertise to advise the parties and make positive suggestions. An AAT member/mediator must also be an "advocate for the law", protecting the public interest and ensuring that private agreements comply with planning provisions. The latter role is very onerous, if not impossible. Mediation by AAT members also threatens the perceived independence and integrity of members conducting hearings.

A community group has noted that mediators must be carefully selected on their "personal qualities" and has suggested that the eighteen to twenty existing AAT members may not be a practical source for an adequate pool of mediators.[105] It would not be politic for me to comment on that. Finding interested members may also be a problem.

Are the attractions and possible benefits of mediation conferences greatly different from the existing process? My analysis suggests that there could be benefits in relation to the participation of parties - having a "voice" in formulating "creative solutions" which satisfy all

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101 Smith, J., "Can the Advantages of ADR Procedures be Transformed to a Judicial Forum?" (1993) 4 **Australian Dispute Resolution Journal** 298. Smith's only reservation relates to "independent caucausing" (private sessions with parties).

102 Western Region Urban Environment Centre, **op. cit**. 23.

103 In most appeals conditions are discussed in a flurry at the end of a hearing. Objectors are often reluctant to suggest conditions, even if it is without prejudice.

104 The Board's Chairman notes that only three matters were mediated. I assume that the Board does not deal with the same type of cases as the AAT. Jeffrey, **op. cit**. (1987).

105 Cormick, **op. cit**. 224.

106 Submission from Victorian National Parks Association summarised in Appendix 1 Management Committee Report, **op. cit**. 41.

parties and are enduring settlements to the disputes. The resulting compliance with permits would have secondary benefits in terms of complaints and subsequent proceedings. On the other hand, there are unlikely to be significant time or cost savings to either the parties or the government.

It remains to be seen whether parties will embrace the option of mediation conferences. Objectors contacted during the pilot project were often reluctant, although this could change if mediation conferences were to become officially part of the AAT procedures. If the views of Amy are heeded, objectors should maintain a healthy suspicion about mediation.

Finally, I note that the Keaney Report suggests that the introduction of mediation is "representative of a change in the mood of the development approvals process ... from an adversarial approach to a consensual one"; "as a climate of negotiation replaces the culture of litigation."[106] Unless there is real participation when the planning framework is set, it would be ironic and perverse for the State Government to be fostering "a climate of negotiation" and the empowerment of parties through mediation while at the same time limiting third party rights to appeal.

## **Postscript** (June 1995)

The President fo the Victorian Administrative Appeals Tribunal has recently advised that within the next few months mediation will be offered at the AAT once an appeal is lodged. Many aspects are yet to be resolved (eg. what type of cases, the "model" of mediation adopted). At this stage, it is though that lawyers "and others involved in the planning field" will be trained to conduct mediations. It is not envisaged that current full time AAT members will also act as mediators.

107 **Ibid.** (iii) and 73.