

# Agenda 2020

## **Regulation Hearing Committee**

Date: Thursday 29 October 2020

Time: 8.30am

Venue: Council Chamber, 200 Tuam Street, Christchurch



# Regulation Hearing Committee

## Membership

### Chair

Cr Claire McKay

### Members:

Cr Grant Edge

Cr Nicole Marshall

Cr Craig Pauling

Cr Lan Pham

**ENVIRONMENT CANTERBURY**  
**REGULATION HEARING COMMITTEE**  
**TABLE OF CONTENTS**

<b>1. Mihi/Karakia Timatanga - Opening .....</b>	<b>4</b>
<b>2. Apologies.....</b>	<b>4</b>
<b>3. Conflict of Interest .....</b>	<b>4</b>
<b>4. Deputations and Petitions.....</b>	<b>4</b>
<b>5. Minutes .....</b>	<b>5</b>
5.1. Minutes from 22 October 2020 .....	5
<b>6. Matters Arising.....</b>	<b>10</b>
<b>7. Items for discussion .....</b>	<b>11</b>
7.1. RHC consideration of resource consent applications .....	11
7.2. Appointment of Hearing Commissioner- MHV Water Limited.....	22
<b>8. Extraordinary and Urgent Business.....</b>	<b>24</b>
<b>9. General Business.....</b>	<b>24</b>
<b>10. Next Meeting - to be confirmed .....</b>	<b>24</b>
<b>11. Mihi/Karakia Whakamutunga – Closing.....</b>	<b>24</b>

- 1. Mihi/Karakia Timatanga - Opening**
- 2. Apologies**
- 3. Conflict of Interest**
- 4. Deputations and Petitions**

## **5. Minutes**

### **5.1. Minutes from 22 October 2020**

Refer to attachment on following page.

## **REGULATION HEARING COMMITTEE**

Minutes of the meeting held in the  
Council Chambers, 200 Tuam Street, Christchurch on  
Thursday, 22 October 2020 at 8.30am

### **CONTENTS**

- 1.0 Mihi/Karakia Timatanga - Opening
- 2.0 Apologies
- 3.0 Deputations and Petitions
- 4.0 Conflict of Interest
- 5.0 Minutes of Meeting – 15 October 2020
- 6.0 Matters Arising
- 7.0 Item for Discussion
  - 7.1 RH Consideration of resource consent applications
  - 7.2 Appointment of Hearing Commissioner – Fulton Hogan Limited
  - 7.3 Decisions on objections to Costs and Decisions Hearings
- 8.0 Extraordinary and Urgent Business
- 9.0 Other Business
- 10.0 Next Meeting
- 11.0 Mihi/Karakia Whakamutunga - Closure

### **PRESENT**

Councillors Claire McKay (Chair), Grant Edge, Nicole Marshall, Lan Pham and Craig Pauling (from 8.33am)

### **IN ATTENDANCE**

Catherine Schache (General Counsel), Tania Harris (Senior Manager Operational Support) and Alison Cooper (Consents Hearings Officer)

#### **1. MIHI/KARAKIA TIMATANGA - OPENING**

Cr McKay opening the meeting with a Karakia.

#### **2. APOLOGY**

Councillor Pauling (for lateness)

#### **3. DEPUTATIONS AND PETITIONS**

There were no deputations or petitions.

#### **4. CONFLICT OF INTEREST**

There were no conflicts of interest. Councillor Pauling confirmed he had no conflicts of interest to declare.

## **5. MINUTES OF MEETING – 15 OCTOBER 2020**

### **Resolved**

#### **The Regulation Hearing Committee:**

- 1. confirms the minutes of the meeting held on 15 October 2020 as a true and correct record.**

Cr McKay / Cr Pham  
CARRIED

## **6. MATTERS ARISING**

There were no matters arising.

Councillor Pauling entered the meeting at 8.33am

## **7. ITEMS FOR DISCUSSION**

Councillor McKay suggested and it was agreed to amend the order of items for discussion to allow time for discussion.

### **7.2 Appointment of Hearing Commissioner – Fulton Hogan Limited**

*Refer pages 21 to 24*

Councillor Marshall said that the report did not cover the delay in the provision of the paper to the Committee. It was noted that paragraph 9 provided the reasoning for the delay in appointment. It was agreed to amend the recommendation to date the receipt of the report.

