7. GENETICALLY MODIFIED ORGANISMS LEGAL LIABILITY ISSUES FOR THE COUNCIL

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The purpose of this report is to provide information, requested by the Strategy and Finance Committee, regarding the possible legal liability implications for this Council arising from the Government's decision last year to permit the commercial release of genetically modified organisms (GMOs).

BACKGROUND

At its meeting on 29 September 2003, the Committee heard representations from Mr Charles Drace, on behalf of GE Free Canterbury, regarding the possible legal liability implications for local authorities arising from Parliament's decision to permit the commercial release of GMOs. Mr Drace supplied background information to the Committee on this topic.

The Committee decided to request staff to report back on the legal liability issues raised by GE Free Canterbury as they could apply to this Council.

Those issues primarily relate to:

(a) the relationship between the Hazardous Substances and New Organisms Act 1993 (HSNO) and the Resource Management Act 1991

(b) the legal liability issues for the Council around the release of GE organisms.

ROYAL COMMISSION ON GENETIC MODIFICATION

In 2000 the Government appointed a Royal Commission to report on:

(a) the strategic options available to enable New Zealand to address, now and in the future, genetic modification, genetically modified organisms, and products; and

(b) any changes considered desirable to the current legislative, regulatory, policy, or institutional arrangements for addressing, in New Zealand, genetic modification, genetically modified organisms, and products.

In July 2001 the Royal Commission reported to the Government. The Royal Commission's report dealt with:

- Cultural, Ethical and Spiritual Issues
- Environmental and Health Issues
- Economic and Strategic Issues
- Research
- Crops and Other Field Uses
- Food
- Medicine
- Intellectual Property
- Treaty of Waitangi
- Liability Issues

The Royal Commission had carried out public hearings over a period of six months and its major conclusion was *"…that New Zealand should keep its options open. It would be unwise to turn our back on the potential advantages on offer, but we should proceed carefully, minimising and managing risks. At the same time, continuation of the development of conventional farming, organics and integrated pest management should be facilitated."*

In Chapter 12 of its report the Royal Commission discussed liability issues and the potential liability of those involved in creating, using or approving the use of GMOs if harm is caused to others or the environment by such organisms or products.

The Royal Commission had heard arguments for prohibiting the release of GMOs into the environment or for the prevention of importation of GMOs invoking the precautionary principle as the basis for the approach. The Commission noted that the precautionary principle has been widely incorporated into a range of international laws, treaties, protocols and other instruments, but it remains the focus of much debate, particularly in relation to biosafety and biotechnology.

The Commission found that although there was much discussion of the precautionary principle and the precautionary approach from those who oppose release of GMOs into the environment, there was no consensus on the meaning of either term, and the meaning of precaution often rested in the values held by the speaker. The Commission concluded:

> *"The Commission considers there is more merit in hearing and responding to the message contained in the words than in seeking to define the meaning or determine how the principle should be applied. In any event, we were not convinced that a single principle could be applied across the board to the use of genetic modification in New Zealand. Decisions on the use of the technology must rest on a range of factors, including the risks and acceptability to the public of the proposed use. They are factors that should inform the process of managing genetic modification."*

The Royal Commission looked at the issue of whether the Resource Management Act is available to regulate the environment. It noted that remedies for damage through genetic modification may be available under the Resource Management Act, and it referred to the ability for anyone to apply to the Environment Court for enforcement orders to prevent or stop any dangerous, offensive, objectionable or noxious activities that are or would be environmentally harmful. The Court can also order that parties responsible for any actual or likely environmental damage must repair or mitigate the damage, or reimburse anyone else who has taken action to remedy damage due to non-compliance with the Court's orders. These remedies however are restricted to effects on the environment and do not extend to personal damage or loss suffered by an individual.

The Commission noted that the fact remedies are restricted to effects on the environment is consistent with the approach in many other countries where reliance on laws that apply to all cases of contamination or pollution and do not discriminate between industries, is preferred to enacting laws creating specific liability for particular industries or activities. So, within the New Zealand context, the ability of the Environment Court to make such orders is the same whether the subject matters relates to GMOs, pollution or noise, or some other adverse environmental impact.

