

ALOHA THE DATE LINE

PUBLIC INTEREST AND ADR

David Rollinson

On the 25th June a number of C.J.C. Mediators were able to come in from the cold of a Sydney Winter's night to hear Bruce Barnes speak at the Downing Court Centre. Bruce Barnes is the Assistant Director of the Legal Assistant Program of the University of Hawaii. For some years the University through its Program on Conflict Resolution has concentrated on cultural dispute processes, given the mixed ethnicity of the Hawaiian communities. The Program has mediation models for small and large scale community disputes, for campus and in schools as well as R. & D. locally and in the Asian/Pacific basin.

Meanwhile, the writer had just left the sun, surf and sand at Waikiki to do some follow up on local ADR developments particularly in the public interest and environment planning areas.

Peter Adler, then Director of The Judiciary, State of Hawaii Program on ADR, spoke at an ADRAA Seminar in Sydney in March '88 (see Newsletter Vol.1 No.4). From June this year new Director Michael Broderick continues what since 1991 has become the Centre for Alternative Dispute Resolution. The Centre has a permanent office within the Judiciary. Its legislated functions are to facilitate voluntary dispute resolution in cases that affect public interest and the work of other State Departments or Local Government. The main ADR 'method' is mediation, including elements of neutral expert fact finding/evaluation and mini-trials.

'Policy roundtables' seem a very useful function Australia could 'borrow'. In a policy roundtable the Centre convenes and chairs discussions on standards, regulations and assessments, particularly in the areas of land use, land development and public infrastructure. The aim is consensual recommendations which are then made to the decision makers.

The Centre draws on a panel of 'qualified neutrals' in its ADR work; in a mediation, one of the mediators will be legally qualified, the other an expert in the subject matter. In 1987 test case mediations began to be used in recognised public interest areas - siting of public facilities, environmental protection, applicant/Council

pre-decision, negotiation with communities on private proposals etc. Following a two year evaluation by the Department of Urban and Regional Planning and the Program on Conflict Resolution at the University of Hawaii, these mediations are now a primary focus of the Centre's work. Another important aspect of its work is ADR training and consultation services to Government Departments and Local Authorities.

From observations, some conclusions

*The use of ADR
within public agencies charged
with decision making
is neither an abrogation of
authority nor an admission of
administrative failure.*

The right to a final decision is not lost; the quality of that decision is generally improved, more informed and sustainable. Major disputes within the community often set the stage for public policy (witness New South Wales Gun Legislation).

Agencies involved in these areas must see that the solution is equitable, efficient and workable, and avoid distortion of policy intent and the public interest. After four years in this area, with on-going evaluation, the Hawaii Centre for ADR has facilitated solutions with greater all round satisfaction in the process and the outcome. Mediation addresses the real and the important to the parties, as they determine what is going to be discussed; if a hidden agenda is revealed, if there is bad faith or 'going through the motions' etc., the withdrawal of a party from the mediation ends the mediation. Not so in the quasi judicial public interest appeal systems in Australia, where determinations will still be made based on facts, precedent and claims of relevance and privilege, in a win-lose setting.

Throughout the U.S.A. there are over 300 instances of the use of ADR, and mediation in particular, in environmental, planning and public interest disputes. The Centre for ADR in Hawaii has been involved in a number these, given that its role is identified and defined through legislation and as part of the State Judiciary. In Australia, public interest, environmental protection, growth and

employment are all part of the quality of life debate and decisions are being made. For informed decision making with greater participation by those affected and emphasis on win-win, ADR must play an increased role in those invariably divisive areas.

Recent Publications

The Australian Commercial Disputes Centre has recently published the *Australian Dispute Resolution Handbook*, funded by the Law Foundation of New South Wales. The authors are Michael Ahrens and Gavin Witcombe.

This 50 page book discusses how and when to use dispute resolution clauses for contracts. The Handbook describes the ADR methods, describes the main providers of commercial ADR services and includes the clauses of these providers. These clauses are annotated.

Anyone interested in obtaining a copy of the Handbook should contact Bronwyn Jones at ACDC on (02)267 1000, or write to ACDC, Level 4, 50 Park Street, Sydney 2000.

What Do the Parties Think? by Anne Prior is a follow-up study of the Marriage Guidance South Australia Family Mediation Project. 222 parties to mediation sessions between 1/1/90 and 30/6/91 were sent a questionnaire; 69 women and 65 men returned it and the results are tabled, discussed and conclusions drawn. Over 70% were satisfied with the mediation process and the fairness of agreements reached. Over 66% of agreements are still in operation, although about half have been modified in some way.

This well written monograph is a first step in Australian research in the area. It is to be reproduced in the *Australian Dispute Resolution Journal*. It is available from Marriage Guidance SA, 55 Hutt Street, Adelaide 5000.

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