The Use of the Resource Management Act 1991 for Trade Competition Purposes

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As with previous planning legislation, businesses are able to use the Resource Management Act 1991 for anti-competitive purposes by opposing planning applications made by their competitors and by appealing decisions to the courts. Frequently, parties who conduct the opposition aim to thwart or delay the projects of their competitors in order to protect their own commercial interests. Often, however, the opposition is disguised in the form of very complex and clever resource management and environmental arguments meaning that each case is heard on its merits. This combined with the broad nature of resource management mean that attempts by Parliament to directly thwart this behaviour via a series of amendments to the RMA have been largely ineffective. Rather the courts have continued to treat appeals involving trade competitors carefully on a case-by-case basis as had occurred previously under the now repealed Town and Country Planning Act 1977. The author believes that the most recent of the amendments will also be largely ineffective.

I. INTRODUCTION

The Resource Management Act 1991 ("RMA") unintentionally allows trade competitors to engage in anti-competitive behaviour. With the intent of reducing competition, a party can make a submission in opposition to an application for a notified resource consent or plan change made by a prospective competitor of that party. Furthermore, if a consent authority grants consent to an application of a party, one or more competitors of that party may appeal the decision to the

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Environment Court provided that they lodged a submission on the application. In some circumstances the decision of the Environment Court may then be appealed to higher courts. These opportunities exist for trade competitors despite attempts by Parliament to stifle such anti-competitive activity by way of the inclusion of a specific provision in the RMA and subsequent amendments.

II. PLANNING AND ANTI-COMPETITIVE TRADE PRACTICES IN NEW ZEALAND

1. Competition Law in New Zealand

The courts, local government and Parliament have long recognised that trade competition should not be an issue to be considered within New Zealand's planning and resource management framework.[1] This is consistent with New Zealand's approach to anti-competitive behaviour in general as per its competition and trade practices laws. These seek generally to prevent the effects of anti-competitive practices in the belief that the most efficient allocation of resources and the best prices for consumers arise out of the competitive market process.[2]

The Commerce Act 1986 establishes prohibitions against various forms of anti-competitive behaviour such as collusive price fixing or the use of a dominant position in a market to eliminate, restrict or prevent competition.[3] However, the use of the planning process to delay and frustrate projects of trade competitors lies outside the scope of such trade practices legislation despite the negative impacts such activity can have on the commercial sector.

2. Trade Competitor Participation as a Business Tool

To those businesses that intentionally use the resource management process to delay and/or stop the projects of their rivals, the opportunity can essentially be perceived as another way of gaining a competitive advantage, in a manner not dissimilar to other commercial actions such as product differentiation, price wars and superior customer service. The means is clearly considerably different from these examples, but it is nevertheless a means to the same ends — that is, the maximisation of profits and market share.

Shrewd trade competitors will carefully weigh up the costs and benefits of engaging in opposition to a competitor's proposal just as they would in making other important business decisions and possibly like any other cost-benefit

1 This is noted and discussed below in Parts III and V of this paper.
2 van Roy, Y., *Guide Book to New Zealand Competition Laws* (1991).
3 Business Competition and Corporate Affairs Division: Department of Trade & Industry, *Review of the Commerce Act* (1986).

analysis. In these cases the predicted costs would be legal counsel and consultants' fees and the potential costs awarded against them by the courts. The benefits would be an increased entry price for the applicant through increased litigation costs and delays and thence the revenue earned by the objector in the absence (or delay in entry) of the competitor.

Even a delay will produce significant benefits to the objector. For example, an existing supermarket operator that can keep its competitor from trading for three years by lodging submissions in opposition and appealing decisions will be handsomely rewarded by three years of high profits earned by preventing the competitor (applicant) from drawing customer patronage away from the existing supermarket. Indeed a lengthy delay may in itself be enough to permanently force a new entrant out of the market, particularly where the applicant has limited resources compared with the trade competitor(s).[4]

A further benefit derived from the delays could be invaluable time which that firm can use to improve the "competitiveness" of their existing commercial operations in cases where it is believed that the applicant will probably eventually gain the decision needed to proceed with their project.

Of course these motives cannot be clearly seen by perusing the case law or examples of trade competitor submissions in opposition. Indeed, trade competitors who engage in such anti-competitive behaviour would strongly deny that their motives are based on commercial gain. Instead they would maintain that their involvement is to protect the interests of the general public and to express their concern for the impacts of human activities on the environment including effects such as noise, traffic generation and impacts on amenity values and the like. However, it is telling that there is a distinct lack of participation of these same players in the resource management process involving activities in which they have no commercial interest. The 1996 KPMG paper proposing law reforms for curtailing such anti-competitive and unfair behaviour made the following comments:[5]

> It will be a rare case where a trade competitor is motivated to spend time, effort and shareholders' funds in lodging an objection in the public interest. Gratuitous and public spirited expenditure always detracts from the bottom line financial performance and needs to be justified from a business perspective. Expenditure may be made to ensure that existing sites continue to be appropriately zoned so as to permit a continuation of current retail activities. However expenditure in respect of another's business hardly brings public relations rewards and almost always is aimed at eliminating competitors in the short or long term.

4 Personal interview with Ken Tremaine, Director of Environmental Consulting Unit, KPMG, Auckland (25 March 1998).

5 Environmental Consulting Unit, KPMG, Auckland, *Trade Competition and the Resource Management Act — A Paper on Proposed Reforms* (1996) 11.

3. The Costs to Society of Trade Competitor Opposition

The corporate players in trade competitor cases fund massive amounts of expenditure, by those mounting challenges in opposition on the one hand, and by the applicants in fighting them off while seeking their consent or plan change on the other. There is a significant cost to business from this activity, particularly in the retail sector. Mobil Oil Business Development director Richard Martin stated that a resource consent for a service station typically "costs" $300,000 and takes up to four years. In many cases this is largely due to strong opposition mounted by trade competitors.[6]

The problem is that in a very competitive industry such as this, if one company decides not to fight the applications of another, but must incur the costs and delays of its rivals objecting to its own applications, then over time it will result in a significant detraction in its ability to compete. Effectively a vicious cycle is the outcome.

