Report of Steering Group from Workshops on Expert Conferencing in Environment Court, 2012

Introduction

The following is a summary of notes brought together by the steering group, from 11 workshops held around New Zealand during 2012 under the auspices of the Resource Management Law Association Inc. The Association's lead facilitator was Planning and Resource Management Consultant Dave Serjeant, and the other members of the group were Acting Principal Environment Judge Laurie Newhook and Environment Commissioner Ross Dunlop. A workshop format was chosen deliberately, designed to generate the greatest amount of discussion, and tap into as much experience as possible from this relatively new aspect of practice in the Environment Court. Prior to the roadshow, a discussion paper was prepared by a small team led by Barrister Martin Williams, and sent to participants. Introductory presentations were made by members of the steering group at each venue, followed by brief presentations by 3 local practitioners from various professions in the locality.

Issues arose across a broad spectrum throughout the sessions, and there was discussion of much detail. While there were common themes, new angles were raised at each of the sessions, illustrating the depth of thought that participants brought to the workshops. Attendees' experience of participating in expert conferences (and counsels' experiences in assisting participants to prepare) varied greatly, from considerable to zero, and from excellent to less than satisfactory. This underscored for the steering group, their original perception of the need for the workshops, and more importantly for practices to be improved and made more consistent nationally and for guidelines to be promulgated by the Court as a document subsidiary to its Practice Note.

The important factor from the Court's perspective was that conferencing of experts should save time and cost in the resolution of cases. That is, that it should be **cost-effective**. Cost-effectiveness of this sort is difficult to measure empirically, but that in the minds of the steering group is not a reason for eschewing the practice. The converse of cost-effectiveness from a practice like expert conferencing would be that another expensive layer would simply be added to the litigation. It is fair to say that at the workshops we heard an entire range of views on whether or not peoples' experiences had been at one end of the spectrum or the other, or somewhere in between. Case Managing Judges believe they have seen the same range of outcomes and qualities of output. They are probably best placed to gain a feel at the end of the life of a case, as to whether the technique has saved time and cost in a case compared to how it might have looked if fully litigated in traditional ways. The good outcomes encourage the Judges to persevere with the technique and to improve it. The less satisfactory outcomes underscore the need for the changes that hopefully will be driven by the recent national exercise.

It is hoped that lessons learned from the workshops, and the next stage in development of the practice of expert conferencing, will assist to produce outcomes strongly towards the cost-effectiveness end of the spectrum. That next stage will be the production in draft by the Court of amendments to some aspects of its existing Practice Note, and a Guidelines document. Those drafts will be issued for consultation with the professions very soon.

Timing of Conferencing

There was significant focus on the timing of expert conferencing in the overall process. While acknowledging that it can occur at any time, including at the direction of the Court during a hearing, most conferencing tends to happen as a lead up to the Environment Court hearing. Virtually every workshop had discussion on how early/late in the process conferencing should occur and whether it should/could occur prior to the production of *evidence in chief* (EIC).

A majority of attendees agreed, after weighing up the pros and cons of timing, that it was more appropriate after the production of EICs. Some of the key advantages were recognised as being:

- Witnesses had thought through the issues;
- Counsel and client know what the witnesses' position is;
- Parties can prepare on the basis of known positions.

Some of the disadvantages in conferencing after the production of EICs were considered as:

- Losing an opportunity for time and cost saving
- Witnesses attend with more entrenched positions

There was a not inconsiderable minority that favoured early conferencing, for the above and other reasons, based on their own experiences in this regard.

In our view, this emphasises the "not one size fits all" characteristic of expert conferencing, however we tend to the majority view for most cases. Related to this topic is "Will Says" and the production of an Agreed Statement of Facts – see below.

Agreed Statement of Facts

One of the key points in Commissioner Dunlop's opening presentation was the advantage of the parties preparing an *Agreed Statement of Facts* (ASF) as one of the first steps in a timetable for preparation for an Environment Court hearing. This suggestion was universally approved of in the workshops. In our experience, the use of this technique is patchy at best at the moment. The ASF could include (this is for a resource consent or Notice of Requirement):

- A description of the proposal, updated as necessary following the first order hearing;
- A description of all relevant aspects of the site and local environment, contributed to as necessary by all experts (planning, landscape, traffic, noise, ecology, air, groundwater etc.), with the purpose of avoiding the need for each expert to re-state such facts in his/her evidence;
- A bundle of relevant planning documents and provisions.

We consider that the preparation of an ASF is a desirable, indeed almost necessary step, irrespective of whether conferencing takes place. It has the added advantage that it underpins the conferencing process by getting everyone knowledgeable of these matters prior to conferencing. Further, a key point is that, if conferencing is not to take place until after the preparation of EICs, then the ASF will generate efficiencies in evidence drafting which will flow through into conferencing itself.

'Will Say' Statements

Despite its specific mention in the current Court Practice Note it was surprising how many workshop attendees had never produced a 'will say'. We had the impression that if they had not prepared EIC and had attended conferencing, then this had been undertaken without a 'will say', contrary to the current Court Practice Note.

We heard views on the relative value of, and effort, to produce a 'will say'. A common view was that for the more quantitative experts (eg a traffic engineer) a 'will say' was relatively easy to produce because the substantive work (such as traffic modeling) had been completed. By comparison, for the likes of planners and landscape architects, there was as much effort in producing a good 'will say' as in drafting EIC.

In our view, unless the production of EIC is to become mandatory prior to any witness attending conferencing, (and perhaps that would be a step too far), the existing Court Practice Note is still appropriate. So that if for some reason a witness has not prepared an EIC, which is preferable, then a 'will say' is necessary. We also consider that the resource management professions need some guidance on the content of a 'will say' and some exemplars would be useful.

