DLA PIPER

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PUBLIC DECISION MAKING NEWSLETTER

This newsletter summarises recent developments in resource management and local government law in New Zealand that are of particular relevance to local authorities and decision makers.

In this edition, we address recent case law on the lapse of a consent, scope of plan change appeals, trade competition, and provide an update on legislative developments. We also provide an analysis of recent prominent organisational inquiries and the key learnings from these inquires.

CONTENTS

IMPLEMENTING ESTABLISHMENT CONDITIONS CRITICAL

The decision of the Environment Court (**Court**) in *Koha Trust Holdings Limited v Marlborough District Council*[1] was released on 15 August 2016. Koha sought a declaration that Mr Woolley's resource consent to take and use water from wells had lapsed because it had not been 'given effect to' within the meaning of **section 125(1A)(a)** of the **Resource Management Act 1991** (**RMA**). The Court found that the basis for the declaration was established but chose to exercise its discretion not to make the declaration sought, as it would affect the rights of an innocent third party to whom the resource consent in question had been transferred.

The issue was that a number of implementation and establishment conditions of the resource consent had (arguably) not been complied with. The conditions related to the installation of a water meter, which was required to be installed before any water could be taken or used under the resource consent, and an ongoing obligation to provide meter readings.

The Court confirmed that certain conditions of resource consent do have an implementation or establishment element, such as a requirement for engineering plans to be submitted prior to earthworks being carried out. The Court found that a resource consent can lapse (ie all rights and privileges under the consent are lost) through non-compliance with these implementation or establishment conditions.

Effectively, the Court was saying that implementation or establishment conditions (particularly where they involve a prohibition against operation of the consent until the required steps are completed) are directly relevant to (and can determine) whether the consent has been 'given effect to'. This contrasts to the position on continuing conditions, such as a condition requiring ongoing monitoring, which may be more amendable to enforcement than determining lapsing.

SCOPE OF PLAN CHANGE APPEALS - STRIKING OUT ABOUT SUBSTANCE NOT FORM

Several recent cases have confirmed the position the Environment Court (**Court**) will take on scope of plan change appeals. Two recent decisions of Judges Smith and Kirkpatrick considered scope of appeals in the context of a strike-out application (*Motiti Rohe Moana Trust v Bay of Plenty Regional Council*[2]) and a preliminary issue ahead of consideration of the substantive plan change appeal (*Bluehaven Management Ltd v Western Bay of Plenty District Council*[3]).

In both cases, the Court confirmed that the law in the area is relatively settled. The requirement for scope of any plan change appeal is whether the appellant made a valid submission and, if so, then whether the appeal seeks relief that was reasonably raised through that submission (*Environmental Defence Society Inc v Otorohanga District Council*[4]). While the legal tests as to scope, and their application, are uncontentious, the Court's comments and approach to the strike-out are of interest. The Court effectively stated that formal strike-out applications are not appropriate in respect of plan change appeals, particularly broad plan changes, or appeals on entire proposed plans. The Court is, however, still capable of striking out part, or all, of an appeal due to its ability to regulate its own process. The Court prefers this approach. This is consistent with the recent oral decision of Judge Dwyer in *East Harbour Residents Association Incorporated v Hutt City Council*[5].

