Jurisdiction of Councils to Regulate GMOs under the RMA - Response to Christensen and Nicolle, Anderson Lloyd Lawyers

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Mark Christensen and Jonathan Nicolle in the Resource Management Journal (RMJ, August 2014, 16 – 21) concluded in relation to whether or not local authorities have jurisdiction to manage the effects from the outdoor use of genetically modified organisms (GMOs) "that the best legal interpretation is that local authorities do not have jurisdiction to control GMOs under the RMA" (p.16).

I do not wish to dispute the merits of their legal arguments but as the Convener of the Inter-Council Working Party on GMO Risk Evaluation and Management Options, comprised of Far North, Whangarei and Kaipara District Councils, Northland Regional Council and the Auckland Council, I do wish to challenge their statement above concerning the best legal interpretation over jurisdiction.

The article in the Resource Management Journal is based upon two opinions by the authors (February 2014; May 2014) provided to Federated Farmers of New Zealand and subsequently attached to submissions from Federated Farmers to the Proposed Auckland Unitary Plan, the Proposed Hastings District Plan (under review), the Proposed Northland Regional Policy Statement (under review), Proposed Plan Change 131 at Whangarei District Council and Proposed Plan Change 18 at Far North District Council. All of these documents have included provisions relating to the management of outdoor use of GMOs.

There are a number of legal opinions, including Crown Law advice to Government, statements from Ministers of the Crown, Environment Court decisions, and planning precedents that contradict the May 2014 Anderson Lloyd opinion that local authorities do not have jurisdiction to regulate GMOs under the RMA. These include:

1. Crown Law Opinion, 8 August 2003 (updated September 2013): *Interface between the Hazardous Substances and New Organisms Act 1996 and the Resource Management Act 1991 and the Local Government Act 2002 – Genetically Modified Organisms.*

   This opinion looked at the interface between the three acts as they relate to GMOs. It expressly examined the question of jurisdiction and found that local authorities could regulate GMOs under the RMA, including prohibition, if supported by a section 32 evaluation. This opinion was not addressed by Anderson Lloyd. In fact at paragraph 41 of their second opinion they state*: "We are not aware of any advice provided to the government on this issue [jurisdiction]".*

2. Crown Law Opinion, 3 November 2004 (updated May 2013): *Advice on potential for council liability arising from rules controlling GMOs.*

   This opinion looked at the issue of liability if a council does, or does not, include rules in a district plan to control GMOs. Following its earlier opinion, it does not question the ability of councils to include rules if supported by a section 32 evaluation.

3. Cooney Lees Morgan Opinion, 29 April 2003: *Role of RMA in Controlling Genetically Modified Organisms.*

   This opinion for Bay of Plenty Regional Council was referred to in the 2003 Crown Law Opinion where it stated that it generally agreed with its contents (paragraph 2). The Cooney Lees Morgan opinion specifically looked at whether the HSNO Act has impliedly repealed the RMA's ability to regulate GMOs by virtue of being later special legislation, or whether there is ability via the earlier general legislation (RMA) to also control GMOs provided this control is for RMA purposes. They opine that both sets of legislation can coexist and that while rules would need to be justified under a section 32 analysis this does not provide a jurisdictional barrier to territorial authorities regulating GMO land use activities.

4. Dr Royden Somerville QC Opinion, 23 February 2004: *Interim Opinion on Land Use Controls and GMOs.*

   In this opinion, for the Inter-Council Working Party on GMO Risk Evaluation and Management Options, Dr Somerville looked at the issue of jurisdiction and found that territorial authorities do have jurisdiction to control land use activities involving outdoor field-testing and the release of GMOs to promote the sustainable management of natural and physical resources. He found that the provisions of the HSNO Act do not preclude territorial authorities from exercising their jurisdiction to control GMO-related land

uses within a district plan pursuant to the RMA provided that the provisions are in accord with their functions under the RMA, Part II, and the provisions of section 32 of the Act.

He also found that a precautionary approach to managing risks involving GMO-related land uses is possible pursuant to section 3(f), section 5(2)(a)(b) and (c), section 7, and section 32(4) of the RMA, and a strong precautionary management objective which involves a policy of establishing GMO-exclusion areas within which GMO-related land uses are prohibited, is available.