Timetable for Conferencing

One of the areas identified for improved practice in conferencing was the timetabling for conferencing. A number of workshops noted the often compressed timetabling for conferencing, not the least being conferencing associated with Boards of Inquiry which are required by statute to be completed within 9 months of commencement of the process. The interplay between the conferencing of various disciplines and the production of evidence was also noted by many workshops. For example, the planners being involved in advising the statutory framework for the specialist witnesses, then coming back to 'bookend' the process with an overall evaluation.

In our view this is an area where experienced counsel and experts need to take a lead in suggesting to the Court an efficient and effective approach. While the Court is now getting more active in structuring the production of evidence and conferencing in a critical path, it should not be left to the Court to do the 'hard thinking', especially as it is the parties who have shaped the case to that stage. Equally, good preparation for conferencing would seem to be assisted by the Court being active in seeing to it through case management that the ground rules are set for the particular case.

The parties need to consider how the preparation for Court time should proceed, from the production of an ASF, to 'roundtable' mediation on issues, to EICs for some 'scene setting' witnesses, to conferencing of these witnesses, to other witnesses preparing EICs, to further conferencing etc.

Role of Counsel

The attendees' view of the role of counsel on the conferencing process was highly varied. While some counsel had clearly recognised the opportunity and responsibility for agenda setting, discussions with experts and advice to clients, for others the notice from the Court that conferencing was to occur was actioned by simply passing on this notice to the various experts.

In our view, there is a definite role here for counsel to act as project manager for the process for his or her party. The role of counsel could include:

- Identifying the key issues to be addressed by the Court;

- Thinking through the conferencing timetable needed to address these issues and liaising with other counsel and the Court on this;

- Organising the A S F;

- Briefing witnesses on the case and the discussing the implications of the witnesses' views on environmental effects, avoidance and mitigation thereof, and statutory provisions;

- Ensuring that the client understands the purpose of conferencing, potential costs and possible outcomes.

We note that much of this is envisaged by the Court Practice Note section 5.5.1 (a) to (e).

Preparation

The 'P' word came up a lot in the workshops, not the least being from one of the Wellington presenters who made a virtue out of it. Nevertheless, in our view, being prepared for conferencing, with or without preparing EIC is part of a paradigm shift that we perceive in this process. The old paradigm is one where the focus of effort by parties built gradually towards the Environment Court hearing, reaching a peak with the hearing itself. The new paradigm is much more front end, and requires participants to have an early focus on the important issues.

In fact, with Court processing times now much reduced from former days, there is no reason why conferencing is not to be seen as an immediate step following the Council process. In other words, the matter doesn't 'go away' while parties wait for the Court to set a timetable, rather the impetus is continued directly following the lodging of appeals and remaining parties joining the case. This can contribute powerfully to shortening of case disposal times. It also acts to concentrate the minds of parties on what the key issues are in the case, and focus on likely outcomes and how those might be produced much earlier in the process than after the conclusion of a hearing and the Court's decision being issued.

Irrespective of the above timing however, preparation was seen as being a key contributor to successful conferencing outcomes. Witnesses should:

- Be thoroughly familiar with their evidence, that of their counterparts and other relevant evidence;

- Know the content of the ASF, to the extent relevant to their brief;

- Realise the implications for their client of any agreement they might come to on environmental effects of plan provision matters;

- Understand their role in expert conferencing.

What is Conferencing?

It is fair to say that a reasonable proportion of attendees left the sessions knowing much more about what conferencing was and was not. This includes who can conference, what the nature of the process is and what the expected outcomes are. Some workshops illustrated what conferencing is by comparing it with mediation. The guidelines which the Court has foreshadowed as a subsidiary document to the Practice Note, could usefully included a general introduction about what Expert conferencing is, and what it is not.

Process of Conferencing

A substantial area of discussion was the actual process of conferencing – the where, when, how and who of conferencing. This topic was well introduced and primed by Commissioner Dunlop's presentation. As noted previously, the conferencing process is not a 'one size fits all' process, and different circumstances must be allowed for. There seemed to be a measure of agreement that the desirable ingredients for a successful outcome are as follows:

- A pre-circulated agenda;
- Participants who are prepared;
- Adequate time for reaching agreement;
- Agreement reached and documented on the day, substantively, if not completely;
- Relevant documents being in the room or electronically available;
- Face to face conferencing, as opposed to video link, telephone, or emails.
- The need for the independent facilitator to be aware of power imbalances amongst participants, and to assist to mitigate them in a fair way.

Agreed Witness Statement after Conferencing

Several presenters addressed the content of the agreed witness statement (AWS), using examples from their own experience. The current Court Practice Minute sets out clearly what the Court wants to see in an AWS (section 5.6.2) however some exemplars would be of use to participants. A view expressed more than once was that the AWS should not be a long document, and that while the reasons for disagreement are a requirement, it is vital that this should not become a re-statement of evidence by one or more of the parties. Some presenters suggested a tabular form as a method by which the AWS can be kept succinct.

A vexed issue was the apparently simple question as to whether the statement should be signed at the conclusion of the conference, or a day or several days later. True objectivity and independence of the participants (avoidance of outside influence) quite strongly militated in favour of the former. Accuracy sometimes suggests the latter approach. The former tended to be favoured by participants in our workshops.

Conditions of Consent

One matter that some participants clearly considered was an intended outcome from conferencing was the wording of draft conditions of consent, if not by specialist experts, then at least by planners. The steering group tended to the view is that the production of conditions is generally not a product of conferencing. Having said that, if the substantive content of a condition has been agreed between the parties or their experts, then planners, lawyers, or some other group of experts might well fine-tune the conditions.

What could well be part of conferencing is the agreement between experts that a specific type of mitigation would reduce adverse effects to being minor, but not the actual wording of, or offering up of a condition.