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Submitter FNDC PC18-301 and WDC PC131-188

Proposed Plan Change 18 (FNDC) and
Proposed Plan Change 131 (WDC)

Genetically Modified Organisms

Written Statement and Legal Submissions

A. INTRODUCTION AND SUMMARY.

1. This written statement and legal submissions are prepared on behalf of Federated Farmers of New Zealand ("Federated Farmers") by Peter Richard Gardner. I am a Senior Policy Advisor with Federated Farmers. I also act as an in-house lawyer for Federated Farmers. I have been with Federated Farmers, in various roles, since June 2000. My academic and professional qualifications appear at the end of this written statement.

2. Federated Farmers has made a total of 10 submission points and 48 further submission on the Far North District Council Proposed Plan Change 18 and the Whangarei District Council Proposed Plan Change 131, Genetically Modified Organisms ("GMOs") ("the Plan Changes").

3. Federated Farmers' 10 submission points all essentially request the same relief, that all provisions related to GMOs be removed from the Plan Changes, including the discussion, objectives, policies, methods and other references.

4. Of the further submission points, 8 are in support of people and organisations that oppose the regulation of GMOs in local authority planning instruments, and the remaining 40 are in opposition to organisations that generally support the regulation of GMOs in local authority planning instruments. The organisations whose submissions Federated Farmers supports are:

    - Agcarm Inc
    - Catherine Meger
    - Forest Owners Association
    - Hancock Forest Management (NZ) Ltd

- Minister for the Environment
- Northland Province Federated Farmers of New Zealand
- Pastoral Genomics Limited
- The NZ Forest Research Institute Ltd (Scion)

5. Leaving to one side Federated Farmers' view that all provisions related to GMOs should be removed from the Plan Changes, Federated Farmers become aware in the course of reviewing the material relevant to the GMOs topic on the Proposed Auckland Unitary Plan, that there are a number of problems with the provisions that were proposed by the Auckland Council. As a result Federated Farmers felt the need to commission its own planning report on the GMO provisions in the Proposed Auckland Unitary Plan, and the outcome of that report was reflected in some expert planning evidence which Federated Farmers filed with the Independent Hearing Panel that heard submissions on the Proposed Auckland Unitary Plan.

6. Returning to the Plan Changes, it is particularly noted that the Section 42a Report records that:[1]

> The wording of PC18 and PC131 are generic and provide the same approach, albeit some variation in structure to allow for formatting differences in the WDC and FNDC district plans. The plan provisions are based upon, and are in substance the same, as those outlined in the document "Draft Proposed Plan Change to the District/Unitary Plan" produced by the Intercouncil Working Party (with formatting differences). *The GMO provisions in the Proposed Auckland Unitary Plan are also the same …* (emphasis added).

Accordingly, given that the Plan Changes are "the same" as the GMO provisions in the Proposed Auckland Unitary Plan, the material that Federated Farmers is presenting in respect of the Plan Changes is largely the same as that presented to the Independent Hearing Panel that heard submissions on the GMOs topic in the Proposed Auckland Unitary Plan. In particular, Federated Farmers presented planning evidence from Dr Mark Bellingham and economic evidence from David Cooper to that Hearing Panel, and that evidence is re-presented in respect of the Plan Changes.

7. It is particularly emphasised that this material, including the evidence, should not be regarded as a complete exposition on the GMO provisions in the Plan Changes. In particular, it should be noted that, in preparing their evidence, the planners were directed not to address the issue of whether provisions regulating GMOs could, or should, be included in the Plan Changes.

[1] Proposed Plan Change 18 (FNDC) and Proposed Plan Change 131 (WDC) – Genetically Modified Organisms Section 42A – Joint Hearing Report, at 18.

8. Further, the fact that Federated Farmers has had expert planning evidence prepared on the GMO provisions should not be seen as detracting in any way from Federated Farmers' primary position, that there is no role in the RMA for planning provisions to be made which regulate the use of GMOs, and that all provisions related to GMOs should be removed from the Plan Changes. Federated Farmers considers that central government has sole responsibility for the management and control of GMOs in New Zealand, and that there is therefore no role for local government in their management as such.

9. As the Section 42a Report records,[2] the jurisdictional issue of whether GMOs can be regulated in local authority planning provisions is before the High Court, in the context of an appeal by Federated Farmers on the provisions regulating GMOs in the Proposed Northland Regional Policy Statement. The broad issue of whether GMOs should be regulated in local authority planning provisions is before the Environment Court, also in the context of the same appeal by Federated Farmers on the Proposed Northland Regional Policy Statement.

10. Federated Farmers considers that the outcome of the Court proceedings on the jurisdictional issue will be completely determinative of the Plan Changes. Federated Farmers considers that the outcome of the Court proceedings on the substantive issue of whether local authorities can regulate GMOs in their RMA planning instruments will be largely determinative of the proceedings regarding the Plan Changes.

11. Accordingly, this written statement briefly summarises both the jurisdictional issue and the broader general "section 32" issue of whether the Far North and Whangarei District Councils ("the Councils") should include provisions regulating GMOs in the Plan Changes. The focus of this evidence is on the matters that are more specifically relevant to The Far North and to Whangarei. Nevertheless, on that basis alone, Federated Farmers considers that there is no justification for including provisions regulating GMOs in the Plan Changes.