5. Dr Royden Somerville QC Opinion, 31 March 2005: *Opinion on Land Use Controls and GMOs.*

   In this opinion Dr Somerville provided advice on a report commissioned by the Inter-council Working Party entitled *Community Management of GMOs II - Risks and Response Options* by Mitchell Partnerships and Simon Terry Associates which examined the risks posed by GMOs and response options to manage those risks. He found that, from a legal perspective, the report contained sufficient information to establish specific district plan provisions controlling GMO land uses in order to promote the sustainable management of natural and physical resources. He found that the report identified risk management options available pursuant to the RMA, and the consequences of potential adverse environmental effects (including on economic conditions) from using land for GMO-related activities. It also highlighted the ability to include financial instruments in a district plan as an efficient and effective risk management method.

6. Dr Royden Somerville QC Opinion, 18 January 2013: *Outdoor Use of Genetically Modified Organisms.*

   In this opinion Dr Somerville reviews the Draft Plan Change and Draft Section 32 Evaluation produced by the Inter-council Working Party on GMO Risk Evaluation and Management Options in terms of the RMA and relevant case law. He found that the evaluation meets the mandatory requirements in section 32(3) and (4) of the RMA and that the proposed plan provisions give a clear indication of the way the risk of potential adverse environmental effects from the release of outdoor GMOs will be managed in order to achieve the purpose of the RMA. He also found that the policies and rules designed to achieve the objective of taking a precautionary approach appear to be consistent with the Court of Appeal's reasoning in Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development (2008).

7. Simpson Grierson Opinion, 11 April 2013: *Risks and liabilities to Council arising from controlling GMOs.*

   This opinion for Auckland Council looked at the issue of jurisdiction for regulating GMOs under the RMA and the risks posed to the council by either including or excluding provisions relating to GMOs in the Auckland Unitary Plan. It reviewed the legal advice on jurisdiction prepared by Dr Somerville QC and the Crown Law Office and agreed with the advice previously received that there is, in principle, jurisdiction to regulate GMOs through the district plan, despite the fact that they are also subject to the HSNO regime. They opine that there is no legislative "trumping" of one Act by the other. They add that any specific district plan provisions will obviously need to be justified in terms of the RMA.

8. Anderson Lloyd Opinion, 14 February 2014: *Control of GMOs in plans under the Resource Management Act 1991.*

   In this advice to Federated Farmers of New Zealand Anderson Lloyd examined the legal jurisdiction of councils to impose controls on GMOs under the RMA and offered a substantive analysis of whether such provisions would meet the relevant RMA statutory tests. In regard to the jurisdictional issue it considered the three legal opinions from Dr Somerville QC and the 2004 Crown Law Opinion on the potential for liability to local authorities should they regulate (or not) GMOs in the environment. It did not examine the 2003 Crown Law Opinion which specifically considered the legal jurisdiction of councils to regulate GMOs under the RMA. Under the heading "The RMA legal tests", Anderson Lloyd opine:

   "For the purpose of this opinion I have not reproduced a discussion of the background to the Council's powers under the RMA which was traversed by Dr Somerville in his 2004 opinion. In general terms, I agree with Dr Somerville's analysis of the relevant legislation contained in his 2004 and 2005 opinions. That is:

   a. *Under the RMA, both the Hastings District Council and the Auckland Council are not precluded as a matter of law from controlling land use activities involving outdoor field testing and release of genetically modified organisms. That is, the Councils have the powers in a legal sense to make such rules. As I have noted, however, this has recently been the subject of comment by the Environment*

Court which suggested that the matter is not without doubt. It remains to be formally tested before the Court.

b. The HSNO Act does not as a matter of law preclude the Councils from making such rules.

c. Under the RMA, the Councils are entitled to take a cautious approach to controlling effects of any activities if the evidence justifies such an approach."

9. Hon David Benson-Pope, Minister for the Environment, 30 March 2007: Letter to Dr Kerry Grundy, Convener Inter-council Working Party on GMO Risk Evaluation and Management Options.

   In his response to a number of queries put to the Government by the Working Party, the Minister stated:

   "Under both the Resource Management Act (RMA) 1991 and the Local Government Act (LGA) 2002, regional councils and territorial authorities have independent statutory roles and are required to exercise a duty of care in the performance of their statutory responsibilities. It is not appropriate for Government to dictate the manner in which individual councils may wish to exercise that duty of care... It is already possible for local authorities to use mechanisms under the Resource Management Act (RMA) 1991 to address land use relating to GMOs. However, such restrictions must meet the purposes of that Act and be imposed consistent with the Act's requirements, notably the necessity test under section 32."

10. Hon Trevor Mallard, Minister for the Environment, 23 August 2008: Letter to Dr Kerry Grundy, Convener Inter-council Working Party on GMO Risk Evaluation and Management Options.

