



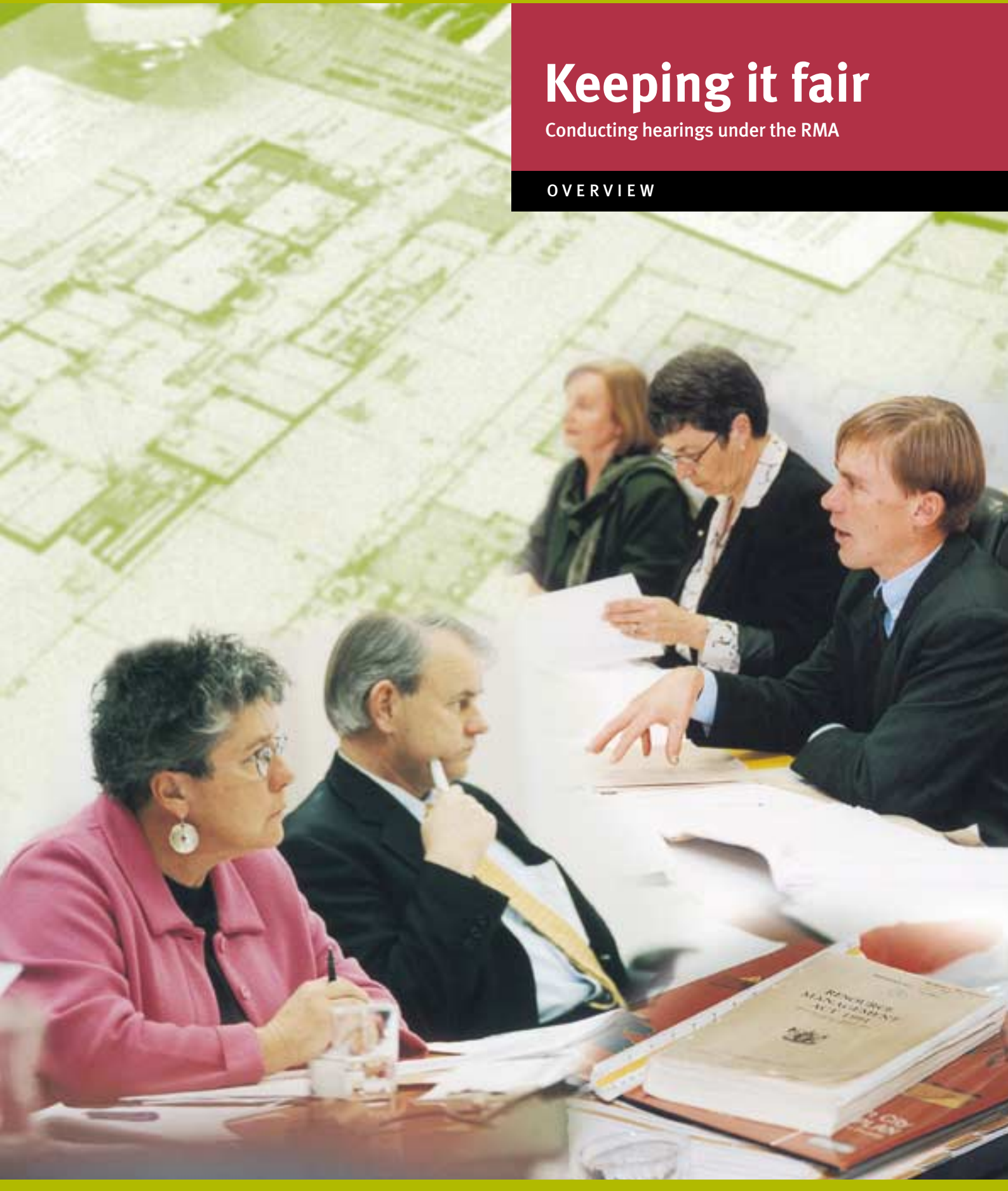
Ministry for the
Environment
Manatū Mō Te Taiao



Keeping it fair

Conducting hearings under the RMA

OVERVIEW





What is a hearing?

Hearings under the Resource Management Act (RMA) are a vital component of the decision-making process for significant resource management issues: either at a consent hearing or at a policy statement or plan hearing. They allow submissions to be heard before a panel in public, without unnecessary formality. As hearings provide an opportunity for public participation in the decision-making process, they need to be conducted fairly so that all involved consider their views have been genuinely taken into account.

Decision-making is often challenging for the hearing panel. Only 5% of all resource consent applications are notified and only some of these require a hearing. Those applications that do require a hearing are often multi-faceted: the proposal is likely to have significant environmental effects or contain challenging issues which are of concern to the community. Decisions on policy statements and plans are also often difficult and complex.

