



# THE DECISION-MAKER

NOVEMBER 2006

A NEWSLETTER FOR MAKING GOOD DECISIONS PROGRAMME CERTIFICATE HOLDERS

Welcome to the first edition of **The Decision-maker**, the Ministry for the Environment's newsletter for certified RMA decision-makers. Published three times a year, the newsletter is designed to provide guidance on issues you face as a decision-maker. It will also tell you about future training opportunities and share the perspectives of others actively involved in making decisions. The Decision-maker will refer you to relevant case law and invite your feedback on thought-provoking issues.



Participants work together to write opening and closing statements during a third-round workshop at the Duxton Hotel in May

## SURVEY SHOWS MAKING GOOD DECISIONS HAVING DESIRED OUTCOMES

An independent survey commissioned by the Ministry has found that the Making Good Decisions Programme has positively contributed to the capability of decision-makers and the quality of hearings and decisions New Zealand-wide.

The survey interviewed 40 senior practitioners – including resource management lawyers, consultant planners and consent managers – about their experiences and observations of change in the behaviour and performance of decision-makers and hearings panels. They were asked to comment with reference to the programme's key competencies.

The survey found that 76 percent of hearings panels observed by respondents had demonstrated an overall improvement in performance.

*“Training has made a difference individually and as a unit. The members keep each other on track and focused on what they have learned from the programme. They often refer to the training and what they learnt to be best practice. They're proud of having participated. For those without any professional background it has helped them focus on their role and see it as having more value.”*

– A survey respondent

The survey attributes these positive changes to the programme's influence, along with the developing skills and experience of decision-makers. In-house training and the mentoring of new panel members by more experienced members were also cited as contributing factors to the improvement in quality of hearings and decision-making.

The programme's greatest impact has been on the way hearings are managed and correct procedures followed. This, in turn, influences how hearings are perceived by other parties involved.

The survey also showed that the programme has improved the quality of decision-makers' questioning skills, particularly those with less experience, although feedback to the Ministry is that even experienced decision-makers have gained a great deal from participation.

Overall, this is an extremely positive result, especially given the programme has only been in existence for 18 months.

Survey respondents reported less improvement in the quality of decisions made. This is likely due to the fact that new requirements for framing decisions were only introduced as an amendment to the RMA in August 2005. Also, guidance on the use of decision tools and decision writing was only available for certificate holders attending subsequent update seminars, after the survey was undertaken.

The report's findings are supported by both the Ministry's evaluations of a selection of hearings panels, and assessments by certificate holders of their own and panels' competency – both before and after training.

A copy of the report is available at [www.mfe.govt.nz/rma/practitioners/good-decisions/index.html](http://www.mfe.govt.nz/rma/practitioners/good-decisions/index.html)

## NEW DECISION-MAKER TALKS ABOUT THE BENEFITS OF MAKING GOOD DECISIONS

Tom Smith is a first-time councillor and newly-appointed member of the Kaipara District Council's Judicial Committee. He speaks to **The Decision-maker** about how the Making Good Decisions Programme has given him the skills and confidence he needs to deal with the complexities of the hearing process.

He also discusses the potentially difficult task of separating his role as an elected community representative with that of a decision-maker under the Resource Management Act 1991 (RMA).

**DM: Why did you undertake the Making Good Decisions Programme?**

Cr Smith: As a first-time councillor and new Judicial Committee member, it was essential for me to quickly get up to speed. So the timing of the programme was ideal for my needs.

**DM: What was the most important thing you gained from the Programme?**

Cr Smith: While I had a reasonable level of understanding of the RMA, and the operative District Plan, I had scant understanding of the judicial procedures and the concepts of natural justice and fair process.

**DM: Has the programme helped you come to terms with your role as a RMA decision-maker?**

Cr Smith: The programme has been invaluable to me. I find the hearing process demanding but stimulating and I gain great satisfaction in participating to achieve a good outcome. The programme has allowed me to go beyond what is being said to better understand the roles of all the participants.

**DM: How do you feel the programme has improved your ability to consider, test and evaluate professional evidence?**

Cr Smith: I felt the update seminar helped me cement my understanding, particularly in regard to questioning expert witnesses and to separating facts from opinions.

**DM: What has been the hardest thing about becoming a decision-maker under the RMA?**

Cr Smith: The most challenging aspect for me is to disconnect the personal roles of community resident and politician, from the judicial role.

**DM: Has the programme helped you address this?**

Cr Smith: Apart from the valuable content, the programme provides a great networking opportunity and I have found participants generous in sharing their expertise and in providing advice.



*Councillor Tom Smith*

## WORKBOOK ERROR – MAIN FINDINGS OF FACT

The Making Good Decisions Workbook contains an erratum, as was made clear during the fourth round of training, and at the recent update seminars.

On page 160 in Module 9, it is suggested that the reference to 'main findings in fact' in section 113 is to be taken to mean "simply those aspects of the application that can be held to be factual and not subject to debate. They would include, for example, a description of the land that an application relates to."

This is incorrect. Rather 'main findings of fact' are the facts that the consent authority considers are important in reaching their decision on the application. This may include stating which facts are relied on in the event of conflicting evidence.

The Ministry is developing decision templates in partnership with local government to help councils address the requirements of section 113. These will be made available to all certificate holders.

If you are aware of any decisions that you consider to be exemplary, please feel free to make **The Decision-maker** aware of them. Perhaps you have had a hand in them!