12. Further, should the Courts determine that there is jurisdiction for local authorities to regulate GMOs in their RMA planning instruments, and should the Courts determine that local authorities are able to regulate GMOs in their RMA planning instruments, then it is respectfully suggested, if there is time available before the hearing panel that is hearing submissions on the Plan Changes is required to report its recommendations back to the Councils, or indeed if there is time available before, respectively, the Councils make their decisions on those recommendations, that the hearing be reconvened to take evidence and hear submissions on any matters that may arise as a result of those Court decisions.

[2] Ibid, at 29.

13. Accordingly, this written statement addresses matters under the following heads:

The matters before the Courts
The process the Councils have adopted is deficient
The provisions included can not be justified
The benefits of GMOs
The GMO provisions in the Plan Changes should be enabling

14. To formally summarise Federated Farmers' position in respect of its 10 submission points:

Submission

PC18-301 1

PC18-301 2

PC131-188 (6 submission points)

Federated Farmers considers that all provisions relating to GMOs should be removed from the Plan Changes.

PC18-301 3

PC131-188 (1 submission point)

Federated Farmers considers that the entire s32 evaluation associated with the proposal should be disregarded and a further evaluation on the entire proposal carried out, as provided for in s32AA of the RMA

From these submission points, this written statement proceeds on the basis that it can best assist by focussing on the matters that are specifically relevant to the Council's proposals regarding the regulation of GMOs in the Far North and Whangarei. The jurisdictional and scope matters which are currently before the Courts are left to one side.

In this context, Federated Farmers considers that:

The process by which the Councils have included provisions regulating GMOs in the Plan Changes is sufficiently deficient to justify their removal them from the Plan Changes;

The provisions that the Councils have included in the Plan Changes cannot be justified on several grounds:

- they are not supported by the science;
- central government processes regulating the use of GMOs that are in place have been largely disregarded;
- there is no relevant issue of regional significance that the provisions address;
- the "precautionary approach" has been misapplied;
- that the RMA is enabling legislation is overlooked;
- the concerns about liability are misguided and mistaken;
- excessive reliance is placed on dated polling data.

The benefits that GMOs can bring about have also been ignored.

On basis of the material that is available to Federated Farmers, it would seem that, if there are to be provisions in the Plan Changes regulating GMOs, then the most stringent they could reasonably be would be as controlled activity rules.

B. THE MATTERS BEFORE THE COURTS.

15. Federated Farmers' primary position is that there is no role in the RMA for planning provisions to be made which regulate the use of GMOs, and that all provisions related to GMOs should therefore be removed from the Plan Changes. The basis for the position is twofold: firstly that there is no jurisdiction within the RMA for local authorities to regulate GMOs in their planning instruments; and secondly, if there is jurisdiction then, local authorities should not regulate GMOs in their planning instruments. Federated Farmers considers that, in terms of s 32 of the RMA, the regulation of GMOs in local authority planning instruments could never be the most appropriate way to achieve the purpose of the RMA, given that there is complete regulation of GMOs under the Hazardous Substances and New Organisms Act 1996 ("HSNO").

16. The jurisdictional issue of whether GMOs can be regulated in local authority planning provisions is before the High Court, in the context of an appeal by Federated Farmers on the provisions regulating GMOs in the Proposed Northland Regional Policy Statement. The broad issue of whether GMOs should be regulated in local authority planning provisions is before the Environment Court, also in the context of the same appeal by Federated Farmers on the Proposed Northland Regional Policy Statement.

17. Federated Farmers considers that the outcome of the Court proceedings on the jurisdictional issue will be completely determinative of the proceedings that are the subject

of the Plan Changes. Federated Farmers also considers that the outcome of the Court proceedings on the substantive issue of whether local authorities can regulate GMOs in their RMA planning instruments will be largely determinative of the proceedings that are the subject of the Plan Changes.

18. Accordingly, Federated Farmers considers that it can best assist by focussing on the matters that are more specifically relevant to the Council's proposals regarding the regulation of GMOs in the Far North and Whangarei.

19. To briefly summarise the position regarding jurisdiction: Federated Farmers considers that central government has sole responsibility for the management and control of GMOs in New Zealand, and that there is therefore no role for local government in their management, the reasons being that:

- HSNO effectively establishes a code for the regulation and control of GMOs, with no role assigned to local authorities in the regulation and control of GMOs as such as part of that code, albeit that there are some references to GMOs in other pieces of legislation;

- There is no resource management purpose for controlling GMO as such, to achieve environmental standards other than those that are able to be specified by way of HSNO;

- As enacted in 1991, the RMA provided a function for the Hazards Control Commission in relation to both hazardous substances and GMOs, with local authorities being assigned a function in relation to hazardous substances, but not in relation to GMOs;

- HSNO repealed the provisions in the RMA relating to the Hazards Control Commission, including all reference to GMOs, and although the legislation left in place local authorities' function in relation to hazardous substances, but the legislation did not include in the RMA any functions for local authorities in relation to GMOs;

- If, somehow, it could be construed that the RMA as enacted in 1991 did provide that local authorities could regulate and control GMOs, any such provision was impliedly repealed by HSNO;

- The RMA provides wide powers for local authorities to regulate land use, but the definition of GMO precludes the regulation of land use at that level.

