A Practice Guide

for the

Conduct of Resource Management Hearings

at

First Instance

September 2011

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INTRODUCTION:

A group of senior experienced independent and Ministry for the Environment chair-certified RMA hearings Commissioners formed a small professional group known as Forum 104 in early 2009 to discuss issues of common concern. One of the purposes of the group is to discuss best practice in the conduct of RMA hearings at first instance.

The following practice notes record the view of the group as at the dates shown. The group has elected to address procedural matters under the four general headings of Delegations, Pre-hearing Processes, Hearing Procedure and Decisions, each with one or more specific issues. For most issues the group has adopted one of three recommendations:

- **Best Practice:** The Forum considers that the guide should be adopted for all but **exceptional cases;**
- **Preferred Practice:** The Forum considers that the guide should usually be adopted;
- **Discretionary Practice:** The Forum considers that whether or not any particular guide is adopted by an independent commissioner is a matter of discretion on the part of that commissioner.

The guide is set out with an issue per page to facilitate subsequent amendments to any single issue. Any such amendment can be interleafed into the guide.

Membership of Forum 104 at the time of compiling this Practice Guide is set out in Appendix 1.

DEFINITIONS:

1. In this Guide the following terms are used:

LGA	Local Government Act 2002 and its amendments;
Plan Making Processes	Proposed plan, proposed plan variation, or plan change (or modification);
RMA	Resource Management Act 1991 and its amendments;
S42A report	Report prepared for the local authority pursuant to RMA s42A.

1. DELEGATIONS:

1.1 Initial Appointments

Issue

The appointment of Commissioners, the delegations given to them, the subsequent conduct of the hearing, and the role of Commissioners in the deliberation phase, are important matters that need to be clearly understood at the time of appointment.

Best Practice

1. Encourage independence in the Commissioner appointment process.
2. If there is to be an even number of Commissioners on a hearing panel, the possibility of a split decision is avoided if the chair is accorded a casting vote. If such a casting vote is to be given this needs to be clearly stated in the written appointment or delegation.
3. Encourage appointing local authorities to use written contracts of engagement.

September, 2010

1.2 Membership of the Hearing Panel

Issue

Local authorities sometimes appoint members of a hearing panel other than the chair with no reference to the chair. Frequently the appointed Commissioners know each other and have worked together before. However, there are times when the Commissioners do not know each other and have not worked together. Convening for the first time at the hearing may not be the most effective way to work together as a hearing panel, at least in the initial stages.

Best Practice

Where Commissioners are not known to each other, the chair should facilitate a meeting or contact between the Commissioners prior to the hearing to discuss any approaches to the hearing and any other matters that are relevant to working together.

Such a meeting could be convened the evening before the hearing, or at least for a period immediately before the hearing. A meeting is most effective but if this is not practicable telephone contact and perhaps an exchange of CVs is to be encouraged.

February, 2010

1.3 Plan Hearings – "Determine" or "Recommend"?

Issue

When independent Commissioners are appointed to hearing panels for plan making processes, there is varying practice with regard to the delegations given to those Commissioners. Sometimes the panels are delegated power to "hear and determine" and at other times the delegation is to "hear and recommend", with the recommendation being back to the full council.

Where the delegation is to hear and recommend, the hearing has been conducted and the recommendation delivered, some Commissioners have been asked to discuss the "recommendation" with the local authority. In those circumstances, the expectations of the local authority are not always clear. Some councillors who have not been on the hearing panel may wish to retain some decision making role and amend (or worse, reverse) the recommendation.

The Law

The RMA provides:

34. Delegation of functions, etc, by local authorities
(1) A local authority may delegate to any committee of the local authority established in accordance with the Local Government Act 2002 any of its functions, powers, or duties under this Act.

34A. Delegation of powers and functions to employees and other persons
(1) A local authority may delegate to an employee, or hearings commissioner appointed by the local authority (who may or may not be a member of the local authority), any functions, powers, or duties under this Act except the following:
(a) the approval of a policy statement or plan:
(b) *this power of delegation.*

(5) Subsection (1) or subsection (2) does not prevent a local authority delegating to any person the power to do anything before a final decision on a matter referred to in those subsections

The limitation imposed by s34A(1) does not exist for a delegation under s34. Therefore, under s34 if independent Commissioners are appointed to a committee of the local authority (which could be a hearings committee) under the Local Government Act, then there is no impediment to that committee "hearing and determining" the submissions and the wording of the plan-making instrument. Such a committee would however be subject to the local authority's standing orders.