These costs are ultimately passed on to others. Local authorities and the courts become clogged up with very lengthy and drawn out hearings. The inflated costs to the corporates have to be recovered and it is likely that consumers bear these costs in the prices of goods. The costs incurred by councils and the courts in deciding these cases are passed on to ratepayers and taxpayers. These cases may provide a substantial amount of work for lawyers, planners, and other professionals but the bureaucracy involved must be weighed up against the overall benefits this is giving society compared with the benefits generated if the resources involved could be put to other uses. It is beyond the scope of this paper to accurately undertake such a cost-benefit exercise.

In addition to the actual expenditure, there are the "invisible" costs similar to the economic concept of opportunity costs to consider where good projects are not even commenced because of the great likelihood of sustained litigation that is financially unsustainable.

A reduction in the number and length of trade-competitor-driven cases will certainly aid the government's ambition to reduce excessive business compliance costs in order to enhance the country's competitiveness and ability to grow.[7]

III. TRADE COMPETITION UNDER THE TOWN AND COUNTRY PLANNING ACT 1977

Trade competitor opposition to planning applications is not a new phenomenon. Very early the Planning Tribunal recognised that the Town and Country Planning

6 Riordan, D., "Critics Say RMA Is Used To Fight Off Competition", *The Independent*, 24 November 1995.

7 KPMG, supra note 5.

Act 1977 ("TCPA") should not be a licensing system and that the circumstances that an applicant is a trade competitor was not a valid ground for objection. Nevertheless trade competitors attempted to justify their participation by attacking a proposal on its impact on the environment and other matters that were strongly argued to be in the interests of the wider community.[8] A large amount of case law was developed under the TCPA that gives trade objectors substantial powers to object in favour of the public interest.

The opportunity for trade competitor opposition under the TCPA derived from s 2(3) of that Act, which specified those persons who have the right to object to planning applications. Under that section, a party who was a trade competitor to the applicant in question had to have *locus standi* (standing) to object. In other words, they had to prove that they were either directly affected by the application in question, or (as was generally the case) they had to demonstrate to the consent authority that their reason(s) for objection represented some relevant aspect of the public interest relating to the proposal in question. This approach often necessitated lengthy hearings to determine whether a party could satisfactorily demonstrate that they had standing and could thenceforth proceed in making an objection to the application.

In *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd*[9] the Supreme Court established that economic effect was a valid objection under the TCPA. The Court held that a claim to be affected to a greater degree than the general community might include economic consequences. This enabled trade competitors to gain status more easily than they could prior to this decision, and it also gave weight to their cases when making objections. This judgment opened the floodgates with regard to trade competition cases.

IV. TYPES OF TRADE WARS

1. Introduction

"Trade wars" have been fought between commercial operators in varying types of industries nationwide. However, the majority of the trade competitor participants are large corporate organisations with significant financial reserves and the trade wars have been dominated by two major groups of players. The first group are retailers, many of whom are supermarkets and their respective property-owning companies (colloquially known as the "supermarket circus"). The other main group of players in the trade wars have been the four main oil companies

8 Hearn, A., QC, *Review of the Town & Country Planning Act, 1977 – A report commissioned by the New Zealand Government*, Department of Trade and Industry, Wellington (1987).

9 [1974] 1 NZLR 295.

traditionally operating in the New Zealand market (BP, Shell, Caltex and Mobil) and their property-owning companies with respect to service stations.

2. The "Supermarket Circus"

Under the TCPA there was an almost universal adoption by local authorities of the "hierarchy of shopping centres" approach, in which commercial activities (of which a large component consists of retail development), were generally controlled more rigidly than residential or industrial activities.

The "hierarchy of shopping centres" approach was adopted to protect the existing main street shopping centres from the competition of stand-alone out-of-centre shops or new shopping centres. This approach embraced a concept of fixed quantity of retail floor space per individual retail unit and distributed within retail centres fixed in style and size in a predetermined way. The development controls varied according to the size, nature and location of the shopping centre (such as a neighbourhood shopping strip compared to a suburban shopping centre). The problem with this highly regulated fixed pattern of retail development promoted by policies, objectives and rules in District Schemes and Plans was that it did not sufficiently provide for the dynamic nature of retail development.[10]

This dynamism can be demonstrated by the popularity of large stand alone supermarkets and large "warehouse-discount" type retail stores such as The Warehouse and KMart chains. These retailers inevitably found that the existing areas zoned for retail floor space were either fully occupied or did not provide sites of an adequate size for the development style they required. Consequently they were forced to acquire sites located away from the established retail centres which were invariably zoned for other types of activities such as industrial or residential activities. Therefore they were required to seek a plan change or a specified departure consent (under the TCPA) or a non-complying activity consent (under the RMA). Being publicly notified, these situations provided competing businesses and landowners with an ample opportunity to oppose the planning applications and appeal the granting of consent to the Planning Tribunal (later the Environment Court).

These supermarket trade wars tend to be fought out on economic grounds where the trade competitor(s) produce evidence to attempt to demonstrate that the entry of the new retail development into the market would inevitably bring about significant decline in the existing shopping facilities and, with that, some definite threat to public and community facilities and infrastructure, which are critical to the well-being of the community.[11]

10 Bhana, H., *Resource Management Ideas: Number 11. Planning for Retail Uses and the Resource Management Act 1991,* Ministry for the Environment, Wellington (1994).

11 KPMG, supra note 5.

3. The Oil Company Trade Wars

The oil company battles tend to be fought on "amenity" and "environmental" grounds rather than economic grounds. For example, oil companies will proceed to attack a proposal for a service station of a rival oil company by producing evidence to suggest that the impacts of the proposal will have adverse effects on the environment that are more than minor. Invariably their cases will be based on an assessment that a proposal will have adverse effects with respect to amenity values due to high levels of light and/or noise emissions and traffic safety concerns due to increased traffic generation.[12] A good example of a case where trade competitors attacked a proposal for a service station on a wide range of grounds including those listed above is *BP Oil New Zealand Ltd v Palmerston North City Council.*[13]

V. THE RESOURCE MANAGEMENT LAW REFORM PROCESS

In his review of the TCPA Tony Hearn QC recognised and briefly reported on the problem of planning legislation being used as a licensing system.[14] He maintained that the circumstance that an applicant is a trade competitor is not a valid ground for objection or appeal. However, he recognised the difficulties of excluding trade competitor activity from planning concerns under s 2(3) in that it would be unreasonable to exclude an objector who has valid planning matters to raise just because the objector happens to be a trade competitor. He therefore recommended no change to the legislation in this regard and that the courts should continue to treat each case on its merits.

