



# THE DECISION-MAKER

DECEMBER 2009

A NEWSLETTER FOR MAKING GOOD DECISIONS PROGRAMME CERTIFICATE HOLDERS

Welcome to the seventh edition of **The Decision-maker**, the Ministry for the Environment's newsletter for certified RMA decision-makers. This newsletter provides guidance on issues you face as a decision-maker, tells you about future training opportunities and shares the perspectives of others actively involved in making decisions. **The Decision-maker** refers you to relevant case law and invites your feedback on thought-provoking issues.

This focus of this edition is on the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (RMAA 2009), and the implications for you as a decision-maker. **The Decision-maker** includes an overview of the most relevant changes to the RMA, questions and answers on some of these changes, and the first decision of the Environment Court that has considered RMAA 2009.

## THE MAKING GOOD DECISIONS ADVISORY BOARD

The Making Good Decisions Advisory Board was established in 2003 to provide on-going input and advice on the development and implementation of the Making Good Decisions Programme. The Board also champions the programme, provides input and advice on any feedback, concerns and issues raised about the programme, provides feedback on the development of new course material and helps to address any complaints. The next Board meeting is on 3 December 2009.

New appointments to the Board have been made since the last edition of **The Decision-maker**. Dr Caroline Miller (Massey University) and Antoine Coffin (Auckland Museum) join the Board in December 2009. As a result of recent staffing changes, the Ministry is now represented by Gina Sweetman (Manager, Resource Management Practice) and Julian Jackson (Senior Analyst, Resource Management Practice).

## NEW TRAINING COURSE – WHO'S AFRAID OF THE RMA?

The Ministry has developed a one day introduction to the RMA, "*Who's Afraid of the RMA?*", which is delivered by SOLGM (Society of Local Government Managers). The training was developed, in part, as a response to requests from several participants in the Making Good Decisions foundation course who wanted a course that gave an introductory overview of the RMA.

Prior to taking the Making Good Decisions training, we recommend that anyone with limited experience with the RMA attends the new one-day training. The course has been designed for anyone involved with local government or interested in the RMA, including:

- council staff – resource management, building, subdivision, engineering, democracy services, administration, management, records, IT, strategic planning, finance, etc
- newly elected councillors and community board members
- long-standing councillors and community board members with a developing interest or involvement in RMA matters
- iwi authorities and hapū representatives
- developers and investors
- community and heritage groups.

Details of the course are provided on the SOLGM website at [www.solgm.org.nz](http://www.solgm.org.nz), or by contacting Sarah Myhill at the Ministry for the Environment on 0800 762 4636.

## CHANGES TO THE RESOURCE MANAGEMENT ACT

The Resource Management (Simplifying and Streamlining) Amendment Act 2009 (RMAA 2009) commenced on 1 October 2009. As decision-makers you will be affected by these changes to the RMA. The main changes to the decision-making processes are summarised below.

### Streamlining decision-making

Applicants, submitters and decision-makers were often faced with a duplication of process, costs and time delays resulting from applications having to both go through a council hearing and the Environment Court, when an appeal to the Environment Court was almost inevitable. There was also concern among applicants about the objectivity, skills and knowledge of elected decision makers, despite only 12 per cent of resource consent decisions being made by elected representatives.

Measures introduced by RMAA 2009 to address these issues include:

- providing the ability for resource consent applicants, requiring authorities or submitters to choose whether they have a notified application considered by elected representatives of the council, or by one or more independent commissioners selected by the council. The costs are borne by the requestor except where an applicant and submitter have both made a request (in which case only the applicant pays)
- providing the ability for applicants for resource consents and notices of requirement to request that their application be determined in the Environment Court, without the need to go through council hearing and decision-making processes, provided that the council has agreed (known as direct referral)
- removing the Minister of Conservation's powers of decision-making on restricted coastal activities. The current recommendation of the hearing panel to the Minister of Conservation now becomes the decision of the hearing panel. The Minister of Conservation has the right to appeal that decision.

### Improving plan making processes

RMAA 2009 has improved the plan making process by simplifying decision reports and reducing administrative costs. Of particular relevance to decision-makers is the amendment to council decisions on submissions. Decisions do not need to be made in respect of each individual submission, but are to be grouped according to plan provision or topics. Only persons with an interest greater than the general public, or representing a relevant aspect of the public interest can make further submissions.

