

# *Public participation and genetically modified organisms*



This article discusses recent developments in managing genetically engineered organisms (GMOs) under the Resource Management Act 1991 (RMA). These developments illustrate the on-going tensions that exist between centralised decision-making and public participation in resource management.

In general, resource management law in New Zealand has tended to promote public participation in decision-making. As the Supreme Court observed in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [15], "Open processes and opportunities for public input were obviously seen as important values by the RMA's framers". However, recent amendments – especially the Resource Legislation Amendment Act 2017 (RLAA) – pull in the opposite direction, by providing for ministerial decision-making that is increasingly isolated from public participation (Ceri Warnock "Differing conceptions of environmental democracy in New Zealand resource management law" (2016) 31(7) AER 253).

As originally proposed, the Resource Legislation Amendment Bill 2015 (101-1) (RLAB) extended this centralisation approach to GMOs, aiming to neutralise the recently-asserted power of local authorities to include



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GMOs in their plans and policies. Compromises were made to secure the RLAB's enactment and, in the result, local authorities have retained their powers to control GMOs, enabling improved public participation on this matter. Local controls on GMOs – except for crops – can, however, be overridden by the Minister to avoid duplication, or overlap, with other legislation. This article describes the proposed changes in the RLAB and why and how they were dropped, and discusses some interpretation issues with the resulting amended wording of the RMA provisions affecting GMOs.

## GMO CONTROLS AND PUBLIC PARTICIPATION BEFORE THE RLAA

Until 2012, activities involving GMOs were controlled solely under the Hazardous Substances and New Organisms Act 1996 (HSNOA) with its regulatory scheme for the development, field-testing and release of GMOs. Many developments and field-tests – but no releases – of GMOs have been approved under this scheme. Although any person can submit on a notified application under the HSNOA, and social and community factors are relevant to decisions, the mere existence of the HSNOA's scheme has been taken to mean that GMOs will be developed, tested and released despite the moral or ethical objections of people (*Mothers Against Genetic Engineering Inc v Minister for the Environment* HC Auckland CIV 2003-404-673, 7 July 2003). Furthermore, the HSNOA contains no planning scheme for GMOs equivalent to the RMA's planning scheme with its opportunities for public input into resource management.

Public interest in GMOs has remained high since the 1990s and in the lead up to the RLAA, several local authorities decided to address GMOs in their plans. In each case, these decisions reflected public submissions made during the planning process. In three instances the authorities' decisions led to litigation, and in all three cases the courts either decided or accepted that the RMA applies to GMOs, which can be included in regional and district plans. This opens the door to public participation on GMO regulation.

In *NZ Forest Research Institute Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 298, the appellant challenged a provision in the proposed Regional Policy Statement stating that the Council "promotes a precautionary approach to the release, control and use of [GMOs] within the region." The proposed Policy asserted that the RMA "may complement and supplement" the HSNOA in the area of GMOs. The Environment Court noted that the complete absence of GMOs from the RMA – including in s 30 on the functions of regional councils – might be considered deliberate and supports a conclusion that the RMA has no place in management of GMOs. However, the parties agreed that the RMA allows the management of GMOs, so the Court decided the appeal on that basis, suggesting a compromise provision for the Policy Statement that flags GMOs as an issue for the future in order to resolve the dispute.

Just over a year before the RLAA was enacted, Peters J in the High Court directly affirmed that regional councils can control GMO use under the RMA in *Federated Farmers of New Zealand Inc v Northland Regional Council* [2016] NZHC 2036. Federated Farmers challenged the Council's decision to accept submissions to promote a precautionary approach to the release of GMOs in its plan, but Principal Environment Court Judge Newhook (in *Federated Farmers of New Zealand Inc v Northland Regional Council* [2015] NZEnvC 89, (2015) 18 ELRNZ 603) found that not only was there nothing to exclude GMOs from the RMA, there were good reasons supporting a finding to the contrary, and the High Court agreed. Foremost among Judge Newhook's good reasons was the policy benefit that if the RMA applies to GMOs, "regional considerations would come in for study in a way not anticipated by HSNO[A]" (*Federated Farmers of New Zealand Inc v Northland Regional Council* [2015] NZEnvC 89, (2015) 18 ELRNZ 603 at [51]).

Then, shortly after the RLAA was enacted, the High Court addressed the scope of a chapter in the Auckland Council's Unitary Plan purporting to apply activity status to GMO activities, including applying prohibited status to non-food related GMO releases (*University of Auckland v Auckland Council* [2017] NZHC 1150). Once again, the parties and the Court accepted that GMOs can be the subject of RMA plans. Dismissing the University's contention that the rule irrationally prohibited the use of viable GMO medical vaccines, Whata J said that it would not be irrational to ban such vaccines, but the rule did not cover them.

Some sectors, however, are apparently unhappy with local authorities controlling some GMOs via the RMA, and the government has tried twice to reduce the relevant powers. First, in mid-2015, the government signalled an intention to reduce local authorities' powers to deal with genetically modified (GM) trees through the proposed National Environmental Standard for Plantation Forestry (NES-PF). Under the draft provisions in the consultation document, afforestation using GM tree stock was proposed to be a permitted activity where the tree stock has gained the appropriate approval under HSNOA (Ministry of Primary Industries *National Environmental Standard for Plantation Forestry: Consultation Document* (MPI Discussion Paper No 2015/18, June 2015) at 64). A number of submitters opposed this, including iwi organisations, and the NES-PF was gazetted without the GMO provision.

