

ENVIRONMENTAL LAW ROUNDTABLE of AUSTRALIA and NEW ZEALAND

A multidisciplinary approach to improve environmental laws
and policies across Australia and New Zealand



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ELRANZ MANUAL



Resource Management Law Association
of New Zealand Inc.



National Environmental
Law Association of Australia

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1. FOREWORD

How many times have you attended a conference and wanted to see a particular issue developed further? Or wanted to have a greater time for discussion of a topic at the conference?

The **Environmental Law Roundtable of Australia and New Zealand (ELRANZ)** provides a forum for discussion and development of proposals for the harmonisation or coordination of environmental law and policy throughout Australia and New Zealand. As a multidisciplinary forum, ELRANZ is open to professionals, Government Departments and Agencies, statutory corporations, business, industry, NGOs, academics and students. As an inclusive and multidisciplinary approach to improving environmental laws and policies across Australia and New Zealand, ELRANZ advocates the processes of public participation and consensus building. Even before harmonisation, a greater level of cooperation will develop out of the ELRANZ process.

The Roundtable is a joint initiative of the **National Environmental Law Association Limited (Australia) (NELA)** and the **Resource Management Law Association of New Zealand Inc (RMLA)**. The first proposal for an Australian Environmental Law Roundtable was released in June 2005. By October 2005 the name was changed and the joint project commenced.

The active participation of Local Government is promoted by ELRANZ as many regulatory actions are within the local sphere. Both RMLA and NELA work closely with Local Government. The RMLA also works closely with Regional Councils in New Zealand. The Environmental Law Associations of Australia work closely with State Governments.

The ELRANZ offers opportunities for all spheres of government to have a forum where new ideas and improvements on old ideas can be discussed in a consensus building framework. ELRANZ expects suggestions to come from the public sector. The ELRANZ will allow Governments to engage with stakeholders through an independent forum.

We acknowledge the ongoing contribution of indigenous peoples in the stewardship of the earth. To the Aboriginal and Torres Strait Islander Nations across Australia and Iwi and Runanga across New Zealand, we openly invite your participation in the continuing development of the Environmental Law Roundtable of Australia and New Zealand.

You can become a part of ELRANZ at any time by sending an email to me as Convenor (my contact details are at the bottom of the next page). Without paying a fee, you can become an ELRANZ Associate and receive ongoing information about Roundtable activities and projects. Being an ELRANZ Associate gives you (a) information on ELRANZ projects and (b) the option of becoming a stakeholder and participating in a project that catches your interest. We do not disclose your email or contact details without your permission but we would like you to join the publicly available list of the names of Associates. This will encourage others

to become Associates and help the ELRANZ network grow, thus allowing you to make the most of ELRANZ as a networking tool.

You can also become a member of the ELRANZ Working Group and assist in research projects and/or developing papers on particular topics. Working Group members have the opportunity to have a greater degree of involvement. You can be an Associate and a Working Group member at the same time.

More information can be accessed through the ELRANZ section on the NELA <http://www.nela.org.au/node/8> and RMLA http://www.rmla.org.nz/library_elranz.aspx websites. The information will be updated from time to time.

As a member of NELA or RMLA, you will be given access to additional ELRANZ information.

This is the third edition of the ELRANZ Manual. It will be updated from time to time especially as we learn from our experiences. If you have any comments or improvements, please email them to me.

The views expressed in this ELRANZ Manual are not necessarily the views of NELA and/or RMLA. Rather, they are put forward to contribute to the necessary dialogue on how to increase the use of consensus building and public participation techniques within the environmental and planning disciplines.

We look forward to working with you.

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2. WHY AN ENVIRONMENTAL LAW ROUNDTABLE OF AUSTRALIA AND NEW ZEALAND?

Achieving good environmental outcomes requires the combination of a number of different efforts. These efforts are integrated within an ecological sustainability discourse. Setting broad policy and law frameworks is part of the process. ELRANZ promotes greater stakeholder involvement, through consensus building and public participation, in making improvements in environmental law and policy in Australia and New Zealand. Within the environment and planning law and policy disciplines there is a need for raising awareness of best practice facilitation, creative visioning, meaningful stakeholder participation and other consensus building techniques.

Consensus building and public participation can transform the traditional adversarial forum of dispute resolution into a forum characterised by collaboration and cooperation. These techniques are relevant to dispute avoidance, minimisation and resolution. ELRANZ recognises that the adversarial tone of litigation (and cultures of adversarialism) can undermine the more cooperative spirit of consensus building, so all stakeholders must be strongly committed to achieve this goal.

