Kluwer Mediation Blog

Working on Water, again: When Collaboration meets Politics

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Friday, March 27th, 2015

Oz, left to himself, smiled to think of his success in giving the Scarecrow and the Tin Woodman and the Lion exactly what they thought they wanted. “How can I help being a humbug,” he said, “when all these people make me do things that everybody knows can’t be done? It was easy to make the Scarecrow and the Lion and the Woodman happy, because they imagined I could do anything.”
Oz, in L Frank Baum’s *The Wizard of Oz*, Ch 16, “The Magic Art of the Great Humbug”

A couple of blogs ago, back in November last year, I discussed what seemed to be a promising and effective process for addressing complex issues of water management and allocation in New Zealand – an expressly collaborative process, the Land and Water Forum (http://www.landandwater.org.nz/Site/Resources.aspx). The apparent beauty of that process was that it brought together all of the key parties with commercial, recreational, agricultural, aesthetic and spiritual interests in and values of water. I wrote too soon! I’ll expand on this below, but despite an inclusive process that focussed on the two key concerns of water quality and water rights allocation, despite government ministers extolling the process as an exercise in “collaborative governance”, despite it being evidence-based and concerned with a dialogue about water values (not “value”), the process and outcome are, as I write, at risk of being undermined by a government that has turned its back on a process it was part of establishing, and instead has returned to the economic and commercial agenda that had brought water quality and allocation to the stage of desperately needing a complete overhaul.

My purpose here is twofold: first, to use this as an illustration of what I’ll call Oz’s Delusion, the dilemma of a belief in abilities that just might not be real; and second, to ask my fellow mediators, facilitators, process junkies a question about whether we’re being naive in thinking we’re able to achieve often complex policy goals through collaboration, even with apparent commitments from government.

In anticipation of that question, and the need to see the conversations continue either in response to this blog or in some other forum, here’s a challenge posed by Alan Jacobs, and quoted by Gregory Kalscheur SJ:

“are blogs the friend of information but the enemy of thought? . . .. It is no insult to the recent, but already cherished institution of the blogosphere to say that blogs cannot do everything well. Right now, and for the foreseeable future, the blogosphere is the friend of information but the enemy of thought.”

http://reasonableminds.wordpress.com/2006/06/29/is-thoughtful-blog-conversation-possible/

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One of our enduring concerns in mediation is about enforceability. The current proposals before UNCITRAL to establish a mediators' equivalent of the New York Convention, at least in relation to international commercial mediations; the requirements of the EU Directive on Mediation (2008) that member states establish provisions to ensure the enforceability of mediated agreements in cross border commercial and consumer transactions; and the recent creation of an arb-med-arb option in Singapore [http://simc.com.sg/siac-simc-arb-med-arb-protocol/] all point to the need to find creative ways of ensuring the commitments made in mediation are not merely kept but enforced. It's one thing to deal with these questions in private mediations where there is at least the option of recording – and enforcing – the agreement as a contract; it's logistically quite another matter to manage that in the kind of high volume-low value disputes that the EU Directive was designed to address where time, distance, jurisdiction and cost of enforcement mean that something even more formal than contract was required. But, take this up another level to those uses of mediation or collaborative dialogue where the government is a party, and it becomes even more politically fraught.

What we do know, of course, is that governments have multiple constituencies, many of whom may not be represented in any collaborative process and who may have little interest in ensuring the success of negotiated outcomes. We also know that, at least until relatively recently, even the more liberal forms of government have had little experience in negotiating with citizens, other than in relatively trifling ways.

This is why the Land and Water Forum seemed so promising. Here was a collaborative process, that included commercial, agricultural, tourism, hydroelectric, indigenous, recreational, aesthetic interests; a process that encompassed close to 60 interest groups representing over 20 sectors and – this was important – included local and central government in the conversation. What could possibly go wrong?