A broader power to override local authorities' powers to regulate GMOs in plans was proposed in the RLAB when it was introduced to Parliament in November 2015.

### GMO CONTROLS AND THE RLAA

The RLAB proposed the most comprehensive package of reforms in the history of the RMA, and spent nearly two years stalled in Parliament. The Bill attracted criticism, inter alia, for its emphasis on stronger top-down direction by ministers and reduced provision for public participation. Some of this emphasis was watered down as the Bill progressed slowly towards enactment, but the RLAA still represents a significant step away from local, and towards centralised, decision-making.

Significantly, the RLAA introduced a new s 360D to the RMA. This empowers the Minister to make regulations to prohibit or override rules in regional or district plans that would duplicate, overlap with, or deal with the same subject matter as other legislation, where that duplication, overlap, or repetition would be undesirable. Under the RLAB, s 360D could have been used to prohibit local authorities from making rules about GMOs to avoid any undesirable overlaps with the HSNOA, signalling a retreat from more public participation in GMO control.

This issue did not go unnoticed in Parliament. During the RLAB's first reading, Hon Peter Dunne described the proposed s 360D as having "sinister potential impacts", including allowing the Minister to override the Hawke's Bay Regional Council's proposal to make its region GE-free. Then, during the second reading, MP Eugenie Sage commented: "Sir Robert Muldoon's ghost is back in the Beehive ... Muldoonism was about the executive making a decision and imposing it by its will. That is what this ... Bill is all about". But most telling was Māori Party co-leader MP Marama Fox's warning that a GE-free Aotearoa was a policy included by her Party in its relationship agreement with the National Party, and that the Māori Party's support for the RLAB was conditional on continuing negotiation of some of its elements.

Shortly before the RLAB was passed with the Māori Party's crucial two votes, Fox introduced Supplementary Order Paper 2017 (281), creating an exemption to the new s 360D for rules regulating "the growing of crops that are genetically modified organisms", and removing a clause that was to be added into s 43A of the RMA and would have allowed an activity involving a GMO to be classified

as a permitted activity in a National Environmental Standard. These changes meant that s 360D cannot be used to override regional or district rules on GMO crops, nor can National Environmental Standards be used to force councils to treat GMO crops as permitted activities.

The RLAA came into force, along with these last-minute changes, on 18 April 2017. As the RMA now stands, two issues appear.

### "Crops"

The exemption in the new s 360D is for GM "crops". Crops being plants, the exemption does not apply to GM animals, which can therefore be the subject of regulations proscribing rules in plans purporting to control activities in a way that duplicates, or overlaps with, the HSNOA. This leaves the door open for a centralised approach to the use, for example, of gene drives in pest control.

The meaning of "crops" in the new s 360D(2) was discussed during the Committee of the Whole House stage, sparking debate about whether it included forestry and grasses, two areas where New Zealand scientists are working with GMOs. Opposition MPs asked if "crops" included ryegrass and pine trees, and whether ryegrass was a crop if grown for pasture rather than seed. The Minister for the Environment then stated that the dictionary definition applied, being "produce of cultivated plants such as cereals, vegetables, or fruit", implying that trees and grasses are not included. Marama Fox responded that the terminology of the section had been negotiated with food producers, and that the Māori Party and the Minister's office had agreed to support the amendments on the understanding that they apply to all types of GM crops including forestry and grasses.

It seems likely that the meaning of "crops" could provide an avenue for future litigation. There appears to be no case law on the word "crops", although there are three statutory definitions (one of which excludes trees but none of which are directly related). The matter may be tested if the Minister decides to make s 360D regulations that are targeted at rules that ban GMO forestry and/or grasses, or if a local authority seeks to include a broad definition of "crop" in its plan along with rules constraining "crop" planting.

### Residual uncertainty

Prior to the RLAA, the position on local authority control of GMOs (including crops) was that established in *Federated Farmers of New Zealand Inc v Northland Regional Council* [2016] NZHC 2036: that GMOs are not the sole province of the HSNOA and can be controlled by local authorities, without Ministerial intervention in regulations. The anticipated appeal on this has been withdrawn, so *Federated Farmers* stands, and has been confirmed by the RLAA.

After the RLAA, the position is unchanged in respect of GMO crops; but for all other GMO organisms, the Minister now has an ability to intervene via s 360D regulations. The carve-out for GMO crops is an implicit acknowledgement by Parliament that local authorities can control other GMOs, since the carve-out would not otherwise be necessary. The repeal in the RLAA of the references to hazardous substances in local authority functions under

ss 30(1)(c)(v) and 31(1)(b) also indicates that local authorities are intended to control GMOs (as the prior inclusion of hazardous substances was said to emphasise the RMA's silence on GMOs). Some uncertainty arises around the longevity of the crop carve-out, given that the Māori Party was not returned to Parliament at September's general election.

### CONCLUSION

For now, local authorities have kept the ability to declare their regions or districts GE-free. For GMO crops, this power is not constrained by s 360D. Applying the RMA to GMOs enabled local control over genetic modification that has survived the enactment of the RLAA almost intact. For GMOs other than crops, the amended Act empowers the Minister to make regulations to avoid overlaps with HSNOA, subjecting local controls on non-crop GMOs to possible veto.



# REFORM TRANSFORM

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