However, submissions made on the Resource Management Bill clearly had some effect as the Supplementary Order Paper containing last minute amendments to the Resource Management Bill included a clause on trade competition:[15]

> A new Clause 6A is included to prevent persons exercising functions and powers under the Act taking into account the adverse effects of trade competition. This Clause has two objectives. First, it is intended to signal to resource managers that the Bill is not intended to be used as a means of economic licensing. Second, it addresses what has been termed the "supermarket circus", which has seen the resource management process being misused by trade competitors.

12 Tremaine, supra note 4.
13 [1995] NZRMA 504.
14 Hearn, supra note 8.
15 House of Representatives, *Resource Management Bill Proposed Amendments: Supplementary Order Paper*, in Ministry for the Environment, *Managing our Future* (1991) 62.

VI. THE RESOURCE MANAGEMENT ACT 1991

1. The Trade Competition Provisions

Clause 6A in the Supplementary Order Paper eventually appeared as s 104(3) of the RMA as originally enacted:

> When considering an application for a resource consent a consent authority shall not take into account the effects of trade competition on trade competitors.

This was the first provision to specifically address the effects of trade competition in legislation. It was recognised at the time by some that this provision was hastily prepared and rather ambiguous to the extent that it would provide problems in due course.[16]

2. The Shortcomings of s 104(3)

It did not take long for the shortfalls of this provision to appear. First, trade competitors could "dress up" their arguments supported by evidence to attempt to persuade the consent authority and/or the court that a proposal of their trade competitor would generate adverse effects on the environment in terms of the wide definition of "environment" under s 2 of the RMA and the wide ambit of the purpose and principles of the Act as set out in Part II. In this regard the trade wars continued under the RMA as they left off under the TCPA in which trade competitors used the provisions of ss 3 and 4 of that Act, which set out the purpose of that statute. Both sections referred to "the wise use of resources and the direction and control of development in such a way as to effectively promote and safeguard the economic and general welfare of the people".

Secondly, s 104(3) of the RMA was imperfectly worded in two critical respects: First, the wording of s 104(3) ended with "... the effects of trade competition on trade competitors". This confusing wording implied that the effects of trade competition on aspects other than trade competitors are legitimate considerations. This was demonstrated by the approach taken by the Tribunal in *Affco New Zealand Ltd v Far North District Council (No 2)*.[17] This approach meant that the effects on other parties having a commercial interest in the "affected trade competitor" (such as the firm's employees and shareholders together with other persons having an interest in that firm's premises (eg, landlord or mortgagee)) were legitimate concerns which consent authorities would have to have regard to.[18] This is an almost farcical situation where these parties could make a legitimate

16 516 NZPD 3022–23 (4 July 1991), per Hon. Peter Dunne.

17 [1994] NZRMA 224.

18 Dormer, A., *The Resource Management Act, 1991: The Transition and Business*, Report prepared for the New Zealand Business Roundtable, Wellington (1994).

objection and appeal. Secondly, s 104(3) clearly only applied to the consideration of applications for resource consents. There was no indication that consent authorities did not have to have regard to trade competition with respect to the preparation of their proposed plans and applications for plan changes.

These shortfalls of the first attempt to stop the trade wars through legislation were quickly seized upon by various trade competitors. Trade competitor cases concerning the Dunedin City Council's decision to grant a plan change applied for by Woolworths N.Z. Limited and ML Investments, which would have allowed them to develop a supermarket at a particular site, are examples of cases where both of the above shortfalls were used to the advantage of the objecting trade competitors.[19] The final appeal to the Court of Appeal was dismissed on 13 February 1995, which was almost exactly two and a half years after the Dunedin City Council had made the decision to grant the plan change. It is interesting to observe that in those cases the trade competitors challenged the sufficiency of perfomance by the Council of its obligations under s 32, RMA, which requires full analyses of plan change proposals. This is an illustration of how trade competitors with sufficient resources will use almost any means available to them to thwart or delay a development proposed by a prospective competitor.

3. Public Participation

Parliament's Resource Management Law Reform group debated various options over public participation including whether any person should be able to participate in notified proceedings. However, it was strongly suggested that those people who represent a relevant aspect of the public interest should not have to prove this to gain standing.[20] As the Review Group noted:

> Regard must be had to modern trends towards more open public participation and the practical consideration that Councils generally allow objectors to be heard even if doubts do exist about their standing.[21]

Given that considerably more flexibility was given to consent authorities to treat appropriate applications on a non-notified basis, the concept of *locus standi* under the TCPA was abolished and replaced with s 96(1) of the RMA, which provides as follows:

19 See, eg, *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1993] 2 NZRMA 497 and *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

20 Ministry for the Environment, *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December, 1988), 55–56.

21 Ministry for the Environment, *Report of the Review Group on the Resource Management Bill* (11 February 1991) 103.

> Any person may make a submission to a consent authority about an application for a resource consent that is notified in accordance with section 93.

The ability to appeal the decision of a consent authority was to be limited, however, to the applicant or consent holder and any person who made a submission on the application or review of consent conditions.[22] Whilst this significant change may have provided benefits such as a more democratic and open consultative process, and the avoidance of lengthy hearings for determining *locus standi*, it has provided trade competitors with the right to object to any notified application posing an economic threat to their business and without having to incur the costs required to prove standing.

4. Economic Effects

It is necessary for local authorities to consider the economic effects of a development on the wider community and the social and economic well-being provided by commercial centres, but s 104(8), RMA, provides that local authorities must not consider the economic effects on individual developments. This was clearly stated by the Planning Tribunal in *Imrie Family Trust v Whangarei District Council*.[23] In this case the appellant requested that the Council change its transitional district plan by extending the zoning for a suburban centre. This plan change request was contested by a trade competitor who argued that the new retail development allowed by the change would divert customers from existing shops, result in wasteful duplication of shopping facilities, and would threaten the viability of another commercial centre. The Tribunal held *inter alia* that the RMA:[24]

> ... does not allow decisions to secure the commercial viability of shopping centres; and that although we need to consider the economic effects of the proposal on the environment, it is only to the extent that they affect the community at large, not the effects on expectations of individual investors.

The distinction between economic effects on the community at large and economic effects on individual investors appears to be able to be clearly ascertained, but frequently it is far from obvious. Indeed, it is generally very difficult to determine whether the economic effects of a proposed development generate effects of sufficient magnitude to threaten the *viability* of existing commercial centres as a whole, or only threaten competing individual interests.