    In his response to a number of queries put to the Government by the Working Party, the Minister agreed with the advice provided to the Working Party by his predecessor, the Hon Benson-Pope on 30 March 2007, and stated that the (then) Government's position on the interface of the HSNO Act, the RMA and the LGA as they relate to GMOs remained consistent with the advice provided to the Ministry for the Environment by the Crown Law Office in 2003 and 2004. He further stated, referring to a cabinet paper to the Cabinet Business Committee 14 July 2008:

    "In summary, the paper notes that the RMA does not prevent councils from restricting or preventing the use of GMOs in their district or region. However, section 32 of the RMA requires a council to demonstrate that its rules are the most appropriate way of achieving the purpose of the Act and have regard to their efficiency and effectiveness. As noted by Crown Law Office, given that the risks of any adverse effects are explicitly dealt with under the HSNO Act, additional restrictions or prohibition by territorial authorities may be hard to justify... Nonetheless, in order to provide guidance to any council that may choose to directly engage in GMO management in their jurisdictions, a template of some model plan provisions and an outline for a section 32 report was appended to the paper for information."

11. Hon Dr Nick Smith, Minister for the Environment, 5 August 2010: Letter to Dr Kerry Grundy, Convener Inter-council Working Party on GMO Risk Evaluation and Management Options.

    In his response to a number of queries put to the Government by the Working Party, the Minister stated:

    "The government's position is that GMOs are most appropriately controlled by the Hazardous Substances and New Organism's Act 1996 (HSNO Act)....However, this does not preclude a council from restricting or preventing the use of GMOs in their region, provided that this action meets the relevant requirements of the Resource Management Act 1991 (RMA)."

    This letter was tabled in Parliament on 25 June 2013 by Steffan Browning Green Party MP when questioning the Hon Amy Adams, Minister for the Environment, over her comments concerning amending the RMA to prevent local authorities managing the risks from GMOs locally and/or regionally.

12. The Ministry for the Environment has the following statements on its website (updated 2013) in relation to genetic modification and local government. These statements recognize that local government has jurisdiction under the RMA to manage effects of GMOs if supported by a section 32 evaluation:

    "GMOs under the Resource Management Act 1991 (RMA).

The Resource Management Act (RMA) requires local government to promote sustainable management of natural and physical resources. 'Natural and physical resources' includes all plants and animals; genetically modified plants or animals are not specifically excluded.

Councils are primarily responsible for managing the effects of activities on the environment. The scope of a council's function under the RMA theoretically includes addressing the environmental risks arising from the development of GMOs in its region. However, the RMA does not specifically require councils to manage GMOs' environmental effects... If a council did wish to introduce controls on GMOs, through either regional policy statements, or through rules in regional or district plans, the RMA has a number of requirements under section 32 of the Act..."

13. Bay of Plenty Regional Policy Statement

    Bay of Plenty Regional Council included a precautionary statement on GMOs in its Proposed Regional Policy Statement. It was appealed by Scion (NZ Forest Research Institute) and went to a hearing in the Environment Court in December 2013. A decision from the Court was released on 18 December 2013 which largely supported the precautionary provisions with some wording changes. Thus, the Environment Court has supported the inclusion of a precautionary approach to the outdoor use of GMOs in an RMA planning document. The Court also indicated in its decision that the Council may propose more directive regulation in the future, including objectives, policies and rules, if it considers it necessary, and justifiable.

14. Hauraki Gulf Islands Section of the Auckland City District Plan.

    The Hauraki Gulf Islands Section of the Operative Auckland City District Plan 1996 prohibited GMOs from 1996 to 2013. These provisions were challenged by Federated Farmers when the plan was reviewed during 2006-2013. This challenge was settled by Consent Order in 2013 and the Proposed Auckland City District Plan (Hauraki Gulf Islands) 2013 became 'operative in part' on 7 October 2013. The Operative Plan 2013 contains provisions regulating GMOs.

    In Part 2 – Resource Management Overview - there is an objective, 2.5.3.3, which reads: *"To prohibit, throughout the islands, the introduction, keeping or farming of new organisms, and identified plant and animal pest species."*

    In Part 4 – General Rules - there is a rule, 4.4.1, which reads*: "4.4 Prohibited activities: Certain activities are expressly prohibited within the islands. No application can be made for a prohibited activity. The following are prohibited activities throughout the islands:*
    1. The introduction, propagation, distribution or farming of:
        a. Any new organism…"

    The explanation associated with the rule includes:

    "….Given the unique statutory status and importance of these resources, and the potential threat posed by new organisms, Rule 4.4(1)(a) has been included in the Plan. This rule seeks to prevent the deliberate introduction, propagation, distribution or farming of any new organism on the Gulf Islands until such time as it has been cleared for full release by the Environmental Protection Authority ('EPA') under the Hazardous Substances and new Organisms Act 1996."