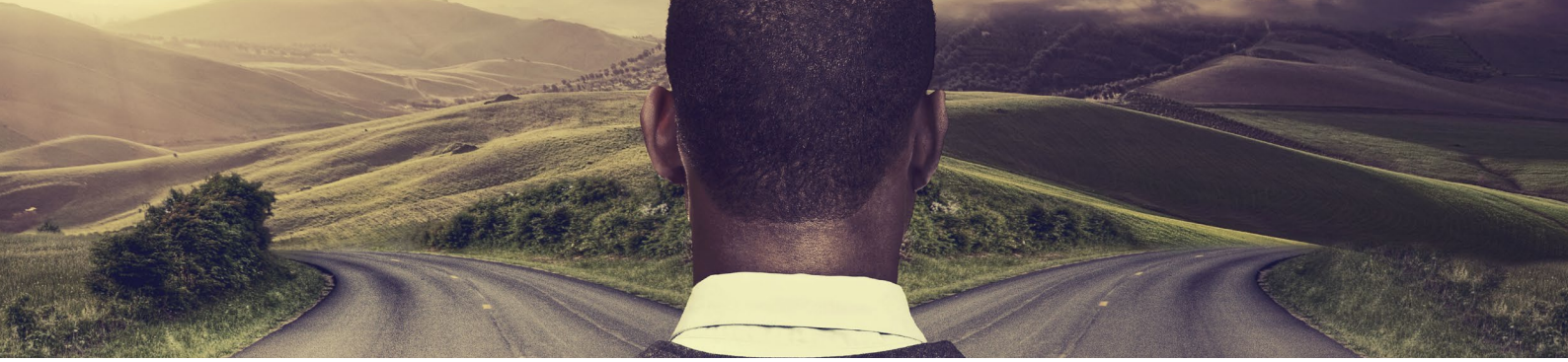
In summary, best practice is to ensure that relief sought through a submission, and any resulting appeal on a plan change, is clearly set out to prevent uncertainty as to jurisdiction. However, flexibility and tolerance is provided to submitters, particularly those who have not received legal or technical input in the process, and the Court will be hesitant to formally strike out proceedings. However, where an appeal seeks to expand on or raise different issues to the submission or the plan change, the Court will seek to approach the scope of the proceeding in a pragmatic fashion.

HOUSTON, WE HAVE A PROBLEM...

Getting organisational inquiries right

Several prominent organisations have found themselves in 'hot water' for various incidents this year. In this newsletter, we look at three distinctly different situations and how they have been handled. In each instance, decision makers have had to make calls on a number of issues to which there is seldom any clear 'right' answer.

1 [2016] NZEnvC 152
2 [2016] NZEnvC 190
3 [2016] NZEnvC 191
4 [2014] NZEnvC 070
5 [2016] NZEnvC 224 - note that this decision is now under appeal.



We look at the Chiefs' 'Mad Monday' scandal, Mike Heron QC's investigation into the Ministry for Primary Industries (**MPI**) fisheries compliance operations and the current Havelock North water contamination inquiry, and offer some comments on the factors decision makers should consider when determining how to respond when issues capture the public's attention.

The Chiefs - 'Mad Monday' scandal

In August 2016, allegations began to circulate that members of the Waikato Chiefs rugby union team had sexually assaulted a woman hired as a stripper for the team's end-of-season 'Mad Monday' event. This sparked a New Zealand Rugby (**NZR**) investigation by NZR lawyer, Keith Binnie. While the investigation found that the allegations were unsubstantiated on the balance of the available evidence, it also found that Chiefs management should have been more involved in the decisions around the team's final season celebrations.

NZR has been heavily criticised for giving the players involved no punishment beyond a formal caution and for having had its own lawyer conduct the investigation. NZR Chief Executive, Steve Tew, has himself admitted that '…given the very sensitive nature of what we were doing, we weren't very transparent with the findings' and that '[with] the benefit of hindsight it might have been easier for people to believe us if we had brought someone from the outside to sit alongside us'. While, according to Race Relations Commissioner, Susan Devoy, another independent investigation would be the best way to give the public confidence that the process has been fair and that all of the issues were out in the open, Tew has said that there is no need to 're-litigate' the investigation, as he is '… completely satisfied we did enough to find the truth'. Chiefs Chairman, Dallas Fisher, has said that there will be a review of how the entire process was handled, including the investigation by the team bosses and NZR.

NZR has since met with anti-sexual violence and survivors advocate, Louise Nicholas, who Tew has said NZR will work with to enhance its education programmes for the players and the broader rugby community, as well as Equal Opportunities Commissioner, Jackie Blue. In September 2016, Tew told Radio New Zealand that NZR planned to launch a respect and responsibility education programme focused on healthy relationships and consent issues, following the incident.