NELA and RMLA have multidisciplinary memberships and promote a multidisciplinary approach for ELRANZ that advocates a strong commitment to collaborative decision making across the various professions.

There is great potential for consensus building and public participation to improve environmental and planning law outcomes because environmental issues often involve multiple parties who represent the diverse interests of government, non-governmental organisations, industry, and community. Consensus building involves the design and implementation of processes that seek to resolve complex, multiparty disputes. Good faith efforts to reach consensus will mean that:

- Dialogue replaces debate. Consensus building allows participants to establish “common ground” on disputed issues and collaborate in designing and implementing a process for action and/or law reform;
- The likelihood of disputes remaining unresolved and progressing to litigation is reduced when a large number of people and organisations participate and provide input into government decision making processes; and
- Community members who are given the opportunity to have their opinions and views heard and assessed within a transparent system are less likely to oppose final outcomes.

Consensus building and public participation techniques are also important for improving environmental laws in Australia and New Zealand. Harmonisation can occur in stages and may relate to the adoption of common procedures. Whilst harmonisation is an ultimate objective, ELRANZ will create a dialogue that will encourage

the movement of environmental laws and policy towards harmonisation, through a process of coordination and cooperation. As stakeholders see the benefits of incremental improvements they will be encouraged to take the next steps.

NELA adopted in September 2004 a position paper on the harmonisation of environmental law (NELA 2004).¹ The Roundtable provides a forum to advance the harmonisation project. The ELRANZ has now expanded the harmonisation process to New Zealand. This is a logical extension as Ministerial Councils and the Judiciary meet on a trans-Tasman basis.

The Roundtable includes the following concepts:

- Associate registration whereby corporations, associations, organisations and individuals can register as ELRANZ Associates and initiate roundtable issues;
- Project Teams are established to assist in ELRANZ projects;
- Associates may engage in research, consultation and brainstorming with respect to a project on the ELRANZ agenda and actively participate in neutral third party facilitated conferences, seminars and meetings;
- Suggested projects will be prioritised within the ELRANZ agenda. The results may include draft legislation, a new policy approach or a protocol for industry;
- Issues suitable for resolution through consensus building processes may be recommended to the Australian and New Zealand Judicial and Intergovernmental Ministerial meetings;
- Some ELRANZ projects could be managed through adaptations to negotiated rulemaking (see discussion of negotiated rulemaking below, section 4); and
- Seminars, public forums and other educational activities can be included as Roundtable events to ensure the involvement of individual and corporate NELA and RMLA members as well as to continue building support for the growing network of ELRANZ Associates.

¹ <http://www.nela.org.au/node/19>

3. HOW TO RAISE AN ISSUE FOR ELRANZ CONSIDERATION

ELRANZ provides an opportunity for Associates to take a complex issue and present it in a forum to suggest the way forward for regulators as to how the issue can be managed across jurisdictions.

There are a number of ways to raise an issue with ELRANZ. A suggestion may be as short as a page identifying the nature of the issue and likely stakeholders. On the other hand, it is expected that some very detailed submissions will be submitted for future ELRANZ projects. To make a suggestion, contact the ELRANZ Convenor:

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Background or historical information on the issue is always helpful in a proper identification of the purpose of the project. The person who makes a suggestion (the **project proponent**) will know how the issue has arisen and communicate that to ELRANZ, which will help develop the vision of the project, conduct the preliminary assessment of its suitability for consensus based resolution and design a set of processes to suit the defined scope of the issue.

As the consultation process is important, all stakeholders need to be identified. The project proponent can start this part of the project design in his/her submission and ELRANZ can respond with suggestions. Networking will be an important means of ensuring all relevant stakeholders are included.

Project proponents can offer sponsorship or suggestions for financing the project. An approximation of budget requirements will be much appreciated.

Some projects will require support before sponsors will make funds available, and project proponents should be prepared to help gather supporters. Stakeholders are likely candidates for supporters, as it will be in their interests to have the assistance of ELRANZ to achieve environmental outcomes that will benefit them.

4. WHAT WILL ELRANZ DO WITH YOUR ISSUE?

Each issue referred to ELRANZ will be subject to an assessment process to consider the suitability of consensus building and/or public participation in its resolution. This assessment may be called a conflict

assessment and will be conducted by the ELRANZ Convenor in consultation with the National Committees of NELA and RMLA in order to determine if it will be taken up by ELRANZ.

