



THE DECISION-MAKER

APRIL 2007

A NEWSLETTER FOR MAKING GOOD DECISIONS PROGRAMME CERTIFICATE HOLDERS

Welcome to the second edition of **The Decision-maker**, the Ministry for the Environment's newsletter for certified RMA decision-makers. Published three times a year, the newsletter provides guidance on issues you face as a decision-maker. It 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.

INTEREST FROM AUSTRALIA

When we designed the Making Good Decisions Programme we looked at how Australian state governments and local government associations were up-skilling their local decision-makers in environment and development matters. At the time, Australian effort focused on training alone, and did not extend to testing and certifying successful participants.

Because of issues around standards and good practice in Australia, this interest is now being reciprocated. The Victoria, New South Wales, Western Australian, South Australian, and Tasmanian State Governments are taking an interest in our Programme, and it was a topic for discussion at the Australasian Local Government and Planning Minister's Council meeting in Auckland last month.

Our neighbours are grappling with difficult issues, including a general shortage of hearing commissioners, variability in the quality of decision-making, and allegedly corrupt practices. The New South Wales Independent Commission Against Corruption has several active investigations into the public sector underway at any one time. For more information visit: www.icac.nsw.gov.au/go/investigations-and-inquiries/investigations

ASKING OFFICERS TO COME UP WITH REASONS FOR YOUR DECISIONS

Occasionally we hear reports that decision-makers are asking officers to come up with reasons for their decisions. This might happen in situations where decision-makers are choosing not to accept the recommendations of council staff, who are then asked to formulate reasons that are 'suitably framed in the context of the RMA', or some other such pretext.

This practice suggests decision-makers are not taking responsibility for the role they have been appointed to and puts reporting officers and other staff in an unfair and unprofessional position. Council staff may be involved in *recording* the reasons for a decision but should *never* be asked to come up with those reasons.

QUESTIONS OF PERCEIVED BIAS

A recent Environment Court decision includes an interesting perspective on perceptions of bias where decision-makers are concerned (*Muriel Roake Barefoot v Auckland CC and Mobil Oil NZ Ltd. and PR & TH Gardner Halt All Attacks on Residential Areas by Mobil Inc* 15 December 2006 A160/06). The appellant expressed concern that elected members from Auckland City Council, who had made a decision on a resource consent application by Mobil Oil NZ Ltd, had previously attended a presentation by the company. In its decision, the Court stated at para 21:

"We are not suggesting that actual bias was present in this case, but public perceptions of bias can only decrease confidence in the Council's decisions, and increase the prospects of appeals to this Court. Further, for resource consent applications made after 10 August 2005 (which this was not), the Court is required by s 290A to have regard to the Council's decision, and the weight that the Court attaches to such decisions could well be affected where the Council's impartiality can be attacked in this way."

EXPERIENCED DECISION-MAKER REFLECTS ON HIS ROLE

Alan Watson is a planning consultant who often sits at hearings as an independent commissioner. Over the past 14 years he has sat at some 400 hearings and helped 25 local authorities in that role. Alan is a member of the Advisory Board we established to help develop and deliver the Making Good Decisions Programme. Over the past two years the Board has provided us with invaluable advice on the Programme, and an insight into the decision-making role. Here Alan speaks about the role he and his fellow decision-makers play.



Alan Watson

DM: What do you most enjoy about the decision-making role?

Alan: Firstly, the opportunity to see the whole picture, while working through legal submissions and technical and lay evidence, and bringing together a range of competing interests to arrive at a reasoned decision. Secondly, the opportunity to be involved in a variety of issues, including off-shore sand mining at Mangawhai, the wastewater outfall at Gisborne, and underground gold mining at Waihi.

DM: What are the greatest challenges you face in performing this role, and how do you deal with them?

Alan: Perhaps the greatest challenge is to provide a decision that is based upon sound reasons, and in doing so, dealing with a vast array of information to work out which is the most relevant for that decision. This of course needs to be done in light of the considerations the decision-maker must have in relation to the RMA. I take time to review the information from the hearing and talk with others on the panel; often gaining a greater appreciation of the various points of view in doing so.

Another challenge is ensuring a fair and equitable process is followed at the hearing. That is not always easy, as lay people often feel disadvantaged when other parties are represented by professionals. I deal with this by ensuring lay submitters feel comfortable with seating arrangements and opportunities to speak. I also make some opening remarks that clearly set out the process to be followed.

