The meaning of success in public policy dispute interventions*

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In the environmental area, some public policy conflicts have been with us for many years, and might now be seen to be intractable. Current government policy emphasises the benefits of building partnerships and collaborative problem solving. The role of facilitators and mediators has the potential to become increasingly important to such processes. But how will success be measured in these endeavours? How meaningful is the concept of "settlement" when disputes involve deeply held values clashes? What should governments and interest groups be looking for in a mediator or facilitator, and how important is neutrality? And how should outcomes be measured – in terms of decreased levels of conflict, or improved relationships, or institutional change, or better on-ground results?

INTRODUCTION

> While mediation and facilitation are at their best, rigorous and robust practices, they remain more art than science. Practice strategies tend to be tacit, reflexive, and improvisational. … Real conflicts are chaotic and assisting disputants to thoughtfully confront the mess is an integral part of the conflict resolution process. This often requires multiple passes through the legal, social, economic and technical issues at hand, rather than one definitive or determinative effort.[1]

Intractable public policy conflicts confront us each day through the media. Our politicians spend much of their time posturing about their resolution. They often, ultimately, defer decisions on such issues, in favour of setting up reviews and commissions of inquiry to collect further information and delay the need for decision-making.

Outside observers have pointed to the complexity of the Australian political system. American humorist Bill Bryson has complained that

> you find yourself mired in a density of argument, a complexity of fine points, a skein of tangled relationships and enmities, that thwarts all understanding. Give Australians an issue and they will argue it so

* An earlier version of this paper was presented at the 6th National Mediation Conference, 18-20 September 2002, Canberra. Professor Tania Sourdin commented on an early draft.

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[1] Adler P et al., "Managing scientific and technical information in environmental cases – principles and practices for mediators and facilitators", Paper sponsored by RESOLVE Inc, the US Institute for Environmental Conflict Resolution, and the Western Justice Center Foundation, and located on the websites of these organisations, p 22.

> passionately and in such detail, and from so many angles, with the introduction of so many loosely connected side issues, that it soon becomes impenetrable to the outsider.[2]

Over the past 15 years, with the rise in perceived power of environmental advocacy organisations, environmental conflict has become part of this complex political process. Of course, environmental conflict or dispute is a misnomer. These are, in general, social conflicts between those advocating the interests of various groups of people with a concern related to the environment, and those representing economic interests.

Commonly these sorts of disputes become intractable. Perhaps this is because they often transcend jurisdictional boundaries and ministerial portfolio boundaries (thus bringing in a broader range of parties and stakeholders). Perhaps it is because they frequently involve land-use and resource use decision-making which will impact on the livelihoods of groups and individuals of great importance to politicians (the "rural vote" and big industry). And perhaps it is because there are strong feelings involved, discussions of "rights" (land rights, use rights, economic rights) and fear for the future (loss of species, degradation of the primary production base, our children's future). Many researchers agree that underlying the "intractability" of such conflicts is a clash of values.[3]

Burgess and Burgess (US) and Foley (Australia) suggest that intractable conflicts are "high stakes distributional conflicts over who gets what".[4] There is competition for the use of resources, where the potential uses are fundamentally conflicting. Foley[5] has described the conflict between environmentalists (who value forest biodiversity and ecological, social and cultural amenity), and the timber industry and its employees (who value employment opportunities and social and economic well-being for local communities) These values are, again, largely incompatible – once a tree is cut down, it is no longer available to play a role in the biodiversity of the region.

FAILING PUBLIC POLICY SYSTEMS

Legislative and political processes seem unable to cope with the magnitude and difficulty of these intractable problems. Environmental conflicts are just part of a wider range of public policy conflicts that Schon and Rein suggest have failed the test of reason[6].

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[2] Bryson B, *Down Under* (Doubleday, 2000), pp 136-137.

[3] For example, Hicks T, "Another look at identity-based conflict: The roots of conflict in the psychology of consciousness", *Negotiation Journal,* January 2001, p 39; Davis G and Keating M, *The Future of Governance*, (Allen and Unwin, 2000), p 2; Wootten H, "Environmental Dispute Resolution", *Adelaide Law Review*, 1993, pp 65-66; Susskind L and Field P, *Dealing with an angry public: The mutual gains approach* (The Free Press, 1996), p 153;

[4] Burgess G and Burgess H, "Constructive Confrontation: A Strategy for Dealing with Intractable Environmental Conflicts"*', Conflict Resolution Consortium Working Paper 97-1* March 1997, Presented to *the Conference on Environmental Conflict Resolution in the West*, Udall Center, University of Arizona, 20 March 1997 p 2.