Chiefs Chief Executive, Andrew Flexman, has also noted the importance of implementing guidelines around future events. Flexman has said that 'end of season celebrations will be much more family focused and will not take place without the involvement and oversight of management'.

MPI - Simmons Report

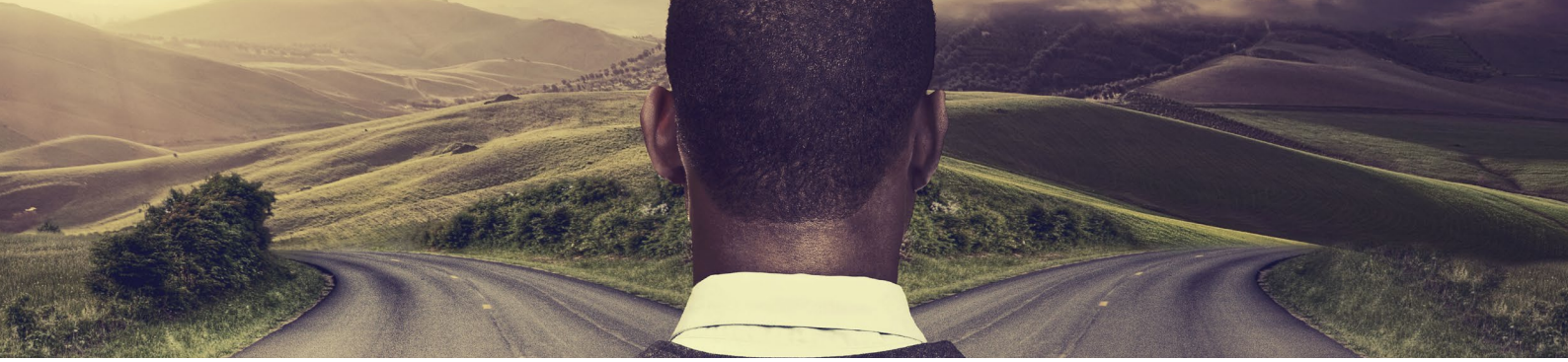
On 16 May 2016, the University of Auckland Business School announced the findings of the Simmons Report, which suggested that fish without economic value have routinely been dumped at sea. On 18 May 2016, Newshub reported that New Zealand fishing boats have been illegally dumping quota fish, claiming its source to be MPI reports into two of its operations (Achilles and Hippocamp), both of which were referred to in the Simmons Report. As a result, there was criticism of MPI's decisions not to prosecute in these two cases.

On 19 May 2016, MPI Director-General, Martyn Dunne, commissioned an independent review into the decisions made in respect of the two operations, as well as a third called Overdue. Conducted by Mike Heron QC, the review focused on the circumstances around each operation, the appropriateness of any decision not to prosecute, and the adequacy of the response from both the Ministry of Fisheries (**MFish**) and MPI.

Heron found that the decision not to prosecute in respect of operations Overdue and Hippocamp was understandable and reasonable in the circumstances, and that no other prosecution or compliance action should have been taken.

In respect of operation Achilles, Heron found that while the decision not to prosecute was understandable and available in the circumstances, and though approached professionally and in good faith, the process leading to the decision was flawed. It was affected by irrelevant considerations, and the earlier conduct of MFish and MPI had created unnecessary hurdles to prosecution. The process was confused and not well documented or communicated. Further, follow-up actions were not thoroughly completed. However, Heron found no evidence of a systemic problem with the prosecution process at MPI.

Opposition Members of Parliament have suggested a much wider cultural problem within MFish or MPI, and called for a wider inquiry into fisheries management and the industry's influence over MPI. In respect of operation Achilles, Dunne has admitted that the way in which the



non-prosecution decision was made is regrettable, and that it is disappointing that the process was characterised by confusion and a lack of adequate documentation and communication. However, Dunne claims to have initiated the review to provide transparency into the three decisions, and he believes that this has been achieved.