    There is a definition of 'new organisms' in Part 14 of the Plan. This definition is the same as in HSNO. Genetically modified organisms are included as new organisms until the EPA has given approval for a full release, i.e. a release without controls. A GMO remains a new organism while in containment, being field trialed, or when approved for conditional release, i.e. with controls attached.

    Thus rule 4.4.1(a) prohibits GMOs in containment, field trials of GMOs, and conditional release of GMOs. This was agreed to by Federated Farmers, Auckland Council and the Environment Court.

15. Memorandum of Counsel in Support of Draft Consent Order, 25 February 2013: Federated Farmers of New Zealand and Auckland Council.

    The Memorandum of Counsel in Support of Draft Consent Order signed by Richard Gardner (Counsel for Federated Farmers) and Counsel for Auckland City supported the above provisions in the Auckland Council District Plan (Gulf Islands) 2013. It thus supported provisions in the Plan regulating GMOs. Moreover, it supported the (restricted) prohibition of GMOs through provisions in the Plan.

Clause 12, of the Memorandum of Counsel in Support of Draft Consent Order, states:

"The parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Resource Management Act 1991, including in particular Part 2."

Hence, Federated Farmers of New Zealand, and its Counsel, state quite clearly that the regulation of new organisms, including GMOs, under the RMA conforms to the requirements and objectives of the RMA and falls within the jurisdiction of the Court and hence the resource management legislation under which the Court operates.

16. Proposed Auckland Unitary Plan.

    Auckland Council has included provisions in its Proposed Unitary Plan based upon the draft Plan Change, Section 32 Report and legal opinions produced by the Inter-council Working Party. The Proposed Unitary Plan was publically notified on 30 September 2013. Submissions and cross submissions on the Proposed Unitary Plan have closed and hearings on GMOs are expected to begin mid 2015. Uncontested parts of the Unitary Plan are expected to become operative in late 2016.

17. Proposed Hastings District Plan.

    After being lobbied by primary producers to prohibit GMOs for economic reasons, e.g. marketing/ price premiums for food and wine, Hastings District Council included GMO provisions in its reviewed District Plan which was publicly notified in Nov 2013. The provisions are similar to those proposed by the Inter-council Working Party. Submissions on the Proposed Plan are closed as are cross submissions. Hearings on GMOs are expected to begin around April 2015.

18. Proposed Plan Change Whangarei District Council

    Whangarei District Council notified a change to its District Plan on 15 July 2014. The provisions regulating the outdoor use of GMOs included in the plan change are based upon the Draft Plan Change, Section 32 Report and legal opinions produced by the Inter-council Working Party and are the same as those in the Auckland Unitary Plan and Far North District Council plan change. Submissions closed on 9 September and further submissions will close prior to Christmas. Hearings will take place mid 2015.

19. Proposed Plan Change Far North District Council

    Far North District Council notified a change to its District Plan on 15 July 2014. The provisions regulating the outdoor use of GMOs included in the plan change are based upon the Draft Plan Change, Section 32 Report and legal opinions produced by the Inter-council Working Party and are the same as those in the Auckland Unitary Plan and Whangarei District Council plan change. Submissions closed on 9 September and further submissions will close prior to Christmas. Hearings will take place mid 2015.

Conclusions

The position advanced by Anderson Lloyd in their 2014 opinion appears as a lone voice when considered against the otherwise universal agreement that there is jurisdiction under the RMA to manage the out door use of GMOs providing that the proposed provisions are in accord with the requirements of the RMA, and are supported by a section 32 evaluation. It also appears to contradict their own view as expressed in their 2013 advice to Federated Farmers of New Zealand.

The legal opinions from Crown Law, Dr Somerville QC, Cooney Lees Morgan and Simpson Grierson, statements from Ministers for the Environment, information from the Ministry for the Environment, including a Cabinet Paper and Cabinet Minute, Environment Court decisions, and a number of planning precedents all support this position. Even the position taken by Federated Farmers of New Zealand and its Counsel in 20013 in relation to provisions regulating GMOs in the Operative Auckland Council District Plan (Gulf Islands) 2013 is contrary to that now being advanced.

There appears to be no significant new factor raised by Anderson Lloyd in its 2014 opinion which challenges the weight of opinion outlined above. The Inter-council Working Party believes the position as detailed at some length by Dr Somerville QC in particular continues to provide a sound basis upon which councils on the Working Party can continue to respond to the concerns of their communities and introduce provisions into their planning documents managing the effects of the outdoor use of GMOs.