### Improving resource consent processes

A number of changes have been made to the resource consent process, to reduce the time and costs faced by applicants and councils. Those of particular relevance to decision-makers are:

- simplifying resource consent decision requirements by removing the need for application material (including the Assessment of Effects) to be repeated or restated in officer or decision reports. What this means is that if a decision-maker agrees in full or in part to the material in the application they can simply cross-reference to and state that they agree with it
- changes to when a resource consent hearing has been concluded. Hearings are to be formally closed no later than 10 working days following completion of the applicant's right of reply.

### Improving national instruments

The time and cost for councils to implement national environmental standards (NES) and national policy statements (NPS) has been improved by:

- clarifying that councils must have regard to the relevant provisions of a NES when making decisions on resource consents, the effect of a NES on existing resource consent applications, and that councils are given an explicit ability to issue certificates of compliance where activities comply with the provisions of a NES
- providing that a NPS can direct councils to include specific objectives and policies in their policy statements and plans without the need to follow the formal plan change processes under Schedule 1 of the RMA. Councils must give public notice of the amendments within five working days after making them. Appeals on these changes are limited to points of law only.

## Trade competition

Resource consent and private plan change applicants can experience significant costs and delays as a result of having to defend their applications from challenges made by trade competitors, or frivolous or vexatious objectors. As a result of RMAA 2009, tighter restrictions are placed on submissions and participation in appeals by trade competitors. Decision-makers cannot take into account submissions or further submissions that are made by trade competitors of an applicant, unless they are affected by an environmental effect that is not related to trade competition.

## Environmental Protection Authority (EPA) and call-in processes

RMAA 2009 provides greater opportunity for decision-making to be removed from the local level, when decision-making is best exercised on a nationwide basis. This is implemented through the establishment of the EPA, new processes for proposals of national significance, and the direct referral process for resource consent applications.

More detailed information on RMAA 2009 is available on the Ministry's website at [www.mfe.govt.nz/rma/central/amendments/rma-simplifying-streamlining-2009.html](http://www.mfe.govt.nz/rma/central/amendments/rma-simplifying-streamlining-2009.html) and [www.epa.govt.nz](http://www.epa.govt.nz).

## QUESTIONS AND ANSWERS

The **Decision-maker** usually includes a question and answer section based on matters raised at recent recertification workshops. However for this edition we have provided relevant questions and answers for decision-makers that were raised at various Ministry for the Environment and New Zealand Planning Institute RMAA 2009 update workshops that were held around the country earlier this year.

**Q: RMAA 2009 is focused on process improvements – will this result in better quality decisions?**

A: The quality of decision-making is expected to improve with a higher standard of applications being lodged and reduced reporting requirements leading to decisions that are easier to read. It will take some time before these improvements, and the full benefits from them, are realised.

**Q: If a hearing is adjourned, does this affect the 15 working day decision time frame?**

A: No, the 10 working days applies from the day after the applicant's final right of reply (be it written or oral) ie, the hearing must be concluded no later than 10 working days after the right of reply has been exercised. Ideally there should be no adjournment after the applicant's final right of reply. Notice of the decision must be given within 15 working days after the end of the hearing.

**Q: Closing hearings within 10 working days will present practical difficulties. For example, scheduling a site visit can take time following the close of the hearing.**

A: Yes, the time frame will be tight in some cases. The onus will be on decision-makers to be organised, such as conducting a site visit, and take any other steps required before the final right of reply.

**Q: Is there anything to guide the council on how to make a decision on direct referral?**

A: There is no guidance in the RMA. It has been left open for councils to decide and set out their reasons for the decision.

**Q: Under s100A(4), does a council have to delegate the hearing and decision-making to commissioner/s only, or can a council appoint a mix of commissioners and elected members of the council?**

A: If requested, the council must appoint one or more independent hearing commissioner(s) who are not members of the council. It was intended that this would be an exclusive delegation to independent commissioners but the council would have the discretion to decide on the number of commissioners.