Once an assessment is made, ELRANZ will recommend a process for developing the proposal further. This will involve on-going dialogue with the proponent and other stakeholder groups who may benefit from the development of the project, which will include a scoping exercise so that clear parameters are established for the project.

It is important to achieve the widest possible support for each project as it is developed and implemented.

Negotiated Rulemaking (including adaptations for particular issues) and Neutral Facilitation (by impartial third parties) are among the consensus building and public participation techniques.

Negotiated rulemaking is a process which brings together representatives of various interest groups and a government department or agency (including, if necessary, each of the different spheres of government) to negotiate the text of a proposed law (wide enough to cover new or amended legislation including delegated legislation). This model can be adapted to suit different situations and tailored for the particular ELRANZ issue.

In comparison, neutral facilitation is the process by which stakeholders discuss and negotiate the development of a new concept or idea or the revision of a law or regulation assisted by an independent third party facilitator who helps the discussion move forward. It may involve separate sessions with individual stakeholders or a number of stakeholders with similar interests as part of the overall structure for the neutral facilitation.

Other consensus building and public participation processes may also be considered as part of the assessment process.

The response to proposals has to remain flexible. There are many different combinations of techniques that can be used to determine the scope and proper implementation of a project.

So far ELRANZ projects are:

- Penalty Infringement Notices; and
- A Negotiated Rulemaking Act for each jurisdiction; and
- Common Planning and Environment Definitions across the 10 jurisdictions of Australia & New Zealand.

Each project is open for sponsorship.

Progress reports on projects are posted to the NELA and RMLA websites. As ELRANZ develops other projects they will be released through www.nela.org.au and www.rmla.org.nz

5. PROCESS DESIGN

ELRANZ advocates a detailed consensus building design for each project referred to it through its growing network of ELRANZ Associates. There are many ways of designing a consensus building process. The process design needs to be flexible enough to accommodate changes as the consensus building exercise proceeds.

The consensus building design model suggested by Straus (1999) is just one example. It typically has four stages:

- Start-up phase;
- Consensus building design phase;
- Consensus building phase; and
- Implementation phase (Straus 1999:138)

The benefits of this design model are achieved when stakeholders own a decision making process and feel comfortable participating in it (Straus, 1999). ELRANZ is committed to developing consensus building processes that are fair, open, inclusive and accountable. These are qualities that Innes & Booher (1999) strongly advocate.

A small group of stakeholders who are willing to collaborate to recommend a process for reaching consensus over an issue can assist with the design of a consensus building process that is tailored to a large set of stakeholders (Straus, 1999:140). ELRANZ recognises the importance in any consensus building process of identifying all the stakeholders in the issues and developing roles in the process for each of them.

Straus (1999:154-166) recommends that the following goals be achieved by a small group of stakeholders prior to presenting the consensus building design to the wider group:

1. Agreement on the ground rules (these can be recommended by a third party);
2. Definition of the scope of the issue;
3. Form of the recommended outcome;
4. Preliminary identification of the key stakeholders including representatives from all relevant and significantly diverse interest groups;
5. Layout of the individual agreements, milestones, that need to be reached throughout the duration of the consensus building process;
6. Complementary layout of the parallel work processes that demand different levels of stakeholder involvement;
7. Detailed “process map”; and
8. Recommendations with respect to staffing, technical consultants, funding and publicity.

ELRANZ has access to persons capable of acting as third party neutral facilitators in the design and/or implementation of consensus building processes. A multidisciplinary panel is also available.

6. SAMPLE APPROACHES

In this third edition of the ELRANZ Manual we have drawn on parts of the **Consensus Building Handbook**. As we add to our experience we will be revising this Manual to include more Australian and New Zealand examples.

The “blank page approach” (described in the next section) is our creation to emphasise the cultural change necessary to improve public participation and have dialogue start early in order to maximise a partnership approach among all stakeholders, including government, in the resolution of environmental and planning issues. We have included the “discussion paper approach” in order to encourage a dialogue on how that approach can be improved. We recognise that there are many different variations on that approach. We are looking for a modification of the approach to improve timely stakeholder access.