MPI claims that a number of actions are underway that will address matters arising from the Heron Report, including a review of its compliance functions. It has also heeded Heron's advice to review and update its prosecution policy with input from Crown Law.

Havelock North - water contamination

In August 2016, approximately 5,000 people became sick and 22 were hospitalised with gastrointestinal illness in Havelock North when a bore contaminated the town's water supply. Evidence to date indicates that sheep or cattle caused the suspected campylobacter contamination. It is believed that three elderly people died as a result of the outbreak, and one death is the subject of a coronial investigation. Three people have also gone on to develop reactive arthritis, while three others have developed a secondary illness, Guillain-Barré syndrome.

The local authorities involved began investigating the situation. However, on 12 September 2016, the Government announced that it would commission its own inquiry into the contamination incident.

Shortly before the start of the scheduled hearing process for the Government's inquiry, the media reported that the Hawke's Bay Regional Council (**Regional Council**) had charged the Hawke's Bay District Council (**District Council**) with resource consent breaches discovered over the course of an investigation. The charges have been laid under the RMA for a technical breach of the District Council's resource consent conditions for taking water.

Hastings Mayor, Lawrence Yule, has expressed disappointment with the Regional Council's prosecution action, saying 'we are supporting the inquiry [and] the inquiry is the appropriate body and system to determine what has occurred here'. He went on to say '…It's unfortunate that the hearing is on the same day as the start of the inquiry and that in itself is disappointing because we are trying to get all the information we need for the inquiry…nonetheless the Regional Council have chosen to do that and we'll have to respond to it'.

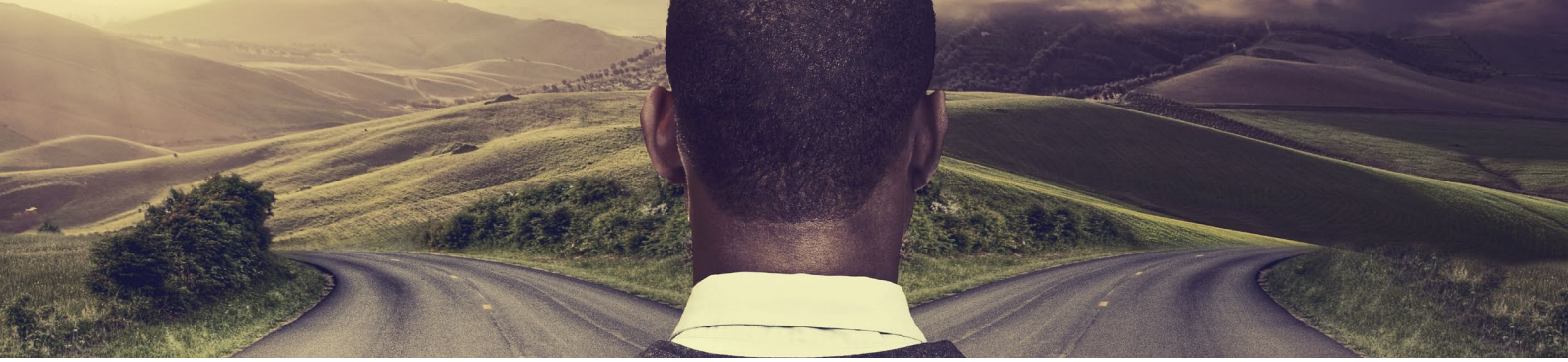
Retired Court of Appeal Judge, the Honourable Lyn Stevens QC, is chairing the inquiry. Joining Justice Stevens on the panel are New Zealand Qualifications Authority Chief Executive and former Director-General of Health, Dr Karen Poutasi CNZM, and local government and engineering expert, Anthony Wilson. The inquiry will report back by 31 March 2017. Under the final terms of reference, it will focus on how the water supply system became contaminated and how this was subsequently addressed, how local and central government agencies responded to the public health outbreak that occurred as a result of the contamination, and how to reduce the risk of outbreaks or similar incidents recurring.