[5] Foley T, "Environmental Negotiation: finding shared interests in forest use conflict", (2002) 13 ADRJ pp 98 – 99.

[6] Schön D A and Rein M, *Frame Reflection: Toward the resolution of intractable policy controversies* (Basic Books, 1994), p 4.

In the US context, Glavovic, Dukes and Lynott suggest that environmental intervention occurs along a continuum. At one end of the continuum is an approach based on what they call "an ideology of management" where public decision making has reached a crisis – a "crisis of governance"- resulting from proliferating competing interests, and governance reform focused on "improved efficiency, productivity, and managerial capability of authorities".[7] They suggest that the goal of environmental intervention at this end of the continuum is "to *settle* disputes, or get agreements".[8]

At the other end of their spectrum is the transformative approach as outlined by Folger and Bush[9], who, Glavovic et al suggest, see the crisis of governance as less important than the "threat to public life itself".[10] "From a transformative perspective, environmental disputes are viewed not only as policy stalemates, but as indicators of the fragmentation of community, civic life, and governance.… The conflict resolution process is thus a vehicle for transforming communities, citizenry, and the institutions and practices of democratic governance."[11]

Australian State governments have primary responsibility for the management of natural resources. Toyne bemoans the process of Commonwealth involvement in national environmental issues through the "cumbersome" mechanism of the federal Constitution.[12] He suggests that political tensions between State governments, and between State governments and the Commonwealth government, result in either strenuous conflict, or "the painstaking process of building consensus between governments, a consensus often arrived at on the lowest common denominator of agreement".

More than this, he contends that ephemeral factors play an even greater role in determining the level of Commonwealth involvement – a particular political party being in control, personal beliefs of leaders, and the impact of elections.[13]

It is these ephemeral factors, and the cut and thrust of a robust political system that most usually determine the outcome of public policy disputes. But not infrequently, the system fails, the problems and conflict remain unresolved, and the dispute comes to be seen as intractable.

CONSENSUS BUILDING PROCESSES

Of great interest to those involved in alternative dispute resolution is the increasing tendency for governments facing intractable environmental conflict to set in train a more broad-ranging policy framework that they hope will build consensus through involving as many of the people involved in the conflict as possible.

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[7] Glavovic B, Dukes EF, Lynott J, "Training and educating environmental mediators: lessons from experience in the United States", *Mediation Quarterly*, Summer 1997, p 277.
[8] Glavovic, n 7.
[9] Baruch Bush RA and Folger JP, *The Promise of Mediation: Responding to conflict through empowerment and recognition* (Jossey-Bass Publishers, 1994).
[10] Glavovic et al, n 7, p 277.
[11] Glavovic, n 7, p 278.
[12] Toyne P, *The Reluctant Nation* (ABC Books, 1994) p 2.
[13] Toyne, n 12, p 3.

The mid to late 1990s saw a move away from reliance on centralised information collection, analysis and decision making towards so-called community ownership and the promotion of "the partnership model" for resolution of environmental disputes. This trend has been particularly obvious in the area of natural resource management, where community involvement in planning processes is now seen as the alternative to governments imposing decisions on communities. The Regional Vegetation Management Committees, the Catchment Management Boards, and the River and Ground Water Management Committees are examples in New South Wales. These sorts of processes have now become so entrenched that the Commonwealth is now proposing to channel its Natural Heritage Trust (NHT) funding directly through the Catchment Management Boards, at least partially circumventing the State governments.[14]

Involvement of mediators and facilitators in these processes is becoming a regular occurrence. The NHT provided funding for Bushcare, Coastcare, Waterwatch and Indigenous Land Management facilitators and coordinators in its first incarnation, and NHT2 promises "approximately 120 full time equivalent landcare-style facilitator and coordinator positions in NSW".[15]

It is likely that most of these facilitators will be working with relatively homogenous groups, focusing their activities to on-ground works. Such facilitators will probably be recruited through traditional bureaucratic processes. They may experience levels of conflict at particular times and will need the skills to bring groups of people together to work on practical projects. The Landcare model provided the initial impetus for such groups, and now having been around for more than a decade, has been adapted in different ways around the country.[16]

However, some of the other so-called community based processes are quite different in that they attempt to bring together people who have very different views to develop policy and make plans which will have a legislative backing. It is these processes that are really trying to grapple with intractable conflict. In NSW, the Regional Vegetation Committees (RVCs) are very good examples. The RVCs bring together people representing rural interests, landholders, Aboriginal groups, environmental groups, Local and State government and scientific interests – the range of stakeholders who have an interest, and who have often expressed a loud political opinion on the issues of vegetation clearing.