She also noted that the proposed commissioner expertise referred to freshwater. The meeting was advised that the proposed commissioner had also had expertise in mining operations.

She enquired if there were any hearing commissioners with air expertise that were Christchurch based. It was confirmed there were not.

Councillor Edge queried about using a sole commissioner where there are community concerns and if a panel would be a better option.

### **Resolved**

**That the Regulation Hearing Committee in regard to resource consent applications CRC204346, CRC204347, CRC204348, CRC204349 and CRC204350 applied for by Fulton Hogan Limited:**

- 1. receives the report on the options for appointment of decision-makers;**
- 2. appoints Craig Welsh as a Hearings Commissioner under s34A of the Resource Management Act 1991; and**
- 3. delegates to Craig Welsh pursuant to s34A(1) Resource Management Act 1991, the function, powers and duties required to: deal with any preliminary matters; hear and decide the resource consent application.**
- 4. notes that the committee had considered this issue at the meeting of the Regulation Hearing Committee on 10 September 2020 and had requested**

**staff to report on alternative options because of a conflict of interest by the proposed hearing commissioner.**

Cr Pham / Cr Pauling  
CARRIED

### **7.1 RHC consideration of resource consent applications**

*Refer pages 11 to 20 of the agenda.*

Councillor McKay invited Catherine Schache to speak to the paper. Ms Schache outlined the pros and cons of the options and suggested two further options for persons/bodies to decide non-heard applications:

- (f) an ad-hoc appointment of commissioners and councillors: - it would improve the skills of councillors and increase the pool of people; however it would be a hearing panel and not a committee so it is not a public meeting, and there would be a lack of continuity.

She noted that there would be a conflict of interest as the RHC Committee members would be appointing themselves.

- (g) Appointment of an independent hearing commissioner and a councillor would sit alongside to observe.

The benefits would be one of up-skilling but there could be natural justice issues.

Councillor McKay asked members what the purpose should be.

Councillor Pham said she would like the committee to go forward rather than have an independent chair.

Councillor Marshall asked for clarification of 'shadowing' a chairperson. It was noted that care would be required to avoid influencing the decision-maker.

Councillor Pauling thought the 'why' would be experience and not necessarily training. He preferred Option B and having input into the decision but not writing the decision.

Councillor McKay explained how the Committee previously worked for making decisions on notified applications.

Councillor Edge considered Option B but thought an ad-hoc committee with an independent person would work.

It was noted that any sub-committee members would require the Good Decision-making certification.

It was suggested a workshop be held.

It was agreed the paper be referred to the next meeting.

### **7.3 Decisions on Objections to Costs and Decisions Hearings**



Councillor Marshall asked if CRC numbers could be added to future reports.

**Resolved**

**That the Regulation Hearing Committee receive the summary information on decisions where objections to costs and decisions have been decided.**

Cr Pauling / Cr Pham  
CARRIED

**8. EXTRAORDINARY AND URGENT BUSINESS**

There was no extraordinary or urgent business.

**9. GENERAL BUSINESS**

There was no general business.

**10. NEXT MEETING - 29 October 2020**

**11. MIHI/KARAKIA WHAKAMUTUNGA - CLOSURE - Councillor Pauling closed the meeting with a mihi at 9.05am**

**CONFIRMED**

**Date:**

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**Chairperson:**

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## **6. Matters Arising**

## 7. Items for discussion

### 7.1. RHC consideration of resource consent applications

#### Regulation Hearing Committee paper

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Date of meeting	29 October 2020
Agenda item	7.1
Operations Senior Manager Support	Tania Harris
Author	Catherine Schache

#### Purpose

1. To consider options for the Committee or other bodies to decide certain types of resource consent applications.

#### Recommendations

That the Regulation Hearing Committee:

1. **Considers the proposed options to allow it to hear resource consent applications;**
2. **Decides its preferred option; and**
3. **Advises staff of its preferred option and asks staff to undertake necessary steps to implement that option.**

#### Background

2. At its meeting on 22 October 2020, the Committee began considering this matter but needed further time to consider available options. This paper has been therefore been resubmitted to this Committee meeting. Staff have taken the opportunity to expand on the number of options for consideration and to provide information on the benefits and disadvantages of those further options. Any new material included in this paper is underlined to make the changes readily apparent.
3. The Council has previously delegated to the Committee (amongst other matters):  
  
*“...the authority to decide resource consent applications to which submissions were received and where there are no requests to be heard or any requests to be heard have been withdrawn.”*
4. Accordingly, during the previous triennium, the Committee made decisions on resource consent applications that had been notified (either publicly or on a limited

basis) but where no submissions were received, or no submitters wished to be heard (“Non-heard applications”).