Principles of natural justice

Several Acts govern hearings procedure. Hearings must also be conducted in accordance with the principles of natural justice:

- Parties must be given adequate notice and an opportunity to be heard in support of their own case and to comment on the cases of opposing parties. The hearing must be procedurally fair.
- The decision made must be disinterested and unbiased. The hearings panel must always remain open to persuasion and not bring a closed mind to the proceedings. The decision-making must be independent and not influenced by matters that have not been transparent in the course of the hearing. No conflicts of interest should interfere with the decision-making process.

Conflicts of interest

Conflicts of interest may arise in a variety of situations and legal advice should be sought in every case. Examples include:

- The council could be seen to be acting in its own interests. For example: the council operates a competing business or could financially benefit from the proposal.
- An individual committee member could be acting in their own interest or have acted previously in a way that may indicate a closed mind (for example, publicly commenting on the merits of an application).

Perceptions can be as important as reality both in the selection of an impartial hearing panel and in the process used. The applicant and submitters should feel confident that the case is being heard without any predetermination or bias.

Delegation of authority

The RMA permits limited delegation of council decision-making, and most councils' standing orders require certain procedures to be followed for implementing any delegation. The full powers of decision-making on resource consents can be delegated to either a standing committee of a council or to a commissioner.

The RMA does not permit councils to delegate the approval of policy statements, plans, or plan changes. However, a hearing panel can conduct the hearings of submissions and they make recommendations to a council.



Who is involved in a hearing?

Chairperson

The chairperson is both a member of the hearing panel and the 'ringmaster' of the hearing. They should explain the procedure of the hearing to those involved.

Panel members

Panel members should inform themselves about the subject of the hearing, and any policies or plans that may affect it. They should avoid any discussions that may lead to an impression of lack of impartiality.

Committee secretary/hearings administrator

The Committee secretary/hearings administrator prepares for the hearing and ensures that it runs smoothly.

Consents officer

The consents officer is responsible for coordinating the council's response to the resource consent application by preparing the planning report. They should attend the hearing to answer questions and to make comments.

Planner

The planner, whether employed by a council or one of the parties, is an independent expert whose role is to provide their expert opinion. They may take on the roles as a consent officer, and should attend the hearing to provide their expertise and answer questions. At times on appeal, a council planner may be subpoenaed and required to give their expert opinion.

Procedural adviser

Advice on procedural matters may be provided by an experienced hearings administrator or committee secretary. However, it is more usual for this role to be filled by the council's planner or a senior manager.

Other experts

Experts who contributed to the council's planning report usually attend the hearing to answer questions and provide advice. Applicants and submitters may call evidence from independent experts who can be asked questions of clarification and explanation by the panel.

Applicant

The applicant, whose proposal or request is the focus of the hearing, may or may not present their case to the hearing panel. They can choose to be represented by an advocate. When the applicant participates in the hearing, the panel may ask questions of them.

Advocates

Applicants and submitters may be represented at the hearing by an advocate, often a lawyer. They are not expert witnesses.

Submitters

Any submitters may speak, either by presenting their own case or when called on by their advocate. They also have the right to call witnesses, including expert witnesses. The hearing panel members may question them.

The public and the media

Members of the public may attend a hearing but are not entitled to participate. The media are entitled to attend and to report on the proceedings, except when the public is excluded.

Preparing for the hearing

Appointing the panel

A large panel can increase the formality and be intimidating for inexperienced participants. A lone panel member can hear small cases. An uneven number of panel members, either three or five, is better for more complex hearings.

The chairperson is usually selected by a council or by the panel.

Joint hearings

Joint hearings are held where the resource consent applications for the same proposal have been made to two or more consent authorities. In restricted coastal activity hearings, authorities will include a territorial local authority, a regional council, and the Minister of Conservation.

The regional council for the area concerned is responsible for notifying the hearing, setting the procedure and providing administrative services, unless the consent authorities involved agree that another authority should be responsible.

Choosing the venue

Venues should be chosen to suit the anticipated number of participants and should not be intimidating. The layout should allow all participants to hear and see the panel and speakers, and to present their cases without inconvenience.

Ensuring easy access, including provision for disabled people, is important in avoiding unnecessary formality. It may be appropriate to consider a marae as the venue for all or part of the proceedings.

Observing Treaty responsibilities

The RMA requires that the principles of the Treaty of Waitangi be taken into account in all decisions on the management of natural and physical resources. The appointment of a Maori commissioner when there are cultural concerns raised by tangata whenua ensures that evidence is understood and considered appropriately.

If any party wishes to speak or read evidence at the hearing in Maori, the council must provide this opportunity.