The best practice guide under this heading will still be relevant to a delegation under s34.

In respect of a delegation under s34A, the element of s34A which local authorities have seen as requiring a recommendation rather than a determination is the exception to the power of delegation in respect of the approval of a policy or plan. The issue is whether a decision on submissions in relation to plan making is in fact an "approval" falling within the exception.

Clause 10 of the First Schedule of the RMA provides that after hearing submissions on a plan making process, what is required is a "decision of a local authority". Clause 17 of the same schedule provides as a separate and subsequent process "approval" of the entire plan. It is that approval under Clause 17 which is caught by the s34A exception, not the decision on submissions under Clause 10. There is no reason why a local authority cannot delegate to a Commissioner the determination following hearings of submissions in plan making matters.

If independent Commissioners are appointed subject to s34A then they are competent to hear the submissions and make decisions on them (reject or accept the submissions). It follows that the Commissioners can also decide the wording of the plan change or variation as that wording results directly from the acceptance or rejection of the submissions.

The Commissioners could not, however, finally approve the plan (after all appeals have been dealt with). That final approval of the plan must be undertaken by the local authority.

Best Practice

When being appointed as independent Commissioners to hear plan making processes, the Commissioners should:

1. Encourage the engaging local authority to delegate the power to "hear and determine" the submissions and the plan provisions, rather than "hear and recommend".
2. Seek copies of the instrument of delegation well in advance of the hearing to confirm that the wording is appropriate.
3. Ensure that the role of the Commissioners is clear and the parties are aware of the process.
4. Ensure that in the event that the delegation is to hear and recommend, the expectations of the local authority are realistic, and in particular the local authority has no opportunity to review the Commissioners' decision, question them on it, or somehow seek to make a different decision.

July, 2009

1.4 Joint Hearings of Applications

Issue

When a matter is to be considered by more than one local authority, there is a range of options available, such as separate committees hearing the evidence jointly but then having separate deliberations and issuing separate decisions, through to a jointly appointed hearing panel issuing one decision on all matters. The actual practice varies, particularly with regard to the resulting decisions (joint or separate). Often the expectations of the local authorities are not spelled out clearly beforehand.

The Law

Under s102(1) of the RMA the default position is for a joint hearing and under s102(3) the default position is for the applications to be "jointly decided":

102. Joint hearings by two or more consent authorities
(1) Where applications for resource consents in relation to the same proposal have been made to two or more consent authorities, and those consent authorities have decided to hear the applications, the consent authorities shall jointly hear and consider those applications unless –
(a) All the consent authorities agree that the applications are sufficiently unrelated that a joint hearing is unnecessary; and
(b) The applicant agrees that a joint hearing need not be held.
(2) When a joint hearing is to be held, the regional council for the area concerned shall be responsible for notifying the hearing, setting the procedure, and providing administrative services, unless the consent authorities involved in the hearing agree that another authority should be so responsible.
(3) Where two or more consent authorities jointly hear applications for resource consents, they shall jointly decide those applications unless –
(a) Any application is for a restricted coastal activity; or
(b) Any of the consent authorities consider on reasonable grounds that it is not appropriate to do so.

In most cases it is expected that the deliberations should be joint (namely all Commissioners participating in deliberations on both the territorial local authority and regional council applications), but decisions should be separate for the reasons that there are separate appeal rights, sometimes Commissioners are appointed because of a special expertise that is applicable to only one council's decision, the parties may be different, the relevant planning instruments will be different, and therefore the considerations are likely to be different.

Best Practice

Where there is to be a joint hearing, independent Commissioners should;

1. Ensure the chair liaises with the local authority administration staff as early as possible.
2. Raise the issue of joint or separate decisions.
3. Ensure that the delegation is specific as to whether there are to be joint or separate decisions.

Preferred Practice

4. The delegation enables Commissioners to hear and decide the territorial local authority and regional council applications (namely one hearing panel with members wearing “two hats”).
5. Appoint a chairperson early on to “manage” the process.
6. All Commissioners to participate in deliberations on both territorial local authority and regional council applications.
7. Issue a combined decision document but with separate decisions within it, or as a minimum separate decision documents released concurrently.
8. There should however be no presumption that decisions on the respective territorial local authority and regional council applications need to have the same outcome; for example the territorial local authority applications could be declined and the regional council applications could be granted.