DM: You often sit on hearings panels with other members who are councillors. What qualities can they bring to the role?

Alan: Councillors always bring local knowledge which can help the process and they generally have a good feel for what is best for the community. Decision-making is well-served by involving people from a variety of backgrounds; often the case with councillors. Councillors attend a variety of meetings which can mean they develop an ability to listen and decide who is making sense and is able to justify what they say. That is an ability that can be directly and effectively applied to RMA matters. Many councillors have considerable experience in RMA hearings and decision-making.

DM: In your experience, what difficulties have you found other panel members having to face?

Alan: Some panel members bring preconceived notions of what they think is the correct way to decide issues. This is often reflected in the questions they ask hearing participants but can be overcome with time and some advice. Some panel members also find it difficult to separate their political role, in serving the interests of the community, from a decision-making role that necessarily embraces other considerations. Sometimes questions are asked seemingly for the sake of it rather than to help the panel better understand that particular presentation. Sometimes you simply do not need to ask questions.

DM: How can those decision-makers with less experience grow into their role? What opportunities for professional development can and should be made available to decision-makers outside and beyond participation in the Making Good Decisions Programme?

Alan: Participating in the Programme is a good start. It provides a grounding for the role; something decision-makers have remarked has not been available to them in the past. It enables them to talk with decision-makers from other councils and to compare notes. The Programme does not however have all the answers. The Ministry will need to continue to provide educational opportunities to improve hearings and decision-making processes. In my view, there does need to be some follow-up to be sure people are continuing to grow in the role.

Outside the Programme, councils and individual decision-makers need to take responsibility for improving performance. Councils can ensure that through careful appointments to panels less experienced councillors can learn from the more experienced. One always continues to learn from working alongside others irrespective of their background and experience. Decision-makers should also consider observing a hearing at another local authority, and a session at the Environment Court, to see where council decisions can end up and how they are scrutinised by the Court.

A COMMISSIONER'S PERSPECTIVE ON ROLES AT HEARINGS

John Milligan is an experienced independent commissioner and former Christchurch barrister specialising in RMA matters. He has contributed a series of articles to the Resource Management Bulletin under the banner *A Hearings Commissioner's Role*. The articles reflect his approach to the role and make interesting reading.

The articles focus on *Hearings and Site Visits* (2006 6 BRMB 142); *Experts, Evidence and the Nature of the Inquiry* (2006 6 BRMB 156); *Section 42A Reports* (2006 BRMB 6 181); and *Control of Hearings* (2006 6 BRMB 194). The Resource Management Bulletin is published by LexisNexis. Non-subscribers can get copies of these articles by emailing judgements@lexisnexis.co.nz or phoning **0800 800 986**. We welcome your views on the matters raised in these articles.

DEALING WITH COMPLAINTS ABOUT PERFORMANCE

The Ministry takes an active interest in the performance of certified decision-makers. We would be concerned about the actions of any certificate holder who brings the Programme into disrepute.

We field complaints from various sources; usually parties to hearings. We seriously consider such complaints and deal with them in a systematic, transparent and fair manner. The Ministry refers – and follows up – complaints to the council concerned.

This partnership-type approach to dealing with complaints is something we are trialing and reviewing. Other options for the future might include a more formal disciplinary hearing before a suitably independent board, and/or the prospect of corrective action or sanctions (such as cancelling certification).

Councils are also legitimately concerned about the impact of the actions of their decision-makers on their own reputations. Hearings panels generally work to standing orders that may apply in and outside of the hearing forum. It is worth checking to see how the standing orders you work to deal with complaints, behaviour and conduct.

GETTING AN INDEPENDENT VIEW ON YOUR DECISION-MAKING

We are helping Local Government New Zealand develop a service which will allow councils, hearings panels or individual decision-makers to request frank, constructive evaluations of their performance. This elective, self-funding service will be available from mid-2007. For more information, or to register your interest, phone Irene Clarke at LGNZ on **(04) 924 1210** or email irene.clarke@lgnz.co.nz.

NEW ACCREDITATION REQUIREMENTS TO TAKE EFFECT

It is up to consent authorities to appoint decision-makers to hearings panels, taking into account the accreditation requirements of the RMA. The Resource Management Amendment Act 2005 introduced new requirements for the accreditation of panel members at local hearings into resource consent applications, notices of requirement, and requests for plan changes.