The Commission also noted that HSNO provides for compliance orders requiring recipients to stop any dangerous conduct or actions contravening the Act, regulations or controls under approval. These orders can require a person to do anything necessary to ensure compliance or to avoid or mitigate adverse effects on people in the environment. A compliance order is available to require remedying any adverse effects on people or the environment caused by a breach of the Act, for example, in the authorised release or non-observers of conditions of a field trial.

The Commission also considered civil liability options in relation to civil liability, insurance, bonds, the establishment of a liability fund and overseas approaches. The Royal Commission noted that where substantial bonds are required by Parliament, they are rarely provided in cash and usually take the form of a performance bond underwritten by an insurance company. The Commission noted there may be difficulties in obtaining such insurance for GMOs. It also saw that the substantial premiums involved would equate to a penalty on a particular activity or product disadvantaging those wishing to trade in the field, compared to other industries.

The Commission concluded that it was unnecessary to recommend legislation providing specific remedies for third parties where they may be have been affected by the release of a genetically modified organism. It stated (paragraphs 80-84):

"80 The Commission considers it is unnecessary to recommend legislation providing special remedies for third parties, where they may have been affected by the release of a genetically modified organism. As technology advanced with ever-increasing pace throughout the 20th century, the common law (that is, law based on court decisions, as distinct from statute law) showed it was well able to mould new remedies for novel situations. Parliamentary intervention has rarely been needed in this area. From a legal liability perspective we have not been persuaded there is anything so radically different in genetic modification as to require new or special remedies.

81. Strict liability can be a barrier to innovation and progress, and the weight of international precedent is against setting up such a regime: the United States, Canada, the United Kingdom and Japan do not impose strict liability and instead rely on the common law or general environment protection legislation for those seeking recourse. Significantly, the first three countries all have a legal background largely similar to our own. On the information before us, the only major countries with a strict liability regime are Germany and Austria.

82. The Commission's recommendations include enhanced filters for field trials and release of genetically modified organisms. The emphasis is on preventing damage or injury in the first place, rather than creating a liability regime additional to that already in place.

83. Given these recommendations, the Commission's conclusion in respect of liability issues in relation to genetic modification and genetically modified organisms is that it is best to leave the regime as it currently stands, at least in the short term, subject to the specific recommendations made below. We appreciate this means there is the potential for some socialisation of unforeseen or unanticipated loss or damage, but we consider that, with the emphasis on prevention, this is appropriate.

84. In making the recommendations below, we acknowledge the liability issues are difficult. In addition to the technical legal issues, other considerations require delicate balancing: on the one hand, protection of the public and the environment, and on the other the need, in the public interest, not to stifle innovation or drive away investors by imposing overly stringent conditions on research or economic activity. For these reasons, Government may wish to refer the liability issues to the Law Commission for more intensive study."

LAW COMMISSION REPORT

Following the Royal Commission's report the Government requested the Law Commission to consider and report on issues surrounding liability for loss resulting from the development, supply or use of GMOs. In particular the Commission was to consider the adequacy of current statute and common law (the law developed by the courts) for dealing with issues of liability for loss from GMOs. If the current law was not considered adequate, then what actions for specific liability regimes were there, and what were their advantages and disadvantages.

In May 2002, the Law Commission released a study paper entitled *"Liability for Loss Resulting From the Development, Supply, or Use of Genetically Modified Organisms".*

In its paper the Commission noted:

- It is difficult to estimate the level of risk proposed by GMOs because they are a new technology.
- The magnitude of potential damage is difficult to assess. Unlike a toxic spill, for example, which involves a defined amount of a particular substance in a limited location, GMOs may have the ability to replicate without limit. In addition, there is the possibility of gene transfer from one species to another.
- GMOs have the potential to create catastrophic levels of harm. In the fact of such loss, most liability regimes will be ineffective. Further, while there may be some damage that would be, for practical purposes, possible to compensate or rectify, such as the loss of biodiversity or the spiritual pollution of traditional foods.

