Alternative Dispute Resolution: Thinking outside the square

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Introduction

[1] Initially I had it in mind to address the conference about judicial settlement conferences as occasionally undertaken in the Environment Court. It then also occurred to me that I should talk about caucusing of experts, and also possibly about hot-tubbing.

[2] Being encouraged by the title of this session "Thinking outside the square" I decided to take the opportunity to introduce the newly-updated Practice Note of the Environment Court, and to speak about a number of matters concerning dispute resolution that might or might not strictly be regarded as "alternative". They are to do with efficiency of resolution of cases in the Environment Court, and involve themes that some may have heard me preach about before. I make no apology for that, and quite honestly have to wonder about the quality or otherwise of some of the past preaching.

[3] Accordingly, I intend to address the following topics:

- Focus, relevance, and avoidance of repetition
- The cost of litigation to parties and to the system (**cost-effectiveness**)
- Identification of issues (as contrasted with topics)
- Caucusing of experts
- Hot-tubbing
- Judicial settlement conferences

Focus, relevance and avoidance of repetition

[4] First, then, the advertorial. I start with this topic, because it applies in relation to all kinds of dispute resolution in courts, not just so-called alternative dispute resolution. A related matter is need for sound **preparation**. Good preparation will assist in attaining focus, relevance, and avoidance of repetition.

[5] The problem is an international one in litigation. Have a look at this newspaper report I saw recently in Singapore! (I guess there are wordy lawyers the world over).

[6] It is well known that prolixity, lack of focus, lack of relevance, and excessive repetition can result in a good message being lost. Be aware that they may also signal to a Judge the *absence* of a good message !

[7] I am not going to suggest that every counsel and every witness is possessed of the skills of founder of the RMLA, Hon. Justice Peter Salmon, who I remember in practice had an uncanny ability to reduce dozens or hundreds of pages of information almost invariably to about nine pages of crisp submissions. Nevertheless, these matters I am preaching about should, if practiced, result in a better quality of hearings, mediations, settlement conferences, and expert caucusing.

Cost to the parties and the system

[8] A corollary is that hearings, mediations, judicial settlement conferences, and caucusing can proceed much more expeditiously.

[9] A significant downside of not practicing these things, is a huge unnecessary cost to the parties, and a slowing of the system. The Government, and many people and corporate entities associated with resource management litigation, and not just before the Environment court, are right to be concerned about these things.

[10] It is worth remembering that there are references in the Practice Note of the Environment Court, to these issues. For instance paragraph 2.1 reads:

> The objectives of case management by the Court are to –
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> Ensure the just treatment of all parties;

> Promote the prompt and efficient disposal of cases;
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> Improve the quality of the litigation process;
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> Maintain public confidence in the court; and
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> Efficiently use available judicial, legal and administrative resources, and achieve the purpose of the RMA (where that is the relevant controlling legislation).

[11] It is relevant also to refer to paragraph 2.18 of the Practice Note, and again it is worth setting it out in full:

> 2.18 Cooperation in the preparation of evidence
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> In preparing for the hearing, parties are expected to cooperate in ensuring that the proceedings are dealt with in a focused way. With that in mind, parties are encouraged to, and may be directed to, provide a statement of agreed facts and issues, and an agreed dossier or folder containing copies of relevant provisions of statutory planning instruments, and any other documents common to the parties, at or shortly before the hearing. *Succinctness and the avoidance of repetition, aided by efficient cross-referencing, tabulation and indexing, is sought by the Court.* [Emphasis added].

Cost effectiveness

[12] What I have just been saying above can, itself, produce an outcome that can be succinctly summarised in one phrase - **Cost-effectiveness.** By that I mean cost-effectiveness for the parties, other participants in the case, the Court, and in many instances the economic well-being of the country.

Issues

[13] In preparation not only for hearings, but also for mediations, caucusing, and judicial settlement conferences, early identification of issues that are agreed and can temporarily be put to one side, but more importantly issues requiring resolution in the case, will be the first major step to gaining focus, relevance and resolution.

[14] It is necessary to give particular thought to the difference between issues and topics. To confuse them, and fill the list up with both, is to erode the pursuit of focus and relevance.

Expert caucusing

[15] I include in my understanding of alternative dispute resolution, any approach that can be taken to agreement of issues, or at least narrowing of them, in order to lessen the scope of the hearing. Mediation is of course the classic example, but others are speaking about that. Expert caucusing has an increasing place in the work of the Environment Court in achieving these ends.

[16] If undertaken well, and faithfully in accordance with the Court's Practice Note, resolution of technical and scientific issues in expert caucusing, can significantly reduce the extent of a dispute, and result in significant saving of hearing time and cost to all.

[17] It is worth remembering paragraph 5.2 of the Practice Note:

> 5.2 Duty to the Court
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> 5.2.1 An expert witness has an overriding duty to assist the Court impartially on matters within an expert's area of expertise.
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> 5.2.2 An expert witness is not, and must not behave as, an advocate for the party who engages the witness. Expert witnesses must declare any relationships with the parties calling them, or any interest they may have in the outcome of the proceeding.