5. It is not unusual for Non-heard applications to arise – and they typically do so four or five times in any year. Usually this is because, after a submitter has made a submission to the Council, there are meetings between the submitter and the consent applicant which result in the consent applicant making changes to its application or proposing consent conditions which address a submitter’s concerns.

## **Non-heard applications – how they arise.**

6. There are some additional logistical steps required if Non-heard applications are decided by a body other than a Hearings Commissioner, because of differences around when the Council becomes aware that an application has become a Non-heard application (that is, the timing of when it becomes apparent that there is no need for a hearing).
7. Broadly speaking, there are three scenarios in which consent applications that have been notified might become Non-Heard applications and come before the Committee (or other decision making body if the Committee decides to proceed with any of the options for deciding these applications other than the status quo). The processing timeframes under the Resource Management Act (**RMA**) vary for each of these three scenarios, hence the differentiation. The three scenarios are:
  - Where, after the application has been notified and the period for submissions has closed, there have been no submissions received or no submitters wishing to be heard;
  - Where the application has been limited notified, with some submissions received, but before the application comes to a hearing, Council is advised that no submitters wish to be heard; or
  - Where the application has been publicly notified, with some submissions received, but before the application comes to a hearing Council is advised that no submitters wish to be heard.
8. These three scenarios and the applicable timeframes under the RMA are set out in Table 1. The yellow boxes in Table 1 indicate the last date on which a matter could become a Non-heard Decision and be referred to the Committee/sub-committee for a decision. These dates are proposed because:
  - They leave sufficient time (15 working days) for the Committee members to familiarise themselves with the issues to be decided;
  - They also leave sufficient time for an RHC/sub-committee hearing to be scheduled in committee members’ diaries and for it to be notified as required by the Local Government Official Information & Meetings Act (“LGOIMA”);

- Occur prior to the date on any appointed Hearing Commissioner(s) would have received the Council officer's s42A report, with a recommended decision on the consent application (and therefore after they will have received and reviewed the application and AEE, but prior to any substantial consideration of the issues being undertaken by the Commissioner(s)); and
  - Occur prior to the date on which the consent applicant, any submitters and any Hearing Commissioner(s) would have been notified of the hearing date.
9. A proposed process indicating the additional steps that would be followed for all of these Non-heard Decisions (regardless of the scenario under which they arose) is set out in Table 2.

## Options for deciding Non-heard applications

10. The Committee has asked staff to prepare a report on the options for it to resume hearing Non-heard applications, taking in to account the following factors:
- The Committee members having access to necessary expertise and guidance for making the decision;
  - All people involved in making the decision having the appropriate *Making Good Decisions* accreditation, for decision making itself and for the chair of the panel, as this is required by section 39B of the RMA;
  - Managing the workloads of Committee members;
  - Meeting timeframes under the RMA.
11. The Committee asked in particular for staff to consider whether it would be possible for the Committee to appoint an experienced Hearings Commissioner to Chair the Committee when it is deciding any Non-heard applications.
12. It would not be consistent with the Local Government Act requirements for the Committee to have a member who attended meetings only when the Committee was deciding Non-heard applications, or who took the chair only for those types of decisions. Simply appointing a Hearings Commissioner to the Committee for Non-heard applications would not be lawful.
13. It would, however, be possible for there to be a sub-committee of the Regulation Hearing Committee (or a separate committee of Council) that met only to decide Non-heard applications and therefore for there to be an independent member of that sub-committee/committee with the necessary skills, attributes or knowledge to assist that sub-committee decide upon non-heard applications.
14. With those factors in mind, staff consider that there are seven options for deciding Non-heard applications, as follows:

- a. The Committee making decisions on Non-heard applications in the way that it has previously done during the previous triennium but with its current membership (although noting that any member of the Committee without *Making Good Decisions* accreditation would not be permitted to participate and would need to excuse themselves from that decision);
  - b. Establishing a sub-committee of the Regulation Hearing Committee, with the sole purpose of hearing Non-heard applications, and for the membership of that sub-committee to include:
    - All members of the Regulation Hearing Committee who hold *Making Good Decisions* certification; and
    - An independent chair, who would bring experience as a Hearings Commissioner and also hold a *Making Good Decisions* chair endorsement;
  - c. Establishing a sub-committee of the Regulation Hearing Committee as above, but with the membership of that sub-committee also including other Governors who are not currently members of the Regulation Hearing Committee but who hold the *Making Good Decisions* accreditation;
  - d. Establishing a committee of the Council (rather than a sub-committee of the Regulation Hearing Committee) with the same options for membership of that committee as outlined at (b) and (c) above;
  - e. Retaining the status quo, with the Committee appointing an independent Hearings Commissioner to decide publicly notified applications; and with senior consents staff making decisions for limited notified applications;
  - f. The Committee appointing a panel each time that a Non-heard application arose, with the panel drawn from those Governors who hold *Making Good Decisions* accreditation, together with an independent member with experience as a Hearings Commissioner; and
  - g. The Committee appointing an independent Hearings Commissioner to make the decision, and with Governors who hold *Making Good Decisions* accreditation 'shadowing' the Commissioner.
15. The table at Appendix 1 sets out the advantages and disadvantages of each of the options and the steps needed (if any) to implement that option.
  16. Staff's recommendation to the Committee is to proceed with Option B, for the reasons set out in Appendix 1, namely that it provides Governors with the opportunity to make resource consent decisions while also benefitting from an independent member's expertise and guidance and meeting statutory timeframes. We seek the Committee's approval to continue with the necessary steps to implement that approach.

## Legal compliance

17. Section 34 of the RMA allows Council to delegate functions to a Committee of the Council; and section 34A allows the Council to delegate functions to Hearing Commissioners.
18. The Local Government Act 2002 (clause 30(2) of Schedule 7) allows a committee of a council (such as the Regional Hearing Committee) to appoint the subcommittees that it considers appropriate, unless it is prohibited from doing so by the council. While there is no express provision in the Committee's Terms of Reference to allow it to establish a sub-committee, there is also no prohibition in it doing so and therefore we consider it is permitted for the Committee to establish a sub-committee to decide Non-heard applications. It would also be necessary to seek specific delegation from the Council to the sub-committee to hear Non-heard applications, as the Regulation Hearing Committee does not have the power to sub-delegate those powers.
19. The Local Government Act allows a person who is not a councillor to be appointed to a committee or sub-committee if, in the opinion of the local authority, that person has the skills, attributes or knowledge that will assist the work of the committee/sub-committee.
20. All of the proposed options are consistent with the RMA, the Local Government Act 2002 and the Local Government Official Information and Meetings Act 1987. There will be different statutory requirements for each of the proposed options but they are all capable of being met.

## Attachments

Nil

<b>Peer reviewers</b>	Alison Cooper, Virginia Loughnan
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**TABLE 1: TIMELINE FOR NON-HEARD DECISIONS**

<b>Working days</b>	<b>Action</b>	<b>Public or limited notification: no submissions received or no submitters wishing to be heard after submission period closes</b>	<b>Limited notification: submitters withdraw before hearing</b>	<b>Public notification: submitters withdraw before hearing</b>
	Decision to notify			
<b>20 working days (s97)</b>	Submission period	No submissions received OR no submitters wish to be heard	Some submissions received	Some submissions received
<b>Submission period closes</b>		RHC notified		
<b>Approx. 10-15 working days later</b>			Hearing Commissioner appointed	Hearing Commissioner appointed
			Submitters withdraw prior to s42A report being provided RHC notified	
<b>30 days after submission period closes</b>			S42A report and notice of hearing (15 working days prior to hearing (s103B(2)))	
<b>45 days after submission period closes (s103A(2))</b>			Decision must be made	



				Submitters withdraw prior to s42A report being provided RHC notified
60 days after submission period closes				S42A report and notice of hearing (15 working days prior to hearing (s103B(2)))
75 days after submission period closes (s103A(1))				Decision must be made

**TABLE 2: PROCESS FOR NON-HEARD DECISIONS**

**Immediately/for all consent applications**

Add extra paragraph to letter of appointment for Hearing Commissioners, to advise them of possibility of appointment being cancelled if no submitters wish to be heard, but with assurance that time worked to date will be paid.