- Although the potential dangers imposed by GMOs are difficult to predict, it is likely that some of the potential negative effects will manifest in the long term and be diffuse in nature. This could mean that potential defences no longer exist when the damage is discovered.
- A potential plaintiff may well face difficulty in expense in establishing causation and proving the extent of any damage. This is because of the possible time elapsed before damage is discovered and the scientific evidence that will be required to prove causation.

The Commission noted that the private remedies available currently to injured plaintiffs are provided by the common law torts of negligence (in cases of damage to personal property or personal injury not covered by the Accident Compensation Scheme and where the criteria for negligence can be met), nuisance (where there is continuing or intermittent harm caused by use of land affecting the land of a neighbour), or the rule in ***Rylands v Fletcher*** (where there is the escape of something harmful to a neighbour's land when the defendant was making "non-natural" use of its land). The Commission also looked at compulsory insurance, bonds and a compensation fund.

With compulsory insurance the Commission concluded full insurance was unlikely to be available for all projects, primarily because of an absence of information on which underwriting decisions could be made, e.g. lack of claims history, uncertainty of future claims. With a bond the Law Commission found there were a number of problems such as the time involved to ascertain the GMO posed no danger, accurately setting the amount of the bond and if there were substantial premiums for a performance bond the premiums became a penalty. With a compensation fund it concluded there are likely to be difficulties of inefficiency and setting the size of the pool.

The Commission noted there were two situations where none of these options would be effective and those injured would be left without a remedy and uncompensated loss. Those two situations were:

(a) catastrophic damage of a type or magnitude that the responsible party, its insurance company or a compensation fund could not cover;
(b) irreversible damage, eg loss of biodiversity.

In (a) loss will lie where it falls or the community as taxpayers will have to come to the rescue by providing compensation to all those injured. It is arguable, the Commission states, that by allowing GMO development the Government, on behalf of society, must take explicit responsibility for uncompensated loss. With (b) no regime can compensate.

The Commission concluded that the current statute and common law will not ensure that all damage that could potentially be caused by GMOs will be compensated and that it was unlikely that any liability regime could guarantee this. The Commission identified a range of possible alterations to the existing liability regime such as creating a new strict liability tort, creating new public law duties, requiring insurance or a bond and creating a compensation fund, but given the ethical and spiritual issues involved were beyond the Commission's brief, then decisions about who should be responsible for any adverse consequence of genetic modification, must be widely debated and agreed upon. No effect has been given to any of the suggested alterations by the Commission to date.

NEW ORGANISMS AND OTHER MATTERS BILL 2003

A number of provisions in HSNO relating to the release of GMOs were inserted by the New Organisms and Other Matters Bill of 2003 and it was the enactment of this Bill which gave legal effect to the lifting of the moratorium in October 2003.

The explanatory note included with that Bill referred to the possibility of overlapping statutory requirements and stated:

> *"The Resource Management Act 1991 (the RMA) has not been used to control the use or effects of GMOs or new organisms to date. With the introduction of conditional release under HSNO, local authorities may be asked to consider introducing additional controls under the RMA. Section 32 of the RMA will require a local authority to demonstrate why the use of such controls is necessary and what effects they are addressing that have not already been dealt with under HSNO. However conditional releases are a new provision, and the Ministry for the Environment will monitor how the interface between the RMA and HSNO is working."*

The position of Local Government New Zealand on this issue can best be seen in its submission to the Select Committee on the New Organisms and Other Matters Bill.

Local Government New Zealand stated that its comments were on the general and controlled release of GMOs, at the regional and territorial level. They were not intended to apply to the proposals for laboratory research, medical applications, cloning or other experimental research through derived potentially useful GMOs. Local Government New Zealand argued for greater clarity on the relationship between HSNO and the RMA, and said that it was open to interpretation whether:

- territorial authorities can regulate land use effects that may be associated with growing GMOs, once approved for release to the environment;
- regional councils can control the effects of the release of GMOs into the environment if such a release is a "discharge" of a "contaminant" or is a "hazardous substance".