The inquiry will not consider any matters of civil, criminal or disciplinary liability, structural arrangements of local government, or any issues about water, aquifer and catchment management unrelated to this contamination.

Lessons learnt

When issues are in the public spotlight, or it's reasonable to expect they may end up there, you should always turn your mind to the possibility of having an independent third party conduct your inquiry. An independent reviewer is likely to be less affected by issues of internal politics or culture, and may have specialist expertise or acumen in an area that internal people do not. Importantly, an independent reviewer is also more likely to be perceived as impartial by the viewing public. By the same token, outsourcing won't always be appropriate. In making your decision on the best way to proceed, consider the following:

- Does the issue concern an individual? If 'yes', this generally lends itself to an internal investigation or inquiry.
- Are you concerned with a 'one-off', very focused incident that does not have broad systemic or cultural implications for your organisation? If 'yes', an internal investigation or inquiry may be appropriate.
- Is the organisation itself under scrutiny or does the situation have an organisational focus? If 'yes', it will often be more appropriate for an external, independent person to conduct the inquiry.
- Are you concerned with a high-profile incident? Are the people or issues involved of significance or public interest? If 'yes', an external investigation will probably be appropriate. The Chiefs incident was certainly high-profile, yet it was dealt with internally and the organisation has faced public backlash as a result.



- Are you concerned with a question or issue that needs to be settled by reference to some sort of external advice because internally there are differences of view or political issues at play? If 'yes', it will often be more appropriate for an external, independent person to conduct the inquiry.
- What is the third party impact or what are the public implications? For example, the Havelock North situation had significant public health implications, lending itself to an external inquiry.

The potential consequences of the incident or situation with which your organisation is concerned will help to determine how formal your response needs to be.

Sufficient time should be taken to carefully consider how best to approach the situation and to plan any inquiry or other response. Sometimes your organisation will need to move quickly to respond to an incident, but that should not be at the expense of ensuring that you take the approach that is the most appropriate in the circumstances.

Be proactive, not reactive, and particularly not reactive to the media. Your organisation will usually benefit from 'front-footing' an incident by instigating an investigation or inquiry itself earlier in the piece, rather than appearing to be reacting to media, public or political pressure down the track.

Clear, well thought-through terms of reference should be devised to set the scope of any inquiry. Consider whether the terms of reference will be released publicly and draft them accordingly.

Where your staff may be required to give evidence or have other involvement in an inquiry, ensure that they are and feel supported, particularly where the issues that have given rise to an inquiry are sensitive or distressing.

Be transparent about the process that is decided on and followed. That doesn't mean that you need to publicly release all of the details of what is found, and particularly not sensitive or private information. Sometimes, it may actually be appropriate to release an investigation or inquiry report itself, as MPI has done.

Once process decisions have been made and followed through, they should be defended. The Chiefs has not defended its internal inquiry and findings particularly well, and the extent of its subsequent response to public criticism has almost undermined the inquiry itself.

Your organisation should have a clear internal position on who the spokesperson for the issue giving rise to the inquiry and the inquiry itself is, and what evolving communications on these will be.

'Disclosure: DLA Piper New Zealand is advising two individuals in relation to the Government Inquiry into Havelock North Drinking-Water.'

