



# THE DECISION-MAKER

JUNE 2008

A NEWSLETTER FOR MAKING GOOD DECISIONS PROGRAMME CERTIFICATE HOLDERS

Welcome to the fifth 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.

## ENROLMENTS OPEN FOR RE-CERTIFICATION

**Does your certificate expire on 31 December 2008? Do you want to maintain your certification?** Enrolments are again open for re-certification. The University of Auckland's Centre for Continuing Education aims to contact all decision-makers whose certificates are coming up for expiry. If your contact details have changed, please let the Centre know.

As indicated in the previous **Decision-maker** (March 2008), two options are available:

<b>OPTION A:</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 act as hearings panel members but don't intend to chair.
<b>OPTION B:</b>	Re-certification for those who want to continue as chairs, 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. Enrol if you are chairing now or there is a likelihood that you will chair in future.

Please note that the current re-certification round is only open to those whose certificates expire on 31 December 2008. Opportunities will be offered to other decision-makers in advance of the expiry of their certificates.

Both courses were well received, but a few improvements have been made in response to feedback from participants in the previous round.

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

## TRAINING FOR LAWYERS ON HEARINGS

The New Zealand Law Society's Continuing Legal Education Board (NZLS CLE) is holding a seminar entitled *Preparing and Running an RMA Hearing* in early August 2008, in the four main centres. Presented by experienced RMA lawyers and commissioners, the seminars will provide insights on both hearing procedure and substantive law. While the seminars are aimed primarily at members of the NZLS, practitioners from other disciplines can register and attend subject to paying a higher fee. For more information, please contact the NZLS CLE on 0800 333 111 or visit [www.lawyerseducation.org.nz](http://www.lawyerseducation.org.nz)

## ADMISSIBILITY OF EXPERT EVIDENCE

In *E M Briggs et al v Christchurch City Council* (C 45/2008), the Environment Court has made some interesting observations on expert witnesses and evidence they choose to give on their own account. The Court looked at the implications of the legal maxim *Nemo in sua causa aequus* (loosely meaning *nobody is a fair judge in their own cause*). The Court made reference to Clause 2 of its Code of Conduct for Expert Witnesses:

2. *An expert witness is not an advocate for the party who engages the witness*

Para 246 of the Court's decision reads:

*The Court has reached the view that it needs 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 cause from time to time. We consider that it is 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. It also impacts upon the administration of justice because if some parties are allowed to give opinion evidence in their own cause, they may be seen as getting preferential treatment before the Court compared with other parties.*

## HEARINGS AND DECISION-MAKING ON PLANS

The Programme focuses on resource consent decision-making, although many of the principles covered in the Programme apply to decision-making on policy and plan-making matters. Hearings and decisions on plans do have some unique characteristics. The Court of Appeal accepted the distinctive nature of the decision-maker's role in *Coromandel Watchdog of Hauraki Inc. v Ministry of Economic Development and NZ Mineral Industries Assn et al* CA285/05 [2007] NZCA 473:

*The local authority considering a plan change acts as a planning authority, rather than as a hearing authority as it does when considering resource consent applications. The latter role is a narrower, quasi-judicial role ... (para 22)*

There are also numerous practical and logistical issues that arise in plan hearings, such as over the grouping of submission points, the level of support expected from council officers, and consistency in decisions across plan provisions.

The Ministry has commissioned the preparation of practical guidance on plan hearings and decision-making. Christine Foster from Environmental Management Services will lead this work. Christine will be familiar to some of you as a workshop presenter for the Programme. This guidance will be provided to all certificate holders in written form, but may in future form the basis for engagement in continuing professional development training under the Programme.

## QUESTIONS AND ANSWERS

At the re-certification workshops, participants have the opportunity to pose any questions about practice, consider them in break-out groups, and offer up to the wider group options, solutions and perspectives. These roundtable discussions are greatly valued by participants. In this and future editions of the **Decision-maker** we will feature a selection of Q & As arising out of the workshops.

Please bear in mind that the responses are not Ministry policy, but represent the collective wisdom of participants, and generally accord with principles of best practice.