20. On the assumption that the Courts do eventually determine that there is jurisdiction for local authorities to regulate GMOs in their planning instruments then, on the substantive issue of whether local authorities can regulate GMOs in their RMA planning instruments, Federated Farmers considers that the matter of central government having sole responsibility for the management and control of GMOs in New Zealand still leaves no role for local government in their management. Central government has established a specialist agency, the Environmental Protection Authority ("EPA") (formerly the Environmental Risk Management Authority, ERMA), which has responsibility for GMOs. The EPA is required to assess the risks inherent in the release of any GMOs. Once this is done and a GMO approved for release, then it would be impossible to demonstrate that there would be any real risk of adverse effects arising from the release of that organism over and above those that will have already been considered by the EPA. Without there being any such additional risk of adverse effects arising from the release of a GMO, there is no basis on which Council can become involved in matters to do with GMOs. It follows from this that any "section 32 evaluation" could demonstrate nothing other than that there is no justification for Council including provisions relating to the management of GMOs as such in their planning instruments, and that the regulation of GMOs as such in local authority planning instruments could never be the most appropriate way to achieve the purpose of the RMA, because the most appropriate way of achieving the purpose of the RMA is the regulation of GMOs under HSNO.

C. THE PROCESS THE COUNCILS HAVE ADOPTED IS DEFICIENT.

21. Turning, then, to the matters regarding the regulation of GMOs that are more specifically relevant to the Far North and Whangarei, Federated Farmers considers that, on that basis alone, there is no justification for the Council to include provisions regulating GMOs as such in the Plan Changes.

22. Firstly, Federated Farmers has serious concerns about the way in which the provisions were incorporated into the Plan Changes. This is so because of the contrast to the consultative manner in which the Councils normally go about developing the provisions in their plans and plan changes, particularly matters that affected farming, such as the provisions relating to electricity transmission and landscapes.

23. Moving on to the Plan Changes themselves, it is apparent that the decisions to include the GMO provisions in the respective district plans by way of the Plan Changes were highly political decisions.

24. In particular it is apparent that the "section 32 evaluation" of the genetic modification matter is grossly inadequate, to the point of being deliberately wrong. For example, the "section 32 evaluation" places undue reliance on the work of the Inter-council Working Party on GMO Risk Evaluation and Management Options, in particular on a purported "section 32 evaluation" of model provisions prepared for the Working Party.[3] The Working Party's "section 32 evaluation" in turn relies on advice over a considerable period given by the Sustainability Council of NZ, Simon Terry Associates and in particular a number of legal opinions prepared by Dr R J Somerville QC.

25. In the section 42a Report,[4] the authors make no mention of the submission point that the section 32 evaluation is grossly inadequate, to the point of being deliberately wrong, and yet they make no attempt to defend the evaluation beyond saying that they believe the evaluation to be comprehensive and to demonstrate careful consideration of the preparation of the proposed provisions.[5] The fact that Federated Farmers' own expert planning evidence comes to a vastly different conclusion as to what the provisions should contain would seem to support the proposition that section 32 evaluation is grossly inadequate.

26. No mention is made of the two independent legal opinions on the requirements of the RMA insofar as they relate to the possible control of GMOs by the Councils, which Federated Farmers obtained, and which were appended to each of the Federated Farmers submissions. As set out in each submission, the opinions received are critical of the advice given to the Working Party by Dr Somerville, and conclude that the section 32 evaluation carried out for the Councils in relation to the inclusion of controls on genetically modified organisms in the Plan Changes is "fundamentally flawed".

D. THE PROVISIONS INCLUDED CAN NOT BE JUSTIFIED.

D1. General Comments.

27. Turning to the provisions included in the Plan Changes themselves, the Councils have provided no evidence which could be used to justify the statement made in the Plan Changes,[6] that "The risks [of potential adverse effects of GMOs on natural resources and ecosystems] could be substantial and certain consequences irreversible" and the statement that "There is a lack of information, including scientific uncertainty, concerning the effects of

[3] The "section 32 report" for Part 2.49 records, at paragraph 1.1, that:
Note that this section is in significant part drawn from the more detailed s32 for the equivalent provisions as prepared by the Inter-council Working Party on GMO Risk Evaluation and Management Options (the Working Party) in 2003 (Appendix 3.49.1). If there is doubt about the interpretation of this section on GMOs, the more detailed ICWP Draft s32 (January 2013) or its successor documentation should drawn on for interpretation.
[4] Above at fn 1, at 126 - 129.
[5] Ibid, at 127.
[6] FNDC Proposed Plan Change 18, Context; WDC Proposed Plan Change 131, GMO.1.1.

GMOs in the environment and risks of irreversible, adverse effects which could be substantial". The only scientific evidence that they have obtained in support of its proposals is that of Dr Heinemann, whose evidence appears to be more about recording the diversity of opinion on the significance, scale and reversibility of environmental effects of outdoor use of GMOs and potential effects on the health and safety of communities exposed to GMOs and the lack of information needed to adequately assess some risks and benefits, than it is about presenting a scientific basis to justify the position the Council has taken on GMOs. Neither do the statements make any mention of the possible benefits that the use of GMOs could bring.

28. Importantly, in promulgating the provisions in the Plan Changes, the Councils also ignore the central government processes that are already in place to manage the use of GMOs. By the time any proposal for the use of a GMO comes to be exercised in the Far North or Whangarei it will have been through a process under HSNO, which must mean that there will not be a lack of information, or any unreasonable scientific uncertainty, concerning the effects of GMOs in the environment, and there will be knowledge of the risks of irreversible adverse effects. Further, the risks of irreversible adverse effects are highly unlikely to be more than minor, given the circumstances that the proposal will have been approved under the HSNO process by the EPA.

29. Whether or not there is a need to "adopt a precautionary approach by prohibiting the general release of a GMO, and by making outdoor field trialling of a GMO a discretionary activity"[7] is a matter which will also have been determined by the EPA under the HSNO Act. The EPA must apply the precautionary approach to its decision making, unless there is no risk associated with the new organism being evaluated. Further, the precautionary approach is already built in to decisions under the RMA so a direction regarding that approach need not specifically be included in the Plan Changes. The reliance the Plan Changes place on the precautionary approach to include provisions regulating GMOs is discussed in greater detail below.

