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Mr Justice Lloyd:

Good morning, ladies and gentlemen. Firstly, I note that this seminar has been a sell-out. I am told there is a waiting list of about 30.

I want to talk to you about mediation in the Land and Environment Court. In 1980, when the Court was set up, there was provision for conciliation conferences under section 34 of the Land and Environment Court Act. This was long before mediation was well known. It afforded parties an opportunity to get together with an assessor in a conciliation session.

Those conciliation conferences were spectacularly unsuccessful, so much so that they have largely fallen into disuse. Over the last six years, less than 2 per cent of cases disposed of in the Land and Environment Court were disposed of as section 34 conferences.

Court annexed mediation commenced initially in an informal way in 1991. Over the last six years, just under 4 per cent of cases in the Court have been mediated - not a large percentage. But the average success rate -that is, the settlement rate - of those mediated cases is about 60 per cent. In addition to the 60 per cent settlement rate, another 5 to 10 per cent of matters mediated resulted in the issues being narrowed, resulting in a shorter hearing time. Although less than 4 per cent of cases in the Court were mediated, they resulted in a saving in the last six years of 631 hearing days.

The success rate in cases mediated is consistent with that in other jurisdictions. For example, in the Federal Court over 70 per cent of cases that are mediated result in a settlement. The high success rate results from the technique and methods employed, some of which are well known to many of you.

First, there is the fact that mediation is a voluntary process. The parties are interested in exploring settlement. Secondly, there is the removal of the dispute from the adversarial procedures of the Court and exposing the parties to procedures designed to promote compromise. Thirdly, the whole basis is that the process is consensual, rather than coercive. Fourth is the fact that the mediator does not impose a solution on the participants, but rather raises options for settlement and helps the parties explore options for settlement. Fifth is the opportunity afforded to parties to hold confidential sessions with the mediator in the absence of other parties -the so-called caucusing. And, finally, there is the fact that all negotiations are without prejudice: neither the parties nor the mediator can disclose anything said in the course of the mediation session unless that is consented to.

The question I ask is: If mediations result in such a high success rate, why are there so few of them? Why don't we see more of them - with resultant benefits both to the parties and to the Court, and the saving of cost, and in the saving of time? For the three years prior to my appointment to the Court, I was on the Supreme Court Panel of Mediators, appointed by the Chief Justice. In those three years I had only one case referred to me for mediation.

The Land and Environment Court has endeavoured to facilitate mediation. In November 1994 the Land and Environment Court Act was amended by the introduction of a new part -part 5A -relating to mediation and neutral evaluation. These provisions enable the Chief Judge to compile a list of persons who are suitable mediators.

Those persons included on the list are: the Court's Registrar; the Assistant Registrar; and a list of persons who have undergone a recognised mediation training course and who have conducted at least 10 mediations.

Of course, parties are not confined to choosing a mediator in the Chief Judge's list. They are free to choose their own mediator. In fact, last night I was talking to one of Australia's foremost mediators, and he was telling me that this week he had settled two cases for the Land and Environment Court, being claims for compensation for resumption of land.

Other relevant provisions of the Land and Environment Court Act provide that, first, the Court cannot refer a matter to mediation unless the parties agree. Second, a party to mediation may withdraw from or terminate a mediation session at any time. Third the Court may give effect to any agreement or arrangement made arising from a mediation session, by appropriate orders.

Fourth, the Act expressly recognises that anything said, or any admission made, in a mediation session is not admissible in a Court: and any document prepared for the purpose of, or in the course of, or as the result of, a mediation session is not admissible as evidence in court - unless the persons in attendance at the mediation session or identified in the document consent.

Fifth, a mediator may disclose information obtained by him in the course of the mediation only with the consent of the person from whom the information is obtained. I should add that these provisions are normally included in any event in mediation agreements.

The Court now has rules relating to mediation. For instance, under part 18 the parties may apply to the Court for referral to mediation a matter arising from proceedings at any time. Importantly, a mediation session, under the auspices of the Court's rules, must be attended by each party, or by a representative of each party having authority to settle the matters.

This last requirement is crucial. It is, I suspect, one of the main reasons why there are so few mediations of matters in dispute in the Land and Environment Court at present. There is, it seems, a general reluctance, particularly on the part of local government councils, to authorise their legal representatives or the General Manager or the Mayor to settle or compromise legal proceedings.

When I was a barrister acting for local government councils, my advice to the councils was that the council should pass a resolution authorising either the General Manager or the Mayor to compromise or settle proceedings as they may be advised by the council's legal advisers; that is, to accept the result of either a section 34 conference or a mediation session (as the case may be) if so advised by the council's legal advisers.

Mediation sessions are only feasible if each party has a representative who has authority to settle the matter. In the case of local government councils, there must be a person authorised to speak for the council and to settle the proceedings on behalf of the council. Alternatively, although it is less satisfactory, if the General Manager or the Mayor has authority to settle and is only a telephone call away, then that may be acceptable. .

The alternative would mean that any settlement reached would be only provisional; it would have to be endorsed by a full council meeting. This would be entirely unsatisfactory since the decision as to whether or not to endorse the provisional settlement would be made by persons who were not present at the mediation and thus were unaware of the strengths or weaknesses of the council's case, or the case of their opponents; and, in view of the confidentiality provisions, would be unaware of the nature of the discussions or disclosures made during the mediation session.

The benefits of mediation are enormous. As I have said, even if no settlement is reached, there is the opportunity of narrowing or confining the issues, thereby shortening the hearing time.

I accept, of course, that there are some matters which are not suitable for mediation; for example, cases where the parties require a ruling on a question of law, or on the meaning of a particular provision in a local

environmental plan, or perhaps cases where there is a large number of third party objectors, or in prosecution proceedings and the like. There is, however, a large range of other cases in which mediation can play a role. I understand that this seminar will include examining the kinds of cases which are suitable for mediation or alternative dispute resolution.

It remains for me to introduce our first Facilitator, Tina Spiegel. Tina Spiegel has combined qualifications and experience in sociology, town planning and law, and has developed a successful practice which includes mediation and facilitation in the planning and environmental law areas, consulting to local government and litigation in planning and development law.

She has a special interest in the use of alternative dispute resolution processes by government authorities to provide a mechanism for evolving new concepts and reviewing existing policies and resolving issues and disputes. I ask you to welcome Tina.