In *Smale v North Shore City Council*[25] the Tribunal upheld the decision of the Council to refuse an application for a plan change that would have changed the proposed business park zoning (with an emphasis on office development) to

22 RMA, s 120.
23 [1994] NZRMA 453.
24 Ibid, 463.
25 (1992) 2 NZRMA 97.

zoning permitting a sub-regional commercial centre incorporating within it a major retailing element. The Tribunal, upon hearing the evidence, held that well-established centres of the North Shore would be threatened, particularly the Takapuna shopping centre. This case concerned a major centre, which would generate widespread impacts on a sub-regional level rather than localised impacts of one, two or a small group of retail outlets. Therefore it deserved significant attention and the need for several hearings was quite justified.

Unfortunately the case seemed to indicate to trade competitors that the economic effects on the wider community could be applied in all circumstances. Trade competition proceedings based on economic concerns have continued to flourish since this decision. Nevertheless, as is discussed later in this article, there is often a fine line between whether or not a proposed retail development will actually cause the downfall of an existing centre and establish a commercial urban environment "less desirable" than the existing centre.

Therefore the courts have taken a prudent approach by making determinations on a case-by-case basis after weighing up the evidence presented to them during legal proceedings. This is only consistent with other aspects of resource management law because of the importance of the particular characteristics and nature of the local "environment" subject to the decision.

Trade competitors often develop arguments to protect their commercial interests on the grounds that the commercial viability of their own activities and those of other existing operators will be threatened because the proposed activity will draw customer patronage away from them. These opponents then argue that this will result in significant detrimental effects on the environment. This tactic is, in a sense, a contradiction in terms.

A new retail activity will only attract customers away from existing retail operators if it provides superior services. In this context the term "services" applies to a range of factors such as price, quality, range of goods and services, level of customer service and other non-economic factors such as convenience of locality, parking facilities and other amenity values. Consumers will implicitly apply weightings to these factors, aggregate them and then select to shop at the outlets that provide the optimum service overall. If a new entrant provides a higher degree of overall "service" then surely its entrance in the market will provide desired economic and social benefits to the wider community.

If the new entrant fails to draw customer patronage from existing retail centres then it may fail to survive in the marketplace. That is the risk it takes as a business in a competitive market. A territorial authority should allow an activity if it is satisfied that "bottom-line" environmental and planning concerns are satisfactorily dealt with. If this can be achieved through remedying or mitigating any relevant effects, for example, then surely the best mechanisms for deciding whether a new entrant survives and outlasts the existing competition are the economic forces of supply and demand.

5. Trade Competitor Opposition Today

Despite attempts to curtail commercially motivated trade competitor participation in the resource management process by the courts, and by Parliament through changes to the RMA,[26] trade competitors continue to find subtle ways to delay and even thwart legitimate projects of their rivals. An example is *Baker Boys Ltd v Christchurch City Council*.[27] It may also be noted that over 180 trade competition objections were made in respect of a notified resource consent application to expand numbers of buyers' and sellers' vehicles at the Ellerslie Car Fair.[28] In this case virtually all of these objectors blindly signed and returned a standard submission form sent to them as part of an apparently orchestrated campaign. In essence these submitters paid no attention to environmental effects or genuine RMA matters as demonstrated by the fact that dealers as far away as Pukekohe and Orewa objected.

A recent study on the impact of the RMA on businesses also demonstrates that trade competitor opposition is "alive and well" in New Zealand.[29] Thirty-two per cent of the businesses interviewed confirmed that trade competitors were involved in making submissions on their applications and a further 25 per cent were unsure but accepted the possibility that trade competitors may have been involved.[30]

VII. IMPACTS OF AMENDMENTS MADE TO THE RESOURCE MANAGEMENT ACT 1991

1. The Resource Management Amendment Act 1997

(a) Introduction

The inclusion of the original provision of s 104(3), RMA (later to become s 104(8)) to curtail the use of the Act for anti-trade purposes was largely ineffective as trade competitors continued to engage in trade competition litigation with each case being treated on its merits.

The 1997 amendments contained the first significant attempts to make changes that explicitly addressed the trade wars. The amendments made were largely a result of significant case law determinations.

26 Discussed in Part VII below.

27 [1998] NZRMA 433.

28 This application was notified on 30 November 1998.

29 Ministry of Commerce, *Key Results of the Ernst & Young Study on the Impact of the RMA Commissioned by the Ministry of Commerce* (1997).

30 Although on the face of it this seems like a small proportion, it is actually a significantly high proportion given that the sample of businesses interviewed were representative of all the sizes of businesses and industry types and that they covered all geographic areas of the country.

(b) The amendment to the existing provision

Section 104(8) was amended to read:

> When considering an application for a resource consent a consent authority must not have regard to trade competition.

The modification of the wording of the previous provision's "... *the effects of trade competition on trade competitors*" to "... *trade competition*" was made to clarify the intentions of Parliament that trade competition concerns to be disregarded by consent authorities could be wider than the effects on trade competitors only.[31] It is also noted that the word "shall" was replaced with the "stronger" word "must" to demonstrate that consent authorities have a compulsory obligation to *not* have regard to trade competition when considering an application for a resource consent.

(c) The preparation and changing of District Plans

Section 74 of the principal Act was amended to provide an equivalent of s 104(8) for the preparation and changing of district plans.[32] Section 74(3) presently reads:

> In preparing or changing any district plan, a territorial authority must not have regard to trade competition.

In some cases the consent authority itself effectively proposes to limit trade competition by the adoption of certain policies and rules in its plan. For example, the North Shore City Council's Proposed District Plan 1994 provides protective zoning for its new regional centre at Albany. This plan prohibits department stores and clothing, footwear, and food retailing at Link Drive.[33] It will be interesting to see what impacts the new s 74(3) will have on the next generation of district plans. It is more than likely that this provision will be applied to the cases of businesses if they believe that a plan is overly restricting the ability of market forces to operate fairly.