D2. GMOs is not an issue of regional significance

30. Federated Farmers does not consider GMOs to be an issue of regional significance, or to be relevant to any other broader issue of regional significance, in the Northland Region. Federated Farmers considers that it is telling that the matter of GMOs was not raised in the notified version of the Proposed Northland Regional Policy Statement, and nor was the matter of GMOs being an issue of regional significance included in the decisions version of the Proposed Northland Regional Policy Statement.

[7] FNDC Proposed Plan Change 18, Policy 19.4.1; WDC Proposed Plan Change 131, Policy GMO.2.2.1.

31. In this context, it is worth noting the comments of the Hearing Commissioners who made decisions on the Northland Regional Council's Proposed Regional Policy Statement in 2013:[8]

> We do not however find that GE/GMO is an issue of regional significance for the Northland region. We agree with the section 42A reporting officer that regional significance is not determined by a large number of people considering it to be an important issue. In particular we note that GM organisms are not known to be present in the region, and are not specifically mentioned in the RMA. We also agree that this is not an issue that requires a substantial, region specific, response under the RMA. It is the case that GE/GMO is managed under the HSNO legislation which provides a regulatory environment for it. GMO applications under the HSNO Act are assessed by the Environmental Protection Agency ("EPA") which is a specialist national body set up to deal with hazardous substances and new organisms, including GMO applications.
>
> We note that section 4 of the HSNO Act states that "The purpose of this Act is 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."

D3. The Precautionary Approach

32. It is apparent from the evidence presented on behalf of the Councils that the Councils see that there is a "gap" in the HSNO legislation,[9] in that there is no requirement under that legislation to apply a precautionary approach, but there is a requirement under the RMA to apply a precautionary approach.[10] Putting it simply, the Councils are wrong on both counts.

33. Whether or not there is a need to adopt a precautionary approach to the use of GMOs is a matter which will have been determined by the EPA under the HSNO Act. Section 7 of HSNO provides as follows:

> **7 Precautionary approach**
> All persons exercising functions, powers, and duties under this Act, including but not limited to, functions, powers, and duties under sections 28A, 29, 32, 38, 45, and 48, shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

Thus the EPA must apply the precautionary approach to its decision making, unless there is no risk associated with whatever it is that is being evaluated, which can only be the case when there is no scientific and technical uncertainty about any adverse effects. Further, the precautionary approach is already built in to decisions under the RMA so a direction regarding that approach need not, and should not, specifically be included in the Plan Changes.

34. If it was to be applied, the application of the precautionary approach by the Council would necessarily occur only after that approach must by law have been applied by the EPA in any consideration of the application for the use of a GMO under HSNO which involves the

[8] Proposed Regional Policy Statement for Northland – Hearing Commissioners' Decisions Report Volume 4 of 4, at 790, 791.
[9] eg Statement of Primary Evidence by Dr Kerry James Grundy on behalf of Whangarei and Far North District Councils, at 24.
[10] Ibid at 38.

evaluation of risk. As the Environment Court said in *Aquamarine Ltd v Southland Regional Council*[11] and *Trans Power NZ Ltd v Rodney District Council*,[12] a precautionary approach should only be applied where there is scientific uncertainty or ignorance about the scope or nature of the relevant environmental harm. The Court said that there needs to be a plausible basis, not just suspicion or innuendo, for adopting the precautionary approach. The Council will not, in law as well as in practice, be able to establish a foundation for adopting a precautionary approach in the Far North and Whangarei regarding the release of a GMO, once the EPA has approved the release of the GMO under HSNO.

35. Indeed, and in any event, because the precautionary approach is already built in to any decisions that may come to be made under the RMA, a direction regarding that approach need not, and should not, specifically be included in the District Plan.

D4. Liability

36. It is also apparent from the evidence presented on behalf of the Councils that the Councils see that there is a second "gap" in the HSNO legislation,[13] in that there is no ability under that legislation to apply strict liability on consent holders, something which is claimed can be done under the RMA.[14] Again, putting it simply, the Councils are wrong on both counts.

37. While it is acknowledged that the EPA does not have the jurisdiction to require a bond, there is no liability that can be sheeted home to the Council, if it does not regulate GMOs. This is consistent with the finding of the Hearing Commissioners in their report on submissions to the Northland Regional Council's Regional Policy Statement for Northland.[15] It is only by regulating GMOs, that a council can be assumed to have any responsibility for the mitigation of effects associated with an adverse effect that might become apparent later and the council then need to rely on a bond to mitigate the adverse effects.

38. Federated Farmers also takes the opportunity to note that the law prevents councils from imposing conditions which prevent any consent that might be granted from operating.[16] It is noted, from experience, that some of those opposed to the use of GMOs assume that a bond could be imposed which would be so large that it would have the effect of preventing the operation of the consent.

[11] Environment Court decision C126/97.
[12] Environment Court decision A085/94 (PT).
[13] eg Statement of Primary Evidence by Dr Kerry James Grundy on behalf of Whangarei and Far North District Councils, at 22.
[14] Ibid at 27.
[15] Proposed Regional Policy Statement for Northland – Hearing Commissioners' Decisions Report Volume 4 of 4, at 792.
[16] *Residential Management Ltd v Papatoetoe City* Environment Court decision A062/86 (PT).