[18] It is the experience of the Judges that the best expert caucusing sessions are almost invariably those chaired by an independent facilitator, particularly one of the Environment Commissioners. In appointing facilitators we endeavour to make use of relevant technical skills, for instance by having one of our engineer commissioners facilitate caucusing sessions of engineers.

[19] Some are aware that I recently chaired the Board of Inquiry concerning the Waterview motorway proposal, an extremely large and complex project, completed with the Ministers' approval in only a few days over the nine-month timeframe required by statute. I have the view, shared by others, that the hearing would have taken weeks or months longer if it had not been for successful facilitated caucusing amongst the many groups of experts involved in the case.

[20] Paragraph 5.4.1 of the Practice Note provides as follows:

> Expert conferencing is a process by which expert witnesses confer and attempt to reach agreement on issues, or at least clearly identify the issues on which they cannot agree, and the reasons for that

> disagreement. Such a conference is a structured discussion between peers within a field of expertise which can narrow points of difference and save hearing time (and costs). All experts have a duty to ensure that any conferences are genuine dialogue between them in a common effort to reach agreement about relevant facts and issues. It should be understood that the term "*expert*" means a person who would be recognised by the Court as an expert in his or her field by reason of relevant qualifications and/or experience. Persons not having such qualifications and experience will not participate in conferences unless otherwise agreed by all parties or directed by the Court.

[21] Interestingly, in the Waterview case, I directed involvement of non-experts (parties) in one session on a topic about reserves and open spaces. There were 22 such pieces of land within the path or vicinity of the proposed motorway, and considerable community "ownership" of them. I therefore directed a preliminary session involving the relevant experts, and the parties interested in them, prior to the session of experts. It is rare to do this, but was well received in this instance, and I think genuinely assisted the parties and the experts to inform each other in a constructive and relevant fashion.

[22] I will not slavishly take you through the three and a half pages of Practice Note concerning this important area of the work of the Court. Be aware, however, that it records that the Court has an expectation that caucusing will occur in most cases as a matter of course, whether or not directed; that it will often be advantageous for full briefs of evidence to be prepared, with at least an exchanging of "will say" briefs beforehand; that sound preparation is essential, that there may be limitations on cross-examination of experts on matters agreed in caucus, and a restriction on the calling of further evidence, at any subsequent hearing.

[23] Paragraph 5.6.2 of the Practice Note provides:

> The joint witness statement will include the following matters:
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> the key facts and assumptions that are agreed upon by the experts;
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> identification of any methodology or standards used by the experts in arriving at their opinions and reasons for differences in methodology and standard (if any);
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> the issues that are agreed between the experts;
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> the issues upon which the experts cannot agree and the reasons for their disagreement;
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> an identification of all material regarded by the experts as the primary data;

> identification of published standards or papers relied upon in coming to their opinions; and
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> confirmation that, in producing the statement, the experts have complied with the Code of Conduct for Expert Witnesses.

[24] The next succeeding paragraph provides that the statement may include reservations by one or more participants about issues on which they are uncertain about the substantive law (eg whether the concept of a permitted baseline applies), or about procedural matters.

[25] Paragraph 5.6.7 provides that witnesses are to review their evidence in light of joint witness statements. If formal briefs have been exchanged before the caucus, they may be withdrawn and replaced with briefs which accord with the agreements reached, and, where applicable, deal only with the issues remaining in dispute.

[26] In summary, remember the watchwords – preparation, focus, relevance, and avoidance of repetition.

[27] Judge Michael Rackemann of the Planning and Environment Court of Queensland recorded at a seminar in Queensland in 2006, that witness caucusing must be a means to an end, and not an end in itself. I think this lines up with an issue that I have identified, that it is possible that there may be occasions when procedures such as mediation and caucusing are not going to produce results, and will only amount to another "layer on the onion," and more cost, not less. This is a bit more likely to occur where initial attempts have already been made at these processes. It may be important for the case-managing judge to be alert to this sort of issue.

[28] While mentioning the thinking of Judge Rackemann, it is interesting to read a recent article by him in the *National Environmental Law Review*,[1] the official journal of the National Environmental Law Association of Australia. I will leave those interested to read the article, but simply note here that Judge Rackemann offers an interesting critique of the practice of some Australian courts to eschew expert caucusing, and instead arrange for but one expert in any given field to be retained by the parties or appointed by the Court. Judge Rackemann offers reasons why such a step might only be appropriate in cases involving a lesser extent of controversy. He also points to the record of judges in courts like his own in resolving conflicting technical opinion evidence. I am strongly inclined to agree with his views.

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[1] Issue 2011:1

[29] Judge Rackemann mounts a strong case for meetings of experts to occur before primary evidence is produced, and offers reasons, including the potential to lessen the impact of client and counsel in the early formulation of opinion, and enhance objectivity. He considers that a respectful way of dealing with experts is to insist that after being retained and briefed by their client and client's lawyer (but before preparation of evidence) the experts be given the appropriate time and space, free from supervision or interference by the parties and their lawyers, to consider and formulate their opinions in consultation with their professional colleagues retained by other parties. I believe that there is considerable force in this.