If the delegation to Commissioners is not joint (“two hats”) then deliberations and decision making must be kept separate.

July, 2009

2. PRE-HEARING PROCESSES

2.1 RMA Section 41B and 41C Orders

Issue

The Resource Management Amendment Act 2005 ("the 2005 Amendment") introduced new powers for local authorities aimed at making hearings more efficient.

In practice, a number of years later many local authorities do not appear to be using these provisions. Often, once independent Commissioners have been engaged, the substantive material relating to the case is not distributed (unless it is specifically requested) until after the s42A report is circulated. That is generally five days prior to the hearing by which time it is too late to make any orders under s41B.

S41B makes provision for directions to provide prepared briefs of evidence to the local authority prior to the hearing. The section imposes minimum time limits of ten working days (applicant's evidence) and five working days (submitters' expert evidence). Any directions must therefore be made in sufficient time for evidence to be prepared and provided within those time limits. Sensibly, that is at least a month before the date of hearing.

The provisions in the RMA are inadequate as:

- While it is possible to require all the evidence of the applicant to be provided to the local authority prior to the hearing, only expert evidence of the submitters can be required to be provided to the local authority prior to the hearing;
- There is no authority to require such evidence to be served on the parties other than the local authority;
- It is possible only to *request* that evidence be pre-provided to parties other than the local authority. However, the local authority can also be requested to distribute it to other parties;
- It is possible only to *request* that non-expert or lay evidence of submitters be pre-provided.

If evidence is to be precirculated it can be posted on the local authority webpage so as to be easily accessible to all parties. This alleviates the concern that some submitters may not have read precirculated material and are therefore disadvantaged at the hearing.

If evidence is precirculated there is an issue as to whether it should then be read at the hearing. To do so may detract from the efficiency gains of precirculation.

The sequence of evidence exchange is important to consider when directing or requesting pre-circulation. The general sequence should be:

- RMA s42A report
- Applicant evidence in chief
- Submitters' expert evidence
- Applicant rebuttal evidence.

Caucusing (or conferencing as it is now called) between expert witnesses during the hearing can be required, but this may necessitate a need to adjourn the hearing to allow the caucusing to occur and be documented.

Best Practice

As soon as an appointment of an independent Commissioner/s by a local authority looks likely, Commissioners should encourage the following process to be observed:

1. The hearing panel and/or independent Commissioners should be appointed at least one month before the hearing.
2. The local authority should be encouraged to appoint a chair in the event that there is more than one Commissioner on the hearing panel.
3. Immediately on their appointment, the hearing panel and/or Commissioners should, through the chair, request copies of all of the substantive material relating to the case (namely the application, the assessment of effects on the environment, any s92 further information requests and the responses received).
4. The chair should then confer with the other hearing panel members and/or Commissioners to consider whether or not any orders under s41A to 41C are appropriate. It may well be that in a number of cases no orders are required.
5. If required, the chair should then draft the appropriate directions.
6. Requiring or requesting the pre-provision of evidence should always be considered.
7. Expert witness caucusing (conferencing) should be considered as a means of narrowing the technical issues in contention.

September, 2010

2.2 Deferral or Adjournment of Hearing

Issue

At times independent Commissioners are engaged and are asked to set aside considerable amounts of time for pending hearings. This can involve forward commitments of several weeks. Occasionally the hearings are deferred, adjourned or cancelled, sometimes at short notice. The Commissioners may have declined other work because of the commitment and the deferral, adjournment or cancellation may then leave the Commissioners with no work in the period that had been set aside.

The question therefore arises as to whether or not there is a case for reimbursement for cancelled hearings (particularly those cancelled close to the date of the proposed hearing) where Commissioners have set weeks of time aside.

Discretionary Practice

There has been no Forum consensus yet on this issue. To some extent it depends on the individual circumstances and other workload commitments of the Commissioners. Sometimes a cancelled hearing is a blessing in disguise as it allows other pending work to be undertaken.

However, any commonly adopted position for reimbursement should probably relate to the length of the proposed hearing with perhaps a cancelled five day or longer hearing being a tipping point.