39. Further, councils cannot impose a strict liability regime on consent holders, other than in situations where the general law provides that they can. There does not appear to be any such ability in the general law as regards the use of GMOs. In the event of an adverse effect becoming apparent that requires mitigation, the Councils will only be able to apply the liability regime that is ordinarily available through the law. The Councils will not be able to apply any bond that might have been paid to the mitigation, unless the consent holder is actually liable. In this regard, the liability provisions in Part 7A of HSNO would appear determinative. In this context, it is noted that the strict liability regime set up under HSNO applies only in the case where an offence has occurred.

40. Again, the Hearing Commissioners' report on submissions to the Northland Regional Council's Regional Policy Statement for Northland contains a useful discussion of the liability regime. It is stated that:[17]

> We were informed through the section 42A report that the Government had considered whether a strict liability approach should be incorporated into the HSNO Act and rejected this approach because:
>
> - it was considered contrary to the conclusion that there is no principled basis for enhanced liability rules for GM-related activities;
> - it could cut across the government policy on GM of proceeding with caution while preserving opportunities;
> - imposing the more stringent standard of strict liability for all harm could deter socially beneficial activities and, consequently, stifle innovation and economic growth contrary to government policy; and
> - The imposition of strict liability would create incentives to pursue non-GM options in preference to GM options, even if a GM option were socially preferable.
>
> We acknowledge the concerns raised by submitters relating to the liability provisions in the HSNO Act and incidents that have occurred involving new GMOs. However we do not see the RPS, or the Regional Council, being in any better position than the EPA in dealing with the effects of GMO in the region and with any associated liability considerations.

41. Thus there is no "gap" in the HSNO legislation, the liability regime that is set up in the general law, as modified by the HSNO legislation is appropriate to the management of GMOs in New Zealand.

42. Nevertheless, and as noted earlier, Federated Farmers acknowledges that the EPA does not have the jurisdiction to require a bond, whereas the RMA does, and accordingly has been advised by its expert planners to include a provision requiring a bond in a proposed rule they have prepared on Federated Farmers' behalf. But, again the point need to be made, that there is no liability that can be sheeted home to the Councils, if they do not regulate GMOs, in which case any liability that might fall on the public as the result of the release of a GMO would rest with central government.

[17] Proposed Regional Policy Statement for Northland – Hearing Commissioners' Decisions Report Volume 4 of 4, at 791, 792.

D5. The RMA is enabling

43. A theme that runs through the material advanced by the Councils in support of their proposals to regulate GMOs suggests that there is a widespread belief that the Plan Changes can be used to effectively exclude GMOs in their entirety from the Far North and Whangarei Districts.

44. For example, some reliance is placed by Dr Grundy on the case *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*,[18,19] to justify the use of prohibited activity status in the Plan Changes for some activities associated with GMOs, on the basis that an appropriate use of the prohibited activity status is where a planning authority has insufficient information about an activity and wishes to take a precautionary approach. The situation with GMOs is quite different, in that by the time an application might come to be made to a local authority, all the relevant information will be available to the planning authority, having been determined by the EPA under HSNO.

45. Later, Dr Grundy refers to a discussion of a "second leg" of the *Coromandel Watchdog* case in a legal opinion obtained by the Councils,[20] that an appropriate use of the prohibited activity status may also be when it is necessary to allow an expression of social or cultural outcomes or expectations. Again, as is the case with the "precautionary approach", the matter is covered off in HSNO. The Hazardous Substances and New Organisms (Methodology) Order 1998 sets out an example of how the interests of communities are to be considered. The Order provides, at cl 9 of the Schedule to the Order, that:

> 9 When evaluating the information provided by an applicant (including prescribed information and any additional information) so as to achieve the purpose of the Act, the Authority must—
>
> …
>
> (b) recognise and provide for the principle of maintenance and enhancement of the capacity of people and communities to provide for—
>
> (i) their own economic, social, and cultural wellbeing; and
>
> …
>
> …

46. Federated Farmers considers that the RMA is an enabling piece of legislation, the purpose of which is to manage resources in a way which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety, which includes enabling land use. Even if the Courts are to eventually establish that local authorities have the ability to regulate GMOs in their RMA policy statements and plans, then, whatever the provisions might be that are included in those planning instruments, they will need to be read as enabling GMOs to be used in the Far North and in Whangarei.

[18] Statement of Primary Evidence by Dr Kerry James Grundy on behalf of Whangarei and Far North District Councils, at 40.
[19] [2008] 1 NZLR 562.
[20] Statement of Primary Evidence by Dr Kerry James Grundy on behalf of Whangarei and Far North District Councils, at 59(f).

47. To some extent the fact that the RMA is enabling runs counter to a second theme that that runs through the material advanced by the Councils in support of their proposals to regulate GMOs, that the RMA enables councils to apply more stringent measures than those in the national framework. Federated Farmers considers that that can never be the case, as the national framework will always be more appropriate than any local measure.

48. The proposition that the national framework will always be more appropriate than any local measure is supported by some case law. In *Dome Valley Residents Association v Rodney District Council*,[21] the High Court considered the adverse effects of noise created by helicopters when in the air. The Court stated that the field of overflying aircraft was properly the subject of the Civil Aviation Act 1990. The Court found that after take off or landing, in particular when the aircraft was operating over 500 ft above land, the effects lay outside the ambit of the RMA. At [59], the High Court Judge said:

> … as a matter of legislative commonsense it seems to me that the entire field of overflying aircraft, its regulation and control, is properly the subject of the Civil Aviation Act 1990 and related regulations and rules.