As mentioned above and in my earlier blog, this was also intended to be an evidence-based process that drew on social, cultural, economic, hydrological, meteorological, and agricultural data; and at the same time, that drew parties into dialogue about water values. This also promised to be a way of dealing with what had become entrenched first user water rights, whether indigenous, agricultural or commercial, which had regrettably – perhaps in the land of plenty – become first user rights without the Lockean proviso of leaving as much and as good for others. The perception of abundance had produced profligacy in both use and care, to the detriment of water quality, fresh water life and non-commercial users. The administrative context of this process was the recognition that water rights administration was fragmented, regional and uneven in its implementation, marked by a lack of national policy and the occasional reliance on Ministerial authority to override judicial oversight.

The legislative umbrella for this was the Resource Management Act [RMA] that is a comprehensive codification of all previous planning and environmental legislation, and written around the core principle of sustainability. This has worked well, by and large, for over 20 years. But it has fallen on politically hard times in recent years as the requirements relating to consents and standards have been seen increasingly as expensive and inefficient and a disincentive to business (never mind that the Act was designed to maintain a balance between development and sustainability).

Nevertheless, it seemed, through this collaborative process of the LWF, that there could be – indeed were – new commitments to national processes to manage fresh water quality and allocation, new competencies in engagement and political participation, refreshed ways of thinking about the market value of water alongside amenity, aesthetic and values, and above all perhaps creating new models of decision making. It all seemed too good to be true.

And it was. The then Government – despite signalling an enthusiastic engagement in this form of 'collaborative governance' (their words, not mine) – almost immediately signalled significant changed to the RMA. This changes are, at the time of writing, before Parliament, that same right-of-centre Government having been re-elected. Reassuringly, they currently haven't got the full support needed to push through the measures but there's no reason to be overly optimistic, as strategic alliances will outweigh environmental principle on most occasions, in the same way that Dan Ariely, in a range of intriguing work on [ir]rationality and choice, has shown that economics will almost invariably crowd out ethics.

In brief, the changes signalled and sought in legislation and economic direction, all couched in the language of efficiency, simplifying, streamlining, confidence for business include:

• removing the central principle of sustainable management;
• substitution of economic value of water in place of amenity and cultural values: water is to be seen as an economic asset;
• a priority priority given to development;
• environmental and water quality degradation is to be seen as a cost of doing business;
• favouring development over sustainability – thus a return to a zero sum calculation unlike the anticipated collaborative process and outcomes;
• the removal of any statutory recognition of the finite nature of resources;
• narrowing the scope of those who can make submissions.
• and all justified by claims that it will make housing more affordable by reducing compliance costs, in a current economic climate where this is a vote-catcher as housing has become unaffordably expensive . . . but not, it must be said, because of compliance costs under the Act.

There is also a sneaking and not improbable suspicion that these proposed amendments are a weakening of the legislation in anticipation of the completion of the current Trans-Pacific Partnership Agreement negotiations, reflecting the perceived need to reduce standards to minimise risk of the government being taken to binding arbitration in the event that employment, environmental or other standards are seen to render multi-national corporations less competitive.

I have two concerns here – and really only one of immediate interest in this blog. One concern is of course, with the cynical reduction of environmental values to a cost that is being borne by the hapless home owner or consumers of goods, typically expressed in populist terms as an unacceptable trade-off between jobs and trees, wilderness, fish, endangered species and so on. The other concern, and one on which I would genuinely like to hear your thoughts, is the cynical abandonment of commitments and of a process of collaborative decision making, in a return to the old standards of ecology and economics as a zero-sum game, and politics as a calculated bet on what will maximise commercial gains while possibly only annoying those whose opinions are disposable and who are unlikely to support the government in any event.

For mediators, facilitators, those involved in negotiated rule making, designers of collaborative dialogues, the question is the same one that we face in other non-judicial, non-legislative forums:

how to ensure commitment and enforceability? If I put the question another way: have we been naive, unworldly, unduly trusting of the goodwill of those with whom we believe collaboration is possible, in thinking that we can – without additional safeguards and institutional protections – scale up the forms of private dispute resolution to the level of the political stage, where the constituencies are likely often to be hidden, powerful and, in the end, not wholly interested in collaboration, except as a strategic value?

"People exploit what they have merely concluded to be of value, but they defend what they love, and to defend what we love we need a particularising language, for we love what we particularly know."
Wendell Berry, *Life is a Miracle*, (Berkeley, Counterpoint Press, 2000, p. 41

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