In the meantime, the appropriate procedural practice is to leave any claim for reimbursement for cancelled or adjourned hearings to the discretion of the Commissioners involved. However, it would be desirable for a consistent approach to be adopted by different Commissioners appointed to the same hearing.

Any adjustment to hearing dates (adjournments) should be at the discretion of the Commissioners. Obviously, this needs to have careful regard to the reasonable requests of the applicant since it is paying for the entire process.

If Commissioners are appointed prior to notification or submissions closing and there are subsequently no submissions received then the Commissioners (not the local authority officers) should decide if there is to be a hearing or not. For example, the Commissioners may wish to ask questions of the applicant or the reporting officers.

September, 2010

3. HEARING PROCEDURE

3.1 Preliminary Issues

Issue

For any hearing there may be one or more procedural or preliminary issues which need to be addressed. Such issues include:

- Jurisdiction
- Inadequate Notification
- Late Submissions
- Conflicts
- Scope of the Application
- Consultation
- Late or non-compliance with RMA s41B orders
- Non-RMA matters eg Need, playing the numbers game.

It may make for a more efficient hearing if those matters are all dealt with at the start of the hearing e.g. a potential submitter may thereby be excluded, or a category of evidence constrained or omitted.

Dealing with any of those matters early in the written decision can also clear the clutter and allow the remainder of the decision to coherently deal with the key issues and matters of substantive contention.

Preferred Practice

1. Hearing

   (a) In the chair's opening at the commencement of the hearing, it should be made clear that there is provision in the hearing process (preferably early) for dealing with any preliminary matters.

   (b) The optimum timing for that is immediately following the recording of appearances.

   (c) After hearing a preliminary point from the party raising it, other parties should be given the opportunity to comment.

   (d) It may be necessary for the hearing panel to retire to consider before giving a verbal ruling on the preliminary issue/s.

2. Decision

   Include (preferably early) in the decision a section dealing with the preliminary matters and record any oral rulings in that section.

July, 2009

3.2 Order of Hearing for Plan Making Cases

Issue

At hearings for plan making processes it is often the view of the local authority that the purpose of the hearing is only to hear submitters address their concerns and there is no need for the local authority to present a case in support of its plan proposal. Submitters involved in such a hearing process can justifiably be concerned that they are required to change the mind of the local authority and its officers, rather than submit on "a level playing field". This is particularly so where the local authority is having the matter heard by councillors rather than by independent Commissioners.

At the hearing of plan making processes, and particularly where independent Commissioners are used, it is highly desirable that the local authority as proponent of the plan making process should open proceedings by presenting its case outlining the plan making proposal and providing the reasons for it . That may involve legal counsel and expert witnesses. The local authority may wish to use the officer who has prepared the plan proposal to present evidence in which case it would be better that an independent consultant prepare the s42A report on the plan making proposal for the hearing.

Preferred Practice

1. The promoter of the plan change (be it the local authority or a private party) should open proceedings by presenting its "case", namely the rationale and evidential basis for the plan making provisions, including (if necessary) technical reports (which have the status of evidence).

   This enables Commissioners and submitters to understand the plan proposal better.

2. There should be a separation of local authority functions – separate staff or consultants should lead the case as opposed to the staff or consultants who prepared the s42A report.

3. Commissioners should include these matters in RMA s41 directions.

July, 2009

3.3 Questions – De Facto Cross Examination?

Issue

Participants at hearings are often confused regarding who is able to ask questions of whom. Some participants are not clear on the procedural position of questions between the parties.

An applicant, submitters and the s42A reporting officer(s) are all parties to a hearing.

Pursuant to RMA s39(2)(c) and (d), no person other than the chair or other member of the hearing panel is permitted to question any party or witness. The practice of many local authorities in allowing questions by the reporting officers of an applicant and submitters is not within the authority of the RMA.

This issue arises when one party wishes to direct a question to another party in order to demonstrate a point to the hearing panel and also where a reporting officer wishes to do the same. Some chairs will allow such questions to be directed through the chair and asked at the discretion of the chair, carefully controlling any exchange between the parties.

Reporting officers or experts presenting for the local authority may be asked by chairs whether there are any points of clarification they consider need to be explained by a presenter in the interests of the hearing panel better understanding what it has heard from that presenter. That can be managed through the chair but the officers themselves should not consider they are in a position to question any parties at a hearing as of right. Such officers are not decision-makers. They appear at the hearing in the same manner as an applicant and submitters and do not occupy a different or privileged position. At the same time questions raised, particularly by experts sitting with the reporting officer, can be very valuable.