49. In *Petone Planning Action Group Inc v Hutt CC*,[22] the Environment Court was considering a proposal was for a residential and retail development in a part of Petone near the Wellington Fault. The Court considered whether designing and constructing the building development according to the Building Code was sufficient to decide a resource consent application, and found that it was, and that there was no resource management purpose for controlling the building work to achieve any criteria other than those specified in the Building Code. The Court said, after noting that the Building Code prevailed over the RMA by way of an express exemption in the Building Act 2008, that the RMA can govern matters within the purview of the Building Act if a valid resource management purpose justifies the exercise the exercise of power under the RMA. In the case the Court found that:[23]

> … there is no resource management purpose for controlling the building work to achieve performance criteria other than those specified in the building code.

50. For similar reasons, regulating the use of GMOs is the purview of HSNO, and there is no resource management purpose for controlling the use of GMOs as such under the RMA.

D6. Reliance on polling data

51. Dr Kerry Grundy[24] relies on some somewhat dated data, which was generated by a poll, in support of his evidence. He claims that there have been widespread and on-going concerns from the Auckland / Northland community regarding the potential release of GMOs over the

[21] [2008] 3 NZLR 821.
[22] Environment Court decision W020/08.
[23] Ibid, at [218].
[24] Statement of Primary Evidence by Dr Kerry James Grundy on behalf of Whangarei and Far North District Councils, at 29 et seq.

last 14 years, and he cites a petition that was made to the Whangarei District Council.[25] Yet, if those concerns existed 14 years ago, they seem to have abated somewhat, as there were only some 272 submitters who made submissions on the GMO provisions in the Proposed Auckland Unitary Plan,[26] and not that many more for each of the respective Plan Changes.[27] Dr Grundy notes that genetic modification is a relatively new and fast developing technology,[28] so it would seem that public attitudes have moved just as quickly.

52. The evidence of Dr Michael Dunbier to the Auckland Council on the GMO Provisions in the Proposed Auckland Unitary Plan also seems to challenge Dr Grundy's claims that there is widespread concern about GMOs.[29]

53. Returning to the matter of the Colmar Brunton poll, as is discussed in the evidence of Dr Kerry Grundy.[30] It would seem that, whichever way the poll results are looked at, a large proportion of respondents to the poll were generally satisfied with the current regime for managing the use of GMOs in the country, and of those that were not satisfied, their concerns could be met only by legislative change, rather than by regulation at local government level. It seems that a good majority of those polled want the option of GMOs left open for the future.

D7. References to GMOs in other planning instruments

54. Dr Kerry Grundy[31] makes mention of references to GMOs in planning instruments in other local authorities. Regrettably, in his evidence he tends to cast his own perspectives on those references.

55. As regards the Hauraki Gulf Islands section of the Auckland District Plan, it needs to be recognised that the provision was included by way of consent, and replaced a provision in an earlier plan which prohibited the use of GMOs in the Hauraki Gulf Islands altogether. It is important to recognise also that the provision is designed to prevent only such things as field trials on the islands, and applies to any new organism, not just GMOs. Even so, the provisions are proving problematic, as they would prevent the use on the islands of new organisms that are on controlled release, such as equine flu vaccine. It should also be noted that the provision applies only to the deliberate use of new organisms, incidental use is not prohibited. It is unlikely that Federated Farmers would have agreed to the provision,

[25] Ibid.
[26] Auckland Unitary Plan Independent Hearing Panel, Topic 024, Statement of Primary Evidence of Maximus Graham Smitheram on behalf of Auckland Council, at 11.24.
[27] Above at fn 1, at 38 (FNDC) and 40 (WDC).
[28] Statement of Primary Evidence by Dr Kerry James Grundy on behalf of Whangarei and Far North District Councils, at 36.
[29] Auckland Unitary Plan Independent Hearing Panel, Topic 024, Evidence of Dr Michael Dunbier on behalf of Pastoral Genomics Limited, at 66 et seq.
[30] Statement of Primary Evidence by Dr Kerry James Grundy on behalf of Whangarei and Far North District Councils, at 11 et seq.
[31] Statement of Primary Evidence by Dr Kerry James Grundy on behalf of Whangarei and Far North District Councils, at 64 et seq.

given the knowledge that it has now regarding the use of GMOs. It would also seem that the Council will need to introduce a plan change, to give effect to the RPS section of the Auckland Unitary Plan.

56. As regards the Bay of Plenty Regional Policy Statement, the statement regarding GMOs included in the RPS does little other than record the concerns of some members of the community regarding the use of GMOs. There are no provisions that could be said to regulate the use of GMOs.

E. THE BENEFITS OF GMOs.

57. Regrettably, there is little mention in the Plan Changes and in the Council's evidence of the possible benefits that might be brought about by the use of GMOs which, as is noted elsewhere in the Plan Changes, are continually being redefined as biotechnology advances.[32]

58. Accordingly, Federated Farmers takes the opportunity to set out some of the benefits that the use of GMOs can bring.

59. Firstly, it is noted that there is a great deal of scientific evidence against placing controls on GMOs over and above those prescribed by the EPA. Included in this is:

    a. A review of the section 32 evaluation, which forms part of the GMO Proposals put forward by the Inter-council Working Party on GMO Risk Evaluation and Management Options, by the Royal Society of New Zealand made the following comments:[33]

        i. In fact, current scientific evidence strongly supports the opinion that GMOs do not impose any greater risks as a result of their genetically modified status;
        ii. The reference [outlining environmental risks] is largely opinion-based and is very selective in the arguments it makes;
        iii. Furthermore, certain errors of fact are made, which might have been avoided had the publication been subjected to scientific peer review;
        iv. … references … are largely opinion pieces, rather than evidence based articles;
        v. … arguments used … do not stand up to scientific scrutiny.