Some of these community-based processes have become conflict-ridden in themselves. The NSW government, in setting up the Regional Vegetation Committee process, has found itself in a number of circumstances with a multi-stakeholder committee incapable of reaching consensus agreement due to deeply entrenched differences.

Putting this diverse group of people in a room together to develop regional policy has in many ways provided just a smaller version of the public policy

[14] Letter to J Elix from Dr Gull Izmir, Deputy Director-General – NSW Department of Land and Water Conservation, dated 6 August 2002.
[15] Izmir, n 14.
[16] For an analysis of the impact of the Landcare movement see Lockie S and Vanclay F, *Critical Landcare, Centre for Rural Social Research Key Paper No. 5,* Charles Sturt University, July 1997 (reprinted April 2000).

debate that has been occurring around land clearing for many years. There is no reason to expect that by telescoping the debates down to individual people in a Committee they will be any less vehement than those conducted by their representative groups in the wider community.

In some cases, facilitators skilled in dispute resolution and training in negotiation and communication skills have been employed to assist the work of the Committees.

For the facilitators and mediators who might become involved in these processes, and in other processes of intractable conflict resolution, looking in more detail at "the meaning of success" and how success might be defined and described both by the facilitator, the client and the conflict participants may well lead to more effective interventions, based on more realistic expectations of outcomes.

IS "SETTLEMENT" A MEANINGFUL CONCEPT?

How will these facilitators and mediators, and their employees and the groups and individuals they are working with, define success in their endeavours? Is the commonly used concept of "settlement" meaningful in the context of an intractable environment conflict?

Both Honeyman and d'Estree et al have written about the importance of being clear about the expectations of a "successful" outcome of a conflict resolution or management process.

Honeyman believes that most mediators have a mental image of a "settlement" but that this image is a distortion of reality. The mental image carried most frequently is that the conflict "ris[es] to a peak of noise and fury till, with a clash of cymbals, a *Settlement* is achieved – after which the orchestra's efforts ebb away and everybody goes home."[17]

However, Honeyman's experience is that the disputants, who have probably failed to achieve their ideal outcome through the initial conflict, take opportunities to regroup, revoice their disagreements, and "for the more conflict-prone aspects of an individual's personality to reassert themselves".[18] Other peaks of conflict occur and, in effective processes, would be anticipated and planned for.

Honeyman asks why the first image of successful settlement still persists, and suggests that it is because we value quick solutions to problems – particularly within a political process. He also suggests that valuing quick outcomes may in fact lead to lack of attention to the parties' long term interests. A realistic assessment of the likely progress of resolution or settlement, over a longer period of time, with subsidiary conflicts, is likely to allow the maintenance of a more positive approach to the resolution of the conflict than an overly optimistic projection.

[17] Honeyman C, "The wrong mental image of settlement", *Negotiation Journal*, January 2001, p 8.
[18] Honeyman, n 17, p 9.

CHANGING THE WAY WE LOOK FOR SUCCESS

D'Estree and her colleagues propose a new set of criteria for assessing the outcomes of a conflict resolution process in four areas:

> Changes in thinking – including attitudinal change and better communication
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> Changes in relations – improved empathy, improvements in the "relational climate"
>
> Foundation for transfer – that is the achievements that allow the "new discoveries" to be conveyed to participants' communities and outside groups
>
> Foundation for outcome or implementation – including political reforms, changed institutional processes etc.[19]

They suggest that this framework will help the discussion about what is a successful outcome in conflict interventions.