It referred to s 142 of HSNO which set out the relationship between HSNO and the RMA with regard to "hazardous substances" but the Bill introduced no similar clarification that would help local authorities understand that responsibilities with respect to the management of "new organisms" and that it was unclear whether such new organisms or their by-products could be considered "hazardous substances" or "contaminants" for the purposes of the RMA. Local Government New Zealand also stated:

> *"The appropriate scope or nature of the relationship between the various regulatory provisions is currently open to interpretation. Variable responses are therefore likely to be generated from within the local government sector, particularly in the absence of national guidance. This will give rise to unnecessary confusion and an inconsistent approach."*
>
> *"Another consequence of a lack of clarity in the relationship between the HSNO Act and the RMA will be that councils continue to receive delegations requesting that they control, restrict or prohibit the growing of GMO crops within their "district" or "region" through amendment to a district or regional plan. Such declarations, or the regulatory instruments designed to give them effect, are also likely to be challenged in the Environment Court, adding to the cost to be borne by all concerned."*

Local Government New Zealand asked whether it was the Crown's intention that territorial authorities should have the ability to prohibit all GMOs or particular GMOs from a part or the whole of the districts, then the ability to exercise this control should be expressly provided for in the Bill and the role of local government be clarified with the Bill including definitions of contaminant, discharge, hazardous substances, effect and other relevant terminology that might contribute to a confused relationship between the HSNO Act and the RMA. Local Government New Zealand also wanted the circumstances of interest to local communities be incorporated into ERMA's decision-making processes.

The Select Committee recommended to Parliament that any local authority with a potential interest in an application should have the maximum time available in which to consider the application and make a submission on the basis of the likely impact on the local authority's area. The Select Committee also recommended the insertion of a new clause to extend the current discretionary provision in the Act to enable all local authorities, including both regional councils and territorial authorities, to be heard by the Authority if, in the Authority's opinion, the local authority is likely to have an interest in the application.

Regarding the issue of lack of clarity about the role of local government in the Bill, the Select Committee was split. A minority view was that the inter-relationship between the Hazardous Substances and New Organisms Act 1993, the Resource Management Act 1991 and the Local Government Act 2002, was unclear.

The majority view of the Committee believed that the regime was clear and that local government does not have powers under the Resource Management Act 1991, or the Local Government Act 2002, to regulate GMOs. The Committee saw that such regulation is the role of ERMA and that as ERMA is a specialist body, then responsibility should lie with it and not with local government.

In its report back on the 2003 Bill, the Select Committee commented on the role of local government and stated:

> *"…Some of us believe that this situation is unclear and that the inter-relationship between the principal Act, the Resource Management Act 1991, and the Local Government Act 2002 is still unsatisfactory.*
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> *Government members believe that this regime is clear. Local government does not have powers under the Resource Management Act 1991 or the Local Government Act 2002 to regulate genetically modified organisms. Such regulation is the role of the Authority under the principal Act. The Authority is a specialist body and responsibility should lie with it and not with local government."*

STATUTORY FRAMEWORK

Today, there are two statutes which are relevant to the issue of the release of GMOs.

Hazardous Substances and New Organisms Act 1996.

The Hazardous Substances and New Organisms Act 1996 (HSNO) is the principal statute that sets out the legal framework for the conditional or unconditional release of GMOs.

The purpose of HSNO is stated to be to *"…protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms."*

Section 7 of HSNO provides that persons exercising powers under that Act *"…shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects"* (the precautionary approach).

The Act establishes the Environmental Risk Management Authority (ERMA) to administer functions and powers under the Act. The Authority comprises six to eight members and is subject to policy direction by the Government.

The Act prohibits the importation, development, field testing or release of GMOs except in accordance with an approval issued by ERMA. The Act provides that ERMA will respond to GMO developments through assessing applications by way of approval, and ERMA can impose conditions and controls on that approval.

The Act sets out a process for applications for a conditional release for a new organism or to field test a GMO to be publicly notified. If an application is for approval of a new organism ERMA is required to notify a local authority if, in the Authority's opinion, the local authority is likely to have an interest in the application.

Any person can make a submission on any publicly notified application and the Authority would usually hold a public hearing. There is no right of appeal against decisions by ERMA. The Minister for the Environment is given the power to call in an application with significant effects.