Best Practice

1. Whether, and the extent to which, questions by other parties is permitted is a discretionary matter for the chair.
2. The chair should explain the intended procedure to the hearing panel before the hearing commences.
3. The chair should control the questioning process carefully.
4. Any perception that the hearing panel may be working in tandem with the local authority and its officers should be avoided.

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3.4 Role of S42a Report Author at Hearing

Issue

Some s42A reporting officers hold the view that their role is more elevated than it should be at a hearing and in particular that they are able to ask questions of the parties and interact with hearing panel members in a direct or in an informal manner. That view is sometimes shared by hearing panel members who will converse directly with the reporting officers.

In respect of questions to other parties, the reporting officer is a witness at the hearing and has no greater, or lesser, rights than any other party. The reporting officer provides the s42A report and has the opportunity to address it, and is often also given the opportunity (by being allowed to ask questions of clarification) to address the presentations of the applicant and submitters. However, the s42A reporting officers should not be addressing the hearing panel in any manner other than by presenting at the hearing. That may include responding to questions from the panel or to requests regarding any clarification that the officer believes the panel could usefully receive from another party.

The role of s42A reporting officers at the start of hearing should be very limited. They should not be asked to describe the application – that is the applicant's role. They should be asked if there are any changes to the s42A report that they wish to announce at that time. The officer should then speak to their report at the end of the hearing (prior to the right of reply) and advise whether or not, having heard all of the evidence and submissions, he/she wishes to change any of his/her recommendations.

Officers should have all relevant material available for the hearing – such as district and regional plans etc.

If the s42A reporting officer recommends refusal of consent but the case is reasonably finely balanced such that the hearing panel may grant consent, the s42A report should include recommended conditions.

The s42A report contains information about the application and submissions but also importantly the analysis and opinion of the reporting officer which is evidence to the hearing panel. The report should therefore include the qualifications and experience of the author and be presented in the first person.

Best Practice

1. At the commencement of a hearing the chair should explain the role of the reporting officer(s) so that all parties at the hearing are clear about it.
2. The officers may (at the discretion of the chair) ask questions of clarification through the chair, but not general questions contesting the evidence of other parties.

Preferred Practice

3. S42A reports should include:

- author's qualifications and experience;
- be written in first person;
- have recommended conditions in all cases where a grant of consent is recommended;
- have recommended conditions in those cases where refusal of consent is recommended but the case is reasonably finely balanced.

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3.5 Legal Advice and the Role of the Local Authority Legal Advisers

Issue

Legal opinions obtained by a local authority are often referred to in support of a position being taken by the local authority or local authority officers. The local authority may then attempt to claim that the opinion cannot be disclosed because it comprises legal advice and is privileged as a result.

The local authority is a public body exercising powers which affect people's rights and interests, and the basis of the legal authority for the exercise of its powers should be available to those who are affected by such actions. As soon as a legal opinion has been relied upon in a hearing (including any background materials that have been prepared for the hearing), it is material which forms part of the hearing and its full content should be disclosed to all parties involved (regardless of whether its content may be embarrassing to the local authority or not, and irrespective of whether it directly relates to the current matter).

Sometimes Commissioners may need to obtain legal advice to assist them with a legal dispute or difficult legal issue that arises during a hearing. It should be made clear in the initial appointment how the Commissioners are to obtain such advice and where they are to seek it from.

Lawyers who serve as Commissioners are not appointed to give legal advice and should refrain from doing so beyond the application of their legal knowledge generally in the course of the hearing (in the same way as any other Commissioner with specialist expertise may do with their own particular knowledge).

When a hearing panel needs to commission legal advice, this should be communicated to all the parties in public while the hearing is still open. Once the advice has been received, it should be circulated to all the parties who must then be given the opportunity to comment on it.

Legal advice relating to the matter being considered cannot be sought after the hearing has closed without re-opening the hearing. Whether such advice is required must therefore be subject to careful consideration, particularly as a hearing will automatically close after 10 working days under the 2009 Resource Management Amendment Act.