**Q: We all know that parties at the hearing are not entitled to cross-examine or otherwise ask questions of each other, but that in some situations, requests for points of clarification may be appropriate. Yet I find that some parties, when allowed to seek a point of clarification, use it as opportunity to aggressively question other parties. Is there any real difference between a 'question' and a 'point of clarification'?**

**A:** There is a distinct difference. Points of clarification are solely a means by which parties may seek to clarify a specific fact, in order to better understand a situation and on that basis more clearly articulate their own position, case or opinion. Requests for points of clarification must be directed to the chair who determines whether they are appropriate. The chair must maintain control and avoid situations where parties engage in cross-examination, or seek to badger or intimidate each other. A 'point of clarification' might be phrased as "Did the submitter say ...?" whereas a question might be "Why did the submitter say ...?"

**Q: What happens if, half-way through a hearing by three independent commissioners appointed under section 34A, a panel member is unwell and cannot continue?**

A: Options for the panel include: (1) adjourning the hearing until the member has recovered, (2) abandoning the hearing, or (3) continuing the hearing with two members. It is not appropriate for a member to be involved in making a decision if that member has not been present when some of the evidence was presented. Continuation may also only be appropriate if the quorum can be met, the chair has a casting vote (in the event of deadlock), and the member concerned does not have some type of expertise that necessitates their presence. Ideally, these matters need to be established before the hearing and potentially involve checking the delegations available to the chief executive or other council officers to make decisions under section 34A (for instance, to grant a casting vote where up to that point one is not in place). This would avoid a situation where adjustments of this nature have to go to full council meetings. In the event that a chair does exercise a casting vote, that fact and the reasons why should be recorded in the decision.

**Q: Aren't site visits a vital means for testing expert testimony? It's not until I visit a site and experience for myself things like traffic volumes on nearby roads and odour from an industrial operation that I can form a realistic opinion about the validity of a traffic assessment or an air quality report.**

A: This raises another question: is the purpose of a site visit (A) to help decision-makers understand the context for an application and better test the evidence or, (B) to gather 'facts'? Decision-makers should avoid substituting their own opinions (perhaps gleaned from a site visit) for those of experts. Of course, it is appropriate to test the assumptions and parameters on which professional reports and expert testimony are based eg, When were traffic counts taken? How often were odour assessments undertaken, and from which locations? Bear in mind that a brief site visit is just as likely to be subject to the same limitations.

**Q: What if, as a panel member or sole independent commissioner, I come to the conclusion during the course of a hearing on an application that was notified on a limited basis, that it should have been fully publicly notified?**

A: This is something to draw officers' attention to if possible as a result of your preparation before the hearing. If that's not practicable, then you have several options. You could:

- (1) explore the reasoning for limited notification with the reporting officer during the hearing
- (2) approach the chair or a council staff member during recess, and / or
- (3) if necessary seek an adjournment and explain your reasons for that decision to the parties.

Having resolved the matter, you could then either:

- (4) reconvene the hearing confident that you can continue, or
- (5) close the hearing and decline the application under section 104(3)(d) with an explanation that the lodgement of a new application might be necessary together with either full notification or the identifying and notifying of other affected parties.

It is important at every point to maintain an open, transparent process.

**Q: How should I deal with a submission from a lay witness in the form of mime, poetry or dance?**

A: Any lay evidence should be managed in accordance with the same principles, however it might be delivered. Does it involve the presentation of recollection and experience or, less appropriately, opinion? Does it illustrate a point that is relevant in terms of the RMA and the application in hand? Is it presented succinctly? Can it be understood by the panel and other parties? Decision-makers are expected to 'avoid unnecessary formality' (section 39(2)(a)) but must also establish a procedure that is 'appropriate and fair' (section 39(1)(g)) and 'recognise tikanga Maori' (section 39(2)(b)).