The Act establishes a system for pecuniary penalties and civil liability for breaches relating to new organisms. The High Court may order that a person pay a penalty if that person:

- Developed, field tested, imported or released a new organism in breach of the Act;
- Possessed or disposed of any new organism imported, manufactured, developed or released in breach of the Act;
- Failed to comply with any controls relating to a new organism

The penalties that can be made by the Court are $500,000 for an individual and for a body corporate the greater of:

- $10M; or
- if it can be readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, three times the value of any commercial gain resulting from the contravention; or
- if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate.

The Court can, instead of or in addition to making the order, make an order that the person mitigate or remedy any adverse effects on people or the environment, or an order to pay the costs of mitigating or remedying those adverse effects.

The Act also provides a person is liable in damages for any loss or damage caused by any act or omission while developing, field testing, importing or releasing a new organism in breach of HSNO.

Resource Management Act 1991

Under s 17(1) of this Act every person has a duty to avoid, remedy or mitigate any adverse effect on the environment arising from an activity carried on, by or on behalf of that person. The release of GMOs into the environment has the potential to create adverse environmental effects and arguably falls within the duty imposed by s 17. Section 17 expressly provides that that duty itself if not enforceable against anyone and that no one will be liable to anyone else for a breach of that duty.

However, the Resource Management Act also provides that any person may apply for an enforcement order from the Environment Court to require any other person to cease or not commence anything that in the opinion of the Court, is or is likely to be objectionable to such an extent that is likely to cause an adverse effect against the environment. Again, it is arguable that such applications are still available notwithstanding an approval granted by ERMA, but typically such applications would only be made once the adverse effect has occurred, and is in respect of effects upon the environment, rather than personal damage or loss suffered by a third party.

Section 76 of the RMA provides that the Council may, for the purpose of carrying out its functions under the RMA, make rules regulating land use activities. The functions of territorial authorities under the RMA include the control of any actual or potential effects of the use or development of land. Before making any rules, s 32 of the RMA requires the Council to evaluate whether having regard to efficiency and effectiveness, any proposed rules and policies are the most appropriate for achieving the objectives.

Regarding the relationship between HSNO and the RMA, the High Court in ***Bleakley v Environmental Risk Management Authority*** (2000) 3NZLR 213, recognised differences in the statutory purposes between the RMA and HSNO. Speaking of HSNO, the Court said:

> *"It is true that the Act (HSNO) has an environmental protection purpose, as does the Resource Management Act, however, that prima facie wide purpose is to be read in the context of its subject matter and specifics. It is to protect the environment against hazardous substances and organisms, and not on a wider scale. The wider scale is the role of others under general legislation in the RMA. Thus, if spraying milk on pastures were to raise a concern that heritable material might escape, that would be a concern for (ERMA). If, after (ERMA) action there was no risk of escape of heritable material but there remained a risk of another environmental character – e.g. destruction of aquatic life in streams – that would be a concern to be dealt with under the Resource Management Act. It would not be an (ERMA) matter, despite the breadth of the opening sections of the Act. It is not an unfamiliar judicial problem to reconcile legislation relating to specific activities, and a general legislation in the Resource Management field."*

Based on this decision, it is considered that HSNO is not a code in relation to GMOs such as that is the only legislation which can apply to GMOs. It is arguable that RMA controls could apply to the release of GMOs and that a territorial authority may have jurisdiction to consider making rules in its District Plan to regulate GMOs.

"COMMUNITY MANAGEMENT OF GMOs" REPORT

In March 2004 the Whangarei District Council, Far North District Council, Kaipara District Council, Rodney District Council and Local Government New Zealand released a report prepared by Simon Terry Associates which investigated options for local authority management of GMOs. The report noted that HSNO establishes the legal framework for assessments and that the Act provides the minimum national standards to be set for GMO activities. It also expressed concern that if an agent making use of GMOs has an inadequate financial resources to cover environmental damage resulting from its activities, then the burden will tend to fall on local government.