(d) The preparation and changing of regional policy statements and regional plans

Equivalent provisions were included in the amendments made to ss 61 and 66, RMA, which relate to matters to be considered by regional councils in the

31 Ministry for the Environment, *Report on Resource Management Amendment Bill (No 3)* (July 1996).

32 This amendment was aimed at overcoming the second shortfall noted in Part VI, 2 of this paper.

33 KPMG, supra note 5.

preparation and changing of regional policy statements and regional plans respectively. While the main concerns are over the consideration of trade competition matters in making decisions on resource consents and the preparation of and changes to district plans, these equivalent changes to ss 61 and 66 were nevertheless added for consistency. This is a positive move as trade competitors will attempt to capitalise on any potential loopholes.

2. Potential Problems of the 1997 Trade Competition Amendments

The effectiveness of these recent amendments is unknown as the courts have not yet tested them. Nevertheless we can predict the problems that may occur. Some poignant submissions were made to the Ministry for the Environment on the Resource Management Amendment Bill (No 3) 1996 that are worthy of discussion.

(a) Consideration of wider economic effects

Despite the tests established by judicial decisions, several submitters expressed concern over the relationship between the purpose of the RMA and the meaning of the term "trade competition". Specifically, the Legislative Advisory Committee emphasised that there is inconsistency and possible conflict between the amendments that seek to disregard trade competition and the promotion of the sustainable management of natural and physical resources including, among other things, enabling people to provide for their economic and social wellbeing. The committee noted that trade competition is "itself a powerful influence in providing economic wellbeing".[34]

It may also be noted that if the more recently proposed reforms of the RMA seek to remove socio-economic considerations from the definition of "environment" under s 2, it has been clearly stated by the Minister that Part II of the RMA will not be tampered with so the socio-economic objectives contained within the purpose of the Act will still remain.

The committee thought that it was not clear from the amendments whether they were intended to prohibit consideration of adverse effects on the financial interests of trade competitors only, or also preclude consideration of questions of need for a kind of business in a particular locality. The amendments do not clarify whether wider economic concerns such as perceptions of competition between commercial centres, rather than individual operators, are still legitimate. In my opinion this means that the trade wars will continue to be fought, with the courts continuing to hear each case on its merits.

The intent of the 1997 amendments concerning trade competition is admirable, but sadly may not have much impact in practice. This is at least supported by the large number of submissions in support of the intention and the widespread concern

34 Ministry for the Environment, supra note 31, 218.

for a predicted lack of effectiveness.[35] In this respect the conclusions of Tony Hearn, QC made in 1987 are no less valid today. The RMA is a public law statute so any resource consent application that is publicly notified will have degrees of non-compliance with the relevant planning document(s) which trade competitors can inevitably attempt to exploit, frequently on a "legitimate" basis.

VIII. POTENTIAL BENEFITS OF TRADE COMPETITOR PARTICIPATION

It is necessary to discuss whether or not the trade war battle is an entirely negative phenomenon. There are numerous cases that demonstrate that trade competitors can have a pivotal role in the resource management process and thence a significant impact on planning outcomes. Typically this is demonstrated when trade competitors appeal the decision of a territorial authority that was to grant consent for a proposal and the Environment Court accepts the appeal and overturns the decision. The more thorough hearing of the issues involved in a particular case can result in an improved outcome, although this is clearly not always so. Examples of arguably positive outcomes are discussed, and so too are the wider issues that are raised by the findings. The discussion that follows further demonstrates that the trade wars cannot, and should not, be avoided simply by further amending the RMA. Rather each case must be heard on its merits even if it is suspected that commercial motives are driving the public participation process.

1. A Significant Change in Outcome Forced by the Trade Competitor

In *Countdown Properties (Northlands) Limited v Ashburton District Council*[36] the only appellants were trade competitors of Foodstuffs who had been granted consent by the Council to construct and operate a supermarket in Ashburton. The supermarket was to be located in close proximity to The Warehouse, which had recently been established as a result of consent to a non-complying activity. There were two other applications pending consent for non-complying retail activities close to both sites. These sites were clearly separated from the main retail core of Ashburton, which the Operative Plan and the Operative Plan Review sought to retain.

The Tribunal was concerned for the wider potential adverse economic effects on the central business area of Ashburton, and consequently on all the people and community of that district. The Tribunal held that together, The Warehouse

35 Support was received from many local authorities, companies, business associations and federations, and professional guilds.

36 [1996] NZRMA 337.

and Foodstuffs' supermarket proposals, and the potential for further cumulative effects if the other pending retail activities were established, could lead to a consolidation of both comparison and convenience retailing located substantially apart from the central business district and there would be a corresponding degradation of the retail core. The Tribunal also noted that the future of the Ashburton community's present central business district should not be decided so early in the review process by way of ad hoc applications for resource consents for non-complying activities. Such decisions may have some significant implications on the resource management regime that warrants attention. Even if we assume that sufficient evidence was provided to the Tribunal that the activation of a resource consent and the potential for further cumulative effects would result in a degradation of the existing retail core (in other words, the Tribunal made the "best" decision), it is interesting to note that it took the profit-maximising motives of trade competitors to reach that decision. Presumably in the absence of intervention by trade competitors, the decision of the Tribunal to refuse consent would not have been made.

This case demonstrates that trade competitors can be very influential as participants of the planning process. Some may argue that such cases demonstrate that trade competitors should have no lesser ability to participate in notified planning proceedings than other parties such as nearby residents affected by a proposal. This raises some genuine concerns over the credibility of New Zealand's resource management system. These include the ability of applicants to provide quality and accurate assessments of effects of proposals on the environment pursuant to s 88 and the Fourth Schedule of the RMA, and the ability of consent authorities to process applications with respect to the objectives, policies, and rules of their plans, and the RMA, in order to provide good and fair decision-making. It would be hoped that effective decision-making and positive outcomes could be achieved without the need to rely on the commercially motivated and haphazard nature of trade competitor opposition.

2. Significant Contributions to the Body of Case Law

Some trade competitor cases have "fleshed out" the meaning of the legislation as applied to many other aspects of resource management law. One example is the Dunedin City Plan Change 8 series of cases[37] due to their impact on clarifying critical aspects of the new obligations for local authorities under s 32, RMA. The

37 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 2 NZRMA 497, and *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

decisions in these cases led to important amendments to s 32 in 1993 and 1994.[38] The proceedings also contributed to the meaning of other important aspects of the legislation such as the needs of future generations and plan changes.

