

---

# Kluwer Mediation Blog

## Working on Water

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Friday, November 28th, 2014

Some 20 years ago, as part of a nostalgia trip (for me) and introductory trip (for my wife) to my childhood haunts in Malaysia, we visited the coastal town of Lumut and the offshore island, Pangkor. This was probably a bad idea. I'd last visited those place as a child, with my family, in the 1950s, when the sum total of Lumut – now a naval base – was two houses and Malay kampong, and on Pangkor there was nothing but jungle. Now Pangkor is a resort island. But, the world moves on, and memories aren't in the place but in our perceptions of them. What was important at the time was to get back into the limpid waters of the bay near our resort: that was the second bad idea. As I waded out, looking back to the shore and waving as only the happily reminiscing can, I glanced down and noted that the waters – the pristine waters of my childhood – were marred by fecal matter. I've not been back since and can only hope that this has changed.

What happened there was not unique: property development has not been matched by infrastructure development nor, I imagine, by sufficient oversight of the integrity of the development. The cost, in this case, was to the shared resource: the sea. Water, too often, is the repository – no, the dumping ground – of those negative externalities.

How can we talk about water? The tale of the blind men attempting to arrive at a common description of an elephant is too well known to bear telling. But if I shift the imagery, this may assist in thinking about the challenge of having a conversation about water. Imagine bringing together a scientist, an artist, a farmer, an indigenous person, a fisherman, a keen swimmer, an industrialist (whose industry has high water needs, whether in drawing water or discharging effluent), a specialist in hydroelectricity generation, a scientist, a tourist, a high country hiker who drinks from mountain streams, and maybe more, and asking them to agree on the value of water. Then – if that's possible – they'll need to agree on a framework of policies to protect that value, or those values.

In this note I want to comment on an exercise in doing just that which is, I think, relevant to this mediation blog as this example involved a process of collaboration, dialogue, negotiation and design that will be familiar in principle at least. This is also about conflict: Kofi Annan warned some years back that the wars of the 21st century would be over water. In fact, three successive UN Secretaries General have offered the same prognosis: Boutros Boutros-Ghali in 1985; Kofi Annan in 2001, and Ban Ki Moon in 2007. Water conflicts will be about scarcity, access, control and quality. Even if war is not about to break out any time soon, water – rivers, seas, and fresh water – will be even more of a challenge for policy makers and for dispute resolution specialists.

This is a mediation challenge too: one of the originating ideals of mediation was “access to justice”, and this is typically seen in procedural and institutional terms, in the facilitation of better access to the law or, just as likely, preferred solutions away from the Courts; but we can – with Aristotle – frame justice more widely and recognise that there is an allocative aspect to this. So the question becomes that of asking whether mediation – or something like it, in the field of facilitated dialogue – can assist with the allocation of water rights.

Starting in 2009, the New Zealand Government established a process, the Land and Water Forum [LWF], to deal with just these issues of competing values, incompatible uses, resource (“commons”) degradation, and increased litigation in relation to freshwater. As I read the documents, it was clear that there were really two main problems: degradation of the resource and competition over limits and allocation. As the LWF observed in 2010:

“Water is also causing disputes – disputes about Water Conservation Orders and water infrastructure development; disputes about the intensification of farming and about run-off; disputes about water infrastructure in cities and towns, its discharges, and how it should be organised and paid for; disputes about who should be involved in its management, including around the role of iwi [Maori tribes]. Recent attempts to improve our policies for dealing with these problems have not succeeded and New Zealanders have spent a great deal of time fighting one another about them, politically, at hearings and in Courts – and often with sub-optimal outcomes.” Foreword, Land and Water Forum. 2010. Report of the Land and Water Forum: A Fresh Start for Fresh Water, p. v [<http://www.landandwater.org.nz/>]

Quite apart from dealing with conflicts, there was and is the pressing issue of preventing further degradation: the “clean, green” image was already looking a little tarnished. Declining water qualities in rivers, lakes and streams, the loss of aesthetic values, the overburdening of carrying capacity of rivers through effluent and industrial discharge, the increasing demand for irrigation, seasonal fluctuations in water levels in hydro storage facilities, the now endemic presence of water borne parasites such as giardia in mountain streams, all contributed to the wake up call.

The LWF, which has now completed three Reports (available online at <http://www.landandwater.org.nz/Site/Resources.aspx>) was probably a unique model of collaborative decision making. More to the point, perhaps, it was set up with the objective of being an exercise in what the two Ministers (of Environment and Conservation) describe at the time as “collaborative governance”. [Ministers’ letter to the Chair of the LWF, Alastair Bisley, 14 September 2009].

What the Forum did was to bring together 58 participating organisations and, because that’s an unwieldy group in which to have a conversation, created a “Small Group” of 21 major stakeholders. Those farmers, industrialists, environmentalists, recreation group representatives and others really did get together to hammer out agreements on key areas relating to freshwater management. It’s also worth noting that the Chairs of the various small groups represented scientific, farming, environmental, Maori, recreational & tourism, forestry and other interest groups. This was very much an exercise in distributing the role and maximising “buy-in”.

The mandate of the LWF was expressly limited in one way: it had no brief to propose specific policy instruments or changes to the governing legislation. However, since the completion of at least this phase of its work, it is clear that the LWF remains in close consultation with the Government on the development of the policy that will implement its recommendations.

As an exercise in dialogue – even if stopping short of actually writing the legislation – the LWR brief and definition made clear that “collaboration” meant the widest possible input, including into the design of the process at the outset, and did so in order to provide better solutions than might otherwise be possible – and to reduce the cost of litigation. This, of course, assumes a political system – and a government – that takes seriously a commitment to this level of public participation and input, and it may always be a fragile flower.

However, what this shows is that the process of collaboration can work, provided that the widest catchment of participation is fostered and, perhaps more importantly, those participating know that they have a role in the design of the process and the articulation of outcomes. What collaboration achieved here was a mix of **process** design and **substantive** agreement on matters such as limits, allocation, impact, indigenous rights, management practices, obligations, accountability, frameworks for decision making (local authority decision making to match national frameworks, to overcome the mosaic of diverse practices), and ecological, sustainability values.

What also seems to have happened – and mediators won’t be surprised about this – is that those who were sceptical of both the process of dialogue and of the possibility of agreeing with people on the “other side” of the river, shifted their grounds. As LWF Chair Alastair Bisley noted, in quoting Lachlan McKenzie, one of the central participants and formerly Dairy Director of Federated Farmers (not perhaps intuitively inclined to talk with environmentalists):

“What we did in the Land and Water Forum was to talk with people we didn’t agree with. And that is the thought I want to leave you with – talk with people that you don’t agree with. It is the only way to find lasting solutions.”

Speech to the Bluegreens, March 2013. [National Party’s advisory group on environmental issues: <http://bluegreens.org.nz>]

---

*To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please [subscribe here](#).*

### **Profile Navigator and Relationship Indicator**

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

# Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Friday, November 28th, 2014 at 3:44 am and is filed under [Decision making](#), [Developing the Field](#), [Environmental Mediation](#), [Governments/Public Sector](#), [Public Policy](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.