Best Practice

1. The initial delegation should include advice as to the manner in which any legal advice required by the hearing panel is to be obtained.
2. Any legal opinions relied on as part of a hearing, including any opinions sought by the Commissioners, should be obtained and circulated to all parties before the hearing is closed. If necessary, the hearing must be adjourned until that advice has been received and then circulated. If any party wishes to comment on the legal advice the Commissioners receive, that party should be given an opportunity to do so within a stated timeframe with any such comments also being circulated to all parties.

3. No privilege attaches to any legal opinion that is relied on during a hearing, including in any of the hearing materials (whether specifically addressed in the evidence during the hearing or not).

4. The local authority's own lawyers represent a party (the local authority) and as such must not direct the content of either the hearing or the subsequent decision. The local authority's legal advisers cannot be involved in the Commissioners' deliberations during the hearing or after the hearing has closed.

5. Lawyers who act as independent Commissioners should refrain from acting on their own legal advice where it would be determinative of the outcome because as Commissioners they are not retained for that purpose. They should instead invite legal submissions from the parties and then make decisions based on their consideration of the merits of those submissions.

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3.6 Role of the Witness

Issue

In broad terms there are 2 “types” of witnesses – lay and expert.

Commissioners have no particular expectations of lay witnesses other than that they will follow the chair’s directions. However, it is important that the hearing process is explained to lay witnesses and that they be afforded courtesy and tolerance from the chair, especially when they are unaccustomed to appearing in such hearings.

Those who wish to claim expert witness status need to establish their credentials explicitly in their statements of evidence. While professional qualifications and membership in their respective professional body is a clear pointer to this status, this is not the only arbiter. Significant practical experience in the field and other relevant experience should be accepted as qualifying a witness in the absence of specific professional qualifications.

It is expected that expert witnesses will generally follow the Environment Court Code of Conduct for Expert Witnesses. It has become common practice for witnesses to include reference to this Code in their statements of evidence. On occasion, it will be appropriate to remind witnesses (and their clients) of their obligations under this Code – particularly with reference to advocacy and opinion qualification where an applicant or submitter’s case is led by someone who wishes to claim expert witness status. While challenges to claimed status in circumstances where the witness is clearly in an advocate role for the party are appropriate, this does not necessarily invalidate the evidence given. Commissioners need to determine carefully the weight to be given such evidence.

<u>Advocacy</u>

Environment Court Judges Newhook and Sheppard have noted concern about those whom they refer to as the committed crusader – the professional who holds a strong view on an area within their particular expertise. While such invites caution, advocacy for a technical or scientific position (such as for or against climate change for example) - as distinct from client advocacy - does not invalidate expert witness status.

<u>Caucusing (or conferencing)</u>

Caucusing (or conferencing) of expert witnesses is now routine in cases before the Environment Court. This is not normally an option for first instance hearings except with more significant applications (or contested plan changes). Ideally, expert caucusing should occur in sufficient time before a hearing commences so that the outcome of that caucusing can inform the proceedings from the outset. For this to be practicable, the possibility needs to be considered at the earliest stage of appointment of the chair. However it should be noted that directions under sections 41B and 41C do not provide for caucusing before hearings. It seems that this ability is provided for under s99 RMA Pre-Hearing Meetings, but that is not at the direction of the chair but, rather, the consent authority.

Best Practice

1. Expertise should be clearly stated and justified.
2. Status should be explicitly queried where there is a doubt in a Commissioner's mind.
3. Once a hearing commences, caucusing can be required as part of the proceedings under the chair's direction.
4. Where caucusing is required, clear directions and sequencing of experts should be given. That is, if the planning witnesses are dependent upon expert evidence, for example, there is little point in them caucusing unless the other experts have reached some agreement. Caucus minutes should always be made and signed.

Preferred Practice

5. Appointment to the hearing panel, particularly the chair, should occur sufficiently early so that evidence exchange and expert caucusing opportunities can be identified and encouraged.
6. Once a hearing has commenced, and provided it is one of sufficient duration, expert caucusing should be considered.
7. Minutes of caucus agreements should be made and signed.

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3.7 Reply – Allow Rebuttal Evidence?

Issue

Where parties are not professionally assisted, or even if parties are professionally assisted but where either there has been inadequate consultation or no s41B order, the issues raised by that party may not have been previously or adequately addressed by the applicant or proponent. Sometimes the hearing panel itself, when prompted by another party, may seek further information from the applicant or proponent. Where these or similar circumstances arise, there is increasing pressure from applicants and proponents to call rebuttal evidence as part of their reply.