If you have any suggestions on what approaches the ELRANZ should adopt and any case studies you would like to share please send the details to the ELRANZ Convenor, John Haydon at johnhaydon@ecodirections.com

7. SAMPLE APPROACH 1: THE BLANK PAGE

This is an example of how to proceed to establish a new law or policy. It is not always appropriate to use a blank page approach but it should be considered along with other options.

Too often the development of a law or policy is done without early public input. When the public are eventually invited to comment, the regulatory authority already has a very fixed view on a solution. Community consultation is relegated to damage mitigation.

The blank page approach encourages the regulatory authority to seek out public input early before a policy or law is considered for drafting, rather than holding back on public consultation until a discussion paper has been developed by the Government.

The purpose of the blank page approach is to bring stakeholders into the policy creation process early in order to identify common ground. This is crucial since the development of relationships of trust and cooperation is a key component of public participation and consensus building.

The blank page approach is more difficult (but not impossible) if there is a history of distrust between stakeholder groups.

The development of an options paper with public participation may save future argument and get some good ideas on the table for assessment at the beginning of the process. The public should be trusted to be able to comment sensibly on planning and environmental issues. A proactive and cooperative framework is encouraged to avoid or minimise conflict.

Defining who “the public” is will vary between projects. Including all relevant stakeholders is important.

8. SAMPLE APPROACH 2: DISCUSSION PAPER

The discussion paper approach could be used as a process for the amendment of an existing law or policy.

There are many variations on the scope of a discussion paper approach. Consensus building techniques can be added into the steps. The range of stakeholders and the history of how the issues have developed will influence how ELRANZ will help to develop a discussion paper approach.

First, know and define your issues. Second, look outside the square to identify traditional stakeholders as well as the silent ones. A suggested approach to developing a discussion paper is as follows:

- Establish a research team of 5 to 7 or, alternatively, up to 10 people (one for each jurisdiction);
- Appoint a co-ordinator who will manage the research team;
- Gather basic information on the topic;
- Develop suggested questions for the discussion paper and a table of contents;
- Hold a workshop or forum in at least one jurisdiction to “road test” the discussion paper questions;
- Finish the discussion paper;
- Internal review panel within NELA and RMLA before the release of the discussion paper;
- Publish and circulate the discussion paper setting out a date for submissions and comments to be received. It is first distributed to ELRANZ Working Group members and to Associates of ELRANZ. Then it is sent to other identified stakeholders. Finally, it is posted on the NELA and RMLA websites and members are notified by email that it is available;
- Analyse the submissions and comments received;
- Negotiate where conflicting submissions are received. The form of this negotiation will vary depending on the nature and extent of the conflict;
- Hold a stakeholder forum in each jurisdiction and/or one meeting for Australia and New Zealand; and
- Publish a report on the topic and send it out to stakeholders for implementation.
- Develop an implementation phase (eg create a dialogue that leads to legislative or administrative reform in all of the 10 jurisdictions of Australia and New Zealand).
- There will be a separate phase of promoting the idea or concept to stakeholders.

9. SAMPLE APPROACH 3: VISIONING

Moore et al (1999) described another sample approach, visioning, as “a process in which people build consensus on a description of their preferred future – a set of conditions they want to see realised over time” (Moore et al., 1999:588).

This text focuses on community-wide visioning, using a cross-section of stakeholders who are predominantly residents. Visioning is said to mobilise citizen participation in political decision making. Community-wide visioning also creates expectations amongst residents that similar consultation will be implemented in the future, and that certain actions will be taken. If visioning remains merely as words, public scepticism about value of public participation will increase (Moore et al, 1999:561).

Like other consensus building processes, a visioning process can be understood in stages. Moore et al (1999:562) suggest the following stages:

- Organisation involving the determination of facilitation, the process design, and the ways to promote broad based participation;
- The visioning process, which involves gathering ideas, drafting goals, increasing education and voter participation; and
- Implementation.

Visioning can be variously applied in a number of different approaches. For example, an informed constituency could be convened to discuss a policy issue and to make recommendations about future action(s) on the issue (Moore et al, 1999).

ELRANZ advocates for broad-based participation in all projects. Moore et al (1999:569) suggest that broad-based participation through visioning can be enhanced by:

- Emphasising that participants will be given the opportunity to contribute their ideas;
- Recording and respecting all ideas so that none are lost;
- Ensuring ideas are translated into concrete actions; and
- Clearly acknowledging that the same group convening the visioning will continue to be involved after the vision is self-determined and will work to implement it.

These principles have relevance in all ELRANZ projects.

