



# THE DECISION-MAKER

AUGUST 2010

A NEWSLETTER FOR MAKING GOOD DECISIONS PROGRAMME CERTIFICATE HOLDERS

Welcome to the eighth 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. This will be the last printed version of The Decision-maker as we are moving to electronic distribution only for subsequent issues.

In this edition:

- An update on the review of the Making Good Decisions (MGD) Programme
- The implications of new resource management discount regulations
- Guidance on the use of Māori commissioners
- The role of an expert witness
- RMA hearing adjournments
- The Making Good Decisions Advisory Board
- Training opportunities.

## UPDATE ON MAKING GOOD DECISIONS REVIEW

### Why the review is needed

A major review of the MGD programme is currently underway to improve the effectiveness and relevance of the programme. The MGD programme has received positive feedback from the Resource Management Law Association in the April 2010 issue of the Resource Management Journal. The Environment Court has informally reported that the quality of decisions from council hearings has improved significantly. The focus for the MGD programme is now on continual improvement of decision-makers.

A comprehensive review of the MGD programme has not been undertaken since its inception in 2005. A significant review of the programme is required to ensure it is up to date and provides effective training in light of continually evolving planning practice, law and environmental issues. The review is happening in two phases.

### Phase 1 – Māori Values and World Views

Phase 1 will produce a Māori Values and World Views Supplement to the MGD programme workbook and integrate Māori values and world views into the foundation training course. New material will be used in the December 2010 round of foundation workshops.

Phase 1 projects respond to feedback from Māori participants that indicated the MGD programme was lacking Māori content and considerations. Non-Māori participants also suggested more information was required to consider Māori values in decision-making. The supplement will support Module 2 (Considerations relating to Māori) of the MGD workbook.

### Phase 2 – Wider review

Phase 2 of the review has started and will involve a broader and more comprehensive review of the programme including the content and structure, publications, course materials, assessment methods, training design and workshop delivery. We will also explore whether MGD should be extended to cover the plan and policy development, renew and change process.

If you have any queries or feedback regarding the review, contact Sarah Myhill on (04) 439 7449 or email [sarah.myhill@mfe.govt.nz](mailto:sarah.myhill@mfe.govt.nz)

## RESOURCE MANAGEMENT (DISCOUNT ON ADMINISTRATIVE CHARGES) REGULATIONS

The Resource Management (Simplifying and Streamlining) Amendment Act was enacted in September 2009 and introduced new sections 36AA and 360(1)(hj) to the RMA.

Section 36AA requires councils to provide a discount on administrative charges imposed under section 36 in circumstances where a resource consent application is not processed within the timeframe(s) set out in the RMA. The Resource Management (Discount on Administrative Charges) Regulations 2010 (the Regulations) were passed on 21 June 2010 and came into effect on 31 July 2010 to provide a 'default' discount.

Councils are required to adopt either the discount set out in regulation (the 'default' discount), or choose to develop their own policy that is more generous than the Regulations. The default discount in the Regulations is 1 per cent (1%) per day, up to a maximum of 50 working days for resource consent applications not processed within timeframes in the RMA. This amount applies to both notified (including limited notified) and non-notified consent applications.

### The charges

The discount applies to administrative charges imposed under section 36 and includes:

- the total charges an applicant would pay the local authority to receive, process and grant (or refuse) a consent application
- the total charges due from a consent holder for an application to change or cancel a consent condition(s).

These total charges include any administrative charges that would be charged to the applicant. We anticipate that councils will be looking more closely at their agreements with independent commissioners, particularly in respect of timeframes.

### The timeframe and hearings

The time during which a hearing is held does not count towards the total timeframes under the RMA. The clock is stopped from the working day before a hearing begins until the day after the hearing is closed. The time in which the clock is stopped for a hearing includes any days of adjournment in between the beginning and end of the hearing. As the clock re-starts the day after the hearing is closed, it is likely there will be more focus on making and writing decisions in a timely manner.