Trade competition cases have been particularly important in determining the extent to which activities have effects in terms of the "economic wellbeing" aspects of s 5(2), which defines "sustainable management". This is critical as the purpose of the RMA is of course to promote the sustainable management of natural and physical resources. The *Imrie Family Trust*,[39] *Smale*,[40] and *Affco*[41] cases have already been discussed. Another interesting case is *J Crooks & Sons Ltd v Invercargill City Council*[42] in which it was determined that the providing of resources that are important to the infrastructure of a community with opportunities to compete with one another is consistent with promoting the economic wellbeing of a community.

The question that must be asked is whether these benefits outweigh the costs imposed on society by the litigious confrontational approach of the trade wars. It is perhaps unfortunate that other means such as more declaratory judgements have not been sought to clarify the meaning of aspects of the legislation.

3. The Identification of Unlawful Activities

There have been a number of cases in which existing businesses have applied for interim and/or substantive enforcement orders to ensure that other unlawful competing commercial activities cease operation. For example, in *Foodstuffs (Auckland) Ltd v Rattrays Wholesale*[43] the applicants sought urgency for enforcement orders to stop the respondents from trading as retail enterprises when they only had a certificate of compliance to conduct business as distribution wholesale warehouses. The respondents had effectively become trade competitors of the applicants due to their unlawful trading. In other words, they had changed their activities but had not applied for the necessary consents or change of conditions. The Tribunal granted the enforcement order to ensure that the respondents limited the use of their property to conventional wholesale distribution activities.

38 Resource Management Amendment Acts of 1993 and 1994. See also Grinlinton, D. P., "Environmental Assessment", in Williams, D. A. R. (ed), *Environmental and Resource Management Law* (2nd ed, 1997) paras 12.11–12 23.

39 *Imrie Family Trust v Whangarei District Council* [1994] NZRMA 453.

40 *Smale v North Shore City Council* (1992) 2 NZRMA 97.

41 *Affco New Zealand Ltd v Far North District Council (No 2)* [1994] NZRMA 224.

42 Environment Court, C 81/97, 8 August 1997, Judge Skelton, noted [1997] *Brooker's Resource Management Gazette* 130.

43 Planning Tribunal, W 11/93, 7 April 1993, Judge Kenderdine.

If the "trade competitors" are not able to apply for enforcement orders in these cases, it may well be that numerous unlawful commercial activities continue unnoticed because no other persons may have the motivation and/or resources to challenge those unlawful activities.

IX. THE DIFFICULTIES OF UPHOLDING THE INTENTION OF THE 1997 TRADE COMPETITION AMENDMENTS

The cases discussed demonstrate that individual circumstances (including the objectives, policies, and rules of district plans and the retail and locational specific dynamics of the site and surrounding environs) need to be carefully considered before the participation of trade competitors is ruled out on the basis that their participation is an anti-competitive abuse of the resource management process.

At first glance it appears that the faults of s 104(8), RMA, including an absence of an equivalent plan change provision, have allowed trade competition cases to flourish. However, the provisions themselves have largely been, and will most likely continue to be, ineffective because of the considerable number of complex and subjective variables involved and the ability of perpetrators to conceal their commercial motives. Numerous methods in which trade competitors can legitimately proceed with objection can delay and frustrate the aspirations of applicants for consent.

There is an unfortunate paradox with the RMA and the trade wars. The 1997 changes to the RMA are an attempt to confront the issue head-on. The trade competition provisions are, however, effectively competing with other provisions of the RMA.[44] The RMA has essentially expanded the potential "weapons in the armoury" of the opposing trade competitor in a number of ways.

First, the Act's wide definition of "environment" in s 2 enables trade competitors to enter the arena because of the need to consider socio-economic concerns.[45] Secondly, the abandonment of *locus standi* allows unrestricted participation of trade competitors.[46] Thirdly, other innovations in the RMA may be used to the advantage of the trade competitor. For example, alleged failure to comply with the obligations imposed by s 32, RMA, can be used by competitors in judicial review proceedings. The introduction of a provision allowing persons other than territorial authorities to request changes to district plans allows further avenues for trade competitors.[47] Under the TCPA, developers did not have the

44 Which mostly represent various fundamental changes to our planning regime under the very same piece of legislation.

45 As discussed in Part VI, 4 above.

46 As discussed in Part VI, 3 above.

47 RMA, s 73(2).

right to instigate scheme changes at any time, but rather had to wait for the council to initiate changes.

X. DISINCENTIVES FOR TRADE COMPETITORS

Through the belated inclusion of s 104(8) in the RMA there can be little doubt that Parliament has intended to quash the trade wars. Nevertheless, this will only be achieved if appropriate disincentives are applied to those trade competitors who attempt to use the RMA to protect their own commercial interests. It is difficult for territorial authorities to provide significant disincentives, particularly when most trade competitor perpetrators have the ability to disguise their commercial motives in the form of very subtle and complex arguments. It is then left to the courts to decide how they will signal the fate or otherwise of those who may look to use the RMA as a tool to shut out their trade competitors in the future.

It is now necessary to investigate the extent to which the courts have provided a disincentive (if any) to prospective trade competition perpetrators. Cases where the courts have upheld the previous decision of the relevant council and/or the court lower down in the judicial hierarchy are used to determine this. Such cases demonstrate that the strong trade competitor opposition did not significantly influence the planning and environmental concerns of the respective proposal. The substantial influence of the participation of the trade competitors, however, were the unnecessary frustration, delays and external costs which they caused but were substantially borne by others.

1. Case Study: *BP Oil New Zealand Ltd v Palmerston North City Council*[48]

This case was an appeal by a trade competitor against the grant of discretionary activity consent to establish a service station in a residential zone. The applicant, Caltex Oil NZ Ltd, had gained the consent of a significant number of potentially affected residents within the proximity of the site. The Planning Tribunal held that the applicant had gone to considerable lengths to ensure that the service station, while remaining visible to the public, achieved minimum destruction of established vegetation. There did not appear to be any traffic difficulties which had not been addressed by conditions. The Tribunal further contended that the service station was to be located on an arterial road as contemplated by the District Plan. Indeed the advent of the service station, which carried with it the ability to impose conditions aimed at amenity preservation, was probably more in line with

48 [1995] NZRMA 504.

general plan objectives of amenity protection than a development permitted as of right.