Concurrent evidence ("hot-tubbing")

[30] A practice which seems to have arisen in Australian courts and tribunals, has been tried from time to time in our Court. In contrast to some Australian Courts' practice, which appears to involve a "colloquium," with witnesses questioning each other or even debating, the use of it in the New Zealand Environment Court has involved considerable adherence to tried and tested principles for the eliciting of expert evidence in civil and specialist Courts. One reason in particular, is the fear that an off-site transcriber might struggle to identify particular witnesses, in creating the record.

[31] Preparation is very important, including pre-trial input from the case-managing Judge, and control of the process by him or her during the hearing.

[32] I have sought views from counsel and witnesses on more than one occasion after hearing such evidence in Court. The identified advantages appear to have outweighed disadvantages. There seems to be some level of agreement that the approach can take objective collaboration and cooperation to a higher level. Also noted are advantages for the Court and counsel in hearing evidence on a topic at one time rather than potentially spread out over several weeks in a long cause. Disadvantages perceived have included inadequacies with courtroom furniture and equipment (recently addressed in the fitting out of our new large courtroom in Auckland), and witnesses in a numerical minority feeling overborne by the majority. In the latter regard, we are always careful to remind parties and witnesses that our work does not involve a numbers game.

[33] I see value for long, complex cases, in this procedure, maybe less so in shorter cases. The best value may be obtained through hot-tubbing groups of witnesses whose input involves relatively objective determinable data and/or opinions, but does not need to be confined to such areas. Guidelines should be set, and the process kept under control by the

presiding Judge. Preparation is critical, including pre-reading of evidence by the Court; indeed the Court may become fairly involved in the questioning of the witnesses.

[34] In a paper presented this year by former NZ Bar Association president James Farmer QC, noted in the Journal of the NZ Bar Association, the work of expert witnesses generally, including in "hot-tubs," was discussed. Dr Farmer apparently observed that some believe that lawyers may be prone to over-use expert witnesses, and in particular use them in substitution for hard factual evidence or submissions. In relation to hot-tubs, Dr Farmer was reported as saying that the method was a superior way of testing expert economic evidence, however it was only likely to work well if the number of experts did not exceed four or five, and where control (I infer judicial control) is kept over the process. The latter aspect can be particularly important, where there is a dominant personality in the witness line up.

[35] I and others favour this process for use on an occasional basis. Its particular beauty appears to be that it provides additional focus beyond that which ought to emerge amongst professionals from caucusing, and can even result in final resolution of a technical issue in fairly short order in the courtroom.

Judicial settlement conferences

[36] Judicial settlement conferences are occasionally used in the Environment Court, but probably not as much as in other jurisdictions such as the work of the Associate Judges in the High Court. That of course is because we have our extensively used mediation service which we consider successfully resolves a very high percentage of the business of the Court.

[37] The parties will sometimes be stuck on a legal or technical issue after mediation and even expert caucusing, and it can be useful for an Environment Judge to conduct a settlement conference to remove the final roadblocks to resolution, or at least further narrow the issues. That can be particularly useful in an endeavour to save time and cost.

[38] If a settlement conference is to be conducted by the judge likely to preside over a hearing, the agreement of the parties will be needed for any judge to get involved with the processes.

[39] Much has been written about differing types of models of mediation or ADR. In summary, they are often described as the settlement model, the facilitative model, the therapeutic model, and the evaluative model. I will not take time to discuss them. I simply comment that the labels are reasonably self-explanatory, and the theories are quite widely

known and understood. My personal view is that a judicial settlement conference of the kind we occasionally offer in the Environment Court, is more likely to be of the evaluative model. (Hence the need for informed consent by the parties if the same judge is to conduct the hearing.) Because there will already have been other ADR steps, there is likely to be an expectation from the parties that the judge will bring to bear his or her expertise and experience to direct the proceedings towards some sort of anticipated range of outcomes. There may be a tendency to provide something stopping just short of direct advice, involving the likes of broad hints, blunt questions, and recommendations for work and negotiation amongst parties and expert witnesses.

[40] The process tends to stop short of appraisal, evaluation, or mini-trial, but the use of such techniques should not be completely discounted. In all probability in these instances however, the judge leading the conference would be unlikely to preside at the substantive hearing should ADR not succeed.

[41] Something akin to a settlement conference can sometimes even emerge during a hearing. It has not been unknown for my division to start working quite directly with parties, seeking realistic identification by them of possible outcomes, once we have got a certain way into a hearing. This is naturally aided by our having pre-read the evidence.

[42] I personally hold the view that if parties can be persuaded to arrive at their own solution, they are somewhat more likely to take ownership of the outcome and perhaps feel better about it, while recognising that "better" will be a relative thing in most pieces of litigation.