Similarly, a series of meetings of practitioners and researchers in public policy dispute resolution in the United States divided success elements into those of substance (satisfying interests and principled criteria, "better than otherwise could have been achieved"); process (including, that it is fair, timely, allows parties to be consulted and have control); and relationships (that they are civil, and provide recognition, respect and an increased capacity for problem solving).[20]

They also found that their practitioners and researchers group shared a series of assumptions about success including the fact that success is a multi-dimensional concept and should be considered from the point of view of the parties involved; that conflict is normal and can be "an important force for positive change"; and that "agreement for agreement sake is insufficient (and perhaps wrong)". They also found that an important component of success is making the right decision about when to use voluntary alternative interventions, and when to use other decision making modes – described as modes based on power and rights (presumably government decision making and use of the judicial system).[21]

These sorts of approaches to defining success would appear to have enormous merit. They separate out the different elements of what might be considered in evaluating the success or otherwise of an intervention, and allow the possibility that successful elements in one area – process for example – might be considerable, while in another area – substance or relationship – they might be much lower.

In Australia, Sourdin has suggested that an ADR process should

> Resolve or limit the dispute
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> Be considered by the parties to be just (or fair)
>
> Be accessible

[19] d'Estree TP et al., "Changing the debate about "success" in conflict resolution efforts", *Negotiation Journal,* April 2001, pp 101 –113. Paraphrased from p 106.

[20] Bingham G et al, "Building bridges between research and practice: learning together to improve the resolution of public policy disputes" http://www.resolv.org/Resources/articles/issue28.htm Accessed 18 April 2002.

[21] Bingham, n 20.

Use resources efficiently and promote lasting outcomes

Achieve outcomes that are effective and acceptable.[22]

Sourdin also brings together both "process" and "outcome" objectives. The expectations of success of facilitators/mediators, their clients and the participants could perhaps become more realistic through consideration of some of the detail under each of these broad objectives. Asking questions at the beginning of a process such as: "How would you know whether the process has been fair?" or "What will be the characteristics of acceptable outcomes?" may assist in determining realistic expectations, and therefore more positive experiences of the intervention process.

IS NEUTRALITY SO IMPORTANT?

One of the broad objectives outlined by Sourdin is that an ADR process should be considered by the parties to be just or fair. In practice, one of the key concepts that is discussed in public policy disputes is that of neutrality or impartiality or independence of the person or persons who are managing the process.

A recent survey[23] of members of the NSW Regional Vegetation Committees (RVCs) asked whether they agree or disagree with the statement that the Chairs of their Committees (who are elected by the Committee membership from among the members at an early meeting) are independent and impartial. Preliminary analysis found that about 30% of respondents disagreed with the statement, and many commented that it is very difficult for such a contentious process to be managed by someone who has a vested interest in the outcomes and process. In some Committees that have experienced significant conflict, an external facilitator has been brought in to assist the Committee.

It is inevitable that deciding on a mediator or facilitator for a difficult, apparently intractable environmental dispute will come down in many instances to the personal characteristics, skills and (to be realistic) contacts of the potential intervenor. However, the concept of neutrality is usually also thrown up as being an essential component for a mediator or facilitator.

When disputing parties use an intervenor to assist them with the conflict, there is generally an assumption that that the intervenor will be impartial (free from favouritism or bias[24]) and neutral (does not act as to support one party over the other[25]). However, there has been considerable discussion as to whether such concepts are realistic and achievable.

Charlton contends that "The principle of mediator neutrality is the core factor which distinguishes mediation from most other dispute resolution processes", and goes on to suggest that any slippage from neutrality is often related to mediator inadequacy or different understandings of what neutrality means.[26] Sourdin summarises some of the considerations undertaken by the National Alternative Dispute Resolution Advisory Council (NADRAC) in this area, and their concern that mediators make appropriate disclosures at the

[22] Sourdin T, *Alternative Dispute Resolution* (Lawbook Co., 2002), pp 66 – 71.
[23] Elix J, unpublished thesis work.
[24] Sourdin, n 22, p 44.
[25] Charlton R, *Dispute Resolution Guidebook* (LBC Information Services, 2000), p 14.
[26] Charlton, n 25, p 15.

commencement of the mediation, and their recognition that mediators may need to intervene to redress power imbalances.[27]

Others have questioned the concepts of neutrality and impartiality. Wolski has listed a wide range of mediator strategies, used at all stages in a conventional mediation, and which demonstrate the use of mediator power and influence.[28] Included among these are the emphasising of some issues over others in the introductory part of a mediation, using different strategies during the reality-testing of alternatives, and also in the course of caucusing and the holding of separate meetings. Many of the strategies identified by Wolski appear to be those of omission and selection, and could be both conscious and unconscious on the part of the mediator. Wolski also comments that mediators are under considerable pressure to generate agreement, and that, in itself compromises neutrality.