**For Non-heard applications**

As soon it is apparent that a matter will be a Non-heard applications:

- Notify RHC members and confirm availability & quorum to decide matter;
- Send to RHC members the consent application, s42A report and any further information provided by applicant (including under s92);
- Advise consent applicant;
- Set date for RHC meeting and give LGOIMA notice of meeting date, time and location;
- Advise appointed Hearing Commissioner (if any).

**At RHC meeting**

- Revoke Hearing Commissioner’s appointment at next meeting;
- Provide run sheet for meeting with a skeleton of matters to be considered;
- Ensure s42A report writer attends meeting;
- Take minutes at meeting, which will form the consent decision.

## Appendix 1: Options for persons/bodies to decide Non-heard applications

Option	Advantages	Disadvantages	Next steps
<p>a) RHC making decisions as it has previously</p>	<p>i. Can start making these decisions immediately</p> <p>ii. Decision making conducted in a public forum with full public notification of meeting and agenda</p>	<p>i. Committee will not have the benefit of specialist expertise to assist with its decision making</p> <p>ii. Matters for consent decisions are becoming more complex, especially with new essential freshwater framework – resulting in increased need for specialist expertise</p>	<p>Report from RHC to next Council meeting (10 December) advising that it is intending to exercise its existing delegations</p>
<p>b) Sub-committee being established with members being:</p> <ul style="list-style-type: none"> <li>• RHC members with <i>Making Good Decisions</i>; and</li> <li>• Independent chair.</li> </ul>	<p>i. Provides appropriate specialist expertise to assist making robust decisions</p> <p>ii. Decision making conducted in public forum with full public notification of meeting and agenda</p> <p>iii. Increases skill level of relevant governors</p>	<p>i. Committee will need to establish sub-committee at future RHC meeting and Council will need to delegate appropriate powers to sub-committee, so some time delays</p> <p>ii. There will be additional costs to pay for an independent member. Currently Environment Canterbury meets costs of RHC decision (ie no cost to</p>	<p>Report from RHC to next Council meeting (10 December) advising that it is intending to establish sub-committee and seeking delegations to sub-committee</p> <p>Report to RHC meeting (early in New Year) to establish sub-committee, make delegations to sub-committee and set Terms of Reference</p> <p>Staff to recommend to RHC individuals who might be appropriate</p>

		<p>consent applicant) so will need to decide whether Council or applicant should bear these costs.</p> <p>iii. Any independent member may have a conflict of interest, so might have to step aside from some decisions</p> <p>iv. Governors may have a conflict of interest – issue with quorum</p> <p>v. The independent chair may not be available.</p> <p>vi. Possible issues in meeting statutory timeframes for making the decision given additional requirements to also:</p> <ul style="list-style-type: none"> <li>• Meet LGOIMA timeframes for notice of meetings; and</li> <li>• Arrange independent member's and sub-committee members' availability.</li> </ul> <p>vii. Increasing layers of decision making bodies</p>	<p>independent members to join subcommittee</p>
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		within Council, with a new sub-committee below the existing RHC	
c) Sub-committee being established with members as above at option (2) plus other governors who hold <i>Making Good Decisions</i>	As for option (b) with addition of: i. Increased pool of members, reducing likelihood of problems meeting quorum requirements arising from conflicts of interest ii. Increases skill level of all governors	As for option (b) with addition of: i. With increased numbers of members, increased issues in managing diaries	As option (b)
d) Committee of Council being established (with membership either as option (b) or (c))	As for option (b)	As for option (b) with slight change to (i), namely that: i. Council will need to establish committee at future Council meeting and delegate appropriate powers to new committee, so some time delays	Report from RHC to next Council meeting (10 December) requesting establishment of a new committee Staff to recommend to Council individuals who might be appropriate independent members to join committee
e) Retaining the status quo, with the Committee appointing an independent Hearings Commissioner to decide these applications (or staff in some circumstances)	i. Can continue making these decisions as currently	i. Governors miss opportunity to undertake consent decision making	No steps required
f) <u>Committee appointing a panel for each Non-heard application to</u>	i. <u>Provides appropriate specialist</u>	i. <u>Not in public</u> ii. <u>Current delegation</u>	