Sending out the planning report and the agenda

The planning report for a resource consent hearing must be received by participants at least five working days before the hearing. The formal agenda and information on the conduct of the hearing should accompany the planning report. A fuller package of information is usually sent to the hearing panel.

For policy statement and plan hearings, planning reports contain a summary of the key points raised by submitters, a discussion of those issues, and a recommendation on each submission. They are usually sent out before setting times for submitters to be heard. The preparation of a report in this situation is considered good practice.

Visiting the site

For resource consents a site visit is essential to understanding the application and its likely effects. The site visit is best done either ahead of the hearing or very early in the hearing. The site visit must not become an opportunity for any of the parties to speak directly to the panel members about the merits of the application.

Conducting the hearing

The chairperson's opening statement sets the tone of the meeting and ensures that every participant knows what to expect procedurally, who is on the hearing panel, and the role of the hearing panel.

Order of proceedings at hearings

Many councils use the following sequence for speakers at resource consent, designation, plan change and heritage order hearings, assuming that the planning report is taken as read:

- applicant
- submitters in support of proposal
- submitters in opposition to the proposal
- staff summary of key points
- applicant's right of reply – no new evidence is permitted at this stage.

New information not included in the planning report may be brought forward at the hearing. If this new information is significant, an adjournment of the hearing may be necessary. All parties should have the opportunity to consider these matters and to comment on them, and to highlight key points of their original report.

Hearings of full policy statements and plans are held in a series, divided into a logical sequence of topics. Staff arrange for submitters to speak by topics, although this can be varied.

Speaking rights

Apart from the applicant and the reporting staff, the only parties who can speak are those who have made formal submissions.

The chairperson has the power to limit the speaking rights of parties to avoid repetition. This power should be used sparingly; to curtail speaking rights of submitters can appear to breach the principles of natural justice. Limiting speaking rights of expert witnesses who are repeating facts which have already been expressed may be more appropriate.

Evidence

The hearing panel may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the hearing.

It is dangerous to take any evidence "as read" during the proceedings, even if the panel members have read it in advance. If witnesses refer to documents to give weight to their opinion they can be asked to produce a copy of the full case or document.

Late submitters

If submissions are received late, the RMA provides for the waiver or extension of time limits. A consent authority may extend the time within set limits, provided it takes into account the interests of any person who might be affected by the extension, the interest of the community, and its duty to avoid unnecessary delay.

Ending the hearing

Most hearings are closed by the chairperson at the end of the public section, and the panel moves into committee to deliberate either at that time or on an agreed date.

Questions

Hearing panel members should develop the ability to ask questions which do not display bias and are open-ended, to behave in a way that shows interest, and to acknowledge emotions without letting them dominate proceedings.





Making decisions or recommendations

Deliberations

In arrangements for deliberations, the aim should be to demonstrate that no person other than the hearing panel is influencing the decision. No one should be permitted to bring forward new information after the hearing is closed.

Staff may remain during deliberations, but their role is limited to drafting the decision and providing procedural advice; they should not influence the decision in any way.

The majority agreement will prevail, but the members who do not agree may record their dissension in the published recommendation or decision.

In joint hearings, unless there is a resolution of each authority to jointly decide the case, the decision of two or more standing committees does not result in a joint decision. The decisions can be written up in one document with separate conditions for each consent if granted. Committees should work together in discussing the issues to get integrated decisions.

The deliberations of a hearing panel for a policy statement or plan are likely to take place over many months. Usually, after all submissions on each chapter or topic are heard, some tentative decisions are made. These can be modified or reversed at the end of the hearings process when all the parts are integrated.

Decisions

For a resource consent, the applicant cannot be granted more than the original application sought.

For policy statements or plans, the hearing panel may recognise what changes could be made to the policy statement or plan to rectify concerns in submissions. These changes have to be within the relief sought in the submissions.

Written decision or recommendation

A written decision meeting minimal statutory requirements is mandatory for all hearings held under the RMA and must be released within the timeframes specified in the RMA.