The requirement for chairs of hearing panels to be accredited has already taken effect. After 10 August 2007, a majority of the members of any hearings panel will also need to be accredited.

The Minister for the Environment has approved the successful completion of the Making Good Decisions Programme as a qualification for accreditation.

ANOTHER STUDY SHOWS TRAINING IMPROVES DECISION QUALITY

A study commissioned by the UK's Department for Communities and Local Government has found better and more regular training for local authority councillors would improve the predictability and quality of local decisions. It is interesting to compare the context within which English and New Zealand decision-makers operate.

The final report, *Councillor Involvement in Planning Decisions* (January 2007) is available for at:

www.communities.gov.uk/pub/485/CouncillorInvolvementinPlanningDecisionsFinalReport_id1505485.pdf

WHAT HAPPENS WHEN YOUR CERTIFICATE EXPIRES?

All certificates awarded under the Programme expire after three years. For those decision-makers who attended the first workshops in February/March 2005, the expiry date is 30 June 2008. The Ministry is developing two options for decision-makers who want to be re-certified on expiry:

1. For those who plan to continue as members of hearings panels, attendance at a one-day workshop and a simple reassessment of understanding and reflection on experience **will be required**.
2. For those who want to continue as chairs, or who would like to develop skills as chairs, attendance at a specialised one to two day workshop and completion of assignments and reflections **will be offered**. More experienced chairs will not be expected to attend the first day of the workshop, which is aimed at providing the inexperienced with necessary exposure to the role.

Those wishing to be re-certified **must** choose one of these two options. Participants gaining certification under either option will receive a new certificate valid for a further three years.

The requirement for **all** certificate holders to engage in some form of further training reflects the Programme's emphasis on continuing professional development. The creation of training options caters more effectively for the range of experience found among decision-makers.

Training under both options is likely to be offered in April/May 2008. We welcome any perspectives you may have on this approach.

THE NEXT MAJOR ROUND OF TRAINING

A crop of newly elected councillors will be seeking certification after the October 2007 elections. Rounds of training under the Programme will be held late in 2007 and again in February/March 2008 to cater for this demand.

OPPORTUNITIES FOR FURTHER, SPECIALISED TRAINING

The Centre for Continuing Education at the University of Auckland delivers the Programme on the Ministry's behalf. Jan Crawford is one of the training facilitators. Together, they are working to develop further, specialised training for local decision-makers and RMA practitioners, under the banner *Putting the RMA into Practice*.

Short courses for decision-makers titled *Writing Good Decisions and Making Good Policy* will be offered during 2007. The elective courses will be of interest to those decision-makers and practitioners who wish to develop a more detailed understanding of decision writing, and policy and plan making respectively.

The *Putting the RMA into Practice* courses complement the training offered under the Making Good Decisions Programme.

For more information on the courses, contact Anne Cave at the Centre for Continuing Education by phoning **(09) 373 7599 x 89541** or email a.cave@auckland.ac.nz.

TAKING THE FEAR OUT OF HEARINGS

The nervousness many parties feel when appearing at a hearing and speaking in public can be significant. Hearings panels should do all they reasonably can to make parties feel at ease. Often, agendas distributed by councils in advance of hearings contain no guidance for parties on the process, form and conduct of hearings. Including such guidance can help parties feel more comfortable in advance of a hearing.

As part of a package of information for the public on the RMA, we have released two booklets on the hearing process: *Appearing at a Resource Consent Hearing* and *Appearing at a Council Plan or Plan Change Hearing*. Councils can distribute these with hearing agendas, make them available at hearings, or adapt them for their own use.

Copies of the booklets can be downloaded from www.mfe.govt.nz/publications/rma/everyday/index.html or you can request printed copies by emailing publications@mfe.govt.nz or phoning **(04) 439 7546** (24-hour answer phone).



MORE INFORMATION

To enrol for training and certification under the Programme: Libby Passau, Centre for Continuing Education, Auckland University, phone (09) 373 7599 x 88532 or email l.passau@auckland.ac.nz

For general enquiries about the Programme: Mark Leggett, Ministry for the Environment, phone (09) 985 4811 or email mark.leggett@mfe.govt.nz

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