The report saw two alternatives for local authorities:

(a) That the RMA be used to apply a precautionary approach in regulating the outdoor use of GMOs and that the RMA provides a mechanism to address liability and compensation concerns. Not all categories of GMO use need to be regulated with the same degree of precaution which may result in two or more different sets of rules in order to group and match similar categories of risk with the appropriate controls. It was considered that these rules could be argued to be efficient and effective as required by s 32 of the RMA, on the grounds that ERMA can not be relied on to make provision against particular risks and that local authorities may reasonably wish to set higher standards for controls than ERMA sets.

(b) The other alternative is for local government to press for the amendment of HSNO so as to provide the ability for local authorities to issue policy statements on GMO activities under an amended HSNO such that ERMA would be required to accommodate those new policy statements in its decision, with the option to examine individual applications in tandem with ERMA assessments and, if required, to set stricter controls to apply within a local authority's district.

The report stated that the next stage of work will involve local authorities studying the risks to the Northland region and at the same time drafting control options if the analysis suggests these are required. This process would not commit a council to implement such controls but it is the next step towards such an outcome and would bring before a council information on the scope and severity of the risks at the same time as well as detailing the options for their control and the factors relevant in deciding between the options. Such work would be required irrespective of whether the statute that would be used is the RMA or an amended HSNO Act.

It concluded that a key part of this process would involve examining the outcomes the council wishes to see, and determining which could be expected to be delivered by ERMA and which it wishes to ensure are developed through its own initiatives. Ideally this work will be done as part of a joint project between Northland local authorities. The analysis would provide a common resource base for councils to work from and assist the evolution of a uniform region-wide approach.

The Terry report concluded further that the absence of the right to appeal HSNO decisions to the Environment Court (as is available for RMA decisions) significantly limits the ability to ensure a consistent approach and underscores the inability to rely on the HSNO process to deliver outcomes set by the community.

The report refers to Crown Law advice to the Ministry for the Environment when the 2003 Bill was before the Select Committee which concluded that local government is unlikely to be exposed to liability claims arising out of the circumstances relating to GM contamination on non-GM produce. That advice stated that if the crop was ERMA approved and the person complied with all the conditions imposed by ERMA, then it is unlikely that a claim in negligence would succeed. However, the Terry report notes that losses arising from legal actions against a local authority are just one form of exposure and the wider issue is loss arising from an inability to obtain compensation from those causing damage.

It notes that a clear source of risk for local government in this regard is environmental damage and states that local government is exposed to the absence of a requirement for GM developers to be financially fit. If the operator has inadequate financial resources to cover environmental damage resulting from its activities, the burden will tend to fall on local government as has already occurred in the past with contaminated sites.

The report notes that to date it has been local government which has been left with the responsibility in most cases, although there have been significant Crown contributions to the clean up of sites, such as Mapua, being the exception in recent years. Such environmental damage represents a cost to a local authority's territory, whether or not any financial loss is recorded in the Council's accounts.

The report notes that a GM developer or operator is not liable for harm under HSNO caused as long as it obtains and abides by an ERMA consent, nor does HSNO require ERMA to ensure that an applicant has the means to pay compensation by way of a bond. If an approval is granted for unconditional release, then ERMA has no legal means of imposing a bond or any other financial insurance requirement.

If an approval is granted for conditional release, then ERMA can impose financial insurance requirements. However, the report notes that such financial insurance requirements would not necessarily require a bond and it believes there is little basis for expecting that ERMA will set meaningful financial insurance requirements.

The report refers to s 108A of the RMA which affords local authorities wide powers in this respect to impose a bond which may be set to cover conditions a council considers appropriate, continue after the expiry of the resource consent to secure the ongoing performance of conditions relating to long-term effects, provided the liability of the holder of the resource consent not be limited to the amount of the bond, require the holder of the resource consent to provide such security as the council thinks fit for the performance of any condition of the bond and require the holder of the resource consent to provide a guarantor. The report believes that such powers could be used to provide a significant level of protection.

The report attaches an opinion by Dr R J Somerville QC entitled *"Opinion on Land Use Controls and GMOs"* (February 2004).