        It would seem that some changes have been made from the version of the evaluation that was reviewed by the Royal Society from that which is relied on for the GMO provisions in the Plan Changes, but none appear significant.

    b. European Commission studies and the organisations which support their views.

        The European Commission has conducted two reviews (meta-analysis) of the literature reflects the scientific consensus on GMOs.

[32] FNDC Proposed Plan Change 18, Context, 3rd paragraph.
[33] Available at <http://www.royalsociety.org.nz/expert-advice/papers/yr2014/managing-risks-associated-outdoor-use-genetically-modified-organisms/>.

i. EC Sponsored Research on Safety of Genetically Modified Organisms (GMOs) (1985-2000)[34], which states:[35]

> The results of the research and growing practical experience, feeding into regulatory and risk management policies, have enabled these to be regularly adapted to facilitate safe innovation, thus contributing to the excellent safety record to date, and providing a basis for continuing public confidence in the technology and its products.

ii. A Decade of EU Funded GMO Research (2001-2010),[36] which states:[37]

> The main conclusion to be drawn from the efforts of more than 130 research projects, covering a period of more than 25 years of research, and involving more than 500 independent research groups, is that biotechnology, and in particular GMOs, are not *per se* more risky than e.g. conventional plant breeding technologies.

c. Groups who have a similar view include:

> The American Medical Association, The American Assn for the Advancement of Science, The World Health Organization, The National Academy of Sciences, The Royal Society of Medicine (UK), The American Council on Science and Health, The Academy of Nutrition and Dietetics, The American Society for Cell Biology, The American Society for Microbiology, The American Society of Plant Sciences, The International Seed Foundation, The International Society of African Scientists, The Federation of Animal Science Societies, The Society of Toxicology, The French Academy of Science, The Union of German Academies, The Royal Society of London, The US National Academy of Sciences, The Brazilian Academy of Sciences, The Chinese Academy of Sciences, The Indian National Science Academy, The Mexican Academy of Science, Fourteen Science Academies of Italy and The Third World Academy of Sciences.

60. Federated Farmers notes that non-viable GMOs are already imported into the Northland region in the form of GMO cotton seed meal and GMO soy bean meal for feeding to animals such as dairy cows, and which has made up a vital form of supplementary feed during recent droughts.

61. It is also noted that approval has already been granted for a live GMO vaccine for horses in the event of equine influenza. In this context it is noted that live GMO veterinary vaccines such as the equine influenza are permitted activities under the rules as proposed by the Council. A growing number of animal remedies are derived from GMOs, and GMO enzymes are, and have been for years, regularly used in the manufacture of cheese.

62. Further, prohibiting GMOs would mean forgoing an opportunity for farmers to reduce their environmental footprint, for example through reduced water demand and reduced nitrogen leaching, as well as the opportunity to improve environmental outcomes such as pest eradication thereby eliminating the need for poisons such as 1080. GMO science may offer solutions for problems such as Kauri die-back disease.

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[34] Available at <http://ec.europa.eu/research/quality-of-life/gmo/>.
[35] Introduction by Philippe Busquin, EU Research Commissioner (1999-2004).
[36] Available at <http://ec.europa.eu/research/biosociety/pdf/a_decade_of_eu-funded_gmo_research.pdf>.
[37] Page 16.

F. THE GMO PROVISIONS IN THE PLAN CHANGES SHOULD BE ENABLING.

63. As noted earlier, there is a theme that runs through the material advanced by the Council in support of its proposal to regulate GMOs which suggests that the Plan Changes can be used to effectively exclude GMOs in their entirety from the Far North and Whangarei. This is considered to run counter to the ethos of the RMA.

64. It is Federated Farmers' view that that the RMA is an enabling piece of legislation, which includes enabling land use. Even if the Courts are to eventually establish that local authorities have the ability to regulate GMOs in their RMA policy statements and plans, then, whatever the provisions might be that are included in those planning instruments, they will need to be read as enabling GMOs to be used.

65. It is considered that s 32 of the RMA directs that the methods, be they rules or otherwise, that are included in a plan are to be the most appropriate for achieving the objectives, having regard to reasonably practicable options, and their efficiency and effectiveness. These latter two terms are not defined in the RMA, however, the Ministry for the Environment in its December 2014 publication "A Guide to section 32 of the Resource Management Act", contains a useful set of descriptions:

> Effectiveness assesses the contribution new provisions make towards achieving the objective, and how successful they are likely to be in solving the problem they were designed to address.
>
> Efficiency measures whether the provisions will be likely to achieve the objectives at the lowest cost to all members of society, or achieves the highest nett benefit to all of society. The assessment of efficiency under the RMA involves the inclusion of a broad range of costs and benefits, many intangible and non-monetary.

66. Thus s 32 requires the consideration of efficiency and effectiveness to extend to benefits and costs of the environmental, economic, social and cultural effects anticipated for economic growth and employment benefits.

67. It is considered that, generally speaking, s 32 directs that the least stringent method by which the policies are implemented, and which are likely to achieve the objectives, should be favoured. It is submitted that that is not what the Council has done, in promulgating the provisions it has promulgated regarding the management of GMOs in the Plan Changes.