Rebuttal evidence and submissions in reply are distinct. Ideally, the rebuttal evidence (if it deals with submitter issues) would be received before the s42A officer's response and before the applicant's right of reply is given.

Preferred Practice

1. Rebuttal evidence may be introduced only with the prior consent of the chair.
2. The necessity to tender rebuttal evidence later than evidence in chief is much less likely to arise if an appropriate s41B order has been made and complied with before the hearing.
3. It is preferable to have further information coming to the hearing panel from the appropriate witness rather than receiving evidence from the applicant's counsel in closing or reply.
4. It is therefore acceptable to allow rebuttal evidence but the chair should ensure that the content is rebuttal only.
5. The introduction of new material should be managed carefully. Natural justice considerations mean other parties should be able to comment on any new material. That may mean the hearing needs to be adjourned and subsequently reconvened. The chair should seek the views of the other parties on this.
6. Allow questioning from members of the hearing panel on the rebuttal evidence.

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3.8 The Reply – Applicant

Issue

In exercising a right of reply, there is a temptation for proponents to restate the case of the proponent, introduce further support for that party's position, or to shore up the evidence already tendered. The primary purpose of the right of reply is to provide an opportunity to the proponent to comment on the case/s of the parties who have followed after the opening case of the proponent at the hearing.

Preferred Practice

1. The reply should be confined to those matters raised by submitters. It is not an opportunity to restate the case.
2. Allow questioning from members of the hearing panel on the reply.
3. Submissions in reply should preferably be in writing for complex cases. It is not necessary for most cases although it can be useful.

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3.9 Adjourn or Close

Issue

At the conclusion of a hearing, following the right of reply, Commissioners could either adjourn the hearing or close it. The practice to date in this respect prior to the 2009 RMA amendment was variable. Some local authorities adjourned as matter of course so that the clock was not ticking. That is an abuse of process. That option is no longer open because of the operation of s103A.

If it appears that for some good reason an adjournment may be warranted (eg further information), then Commissioners should ideally raise that with the parties before the right of reply is exercised and preferably before the s42A author has been heard (as the s42A recommendation may change as a result of the further information).

Preferred Practice

1. It is an abuse of process to adjourn a matter routinely at the conclusion of the hearing and not address promptly (or ever) the date when the hearing has been closed.
2. At the point before the reply is due to be delivered, if there is any suggestion that further information may be required, adjourn the hearing for a very brief period for the hearing panel to confer on that issue.
3. If the hearing panel is agreed that further information is required, adjourn the hearing for an appropriate period to allow for the further information to be provided. In adjourning the panel should indicate the likely procedure when the reason for the adjournment is met particularly the extent of involvement thereafter by parties other than the applicant. That may include reconvening the hearing. It may be useful to record the adjournment reasons and what is to result from it in a minute or memorandum to the parties.
4. There is no reason why the reply cannot be in writing. The hearing may not need to be reconvened. Indeed it may be more helpful to the hearing panel if the reply is written because it can be easily referred to during the deliberations phase.
5. If the reply is in writing, on receipt of the reply, the chair should formally close the hearing and notice of that should be given to the parties. It is at this stage that the 15 day decision making period commences in respect of resource consent applications.

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4. DECISIONS

4.1 Dissenting Panel Member

Issue

There are occasions when, despite endeavours to reach a consensus on a decision, there is a hearing panel member with a dissenting view.

Questions that can arise out of that situation include:

- Does the decision record that it is a majority decision?
- Does that then "invite" an appeal on the basis that a dissenting view creates the perception that the decision is not as strong as it may be otherwise be if the decision was unanimous?
- Does the dissenting member write a section into the decision? If the dissenting member finds some difficulty with writing a section into the decision is assistance to be provided to them by the chair or local authority officers?
- If the dissenting member writes the section which is not expressed as well as may be expected in a decision, or it has a basis other than submissions and evidence from the hearing, does the chair have any obligation to assist in that respect?

Best Practice

1. The decision should record that there is a dissenting member, who does not agree with the decision or significant aspects of it.