That opinion concluded that bylaws under the Local Government Act 2002 were unlikely to be available as a regulatory tool in this situation, and concluded that the RMA emerged as the best of the options. Dr Somerville also concluded that the HSNO Act and the RMA were not in conflict and can operate side by side. He concluded the provisions of the HSNO Act would not preclude a territorial authority from exercising its jurisdiction to control GMO-related land use in its district pursuant to the RMA.

Dr Somerville indicated that separate advice would be needed to research the extent to which regional councils would have authority to act through the issuing of policy statements and plans, and that a number of important issues remain to be clarified before it is known to what extent a regional council could manage the outdoor use of GMOs. He concluded that whether or not a regional response could be achieved for there to be an efficient and effective land use controls the territorial authority would need to be involved.

With regard to this report, the Team Leader City Plan comments:

> *"The Executive summary of the section on s32 in the Simon Terry report for the Northland Councils is quite unsound. It says;*
>
> *16. Such rules can be argued to be efficient and effective in terms of RMA section 32 on at least two grounds:*
> - *ERMA can not be relied on to provision against particular risks.*
> - *Local authorities may reasonably wish to set higher standards for controls than ERMA sets. There is no legal barrier to councils setting higher standards than those specified by ERMA under HSNO.*
>
> *This has ignored the first requirement of section 32, whether the objectives of the district plan are "appropriate". The efficiency and effectiveness test applies to policies, rules and other methods and is to test if these best achieve the objectives. So the starting point for a Council would be to adopt objectives about GMO's, and justify them.*

Section 4.4 on s32 in the main body of the report is much sounder. It does recognise the need to set and justify objectives. It also has a good discussion of the "precautionary principle" which is inherent in section 32(4) "the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods. There is also an extensive discussion of the precautionary principle earlier in Section 3.3 of the report.

Most of this section is founded on the possibility of local government either wishing to use this precautionary principle, or wishing to set higher levels of protection than those set by ERMA under HSNO. I would not disagree with any of this analysis at a theoretical level. But the problems in justifying objectives and the supporting policies and rules under section 32 would be considerable. I do not see how a Council could avoid going into all the same scientific analysis that ERMA has to consider, because there is no doubt that if it did not the industry would challenge its analysis through the submissions process.

I think it would be a difficult task to set and justify relevant objectives as to do so would duplicate another statutory framework specifically set up for the purpose, and rely on an argument that that specific framework was inadequate for the purpose. There is a legal principle of statutory interpretation that the specific overrides the general which may be applicable here. The report, and the accompanying legal opinion by Dr Somerville are careful to describe how the RMA and HSNO are not necessarily incompatible and there could be a role under both. However Dr Somerville does recognise the need for extensive, robust multi-disciplinary analysis in order to succeed.

I believe the report prepared for the Northland Councils focuses too much on its interpretation of what Government may have intended with the original HSNO legislation, rather than the actual outcomes under the 2003 Act. See sections 2.2 and 2.3 of the report. The 2003 Act has clearly not provided a role for local government to set increased standard for new organisms, in contrast with the position where local government is able to set higher standards for hazardous substances, under s143. A Court may find significance in this different treatment, and find that it was a deliberate intention by Parliament.

With reference to efficiency and effectiveness of any rules (assuming we were able to set and justify an objective), this would be extremely difficult and expensive. The argument in the report that local government could at least address economic impact without too much difficulty may not be sound. While economists reports are not too hard to obtain, they have to rest on the assumption that harm would result and make some estimate of the likelihood or frequency of that harm, and this takes us right back top the core of the GMO debate, and the need for the same scientific analysis that ERMA has to deal with. As the report notes, the Environment Court has ruled on a number of occasions that the risk of effects must be real not perceived.

I find the proposal for amendment to HSNO to allow dual control by ERMA and local government through the one process quite alarming in terms of the level of resource local government would have to put into the process. This would as much the effort that would be required if local government addressed the issue through the RMA. About its only advantage therefore would be to remove the uncertainty that local government currently has about whether it is allowed to address this issue.