<p><u>consist of governors who hold <i>Making Good Decisions</i> plus an independent Hearings Commissioner</u></p>	<p><u>expertise to assist making robust decisions</u></p> <ul style="list-style-type: none"> <li>ii. <u>Increases skill level of relevant governors</u></li> <li>iii. <u>Can start making these decisions immediately</u></li> <li>iv. <u>Large pool of possible candidates</u></li> </ul>	<p><u>requires panel to be maximum of four</u></p> <ul style="list-style-type: none"> <li>iii. <u>Limited continuity for governors – that is, only a few could participate in each decision;</u></li> <li>iv. <u>Possible issues with a conflict of interest in committee members voting to appoint themselves as panel members</u></li> </ul>	
<p>g) <u>Committee appointing an independent Hearings Commissioner to decide these applications, with governors shadowing the decision maker</u></p>	<p><u>As for option (f)</u></p>	<p><u>As for option (f), with addition of:</u></p> <ul style="list-style-type: none"> <li>i. <u>Potential natural justice concerns if 'shadowers' start to participate in decision making,</u></li> </ul> <p><u>but without (iv)</u></p>	

## 7.2. Appointment of Hearing Commissioner- MHV Water Limited

### Regulation Hearing Committee paper

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<b>Date of meeting</b>	29 October 2020
<b>Agenda item</b>	7.1
<b>Operation Senior Manager Support</b>	Tania Harris
<b>Author</b>	Alison Cooper

#### Purpose

1. To appoint a Hearing Commissioner to hear and decide resource consent application CRC185857 applied for by MHV Water Limited.

#### Recommendations

**That the Regulation Hearing Committee in regard to resource consent application CRC185857 applied for by MHV Water Limited:**

1. **Appoints Sharon McGarry as a Hearings Commissioner under s34A of the Resource Management Act 1991; and**
2. **Delegates to Sharon McGarry pursuant to s34A(1) Resource Management Act 1991, the function, powers and duties required to: deal with any preliminary matters; hear; and decide the resource consent application.**

#### Background

2. MHV Water Limited has applied for resource consent to discharge nutrients from farming activities on properties supplied with water by the applicant who operates an irrigation scheme on the Hinds/Hekeao Plains Area between the Hakatere/Ashburton and Rangitata Rivers.
3. The application was limited notified to Te Rūnanga o Ngāi Tahu who have made a neutral submission in return. They do not wish to be heard.
4. The submitter acknowledged that MHV Water is committed through its consultative process on the consent application to work in a collaborative manner and incorporate the values and practices of Arowhenua into conditions and environmental management and monitoring plans.

## Decision Requirements

5. As there are no submitters to be heard and the recommendation is to grant the application, a hearing is not required, and the application would ordinarily be decided by staff acting under delegation.
6. It is recommended that an independent hearing commissioner be appointed to decide this application because senior staff have been involved in providing advice to planners and the applicant and therefore staff wish to avoid any potential of a perceived conflict of interest.

## Recommendation

7. The Hearings Policy outlines the criteria for the selection of hearing commissioners:
  - Ability to understand and evaluate the key issues associated with the application
  - Suitable experience
  - Scale, complexity and nature of the application
  - Availability for hearing and decision-making
  - Conflicts of interest
  - Ministry for the Environment (MfE) Making Good Decisions Accreditation
8. This application requires a hearing commissioner with experience to be able to evaluate the proposed discharges on water quality, as well as the relevant planning provisions and national freshwater policy changes in order to make a decision.
9. It is recommended that Sharon McGarry be appointed. She is a very experienced hearing commissioner and has relevant experience in in deciding discharges of contaminants as relates to water quality.
10. Sharon McGarry has satisfied Council staff she has the necessary criteria, including technical ability, RMA Accreditation certification, availability and timeframe commitments to carry out the duties required.

## Legal compliance

11. S34A of the Resource Management Act 1991 allows Council to delegate functions to Hearing Commissioners appointed by the Canterbury Regional Council.
12. The Regulation Hearing Committee appoints Hearing Commissioners in relation to consent authority matters under the Resource Management Act 1991.

<b>Peer reviewers</b>	Virginia Loughnan, Catherine Schache
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**8. Extraordinary and Urgent Business**

**9. General Business**

**10. Next Meeting - to be confirmed**

**11. Mihi/Karakia Whakamutunga – Closing**