SHAREHOLDERS, DIRECTOR AND CEO OF TRADE COMPETITOR COMPANIES FOUND NOT TO BE TRADE COMPETITORS

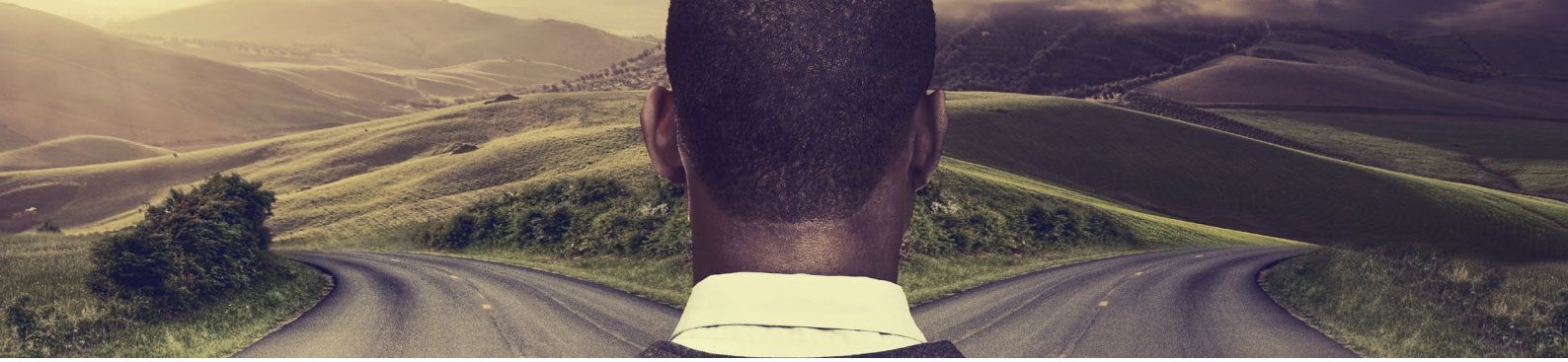
In *Kapiti Coast Airport Holdings Limited v Alpha Corporation Limited*[6], the Environment Court (**Court**) held that shareholder investors in trade competitor companies, as well as a director and the Chief Executive Officer were not themselves trade competitors for the purposes of **Part 11A** of the RMA.

The background facts that gave rise to the decision are that Kapiti Coast Airport Holdings Limited (**Kapiti**) owned land in and around Kapiti Coast Airport and undertook a range of activities, including the activities of commercial land owner, developer and lessor. Kapiti's land was in the Airport Zone of the Kapiti Coast District Plan. Kapiti lodged a private plan change request, **Plan Change 84: Airport Zone** (**PC 84**), seeking to change the prohibited activity status of certain types of activities in the zone.

The six respondents lodged submissions in opposition to PC 84. Kapiti contended that the respondents were trade competitors of it. The interests of the respondents giving rise to Kapiti's contention of trade competition were summarised in the decision as follows:

- Coastlands Shoppingtown Limited (**Coastlands**), Sheffield Properties Limited (**Sheffield**) and Ngahina Developments Limited (**Ngahina**) carried on business as commercial land owners, developers and lessors of land used for retailing at Paraparaumu Town Centre approximately two and a half kilometres away from the airport.
- Alpha Corporation Limited (**Alpha**) owned all of the shares in Coastlands and Sheffield, as well as 50 percent of the shares in Ngahina.
- The Ngahina Trust (**Trust**) owned 50 percent of the shares in Ngahina and six percent of the shares in Alpha.
- Richard Mansell was a director of Alpha, Coastlands, Sheffield and Ngahina. He was also the Chief Executive Officer of Coastlands.

6 [2016] NZEnvC 137



A range of declarations were sought by Kapiti, but it was agreed by all parties that the Court should first determine as a preliminary point, whether or not the respondents were trade competitors of Kapiti. This question was relevant because of the restricted circumstances set out in **clause 29(1B)** of the **First Schedule** to the RMA, where a trade competitor of a person who makes a private plan change request may make a submission on the plan change.

There is no statutory definition of what constitutes trade competition in the RMA. However, at a general level, the Court considered that the conclusion reached by the High Court in *Montessori Pre-school Charitable Trust v Waikato District Council*[7] provided a useful test. There the High Court stated that in characterising respective activities as trade competition, what matters is that there is a competitive activity having a commercial element.

In applying this test, the Court was of the view that there was unquestionably a competitive activity having a commercial element in the case before it, at least insofar as some of the respondents were concerned. The Court noted that Kapiti, Coastlands, Sheffield and Ngahina were all in the business of commercial landowners, developments and lessors, and competed for lessees to rent their premises in Paraparaumu. Consistent with the findings of the courts in previous cases, the Court considered that at first blush this made these three respondents trade competitors of Kapiti.