Silby[29] says that mediators are neutral neither with respect to the importance of resolving a dispute, nor with their own assessment of the process they are overseeing, the interests of their profession, and not even in respect to the parties involved in the mediation.

Forester and Stitzel have also rejected the concept of neutrality in their examination of the possibilities of what they call "activist mediation" in public sector disputes – particularly by planners at the local government level.[30] They say that the concept of neutrality "hides a range of strategic judgements that must be made" and "suggests a technical objectivity, an absence of responsibility, a 'good guy' image of the mediator that actually obscures not only issues of power and representation, but the mediator's own active influence on the outcomes".[31]

And Astor also recommends a re-thinking of the concept of neutrality suggesting that rather than considering it to be an either/or behaviour – the intervenor is either neutral, or trying to be neutral; or not – it should be recognised that neutrality is "highly complex and contextual".[32]

It is the view of the author that when relationships are established within a multi-party context, intervenor neutrality is an even more problematic concept. As a conflict management process unfolds over an extended period of time, relationships of various types develop between the facilitator/mediator and the participants, which inevitably impact on the way the facilitator carriers out the work. There are challenges to impartiality, including the long term management of a process involving emotional people with restricted repertoires of communication skills. In addition the pressure for "resolution" from those involved in the process, and those paying the bill for the facilitation/mediation, increases considerably with time.

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[27] Sourdin, n 22, p 44.

[28] Wolski B, "Mediator settlement strategies: Winning friends and influencing people", (2001) 12 ADRJ pp 248 – 262.

[29] Silbey S, "Mediation mythology", *Negotiation Journal,* October 1993, pp 349 – 353.

[30] Forester J and Stitzel D, "Beyond neutrality: the possibilities of activist mediation in public sector conflicts", *Negotiation Journal*, July 1989, pp 250 – 264.

[31] Forester, n 30, p 260.

[32] Astor H, "Rethinking neutrality: A theory to inform practice – Part 1", (2000) 11 ADRJ pp 73 – 81. Extract from p 79.

So, it is suggested that neutrality is a concept that needs far greater exploration and consideration by clients in choosing mediators and facilitators to carry out dispute resolution work. While this issue has already received attention in the ADR community, those employing mediators and facilitators in public policy disputes are likely to have quite narrow and fixed understandings of neutrality and impartiality. Discussing the expectations of neutrality at the commencement of an intervention can again contribute to the development of realistic expectations.

CHARACTERISTICS OF AN EFFECTIVE INTERVENOR

In their work on training and education environmental mediators, Glavovic et al outline the six characteristics of what they call the "consummate environmental mediator".[33] The characteristics are not, they emphasise acquired through training (and are therefore differentiated from competencies like communication and negotiation skills[34]). Rather they are "innate qualities, attitudes and values … or the product of years of development much beyond the capacity of any one training or educational program".[35]

The consummate environmental mediator, one who is both ethical and effective, needs to embody at least the following six qualities:

1. Advocacy for sustainable development
2. Environmental literacy, that is, familiarity with the language and substance of environmental science and public policy
3. Significant life experience
4. Commitment, integrity and trustworthiness
5. The ability to adopt different dispute resolution styles and behaviours
6. Superb planning and organizational capacity.[36]

The first two characteristics might seem to be at odds with the generally accepted wisdom that a mediator should be neutral, but perhaps more consistent with the emerging thought about the impossibility of neutrality discussed above.

Lampe and Kaplan in their analysis of eight case studies to resolve land use conflicts, found that the parties involved in the case studies "expressed strong appreciation for the intervener's substantive knowledge of the content of the conflict and ability to suggest options and alternative means for overcoming differences".[37]

Calcagno from the US Institute for Environmental Conflict Resolution has spoken in some detail about choosing what she calls "an appropriate neutral".[38]

[33] Glavovic et al., n 7, p 279.
[34] Glavovic, n 7.
[35] Glavovic, n 7, p 278.
[36] Glavovic, n 7, p 279.
[37] Lampe D and Kaplan M, "Resolving land-use conflicts through mediation: Challenges and opportunities", *Lincoln Institute of Land Policy Working Paper,* 1999, p 3.
[38] Calcagno J, "Choosing an appropriate neutral", *Alternative Dispute Resolution and Natural Resources – Building consensus and resolving conflicts in the twenty first century,* Conference Proceedings, May 16-19, 2000, Tucson Arizona. Obtained as a .jpg file from the Udall Centre for Studies in Public Policy at the University of Arizona, pp 365 – 367.