Conclusion

Apart from the executive summary, I think the report, and Dr Somerville's legal opinion are probably correct at a theoretical level in their discussion of section 32. The practical difficulties however of using the RMA to intervene in the GMO debate would be very considerable, no doubt very expensive, a point clearly recognised by Dr Somerville and not so clearly by Simon Terry Associates in the principal report."

GENERAL CONCLUSIONS

This report has focused on the legal liability issues relating to GMOs as requested by the Committee. It has not attempted to traverse the social, economic, environmental and cultural issues that arise through GMOs, and as will be seen from some of the quotations above, there is a wealth of information on this topic from many different perspectives. In response to the deputation made to the Committee in September 2003 and to assist Councillors to reach a view on this matter, my conclusions are:

(a) It is arguable to say that a territorial authority does have the ability under the Resource Management Act to exercise control on the release of GMOs in its district. However, that proposition is not settled at this point in time, and if a local authority was minded to consider exercising such controls under the RMA, then in my view it should seek a declaratory judgment from the High Court before embarking on the research necessary to carry out the analysis which would be required under Section 32 of the Resource Management Act to make such rules. There is a precedent for this in Christchurch in that in the early 1990s this Council sought to impose controls on the opening hours of licensed premises through the City Plan and there was a preliminary hearing in the Environment Court, and subsequently the High Court, on the Council's legal ability to do so to exercise such controls, notwithstanding that opening hours were set by the Liquor Licensing Authority under the Sale of Liquor Act 1989.

(b) The Terry report referred to above has been initiated by a number of councils in New Zealand and I understand that those councils intend to carry out further analysis of the issues required and one option for this Council would be to await the outcome of that work before embarking itself upon what could be a very time-consuming and expensive process of effectively duplicating such research. I concur with the views of the Team Leader City Plan regarding the Terry report.

(c) All of the issues referred to in this report such as the relationship between HSNO and RMA, and the use by a local authority of its powers under the RMA to impose conditions requiring bonds (assuming planning rules to regulate GMOs had been made) have been considered by the Royal Commission, the Law Commission and on the relationship issue, more recently by a parliamentary select committee. Part of the argument for those seeking to persuade this Council to become involved in this issue appears to be a lack of trust in ERMA which has been established to manage the approval process.

It will be a matter for Councillors to weigh up whether having had this very complex GMO issue considered by a Royal Commission, the Law Commission and with the opportunity for public submissions to a parliamentary select committee, whether it is necessary for this Council to become involved at this point in time. Certainly both the Royal Commission and the Law Commission have concluded that bonds and insurance requirements are not practicable. Given the resources invested by both those bodies in their reports, I do not believe it is realistic for this Council to endeavour, at public expense, to duplicate that work.

(d) The matter of making rules in this area is one where territorial authorities could well expect guidance to be provided by central government rather than leaving it to each community to become involved in a very complex scientific debate. It is reminiscent of the debate around cellphone towers and the issue of emissions from such towers where this Council some years ago became involved in the issue under the RMA because a number of applications for resource consents happened to have been made in this City. Those applications resulted in some three appeals to the Environment Court with the attendant cost for Christchurch City ratepayers. As a result of that experience, the Council wrote to central government asking for national policy statements under the RMA on cellphone towers.

Part 5 of the RMA specifically provides that the Ministry for the Environment may issue national policy statements on specified matters and it would seem to be appropriate that in the area of GMOs another option would be to seek a national policy statement under the RMA for the release, conditional or unconditional, of GMOs. The purpose of such national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA.

(e) There is an inference in the papers provided by the deputation that if the Council does nothing it will somehow be liable if loss is caused by the release of a GMO. On conventional legal remedies e.g. negligence, nuisance, I do not agree with that proposition. Liability cannot be imposed on the Council where it has had no involvement in the process leading to that release.

Where the issue may more directly arise is the catastrophic situation identified by the Law Commission, but in that event, as the Commission notes, it is probable that central government will have to accept responsibility. I do not believe that the Council should consider making planning rules to provide for catastrophic situations where the advice from the Law Commission is that in that event, no liability regime could guarantee compensation for those affected.

Staff Recommendation: That the information be received.

Chair's Recommendation: That the information be received and that the Council take no further action given the advice that there is no legal liability on the Council.