The Court then discussed the more recent decision of the High Court in *Queenstown Central Limited v Queenstown Lakes District Council*[8]. This decision was relied upon by the respondents in support of their contention that they were not trade competitors of Kapiti.

In essence, the Court considered that in *Queenstown Central*, the parties were resource use competitors, which could be contrasted with the situation in Paraparaumu. The Court observed that some of the respondents (who were unquestionably in competition with Kapiti as commercial lessors) sought to restrict the commercial activities which Kapiti may apply to undertake on its land. The Court found that was not competition for a resource but trade competition related directly to the competing land uses which they undertook on their respective areas of land at the Kapiti Coast Airport and Paraparaumu Town Centre. For those reasons, the Court determined that Coastlands, Sheffield and Ngahina were trade competitors of Kapiti.

The Court did not reach the same conclusions about Alpha, the Trust and Mr Mansell, and declined to make declarations that they were trade competitors of Kapiti. Of these three remaining respondents, the Court was of the view that the position of Alpha was the most difficult to determine. The Court acknowledged that although Alpha did not compete in the commercial lease market, two of its wholly owned subsidiaries, Coastlands and Sheffield, did. Nevertheless, the Court was of the view that the trade Alpha was engaged in was that of investor, not commercial lessor. It reached a similar conclusion about the Trust, which was a 50 percent shareholder investor in Ngahina. The position of Mr Mansell was different again. As a director of four of the companies and Chief Executive Officer of Coastlands, it appears that Kapiti conceded and agreed with a view expressed by the Court during the hearing that those interests could not make Mr Mansell personally a trade competitor of Kapiti.

To the extent that its determination was contestable, the Court recorded that it had taken a restrictive and literal approach to interpretation of a statutory provision which seeks to limit the right of public participation in the RMA process. The decision suggests that the Court is likely to apply a high threshold when identifying a trade competitor. There will need to be evidence that the relevant parties are themselves engaged in the same category of commercial activity and are not just investors.

Legislation corner

7 November 2016 came and went without too much fanfare. The long awaited report back from the Select Committee on the **Resource Legislation Amendment Bill** (**Bill**) did not eventuate. The Bill was instead reported back pro-forma and referred back to the Select Committee. While it appears that the Government is having difficulty getting its significant reform package across the line, recent support from the Māori Party may mean that the next stage of the Government's planned overhaul of the RMA may occur. The final form is not known, but there are likely to be significant changes to the Bill when reported back from that which formed the basis of the submission process.

Even though the Bill itself may have stalled, the Government's agenda in terms of removing barriers to development is being pursued. The **National Policy Statement on Urban Development Capacity 2016**

7 [2007] NZRMA 55 (HC)
8 [2013] NZRMA 239 (HC)

was finalised, with obligations for many local authorities coming into effect on 1 December 2016.

In November 2016, the **Resource Management (National Environmental Standards for Telecommunication Facilities) Regulations 2016** (**NES**) were also promulgated. From 1 January 2017, the previous 2008 regulations will be replaced and a range of telecommunication activities will no longer require resource consent. The intention of the NES is to make it quicker and easier for New Zealanders to get connected to new and better communications technologies.

In addition, the Government has extended the **Housing Accords and Special Housing Areas Act 2013** to allow the streamlined consenting process for residential development to continue.