10. SAMPLE APPROACH 4: JOINT FACT FINDING

Joint fact finding offers an alternative to the process of adversary science (Ehrmann & Stinson, 1999). Stakeholders in a joint fact finding exercise may be asked to determine the following questions (Ehrmann & Stinson, 1999:377):

- The issues of concern that require technical analysis;
- The questions that experts ought to ask;
- Who the experts should be;
- The best process for gathering information and answering questions;
- The limitations of the various analytical methods that will be used; and
- The best way of integrating jointly discovered information and results into the consensus building process.

Ehrmann & Stinson (1999:377-380) also identified the following benefits arising out of joint fact-finding. They suggest that benefits stemmed from:

- Increasing the opportunities for participants in a consensus building process to address information gaps and scientific uncertainty;
- Enabling participants to develop a common knowledge base;
- Improving the quality of interim and final agreements as a result of participants' identification of the most accurate and best available information;
- Enhancing participants' understandings of technical issues to allow them to explain an outcome (that is based upon some technical determination) to their constituencies and to the public;
- Cultivation of greater and shared understanding of issues; and
- Improving communication between and within stakeholder groups.

11. SAMPLE APPROACH 5: BEST USE TECHNOLOGY

Computer based communication technologies can be invaluable aids in disseminating information to stakeholders both at the outset of a proposed consensus building process (to generate interest) and during the process (to keep stakeholders notified of developments). This is more fully described in the Consensus Building Handbook (Susskind et al., 1999) in Chapter 10.

The Internet and email can be used to assist convenors and facilitators with four functions:

- Notifying the public of upcoming consensus building processes and seeking out appropriate participants;

- Distributing materials to participants during the process;
- Enabling participants to share information with their constituents; and
- Keeping the public informed about the progress of a consensus building process.

An independent web site can be created. The costs of this process are generally low and the site can be useful if a large number of participants are likely to be involved over a long period of time. An independent site can be useful for allowing individuals/organisation to electronically indicate interest and thus allow for easy identification of stakeholders.

Websites can also be used as document repositories. A benefit of having a central information hub can reduce potential sensitivities about the location, ownership, and access to relevant documents. If required, access to documents can be limited by the use of passwords.

While web sites can enhance information dissemination, they should be used in combinations with other methods if some stakeholders are likely to have difficulties accessing or using the web.

Face to face meetings can be augmented with computer based technologies. Web conferences/chats and Listservs can break through time constraints and allow group discussions after and/or between meetings. Listservs are an internet option in which the email addresses of subscribers are compiled into a master electronic mailing list and any subscriber can send an email simultaneously to all other subscribers.

These devices can provide a written record of exchanges ensuring accountability. They can be monitored and enable facilitators to keep track of who contributes to such discussions and who does not. Facilitators will need to confirm which members have 'heard' critical discussion points.

Computer technologies can also facilitate issue identification and analysis as:

- Aids in conducting technical analysis;
- Communication tools in discussions about technical aspects of specific issues; and
- Individual and group decision-making tools.

Emails can be used to distribute drafts of written documents quickly and suggested revisions can also be sent back promptly.

Computer based technologies also provide an opportunity to poll levels of agreement in a consensus process, without the risk of solidifying positions prematurely.

Notwithstanding these suggested benefits, computer based technologies may be problematic because:

- (i) Access depends upon a basic level of computer literacy and reliable Internet connections. These conditions cannot be assumed to exist for all stakeholders;

- (ii) People sometimes require personal invitations to participate;
- (iii) Downloading and printing documents can take additional time; and
- (iv) There is potential for misinterpretation of electronic messages and the subtleties of direct communication can be lost through internet correspondence. Face-to-face conferences, where possible, will strengthen the human relationships between participants.

12. MEMBERS ONLY INFORMATION

ELRANZ is part of the package of benefits for members of NELA and RMLA. Although it is not necessary to be a member of either organisation to be an ELRANZ Associate you are encouraged to join so that you can access more information on ELRANZ and its processes and project development.

As an ELRANZ Associate there is no obligation to participate in all Roundtable activities.

Additional information is available to members through the NELA and RMLA websites including:

- Consensus Building Case Studies:
 - The Chattanooga Process;
 - San Francisco Estuary Project;
 - Resolving Science Intensive Public Policy Disputes; and
- Various articles discussing ELRANZ topics.

13. APPENDIX A - BIBLIOGRAPHY

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