



RESOURCE MANAGEMENT AMENDMENT ACT 2009

## Fact Sheet 2: Trade Competition, Representation at Proceedings and Environment Court Costs

This is one of a series of fact sheets giving an overview of the amendments to improve the Resource Management Act (RMA). This fact sheet outlines the new tools to reduce the number of vexatious and frivolous appeals and appeals motivated or backed by trade competition, and the changes to representation at proceedings (section 274) and Environment Court costs.

### WHAT WERE THE ISSUES?

The amendments address concerns that the RMA does not effectively deter some submitters and appellants from opposing applications on the basis of arguments that have little or no merit, and does not effectively prevent anti-competitive behaviour by trade competitors.

### HOW HAS THE RMA BEEN IMPROVED?

The RMA now includes several measures to prevent or otherwise limit the participation of trade competitors and other potentially frivolous or vexatious parties in matters before councils and the Courts.

Amendments to improve the RMA include:

- limiting the ability for trade competitors or other potentially frivolous or vexatious parties to participate in objection and appeal processes, unless they are directly affected by an adverse effect of the activity on the environment
- discouraging the covert use of third parties by trade competitors
- requiring decision-makers not to have regard to trade competition or its effects

- reinstating the power of the Environment Court to require security for costs as a way to dissuade frivolous or vexatious appeals
- requiring the Courts to award extensive costs against parties who are found to have anti-competitive motives.

### Restrictions on trade competitors' submissions and appeals

New Part 11A makes it clear that the RMA is not to be used to oppose trade competitors.

New clauses 6(3) and 6(4) of Schedule 1 state that for proposed policy statements and plans, persons who could gain an advantage in trade competition through the submission may only make submissions if directly affected by an effect of the policy statement or plan that:

- adversely affects the environment, and
- does not relate to trade competition or the effects of trade competition.

New section 308B imposes additional limitations on making submissions on trade competitors:

- of the person who made the request for a private plan change
- of applicants for resource consents and designations
- who wish to be a party to an appeal
- who wish to submit on called-in matters and matters lodged with the Environmental Protection Authority.



Note that the restriction on submissions does not apply to heritage orders.

New section 308D provides that persons must now not bring appeals or be parties to appeals in the Environment Court for the purposes of:

- protecting themselves from trade competition
- preventing or deterring other parties from engaging in trade competition.

### **Decision-makers not to have regard to trade competition or its effects**

Under the RMA, councils are not to have regard to trade competition in preparing or changing policy statements or plans, or in considering applications for resource consent. That direction has now been extended to include the ‘effects of trade competition’ (see sections 61(3), 66(3), 74(3), 104(3)(a)(i)). This amendment clarifies existing law, that trade competition includes its effects.

Decision-makers are not to have regard to trade competition *or* its effects where:

- a council is forming an opinion, before making a decision on notification, as to whether the adverse effects of an activity for which resource consent is sought may be more than minor (section 95D(d))
- a council is considering a notice of requirement for a designation and any submissions received (sections 171(1A), 168A(2A)).

### **Trade competitors and ‘surrogates’**

New section 308F of the RMA prohibits trade competitors from using ‘surrogates’ to bring an appeal or be a party to an appeal for trade competition purposes.

‘Surrogates’ are persons whom trade competitors may directly or indirectly help to bring an appeal or to be a party to an appeal against a decision in favour of other competitors.

Surrogates must tell the Environment Court when appearing as appellants or parties if they have, are, or may knowingly receive direct or indirect help from trade competitors.

The requirement that the surrogate *knowingly* receives the assistance from a trade competitor ensures that the surrogate will not be punished for having unwittingly received that assistance (for example, by way of unrelated donations to a community group).

### **Trade competition declaration**

New section 308G provides that any person who was a party to an appeal (except the trade competitor and any surrogates) can apply to the Environment Court for a declaration that the trade competitor or their surrogate has:

- contravened the provisions of Part 11A, or
- aided, abetted, counselled, induced, procured, conspired or otherwise knowingly been involved in contravening the provisions of Part 11A.

The Environment Court has discretion whether or not to make a declaration. The proceedings can not be brought until the appeal has been determined, but must be commenced within six years of the contravention.

### **High Court damages**

Any person who obtains a declaration from the Environment Court may bring damages proceedings in the High Court against the person in breach (section 308I).

Proceedings in the High Court must be commenced within six years of the declaration. The High Court must order damages to be paid for loss suffered by the person because of the conduct of the person in breach.

### **Environment Court costs – call in and direct referral**

There are new costs provisions where the Environment Court is determining applications for resource consent, notices of requirement, or private plan changes that have been referred to it by the Minister for the Environment or referred directly to the Court by the applicant, a requiring authority, or a heritage protection authority (section 285).

These provisions require the Court, in deciding *whether* to make a costs order, to apply a presumption that costs are not to be awarded against section 274 parties, and that costs are to be awarded against the applicant.

When deciding on the *amount* of any costs order, the Court must have regard to the fact that the proceedings are at first instance (section 285(5)).

### **Environment Court costs – trade competition declaration**

There are new provisions for full costs awards if the Environment Court makes a declaration that the trade competition provisions (Part 11A) have been breached (section 308H).

Where it makes a declaration against a party, the Court must order that party to pay *all* the costs and expenses the other party incurred because of the breach, less any costs already paid to that party in previous proceedings on the same matter. There is a similar provision requiring the Court to order that the ‘breaching’ party pays the Court’s costs.

The Court can only decline to make an order against the party if it considers that there are *exceptional* circumstances, but may still order them to pay full or partial costs (section 308H(4)).

If the Court makes a declaration against a surrogate, the Court must order that the trade competitor does not directly or indirectly reimburse its surrogate (section 308H(5)).

### **Reinstating the Environment Court’s power to require security for costs**

The new provisions restore the Environment Court’s previous power to order a party to pay security for costs by repealing section 284A of the Act. This does not mean the Court will automatically order security for costs to be paid in each and every appeal.

An application to the Court for an order for security for costs must first be made. The Court must first be satisfied that the appellant will be unable to pay the costs of the respondent if the appellant is unsuccessful. Where the appellant is an incorporated society, the Court must first be satisfied that, if the respondent is successful, the society’s assets will be insufficient to pay costs.

The Court then decides whether or not to make an order, based on factors developed in case law, such as the merits of the appellant’s case.

### **Representation at proceedings – section 274 parties**

Previously, the RMA enabled anyone to participate in proceedings before the Environment Court where:

- they had an interest greater than the public generally
- they represented a relevant aspect of the public interest.

The RMA now provides for the Attorney-General to appear in the Court to represent a relevant aspect of the public interest (new section 274(1)(c)).

It is expected that a wide range of parties, including iwi, will still be able to join as parties to proceedings on the ground that they have an “interest in the proceedings that is greater than the interest that the general public has” (section 274(1)(d)).

### **OTHER INITIATIVES**

For more information on the awarding of costs, refer to the Ministry’s Everyday Guide to the RMA booklet 6.3 *Awarding of Costs by the Environment Court*, and the practice notes on the website of the Environment Court ([www.justice.govt.nz](http://www.justice.govt.nz)).

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