Finally, as a result of the recent Hurunui/Kaikōura earthquake sequence, on 29 November 2016 the House agreed to a motion of urgency to address:

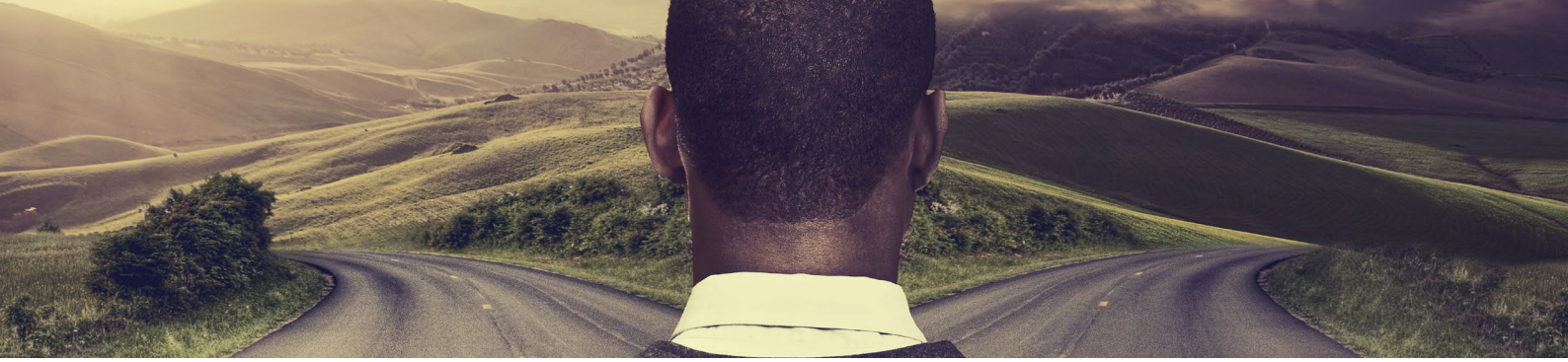
- the introduction, first reading and referral to Select Committee of the **Hurunui/Kaikōura Earthquakes Emergency Relief Bill** (**Relief Bill**); and
- the introduction and passing through all stages of the **Civil Defence Emergency Management Amendment Act 2016 Amendment Bill** (**Amendment Bill**).

The Relief Bill was immediately referred to the Local Government and Environment Committee. The purpose of the Relief Bill is to modify the application of the RMA (around timeframes for retrospective approval for emergency works), facilitate emergency activities undertaken by rural landowners, and rehabilitate Kaikōura harbour. The Relief Bill was reported back from Select Committee on 1 December 2016, and passed through all remaining stages. It received Royal Assent on 5 December 2016, and the **Hurunui/Kaikōura Earthquakes Emergency Relief Act 2016** is deemed to have come into force on 14 November 2016.

The Amendment Bill was introduced to Parliament on 29 November 2016. The Amendment Bill amends the recently enacted **Civil Defence Emergency Management Amendment Act 2016** (**Act**), bringing forward the commencement date of most provisions of the Act to allow them to be used to support recovery from the Hurunui/Kaikōura earthquake sequence, as well as providing transitional provisions and allowing directions to owners of structures to obtain an assessment of the effect of an emergency on those structures when a state of emergency is in force. The Amendment Bill passed through all stages and received Royal Assent on 29 November 2016.

On 1 December 2016, the **Hurunui/Kaikōura Earthquakes Recovery Bill** (**Recovery Bill**) was introduced and immediately referred to the Local Government and Environment Committee. The purpose of the Recovery Bill is to enable the next phase of recovery in the main affected areas (Hurunui, Kaikōura, Marlborough and Wellington). It seeks to achieve this by establishing a process where Orders in Council can be made to grant exemptions from, modify, or extend any provisions of (almost) any enactment to assist in recovery from the earthquake sequence. The Select Committee reported back on 8 December 2016. The Recovery Bill passed through the remaining stages on that date, and received Royal Assent on 12 December 2016. The **Hurunui/Kaikōura Earthquakes Recovery Act 2016** came into effect on 13 December 2016.

If you have any questions, or require further information regarding any aspect of this newsletter, please contact us.



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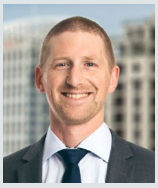

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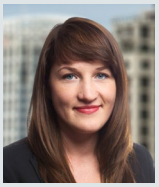

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