2. The reasons for the dissenting view should be recorded in the decision, in a separate section of it. That may record reasons for the dissenting view on the decision or alternatively on specific points involved in that decision.

3. The dissenting member should write the dissenting section into the decision. There should not be a difficulty in doing so given it would need to be based on submissions and evidence that has been presented at the hearing to which the dissenting member should refer.

4. The chair of the hearing panel may provide some assistance to the dissenting member in respect of that section of the decision as s/he sees fit.

This accords with the practice of the Environment Court as demonstrated in recent decisions where there has been a dissenting member of the Court.

February, 2010

4.2 Interim Decisions

Issue

An interim decision is not an option which many Commissioners may prefer. The following guide is for those who wish to consider the option.

In some circumstances it may be more helpful to the parties if the hearing panel remains seized of a matter rather than make a final decision and leave the parties to their subsequent remedies. Those remedies (usually in the Environment Court) are likely to be more expensive and more adversarial. Providing more time may enable the parties to contemplate a more appropriate resolution of the matter particularly if an interim decision makes findings on some issues which will advance the matter.

In the November 2007 edition of "The Decision-Maker" the Ministry for the Environment cautioned against interim or preliminary decisions, pointing out that an interim decision is still a decision of a local authority which is appealable. At the same time, the experience of the Commissioners who have issued interim decisions is that parties do not appeal an interim decision but instead wait for the final decision. This is particularly so if the interim decision specifically address the main points and advises that a final and appealable decision will be issued in due course.

Commissioners have jurisdiction to deliver an interim decision on the basis that:

a) In the case of a resource consent, the local authority's power has been delegated to the Commissioners to hear and determine the application. That must include everything from a full grant with few conditions through to declining an application. An interim decision is likely to be addressing matters in between. Such an alternative must lie within the parameters of the delegated power;

b) The same would apply for a plan making issue, particularly as the scope of the matters under consideration have been be fixed by submissions. The scope is usually very wide;

c) RMA s39 allows Commissioners to establish a procedure that is appropriate and fair and to conduct the hearing so as to "avoid unnecessary formality". Procedurally there should be no difficulty in issuing an interim decision and inviting the parties to consider their position in the light of the findings to that stage;

d) The procedure proposed is adopted not infrequently by the Environment Court.

Interim decisions are appealable. Therefore it is desirable to say in the interim decision, if one is issued, what will and what will not be accepted if further input is sought from the parties – namely the scope of what is still to be decided. Consequently, the interim decision must include directions on what is to happen next (both the procedural steps to follow and their timing).

An alternative option is to adjourn, or issue a Minute with "findings to date" or "preliminary views" and call them a "provisional determination" or "interim ruling". But whether the document is actually an interim decision or not depends on its content and its legal effect and not on what it may be called.

4.3 Discretionary Practice

Interim decisions may be appropriate where:

1. Conditions need to be finalised.
2. There is lack of evidence on a critical issue but there is little merit in the parties having to begin all over again.
3. An alternative resolution is apparent but there is no or inadequate evidence on which to base a decision.
4. There would be a better long term outcome.

February, 2010

4.4 Management of Deliberations

Issue

Different approaches are taken to deliberations sessions. Sometimes it is a matter of identifying and discussing the main issues in contention and to arrive at a view on each in order to then decide the matter. Sometimes little discussion is needed. In other more complex matters, there is a need for a carefully managed approach often involving more than one deliberations session.

It is inappropriate that:

a) A matter is decided quickly and the details of the decision, including conditions, are left to the local authority's officers;

b) Officers and reporting consultants have any role in deliberations and decision-making processes as that would go beyond their reporting or advisory role (and their role as witnesses);

c) Panel members wish to decide matters on the basis of information other than that presented at the hearing; or

d) Commissioners seek to redesign proposals as part of a decision rather than decide the application on the basis of the information and evidence put before them.

Preferred Practice

1. The chair should explain to hearing panel members the manner in which the deliberations are to be managed so that the panel members are all clear on the approach that will be followed.
2. The hearing panel should accept the proposal as presented to them in the evidence and not seek to redesign it themselves. At the same time it is open to the hearing panel to reduce the scope of the proposal in order to reduce the impact of adverse effects.
3. The hearing panel should write the decision including the conditions and advice notes.
4. Standard conditions (and advice notes) should not be slavishly imposed if they are not relevant to the circumstances.

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Appendix 1

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