68. Some guidance as to the appropriate level of stringency that may be attached to provisions in local authority planning instruments that regulate GMOs may be obtained from the consultation document on a proposed National Environmental Standard for Plantation

Forestry which was released in June 2015 by the Ministry for the Environment and the Ministry for Primary Industries.[38] In the discussion document the statement is made that:[39]

> Genetically modified organisms are regulated under the Hazardous Substances and New Organisms Act 1996. To avoid duplication, the proposed NES-PF includes a provision permitting afforestation using genetically modified tree stock where it has been approved by the Environmental Protection Authority under the Hazardous Substances and New Organisms Act 1996.

69. The following are described as permitted activities under the Standard:[40]

> **Genetically modified tree stock**
> Afforestation using genetically modified tree stock is permitted where the tree stock has gained the appropriate approval for deployment from the Environmental Protection Authority (EPA), and is subject to conditions imposed by the EPA.
>
> Replanting using genetically modified tree stock is permitted where the tree stock has gained the appropriate approval for deployment from the Environmental Protection Authority (EPA) and is subject to conditions imposed by the EPA.

In both cases the "rationale" is stated as being:[41]

> This condition recognises that the EPA is best placed to evaluate the risks of genetically modified organisms and that approval and conditions imposed under the EPA regime will be sufficient to ensure that any risks associated with the deployment of the tree stock are managed.

70. Plainly, the Ministry for the Environment and the Ministry for Primary Industries both consider that there is little if any role for local authorities in the management of GMOs.

71. In his evidence for Federated Farmers on the GMOs topic in the Proposed Auckland Unitary Plan, Dr Mark Bellingham states that he considers that the Plan Changes provisions require amendment to provide for GMOs that been approved for general release by the EPA following field trials under HSNO Act as a controlled activity.

72. Thus it would seem that there is no basis on which the provisions currently in the Plan Changes restricting the use of GMOs can be sustained.

G. EVIDENCE

73. As noted earlier, the GMO provisions in the Plan Changes are the same as those in the Proposed Auckland Unitary Plan.[42] Aside from its submitter evidence, Federated Farmers commissioned two sets of professional evidence for the consideration of the Independent Hearing Panel that heard submissions on the GMOs topic of the Proposed Auckland

[38] Available at < http://www.mpi.govt.nz/document-vault/8220>.
[39] Section 6.4, page 43.
[40] Page 64, 82.
[41] Ibid.
[42] Above at 6.

Unitary Plan. Given the GMO provisions in the Proposed Auckland Unitary Plan are the same as those in the Plan Changes, it seems appropriate that that same evidence is placed before the hearing panel hearing submissions on the Plan Changes.

G1. Dr Mark Bellingham

74. Dr Mark Bellingham provides expert planning evidence. He states that he agrees with some of the objectives and policies, but finds others duplicate the assessment and approvals procedures for GMOs in HSNO, and are generally unnecessary. Dr Bellingham finds that the Councils' draft section 32 evaluation fails to evaluate the costs to applicants having to negotiate a HSNO approval process, in what appears to be similar to the RMA plan change process, and he states that the draft section 32 evaluation does not address how the Council's might prevent a GMO approved by the EPA for general release in New Zealand, citing as an example a GMO moving from the northern Waikato into Auckland and Northland. Dr Bellingham finds the section 32 evaluation unhelpful to this process as it assumes that:

- The precautionary approach equates to a prohibition on GMO release;
- The Auckland and Northland Councils, Iwi and communities will have no influence on the statutory approval processes under the HSNO Act and these need to be duplicated under RMA plans; and
- The Auckland and Northland Councils can adequately resource GMO consent and plan change hearings and more effectively than the Environmental Protection Agency.

75. Dr Bellingham states that the only appropriate controls on GMO activities in a plan relate to bond requirements for controlled activities.

G2. David Cooper

76. David Cooper provides economic evidence, in which he states that he has reviewed and commented on the evidence provided by Dr John Small on behalf of Auckland Council in the Proposed Auckland Unitary Plan proceedings, and that he has also compared that evidence with similar evidence presented by Dr Small and Fraser Colegrave to the Hastings District Plan Hearings Committee hearing into the GMOs topic on 27 May 2015.

77. Mr Cooper states that he does not consider Dr Small's economic assessment appropriately considers the marginal transaction costs resulting from the additional level of regulation proposed under the RMA to that provided by the EPA under HSNO, ignoring the transaction costs associated with planning development and review to both the council and the private

applicant, and the 'information costs' plan users face through additional regulation and how these interact with the national regulatory approach.

78. Mr Cooper also has concerns with Dr Small's reliance on the 'precautionary principle' in his consideration of the likely benefits of remaining GMO free relying to a significant extent on the assumption that GMOs will not spread between regions. He states that Dr Small's accounting of the potential opportunity costs considers only the GMO developments that are currently available, and fails to recognise some potential consumer benefits.

79. Mr Cooper states that he has attempted to underline these concerns by comparing Dr Small's approach and that of Mr Colegrave. He finds that Mr Colgrave's evidence provides a more in-depth assessment of the nature of premia for non-GM production and subsequently a more detailed economic assessment of the opportunity costs associated with this proposal. In addition he notes that Mr Colgrave outlines a number of additional benefits from GM technology, particularly in terms of both the productivity benefits as well as further benefits to consumers such as nutritionally enhanced options. Mr Cooper notes that, comparatively, consumer related benefits are not accounted for within Dr Small's assessment as a potential opportunity cost.

H. CONCLUSION

80. Federated Farmers commends its submission points on the GMOs topic, together with the evidence of Dr Mark Bellingham and David Cooper to the hearing panel hearing submissions on the Plan Changes.

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