She points out the selection of this person may be the first agreement made by the parties in conflict, and is thus very important.

The selection of an intervenor is an essential part of designing a system for the resolution for an intractable public policy conflict. There is a range of selection criteria to be considered. But, for facilitators themselves, and perhaps for their clients and the conflict participants, the "myth" of neutrality may be less important that the ability for the facilitator to monitor and reflect upon his or her own responses and interventions as the intervention proceeds.

MEASURING OUTCOMES

Evaluation as a concept can be very threatening to those involved in dispute resolution processes – particularly when there has been public criticism of processes, or a general acknowledgment that things have not gone as well as they could.

But without evaluation, process improvement is much more difficult and those attempting similar exercises in the future are forced to rely on the anecdotal experiences of those who were actually involved in the process, rather than any sort of objective view from the outside.

For collaborative, community-based, processes, evaluation might be seen to be even more important. US researchers Conley and Moote comment that "collaborative and community-based approaches can but do not always work, and … at times failure comes at a heavy cost in time and effort expended, and perhaps more significantly, in social capital consumed rather than built".[39] They suggest that evaluation can be used to determine whether the "idealized narrative" of such processes holds true, address criticisms, and assist with efforts to institutionalise this more grass roots driven movement within more traditional social and political processes.[40]

Conley and Moote can see benefits in both external evaluation and self-evaluation, and outline both the quantitative and more qualititative, possibly participatory modes of evaluation, including surveys of participants' assessments, evaluative workshops held for participants and detailed case studies.

They also discuss the "what" of evaluation – given that there are likely to be both intangible measures (communication levels, degrees of respect, community development, conflict reduction) as well as tangible (number of trees cut down, number of metres of fencing erected). They draw attention to the fact that it may be impossible to determine whether the consensus building process has caused a change for the better.[41]

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[39] Conley A and Moote A, "Evaluating collaborative and community-based natural resource management: an assessment", *Alternative Dispute Resolution and Natural Resources – Building consensus and resolving conflicts in the twenty first century,* Conference Proceedings, May 16-19, 2000, Tucson Arizona. Obtained as a .jpg file from the Udall Centre for Studies in Public Policy at the University of Arizona, p 281.

[40] Conley, n 39.

[41] Conley, p 285 citing Innes JE, "Evaluating Consensus Building" in *The Consensus Building Handbook: A comprehensive guide to reaching agreement* edited by Susskind L, McLearnan S and Thomas-Larmer J (Sage Publications, 1999).

From his experience as both a mediator who is the subject of evaluations, and an evaluator himself, Susskind suggests that:

- Professional intervenors should make commitments to being involved in evaluations as part of their agreements with clients
- Parties to new dispute resolution systems should involve documentors and evaluators at the earliest possible stages.
- Draft evaluation and documentation reports should be provided to participants and intervenors. Acceptance of the comments then put forward should be at the discretion of the researchers
- Academics and researchers should "develop a research agenda and appropriate protocols for the dispute resolution field".[42]

CONCLUSION

Adler et al's quotation at the commencement of this paper emphasises the chaotic nature of dispute, and the need for flexible, improvisational and reflexive intervenor strategies. In recognition of this reality, this paper has discussed what might be understood to be a success in public policy conflict interventions, the importance or otherwise of neutrality and the need for process and outcome evaluation.

While these questions might be perceived – at this stage – to be somewhat academic by those placed in the positions of hiring facilitators and mediators, perhaps they should first be considered by the intervenors themselves. Challenging ourselves about what we anticipate will be successful outcomes, questioning our own practices as to neutrality, and setting in train robust evaluation processes that accept that "multiple passes" might be needed at a dispute, are all first steps in improving practice (and outcomes – however they are defined!).

[42] Susskind LW, "Evaluating dispute resolution experiments", *Negotiation Journal*, April 1986, pp 138 -139.