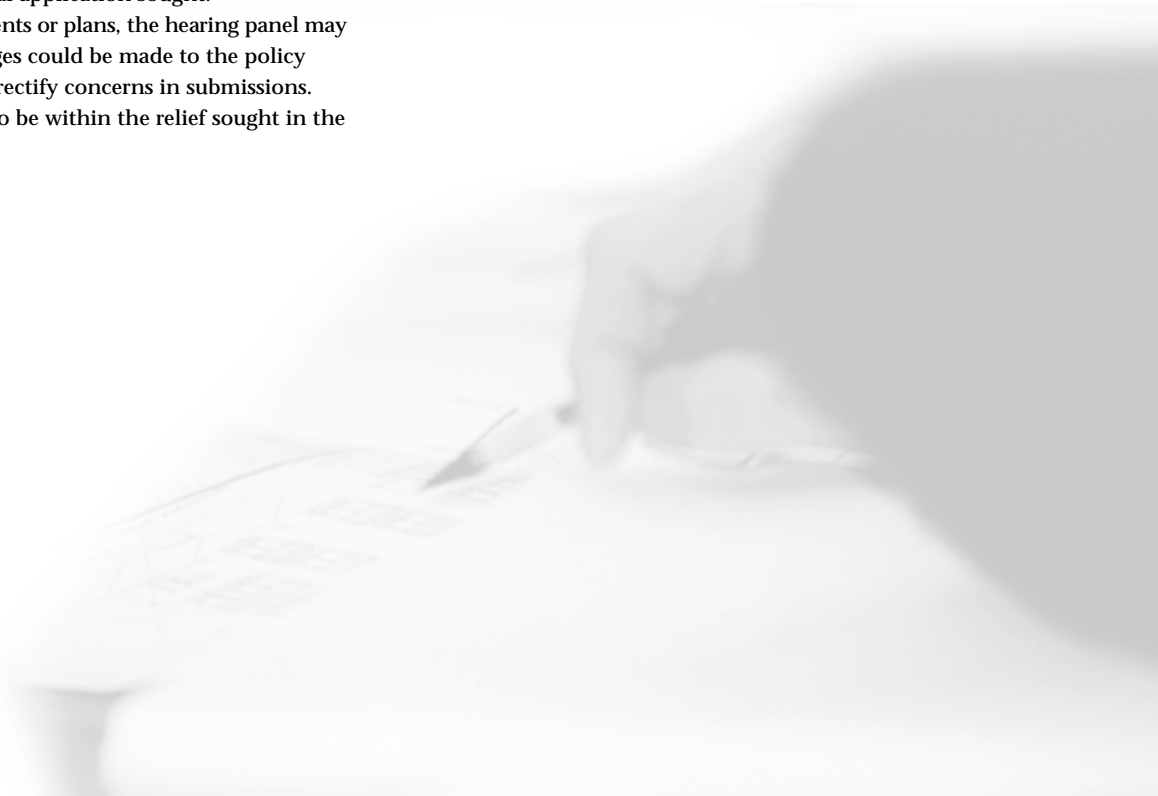
Decisions should include general reasons, as well as reference to the reasons for some key consent conditions. It is useful to refer to submitters' concerns in a decision, especially if the decision is contrary to that sought by them.

Resource consents can be granted subject to conditions to mitigate adverse effects. Only the applicant can be required to do anything by way of a consent condition, not a third party.

Consent conditions should be easily understood, fair and reasonable, consistent, within the authority's legal powers, and enforceable.

After the decision or recommendation

Once decisions are sent out to the applicant and submitters, either has the right of appeal or referral to the Environment Court. The Environment Court hears the case de novo, that is, the Court hears the whole case again.





After the hearing

Quality check

Councils should regularly check the quality of their conduct of hearings. Some councils survey the opinions of participants in hearings and ask questions about the fairness of the process. Respondents can return their questionnaires anonymously.

Another variation is internal assessment, where staff and panel members assess the hearing themselves through a standard questionnaire.

An annual review of the performance of the hearing panel should be linked to an identification of professional development needs of the members.

Keys to success

Good practice in the conduct of hearings is both an art and a science. Integrating these aspects throughout the hearing is the key to successful processes and high quality decision-making. Experienced chairpersons know instinctively when it is time to "take a break" or show some flexibility in procedure. This sort of judgement develops from adopting good practices observed elsewhere, and from reflecting on past performance.

Although there is no substitute for learning on the job, a responsible council offers training supplemented by mentoring where possible.

Councils also need to put in place systematic approaches for evaluating the consistency and quality of both the conduct of RMA hearings and of decisions. The good practices outlined in this practice guide are a starting point for the development of such systems.

Do's for a good hearing!

- Avoid conflicts of interest
- Ensure the venue is appropriate and the hearing is focussed and welcoming
- Prepare well for the hearing
- Ensure that the site visit and the hearing process are conducted so as to protect your impartiality
- Be attentive and considerate of all parties, while ensuring a timely and efficient hearing process
- Ask open-ended questions
- Ensure all relevant factors are considered in your deliberations
- If in doubt on procedural points: seek advice



For further information on best practice for hearings under the RMA see the Ministry for the Environment publication *Keeping it fair: A guide to the conduct of hearings under the Resource Management Act 1991: Comprehensive guide*.