## HOW HAS THE ENVIRONMENT COURT APPLIED SECTION 290A?

Section 290A provides that, in determining an appeal or an inquiry, the Court must **have regard to** the decision that is the subject of the appeal or inquiry.

Section 290A was inserted, as from 10 August 2005, by section 106 of the Resource Management Amendment Act 2005. It does not apply to a resource consent application made on or before the start of the Amendment, that has not yet proceeded to the no-appeal stage (see section 131(1)(b)).

Therefore, to date, only a handful of decisions have applied section 290A to resource consent decisions made by councils.

You will recall from pages 160, 161 and 165 of Modules 9 and 10 of the Making Good Decisions Workbook the new requirement under section 113 of the Amendment Act to include:

- reasons for the decision
- relevant statutory provisions considered
- relevant plans and policy statements considered
- principal issues
- summary of evidence heard
- main findings of fact<sup>1</sup>
- reasons for a shorter term
- reasons for granting a consent allowing the effects in section 107(1)(c)-(g).

Not only are these details of interest to the parties, but they are also of interest to the Environment Court on appeal. So, how has the Court been approaching its task under section 290A so far? Examples of the Court's approach can be found in the following cases:

- Fraser Broadview Ltd v Queenstown Lakes DC Env C C87/06 (Fraser)
- Pinehaven Orchards Limited v South Wairarapa DC Env C W54/06 (Pinehaven)
- Leonard v Kaipara DC Env C Env C A78/06 (Leonard)
- Isola Estates v Auckland DC Env CW42/06 (Isola Estates)
- Oruawharo Marae v Auckland RC Env C A83/06 (Oruawharo Marae)

In the cases of Fraser, Leonard and Isola Estates, the Court (Judges Jackson Newhook and Thompson) took a similar approach to applying section 290A. It was not clear to the Court whether section 290A applied, and so the Judges took a cautious approach and had regard to the councils' decisions anyway.

In Fraser, in setting aside the council's decision, Judge Jackson said that for the reasons covered in the decision, the Court was satisfied that the purpose of the Act would be better achieved by granting the consent rather than by declining it. The Court also referred to the Commissioner's consideration of the permitted baseline under the Resource Management Amendment Act 2003.

In Leonard, Judge Newhook remarked that the basis on which the council refused consent was unduly conservative, and, in the case of roading aspects, incorrect as a matter of law. While the Court respected the council's decision, it considered that the purpose of the Act would be better satisfied by granting consent.

In Isola Estates, Judge Thompson said the Court was satisfied that the concerns expressed by the council in its decision would not come to pass, and that the Act's purpose would be better satisfied by granting the consent.

In Oruawharo Marae, the Court stated that while it was not required to apply section 290A, it had nevertheless done so, in the way that the Court often found it appropriate in any event.

Finally, in Pinehaven, the Court summarised the council's reasons for declining the consent, and stated that the Court had heard submissions and evidence on the substance of those matters, and had addressed them in its decision. In **that** way, the Court had had regard to the council's decision.

**The Decision-maker** will provide further updates on this topic as case law develops.

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<sup>1</sup> See *Workbook Error article on previous page*.

## WHO SHOULD PARTICIPATE IN PRE-HEARING OR MEDIATION MEETINGS?

Is it best practice for the Chair, or any member of a hearings panel/committee, to participate in a pre-hearing meeting or mediation process? Our discussion of this issue has been prompted by a recent query from a certificate holder.

Section 99A(4) states that a person with the power to make the decision on an application that is the subject of the pre-hearing meeting may attend and participate in that process if the council considers it appropriate, and all the parties agree. If the parties failed to reach such an agreement, members of the hearings panel would be precluded from attending the pre-hearing meeting. In regard to the mediation process, the RMA is silent on whether a hearings panel member can be involved.

There are a number of matters that decision-makers may wish to consider when deciding whether or not to participate in pre-hearing or mediation meetings. Pre-hearing meetings and mediation processes provide opportunities to clarify areas of common ground and/or narrow the actual matters in contention. They can also facilitate a potential resolution to those contentious matters.

However, during this process, parties can raise issues or offer potential settlement options, as means of resolution. These options may not be presented in evidence during the subsequent hearing, or form part of a party's case during the hearing.

If a member of a hearings panel engages in such preliminary discussions, it could undermine their ability to determine the case solely based on the evidence presented as part of the hearing process. It may put them in a difficult position – one where their role at any subsequent hearing is open to potential challenge from one or other of the parties.

Often, consent authorities appoint an independent person – such as a suitably qualified council officer, a trained mediator or arbitrator, or a councillor otherwise uninvolved in the subsequent hearing – to chair pre-hearing or mediation meetings.

What do you think? **The Decision-maker** welcomes your views on this issue, or on any other matter you consider relevant to best practice and which could benefit from being discussed in future newsletters.

## NEW INFORMATION ON THE RMA

In your role as a decision-maker you will always be coming into contact with those who are entirely unfamiliar with the legislation or its requirements. The Ministry has recently launched a comprehensive information package for business and the public on the RMA. This includes a dedicated website, a series of booklets on specific RMA processes, a CD-ROM and a free phone number for queries regarding the RMA. For more information, go to [www.mfe.govt.nz/rma/](http://www.mfe.govt.nz/rma/)

### 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](mailto: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](mailto:mark.leggett@mfe.govt.nz)

Published by the: Ministry for the Environment, Manatū Mō Te Taiao, PO Box 10362, Wellington, New Zealand. Publication number: INFO 178