The Ministry has produced guidance material to accompany the Regulations. This is aimed at council resource management professionals; however, you may find it useful. The guidance can be found on the Ministry website at <http://www.mfe.govt.nz/publications/rma/discount-on-administrative-charges-regulations/index.html>

## GUIDANCE ON THE USE OF MĀORI COMMISSIONERS

There may be circumstances when Māori commissioners should be appointed, such as for proposals to make use of natural resources including water, water bodies and geothermal, or which affect cultural and heritage assets, or are otherwise based on Māori values. The Quality Planning Guidance Note on the use of Independent Commissioners has been updated to give advice on the use of Māori commissioners and can be visited here:

[http://www.qp.org.nz/plan-development/commissioners.php#\\_Guidance\\_on\\_the](http://www.qp.org.nz/plan-development/commissioners.php#_Guidance_on_the)

## ROLE OF AN EXPERT WITNESS

The role of an expert witness is described in modules three and eight of the MGD Workbook. These descriptions clearly outline the need for 'clear and distinct roles' for participants involved in the hearing process. Clarifying these roles helps create a fair hearings process and it is important these distinct roles are upheld throughout the hearing. There may be times when participants misunderstand or are unaware of the different roles of submitters and expert witnesses, and may need to have these distinctions drawn to their attention.

The particular role of an expert witness is to provide objective, accurate evidence to the hearing committee. This purpose is clearly outlined in the Environment Court's 'Practice Notes – Expert Witnesses – Code of Conduct' which can be found at the website below.

<http://www.courts.govt.nz/courts/environment-court/legislation-and-resources/practice-notes/expert-witness.html>

Specifically, the expert witness must have an overriding duty to help the decision-makers impartially on relevant matters within the expert's area of expertise, and cannot be an advocate for the party who engages the witness. An expert witness should comply with expectations set out in the Environment Court Practice Note. While this practice note does not strictly apply to council hearings, it is considered good practice for council hearings to follow and its use is encouraged. If an expert witness does not meet these obligations, it can be a factor in the weight accorded to their evidence. If these rules are not observed it also makes the evidence and final decision vulnerable to appeal.

This matter was brought to the attention of the Environment Court in 2008 in *EM Briggs & Ors v Christchurch City Council*. The decision (C045/08) highlighted an important issue relating to the role of expert evidence; whether experts who were also appellants could give expert evidence in support of their own appeals.

Although the Court observed in *EM Briggs & Ors* that the witnesses had not done anything untoward in the preparation of their evidence and that it was likely that their evidence would have been similar if given for a third party to which they had no involvement, the Court came to the conclusion the privilege given to expert witnesses to give independent opinion evidence is one of importance.

The Court concluded it needed to “draw a line in the sand” on this issue given the tendency of lay witnesses to give opinion evidence and experts to give evidence in their own cases from time to time. The Court held it was “inappropriate as a matter of principle for expert witnesses to give evidence as experts in their own case. At the very least it will mean that little weight should be given to their evidence where there is a conflict with other witnesses”. As a result, the Court considered little weight should be given to the expert evidence of the appellants.

Therefore, applications and appeals even if made by expert witnesses should be supported by non-party experts to ensure full weight can be given to the expert opinion by avoiding any perception of partiality. In essence, an applicant or submitter should not provide their own expert evidence to support their own applications or appeal. Hearing committees should ensure participants are not under the impression they can be expert witnesses for their own application or submission, and if they insist on doing so, that the committee is clear that little weight will be given to their evidence.

## **RMA HEARING ADJOURNMENTS**

**Written by Alan Watson – Independent Hearings Commissioner (North Shore City) and former founding member of the MGD Advisory Board**

Recent experience at hearings at various councils around the country has shown an increasing propensity for adjournments of hearings rather than closures for various reasons.

One reason is where adjournments may be used to settle differences between parties. An example is when seeking to obtain agreement on recommended conditions of consent. The decision-makers may see an opportunity for an agreement between the parties on key conditions which will then be more effective in practice as part of a consent. The parties may see that the decision-makers will make a decision that will not favour one or other party, or a decision that will be a compromise, and that the outcome may be more effective if they work together to resolve a difference.

An adjournment has to be carefully managed given the potential for the process to have an unsuccessful outcome. It is wise for an adjournment to be on the basis of a memorandum to the parties so that no one is in any doubt as to what is happening, what the individual parties are expected to do and to set out a time schedule that ensures the described actions are taken in a timely manner. Clearly too, if the reason for the adjournment is found to be unachievable, the decision-makers need to be in a position to promptly make their decision.

While such an approach clearly has its pitfalls, if carefully managed it can result in more effective decision-making with resolution of matters at the council level rather than having some parties aggrieved by the RMA hearings process and perhaps having to proceed to an appeal to settle differences.