The Tribunal did not find anything to cause it to disagree with the "careful and balanced decision reached by the Council". At no stage was any evidence presented by the appellant (BP Oil NZ Ltd) concerning the important aspect of traffic, nor any evidence as to the views of residents. The same witnesses were essentially called before the Tribunal as appeared before the Council at its hearing. Therefore effectively the Tribunal was in a situation where a second opinion was being sought at the expense of the other parties. The question of costs between the appellant and the applicant had been settled out of Court but the respondent Council applied for costs of $19,633 as compensation for its costs incurred in defending its decision. Despite the fact that the careful decision of the Council was fully supported by the Tribunal, the award of $13,000, equating roughly to two-thirds of the cost incurred by the Council, was deemed to be appropriate by the Tribunal.

While it is unknown what sum of money was paid by BP to Caltex to settle out of Court, two points can be made. First, the Council ended up losing $6,633 despite the fact that no evidence was presented by the appellant concerning any resource management issues of critical moment. It is also important to reiterate that only discretionary activity consent was required as opposed to non-complying activity consent. Therefore it was less likely that in this case a Court hearing would raise any significant concerns to alter any decisions made during the notified planning process at consent authority level. Not surprisingly the Tribunal supported and upheld the decision of the Council to grant consent for the application and determined that "the appeal had been based principally on trade competition grounds".

Secondly, by the Tribunal only awarding costs against BP for two-thirds of the costs incurred by the Council, it is extremely difficult to see how this is going to act as a deterrent for prospective trade competition perpetuators. In this case it may well be possible that BP covered the $13,000 Council costs and some or all of its own costs incurred in its opposition due to the revenue earned by its own service stations within the market catchment of the appeal site during the period in which the Caltex proposal was delayed. If we assume that this was so, BP would not only have been given no real disincentive for engaging in future opposition to its competitors' applications, but could also have achieved a positive commercial outcome.

2. Case Study: *Pine Tree Park Ltd v North Shore City Council*[49]

In this case the appellant owned neighbouring land to the Green & McCahill site on which the applicant, Shell Oil NZ Ltd, was granted consent to construct and

49 [1996] NZRMA 401.

operate a service station. Each landowner had been planning a service station on their respective sites to the exclusion of the other since 1986. Following protracted consideration of zonings the subject site was zoned to accommodate a service station. This was unsuccessfully appealed by another trade competitor, Mobil Oil NZ Ltd.

In January 1994 Shell applied for the necessary resource consents to establish a service station on the land zoned for that use. It was considered as a discretionary activity. The Tribunal held that consent was not contrary to the objectives and policies of the plan and that it generally gave effect to the zoning earlier directed by the Tribunal. All environmental effects such as noise, lighting, signage, screening and traffic safety concerns were properly considered and treated accordingly.

The Tribunal dismissed the appeal of the trade competitor. It noted that the appeal had been conducted against a prolonged background of commercial rivalry between adjoining landowners and the appellant was seeking to secure a commercial advantage. Indeed, the trade competitor's motives were clearly apparent because it used arguments against the desirability of a service station with respect to the applicant's adjoining site despite the fact that it had come to a completely different (positive) conclusion when it addressed essentially the same matters to advance the case for a service station on its own site.

The appellant was ordered to pay $10,000 costs to the respondent Council whose costs had been $14,000. An application for costs by Shell/Green & McCahill was rejected on the grounds that they could not expect to represent what were private interests at the appellant's expense. Again the Council was not fully compensated. More significantly one must question what kind of disincentive do costs of $10,000 provide to a large company? I would argue that it would not provide much of a disincentive at all. Perhaps the fact that the appellant then appealed the Tribunal's decision to the High Court, not to question the costs but to question an amendment the Tribunal had made to a condition of consent regarding the provision of a "safe traffic environment" indicates that costs were insignificant compared to the potentially high profits a direct trade competitor would soon be making from gaining a strategic location for capturing a significant amount of business from commuter traffic.

3. Case Study: *Baker Boys Ltd v Christchurch City Council*[50]

This is a "classic trade competition" case in which trade competitors appealed a consent allowing the establishment of a supermarket. The Environment Court held that the appellants were operators of supermarkets and adjoining shops and

50 [1998] NZRMA 433.

the owners of their land and buildings and as such, they were seeking to delay or stop a potential competitor, and that no genuine issues of public interest were raised in their case. Although the appellants failed to overturn the decision of the Council, the appeal itself nevertheless delayed the entry of the new supermarket into the market by many months.

XI. PROPOSED OPTIONS FOR SUPPRESSING THE TRADE WAR

The first attempts to curtail the use of the RMA for trade competition purposes have been largely ineffective due to the complex nature of other relevant variables. It is also likely that the recent amendments made to the legislation will not generate a clear and complete solution. Other options are proposed in the following section which, if nothing else, will hopefully provide stimulus for further debate and discussion.

1. Total Prohibition

Some RMA users have proposed that trade competitors should be banned from participating in resource management proceedings altogether. The RMA could be amended so that trade competitors are given no standing whatsoever with respect to any resource consent or plan change application made by any of their competitors. This would probably require that the term "trade competitor(s)" or some equivalent term be defined under the Act. This in itself would be an onerous task and indeed could be a dangerous path to proceed down as it could even open up further loopholes for the perpetrator to jump through. For example, referring back to *Pine Tree Park Ltd v North Shore City Council*,[51] it is not clear whether Green & McCahill were trade competitors of Mobil, BP or Caltex despite the fact that they clearly have considerable commercial interests in the resource management matters pertaining to both sites. Besides, this option is not likely to be effective as there would be nothing to stop a trade competitor from "commissioning" some third party (such as a resident living near the subject site) to lodge all submissions and appeals on their behalf. This would be extremely difficult, if not impossible, to police.

Furthermore, this approach would undermine the public participation values underpinning the RMA. It may even open the floodgates for other restrictions on participation and consultation, which would not necessarily be desirable. This paper has found that trade competitors do influence outcomes and that these are not always negative. Indeed there have been cases where the trade competitor

51 [1996] NZRMA 401.

has shed new light on a case to such an extent that costs have been awarded against the applicant or respondent consent authority. [52] For these reasons, the prohibition of trade competitors is not feasible and not recommended.

2. KPMG's Proposed Motivation Method

KPMG's 1996 paper on proposed legislative reforms to deal with trade competition[53] suggested that consent authorities should be given the power to disregard submissions made where it considers that the aim of the submission is to stifle competition. The underlying principle of this method is that a trade competitor should still be able to make submissions raising genuine planning issues unless the motive is clearly to protect its own commercial interests to the extent that this would constitute an abuse of the RMA.