**Q: Before a hearing on a complex scientific issue, council staff seek to arrange a briefing on scientific terms that we are likely to encounter during the presentation of expert evidence. Is this appropriate?**

A: To protect the transparency of the process and avoid perceptions of bias, such a briefing should really be provided at the hearing. In arranging the hearing schedule, the chair could propose such a briefing with the agreement of the parties. Ideally, the person or persons providing the briefing should not be a party to the hearing. On the other hand, it may be tempting to make use of the assembled expert witnesses to co-present the briefing, although you would certainly want to **invite comment from parties**. Such a briefing is likely to assist all parties (particularly lay submitters), and might help reveal any differences in interpretation among expert witnesses.

## DO YOU KNOW ANYBODY WHO IS SEEKING CERTIFICATION?

Enrolments have opened for those seeking certification for the first time. This opportunity follows on from the 'major' certification round held after the last local body elections, and is intended to cater for unmet demand. A limited number of workshops will be held in Auckland, Wellington and Christchurch. For more information, call Petteena at the Centre (see 'More information' below for contact details).

## OPPORTUNITIES FOR FURTHER, SPECIALISED TRAINING

The Centre for Continuing Education is offering a series of short, elective, specialist courses for local decision-makers and others, under the banner *Putting the RMA into Practice*. The courses are now open for registration and include:

- *Writing Good Decisions: A Workshop for Councillors, Independent Commissioners and RMA Practitioners*, 9 July 2008
- *Effective Leadership for Councillors Developing RMA Plans*, 16 July 2008

These courses are being delivered by Jan Crawford, a practising planner, and one of the facilitators of the Making Good Decisions Programme workshops. They complement the training offered under the Programme. They are being run in Auckland with the prospect of being delivered elsewhere to cater for demand.

For more information call Anne Cave at the Centre on (09) 373 7599 x 89541, email [a.cave@auckland.ac.nz](mailto:a.cave@auckland.ac.nz) or visit the Centre's website at [www.cce.auckland.ac.nz/rmainpractice](http://www.cce.auckland.ac.nz/rmainpractice)

## WELL-WRITTEN DECISIONS – GUIDANCE, TEMPLATES AND EXAMPLES OF GOOD PRACTICE

Since 2005, the RMA has required fuller expression in the way decisions are written. Councils have largely developed their own approach to addressing this requirement. The Ministry has commissioned the:

- development of principles underlying any well-written decision
- completion of templates for decisions, decision reports, and covering letters
- selection of actual decisions which accord with the principles.

The templates and decisions represent a variety of situations such as decisions on notified, limited notified and non-notified applications issued by regional and territorial authorities, hearings panels, sole independent commissioners, and staff with delegated authority. Different consent types and relatively simple and complex applications are also represented. The principles will be familiar to those who have participated in the re-certification course for chairs, as they are built into the course material.

The principles, templates and exemplary decisions are now available on line. The Quality Planning guidance note *Making a Decision on the Resource Application* can be found at [www.qp.org.nz/consents/making-decision.php](http://www.qp.org.nz/consents/making-decision.php)

This work included a review against the principles of some 140 decisions from a wide range of councils. **The Ministry welcomes feedback on the principles, templates and the selected decisions.**

## CHANGES AT THE MINISTRY

Sarah Myhill will be looking after the Programme on the Ministry's behalf from now on. Sarah is an experienced planner who worked in local government and consultancy before joining the Ministry several years ago. Among her other responsibilities, Sarah looks after the RMAINFO service that was profiled in the November 2007 **Decision-maker**. Sarah has a keen interest in making the RMA work for everybody through good training and guidance. She can be contacted on 0800 762 4636 or at [sarah.myhill@mfe.govt.nz](mailto:sarah.myhill@mfe.govt.nz)

Mark Leggett is moving on to assist the Ministry with planning for aquaculture under the RMA.



Sarah Myhill

### MORE INFORMATION

To enrol for training and certification under the Programme: Petteena McOnie, Centre for Continuing Education, Auckland University, phone (09) 373 7599 x89695 or email [p.mconie@auckland.ac.nz](mailto:p.mconie@auckland.ac.nz)

For general enquiries about the Programme: Sarah Myhill, phone 0800 762 4636 or email [sarah.myhill@mfe.govt.nz](mailto:sarah.myhill@mfe.govt.nz)

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