**Q: With the ability to request independent commissioners, will councils have processes to ensure Māori will be represented?**

A: It is up to the council to decide who the commissioners will be and the composition of the hearings panel. The selection of commissioners is often dependent on whether specialist knowledge is required. The Ministry for the Environment is developing best practice criteria for appointing Māori commissioners to hearing panels where decisions require consideration of Māori values. This guidance will be publicly available on the *Quality Planning* website.

## CASE LAW

The Environment Court decision on *Butterworth v Auckland City Council* (A090/09) is one of the first where the Courts have considered RMAA 2009, albeit indirectly as the appeal related to an appeal to a resource consent decision made prior to RMAA 2009. The case addressed the removal of blanket tree protection rules in district plans (s152 of RMAA 2009). It was a successful appeal by Butterworth against the refusal of ACC to grant restricted discretionary consent for the removal of a large oak tree protected under a general tree protection rule.

The Court found that ACC's decision was "notable for its seemingly unbending focus on the alleged importance of retaining the tree", which the Court considered was too big for its setting. The Court also noted that the plan provisions contained "nothing of the flavour of matters raised by Part 2 of the Act, for instance, the health and safety of people, and social and economic wellbeing".

Under 'any other matters' (s104(1)(c) of the RMA), the Court had regard to s76 of the RMA, by which rules in district plans restricting or prohibiting tree felling in an urban environment must be revoked from 1 January 2012. The Court was conscious that it should not give the change instant full effect, as that would be contrary to the intention of Parliament for a lead-in time. "Nevertheless, for practical purposes in the current situation, Ms Butterworth having taken the trouble to bring an application for the removal of the tree and to appeal the refusal of consent, and in circumstances where we believe consent should be granted anyway on other grounds, it would not seem to us to be sensible to make her wait and continue to suffer the problems for the sake of the limited benefits for the amenity of the locality during two years."

The Court determined that the appellant was permitted to remove the tree if she planted a kowhai in mitigation.

## RE-CERTIFICATION

### Does your certificate expire on 30 June 2010 or 31 December 2010? Do you want to maintain your certification?

There will be recertification courses in early 2010. If your certificate expires 30 June 2010 or 31 December 2010 you will need to attend the courses in the first half of the year, as recertification courses will not be offered in the second half of 2010. The CCE aims to contact all decision-makers whose certificates are coming up for expiry. If your contact details have changed, please let the CCE know.

Two options are available:

<b>OPTION A (Panel Members)</b>	Re-certification for those who plan to continue as members of hearings panels. This course is at a difficulty level similar to the original training. It is for decision-makers who primarily act as hearings panel members, rather than as the chair of hearing panels. <b>Courses for panel members will be held in the North and South Islands in April/May 2010.</b>
<b>OPTION B (Chairs)</b>	Re-certification for those who chair hearings, or who would like to develop skills as chairs. This course is more advanced. The assignments are significantly more demanding, and there are no opportunities for resubmission. <b>A course for chairs will be held in Auckland in April/May 2010.</b>

Please note that the re-certification round will only be open to those whose certificates expire on 30 June 2010 or 31 December 2010.

If you are successful you will be issued with a new certificate that is valid for a further **five** years. If you obtain re-certification under Option B your certificate will include a 'chairing endorsement'. **You aren't legally required to have a 'chairing endorsement' to chair hearings, but the course will help you develop or maintain the skills you need to perform this role effectively.**

For more information, call Petteena McOnie at the CCE on (09) 373 7599 x 89695, email [p.mconie@auckland.ac.nz](mailto:p.mconie@auckland.ac.nz) or visit CCE's website at [www.cce.auckland.ac.nz/rma](http://www.cce.auckland.ac.nz/rma)

## DO YOU KNOW ANYONE SEEKING CERTIFICATION?

Certification workshops will be held in Auckland, Wellington and Christchurch in March/April 2010. For more information, call Petteena at the CCE (see above for contact details).

### MORE INFORMATION

To enrol for training and certification under the Programme: Petteena McOnie, Centre for Continuing Education, Auckland University, phone (09) 373 7599 x 89695 or email [p.mconie@auckland.ac.nz](mailto:p.mconie@auckland.ac.nz)

For general enquiries about the Programme: Julian Jackson, phone (04) 439 7486 or email [julian.jackson@mfe.govt.nz](mailto:julian.jackson@mfe.govt.nz)

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