



Report 04.312
Date 7 June 2004
File ENV/09/01/01

Committee Environment
Author Luci Ryan, Manager, Consents Management

Recent changes to the Environment Court

1. Purpose

To report to the Members of the Environment Committee on improvements in the Environment Court that have reduced delays in progressing appeals and references.

2. Background

Approximately 1100 cases are lodged with the Environment Court each year. However, the Court has been unable to deal with this many cases and, as a result, a backlog of cases waiting to be heard has arisen. In February 2003 there were over 2500 cases on the books. The backlog of cases has resulted in an average disposal time of between 18 and 30 months.

It should be noted, however, that there is considerable regional variation in the delays experienced. Delays in Auckland are by far the longest, skewing the average disposal time figures. For example, in May 2001 there was a backlog of 939 cases in Auckland, compared with 96 in Wellington. Furthermore, the number of references on plans to the Court varies considerably around the country. In Wellington, where the majority have been operative for some time, the number of references are considerably lower than in those areas where plans are not yet operative.

3. Reasons for the delays

There are many reasons for delays between lodgement of an appeal or reference and disposal. A report prepared by the Ministry for the Environment¹ provides more detail, but the reasons can be broadly summarised as follows:

- Large increase in the number of references and appeals to the Court

¹ Reducing the delays – Enhancing New Zealand's Environment Court, Ministry For The Environment, March 2003

- Lack of Judges, Commissioners and support staff to deal with the increase in cases
- Low fees to lodge an appeal or a reference
- Potential for appellants to use the courts to delay a project commencing
- The *de novo* status of hearings
- Poor quality first-instance decision making

4. Funding and resources

The Environment Court was awarded an additional \$1.2 million per year in May 2002. This enabled the Court to employ more judges and commissioners and increase the level of administrative support. In particular, each judge now has a case manager and a legally qualified hearing manager.

The additional funding also allowed a case tracking system to be set up in April 2004. Cases will now be assigned as belonging to one of three categories: 'Standard'; 'Complex' and 'On Hold'. Previously no such tracking system existed and it was often difficult to determine the status of an individual case.

It is now intended that 'Standard' cases will have a hearing date set within six months of lodgement of proceedings.

5. Defining the Role of Commissioners

When the Ministry for the Environment examined the options for reducing delays in the Environment Court, they recommended that the RMA be amended to give Commissioners in the Court a greater role. At the time of the MfE review, the RMA contained very little guidance about the role Commissioners were expected to play. Experience overseas has shown that given greater responsibilities, Commissioners could play a significant role in reducing the backlog of cases, if they were able to hear certain appeals without the need for a judge to be present.

The RMA amendment in 2003 did go some way to further defining the role of Commissioners. As a result, the ability of a Commissioner to sit alone and hear a case has been increased.

In addition to hearing cases, either alone or with a Judge, Commissioners are often used for chairing mediation. There has been criticism in the past that the quality and effectiveness of mediation has varied between Commissioners and that this has contributed to delays in the Court. In order to rectify this, all Commissioners have been sent on advanced mediation training to help them resolve issues without the need for a formal hearing. The more cases that can be resolved through the mediation process the better, as this will help reduce delays, for those cases that genuinely need a formal hearing, in getting to Court.

6. Costs for appellants

At present it costs an appellant \$55 to lodge an appeal with the Court. This has not changed since 1988, and is often cited as a reason why so many appeals are lodged with the Court. The general consensus is that this is too low and does not encourage potential appellants to be careful.

In 2003 the delays in the Courts were reviewed by Ministry for the Environment and at that time it was suggested that the filing fee be increased to between \$100 and \$150. Furthermore, it was recommended that the appellant pay a setting down fee of around \$1,900 and \$1,100 per every half day in Court. This would have brought the process of lodging an appeal in line with process of lodging a judicial review. However, at this time the filing fee remains at \$55 and there are no other fees payable.

7. Information for lay people

There is very little information available for lay people about the functions of the Court and their role as an appellant. As a result, many appellants do not understand what behaviours are expected of them. For example, it is relatively common for appellants not to turn up to Court when requested. Currently the Court is lenient on this type of behaviour and this has increased delays in getting cases through the hearing stage and to disposal.

Historically, MfE has published material aimed at practitioners only. However, this is changing and MfE has published lay persons guides to Mediation and the Resource Management Act. As yet there is still no guide to the Environment Court, although in the 2003 review of Court delays, MfE recommended that such a guide would be useful.

Appellants who make it through to a hearing often do not have legal representation (i.e. they represent themselves). Lack of legal representation can result in protracted hearings, because of the failure of the appellant understand what is relevant for discussion in Court. The introduction of the Environmental Legal Assistance fund in March 2001 may go some way to reducing the number of lay litigants without legal representation, by providing subsidised legal aid.

8. Use of audio equipment

Whilst this may not sound like a big issue, the introduction of digital audio technology has reduced the average time of a hearing by as much as 40%. Previously judges or the court stenographer were required to take extensive notes during cross-examination. This not only resulted in delays during the hearing, but also meant that those being cross-examined could not talk at a natural pace.

Proceedings are now recorded and sent digitally, every 10 minutes, to a transcription service located in Australia. The transcripts are then returned within hours of the hearing taking place.

9. First instance decision making

There has been concern that poor decision making by Councillors and/or hearings commissioners at the time a consent is granted has been partially to blame for the increase in cases lodged with the Court. In particular, there has been concern that it may be difficult at times for Councillors to separate their political duties from their judicial responsibilities when making decisions on applications.

Therefore, a voluntary programme of training for Councillors sitting on consent hearings has been created. This will commence shortly after the next local body elections. The programme aims to help Councillors understand their role and to keep them up to date with resource management issues.

10. Communication

No further public communication is necessary for this report.

11. Conclusion

Recent changes to the Environment Court have resulted in the number of outstanding cases falling from a high of 3,000 to approximately 1,500. This is an excellent result in a very short space of time and will help to provide more certainty for all parties involved in the resource management process.

The reduction in outstanding cases has been achieved by implementing a number of changes recommended by MfE in 2003. However, not all the changes recommended by MfE have been implemented. For example, a review of the *de novo* status of hearings and increasing the costs paid by appellants when lodging an appeal. At this stage it is not clear when these changes will be implemented, if at all.

12. Recommendations

It is recommended that the Committee:

1. *receive this report; and*
2. *note the contents.*

Report prepared by:

Report approved by:

Luci Ryan
Manager, Consents
Management

Jane Bradbury
Manager, Environment
Division