This method would make for a return to the *locus standi* restrictions under the TCPA, as a pre-hearing standing assessment may be required for the consent authority (or perhaps an Environment Judge or other independent commissioner) to decide whether all or part of the opponent's case should be struck out of the process before the substantive hearing. This method certainly has some merit as it could remove, near the beginning of the public notification phase, those trade competitors who cause substantial delays and costs to be incurred while they pursue their commercial motives at little or no benefit to the environment or the wider community. On the other hand, the method would no doubt lead to judicial review challenges of any decision to exclude potential parties from the process.

In 1996, the Ministry for the Environment considered KPMG's proposed method but did not pursue such a method because it believed that a move backwards from open participation was not consistent with the approach of the RMA, and enough case law had been developed so that the motives of trade competitors could be easily established in most cases.

Rather than having parties debate whether they should have standing or not, the Ministry believed that this time would be better spent debating the resource management merits of a proposal. Consent authorities are well aware of trade competitors' abuse of the process, and the Environment Court is now very experienced in dealing with such matters. The Ministry maintained that where cases are taken to court, the court should have the chance to hear the genuine resource management issues debated and to determine the motivations of trade competitors implicitly during the course of the proceedings and then award costs as necessary.[54]

52 Costs were awarded against the applicant in *Smale v North Shore City Council* (1992) 2 NZRMA 97.

53 KPMG, supra note 5.

54 Ministry for the Environment, supra note 31.

3. Appeals

Perhaps applicants should be given the right to challenge in a preliminary hearing any submissions made by trade competitors. This would give them a chance to demonstrate that all potential effects and statutory provisions have been adequately dealt with and that the points made by the trade competitor are not valid. This is more consistent with the permissive approach of resource management, with the onus primarily upon the consent authority and applicant to determine effects and compliance issues rather than third parties.

Many of the delays and costs involved with the trade wars arise out of re-hearings, appeals to the Environment Court, and appeals to higher courts. It is questionable whether these options should be available to the extent that they are for trade competitors. This is particularly so in light of cases such as *Pine Tree Park*. How many confirmations are required before we can be assured that a final decision is reached?

Restricting the rights of appeal of certain parties,[55] however, inevitably undermines well-established legal principles of natural justice. Arguably trade competitors are not so problematic as to warrant such a move.

Opposing the possibilities discussed above is the contention that appeals on resource consent applications be limited to applicants. Whilst full public participation[56] in the case of district plan provisions is desirable, there is no strong justification for "every person" to have full rights of appeal on the localised exercise of discretion on individual property rights, particularly once the policies and rules of a plan are approved.

4. Costs

Perhaps the safest approach is to ensure that the new provisions are given due consideration in deciding each case on its merits. The circumstances particular to a case should be viewed in light of the motives of the trade competitor. Where commercial motives are deemed to be the most significant reasons for opposition and the appellants do not significantly change the decision and consent conditions, substantial costs should be awarded against the trade competitors to signal to them, and others, that they may be required to compensate to a degree greater than the direct costs incurred by the other parties.

The purpose of this is threefold. First, it will offer a substantial disincentive for those who may think that they can stand to gain out of disguising their true motives behind a cloak of resource management matters. Secondly, it may be hoped that this will at least reduce the amount of trade war litigation. Thirdly, it will be an attempt to account for the "invisible costs" borne by ratepayers and

55 Eg, trade competitors who fail to reach some criteria.

56 Including trade competitors by default.

taxpayers. The courts could be given the power to award such costs and then distribute the monies to the community by a specifically designed means.

Perhaps the key weakness of this method is that costs are awarded at the end of the process so they do not nullify delays and some of the invisible costs borne by the public. Costs will, however, have a positive influence if they are of sufficient magnitude to signal stern warnings to prospective trade competitor litigants.

5. Amendments to the RMA that Indirectly Affect Trade Competitor Opposition

Aside from the awarding of costs it is unlikely that life can be made more difficult for trade competitors by other broader changes to the legislation. This will have a greater impact in thwarting the trade wars than tinkering of the provisions relating specifically to trade competition. To illustrate, an example may be the proposed reform to implement the option of "limited notification" of applications that would indeed remove the opportunity of many parties to participate in the resource management proceedings of their trade competitors. However, it is likely that many large commercial projects will continue to be fully notified. Moreover, the determined trade competitor may still be able to influence affected parties who are notified where they themselves have been excluded by the limited notification. Alternatively, the trade competitor may in some cases still apply to the High Court for judicial review of the decision of the consent authority to treat the application on a limited notified basis.

XII. CONCLUSION

The methods in which trade competitors use the RMA to protect their own commercial interests are often very complex and subtle. Their arguments at council hearings and court proceedings often hide their true commercial motives behind almost any aspect of relevant planning principles; any potential effects; any provision in the legislation; and other methods available to them. In this sense these actions can be viewed as anti-competitive business tools which should not be tolerated under the RMA unless genuine planning and resource management concerns are brought to light. This is difficult to achieve as the very nature of the RMA regime requires that the kinds of things trade competitors use to pursue their commercial motives are carefully considered in each case.

For the most part those who partake in such behaviour are those who are well equipped to delay and frustrate because they have the resources to acquire good legal advice backed up with expert evidence from an array of expert consultants.

Direct attempts have been made to stop the trade wars through statutory amendment, but to date these have not had a considerable impact. The 1997 amendments are also proving to be ineffective. Such attempts to address trade

competitors' abuse of the legislation generally have considerably less impact than: first, changes in other aspects of planning and resource management law; and secondly, the dynamic nature of certain business sectors. The effectiveness or otherwise of trade competition provisions will depend heavily on the ethics of trade competitors. If they continue to treat such anti-competitive behaviour as a legitimate tool, then delay and thwarting of projects by this means will continue for years to come. Greater use of costs awards to counter such anti-competitive behaviour appears the only effective method available to the courts, but there are limits on the use of costs awards as "punitive" measures.

Further research could be undertaken in several years' time to determine the effects of the 1997 amendment to s 104(8) and the pending amendments to the RMA if enacted. There are certainly no simple solutions to curtailing trade competitors' anti-competitive use of the RMA. Perhaps some of the options proposed will lead to fuller discussion and debate by others.