Another reason for adjourning is to allow panel members time to review the evidence and discuss whether they have all the information they believe is necessary for a decision. Such adjournments should not be used to unnecessarily delay the preparation of decisions.

With adjournments for any reason, decision-makers need to also be conscious of the time limits for completion of an adjourned hearing (Section 103A RMA). The hearing must be concluded no later than 10 working days after the right of reply has been exercised. That may mean deciding on an adjournment before presentation of the right of reply.

## THE MAKING GOOD DECISIONS ADVISORY BOARD

The Making Good Decisions Advisory Board was established in 2003 to provide ongoing 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 Board meets up to three times a year.

There have been some recent changes to the composition of the Board. Fiona Illingsworth (Department of Internal Affairs) has departed and Dr Caroline Miller (Massey University) and Antoine Coffin (Auckland Museum) have joined. Current Board members are: Mark Farnsworth (Northland Regional Council), Peter Frawley (Tauranga City Council), Adrian Ramage (Porirua City Council), Irene Clarke (Local Government New Zealand), Paul Rogers (Adderley Head Lawyers), Bob Nixon (Plaint Associates) and Gina Sweetman (Manager, Resource Management Practice). You can contact any of the Board members with any feedback, concerns or issues that you have regarding the programme. The Ministry for the Environment hosts Board meetings.

## OPPORTUNITIES FOR FURTHER SPECIALISED TRAINING

**Centre for Continuing Education, University of Auckland** – *‘Writing Good Resource Management Decisions’*: A Workshop for Councillors, Independent Commissioners and RMA Practitioners – Auckland, 2 September and 5 November; Wellington, 8 October; Christchurch, 15 October.

A one-day course to examine the features of well-reasoned and well-written decisions and learn how to:

- write a clear decision that conforms to the requirements of the RMA and the needs of both the professional and lay audience
- organise large amounts of complex material into an appropriate format
- clearly communicate the reasoning behind the decision.

Further information can be found at the following website:

<http://www.cce.auckland.ac.nz/uo/rmaputtingthermaintopractice>

**SOLGM Opus Business School** – *‘Who’s Afraid of the RMA?’* – Auckland.

This one-day training programme is designed to meet the needs of anyone who wants a basic understanding of the RMA. This is good preparation for those who have little prior knowledge or experience of the RMA but who wish to undertake Making Good Decisions training. Further information:

[http://www.solgm.org.nz/tools/events/details.aspx?SECT=Business\\_School\\_Events&ID=213](http://www.solgm.org.nz/tools/events/details.aspx?SECT=Business_School_Events&ID=213)

**RMLA 2010 Conference** – *‘Sustainable freshwater management – Are we there yet?’* – 30 September–2 October 2010, Christchurch Convention Centre.

This conference takes a ‘hard look’ at the issues impacting on sustainable management of our freshwater resource. There will be a workshop on the MGD programme investigating current issues faced by commissioners including compliance with timeframes, monitoring and management of commissioner performance, and the best practice guide for commissioners currently being developed. Further information:

[http://www.rmla.org.nz/pop\\_up\\_events.asp?record=538](http://www.rmla.org.nz/pop_up_events.asp?record=538)

**Local Government Online – Te Mātāpuna Conference** – *“Nā Kohuki, ko wheriko whakamua”* – *“Reflect on the past to glimpse the future”* – 11–13 November 2010, Hawke’s Bay Opera House, Hastings.

What does the RMA Amendment Act mean now for Māori? How can councils better help iwi through their Treaty negotiations? If hapū in your area are now involved in their Treaty settlement process, or have recently settled, then your key elected members and staff may benefit from attending Te Mātāpuna 2010. The conference will also add value through sharing and listening to presentations from officers who are engaged with Māori in current work programmes. Further information: [http://www.localgovt.co.nz/site/LGOL/Events/Te\\_Matapuna\\_Conference\\_13\\_Nov.aspx](http://www.localgovt.co.nz/site/LGOL/Events/Te_Matapuna_Conference_13_Nov.aspx)

### MORE INFORMATION

To enrol for training and certification under the Programme: contact 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: contact Julian Jackson, phone (04) 439 7486 or email [julian.jackson@mfe.govt.nz](mailto:julian.jackson@mfe.govt.nz)

For enquiries about the Programme review: contact Sarah Myhill, phone (04) 439 7449 or email [sarah.myhill@mfe.govt.nz](mailto:sarah.myhill@mfe.govt.nz)

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