

31 March 2005

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Attention: Mr G J Mathias

Dear Partners

### **Opinion on land use controls and GMOs**

Thank you for your letter of the 12<sup>th</sup> of December 2004.

#### **Introduction**

In my interim opinion of the 23<sup>rd</sup> of February 2004, I suggested:

A further opinion would be required, accompanied by expert economic and planning advice, before decisions could be made as to the appropriate categorisation of GMO-related land use activities and the most effective and efficient controls for inclusion in a GMO-management area.

A report entitled *The Community Management of GMOs II - Risk and Response Options* (the report) has now been prepared by Messrs Terry and Kyle which addresses these matters. I have consulted with them over legal aspects raised in the report.

You have asked for my opinion on two points:

1. *Provide advice on an as required basis with respect to the options for framing a rule change under the Resource Management Act including comment on the merits of different generic options, such advice to be shared directly with other consultants assisting the Council on this matter.*
2. *Provide a review of a suggested plan change to assess it against the requirements of section 32 of the Resource Management Act, its expected robustness to legal challenge and any potential variations to the proposed rule that could improve it.*

### **Advice to consultants on options**

In my interim opinion I set out a fundamental checklist for establishing district plan provisions for incorporating a precautionary approach to managing environmental risks pursuant to the Resource Management Act 1991 (the RMA).<sup>1</sup>

A checklist for establishing district plan provisions is:

To –

- Identify issues.
- Determine environmental results to be achieved.
- Specify objectives.
- Specify policies.
- Specify methods including rules.
- Specify standards, terms and conditions for rules or activities.

I am of the opinion the report contains sufficient information for the district council to undertake the above process. It identifies risk management options available pursuant to the RMA, and the consequences of potential adverse environmental effects (including on economic conditions) from using land in the district for GMO-related activities. It also highlights the ability to include financial instruments in a district plan as an efficient and effective risk management method.

In my opinion, subject to a comprehensive consultation programme with the community, from a legal perspective the report provides a sufficient foundation for the preparation of a specific chapter in a proposed district plan with an objective of managing risks associated with GMO-related land uses, and policies and methods to implement that objective in order to promote sustainable management of the land resources of the district pursuant to the RMA.<sup>2</sup>

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<sup>1</sup> Interim opinion, section 4, page 23.

<sup>2</sup> Report, page 48.

## Section 32 requirements

If the community urges the district council to prepare GMO-related land use risk management objectives, policies, and methods, to be incorporated into its proposed district plan, or a private plan change were promoted to do that, then section 32 of the RMA applies to the proposed plan provisions.

You have asked for my assessment of any suggested plan change in terms of section 32. The heading of section 32, “*consideration of alternatives, benefits, and costs*”, describes the statutory purpose of the section when a district council evaluates a proposed plan change to address environmental risks associated with GMO-related land uses as a significant resource management issue for its area.<sup>3</sup>

The mandatory components of any evaluation are set out in section 32(3), and (4).

- (3) An evaluation must examine-
  - (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
  - (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
- (4) For the purposes of this examination, an evaluation must take into account-
  - (a) the benefits and costs of policies, rules, or other methods; and
  - (b) 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.

The way the work of Messrs Terry and Kyle has evolved means that at this stage it focuses on options for the council rather than suggesting specific draft plan provisions. Notwithstanding that, I am satisfied that there is sufficient information in the report to undertake a section 32 analysis if the district council were to proceed to consult with the community and develop objectives and policies for inclusion into its district plan to manage the level of environmental risk the community is prepared to accept in order to promote the sustainable management of the land resources of the district.

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<sup>3</sup> Section 5(2) and (3) of the Interpretation Act 1999 allows for the headings of sections to be used to establish the meaning of a provision.

However, if a district plan is to include financial instruments as a method for mitigating or offsetting adverse environmental effects resulting from GMO-related land uses, then further work is required before a section 32 assessment could be completed.<sup>4</sup>

Section 108(10) states:

**108. Conditions of resource consents –**

...

- (10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless –
- (a) The condition is imposed in accordance with the purposes specified in the plan [[or proposed plan]] (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
  - (b) The level of contribution is determined in the manner described in the plan [[or proposed plan]].

If the council were to consider, as part of a section 32 evaluation, that it was not appropriate to include objective(s), policies, and methods for managing environmental risks associated with GMO-related land uses (including the use of financial instruments) in order to promote sustainable management of the land use resources of the district, then it still has other statutory obligations pursuant to the RMA.

Even without plan provisions, if there was potential or actual damage from GMO-related land uses to adjacent land or to the wider community, the district council can become involved in enforcement issues pursuant to sections 17 and 314.

Because the council is a public authority and is obliged to act in the public interest when exercising its statutory duties, it can be subject to judicial review proceedings in the High Court for the way in which it exercises any discretion it has to act or not to act.

A relevant statutory duty is found in section 35, which states, *inter alia*:<sup>5</sup>

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<sup>4</sup> For a discussion of the challenges of undertaking a section 32 assessment when introducing financial instruments into a district plan to address adverse environmental effects from a proposed land use, see M.J. Grant, *Equity in the Environment? Financial Contributions* 7th RMLA Conference, Christchurch, September 1999, pages 11, 16, 17.

<sup>5</sup> An appeal on the grounds that a statutory body should be immune from a claim for negligence for a failure to enforce conditions of a water right (including a monitoring condition), was rejected by

**35. Duty to gather information, monitor, and keep records** - (1) Every local authority shall gather such information, and undertake or commission such research, as is necessary to carry out effectively its functions under this Act.

(2) Every local authority shall monitor-

(a) The state of the whole or any part of the environment of its region or district to the extent that is appropriate to enable the local authority to effectively carry out its functions under this Act; and

[(b) the efficiency and effectiveness of policies, rules, or other methods in its policy statement or its plan; and]

(c) The exercise of any functions, powers, or duties delegated or transferred by it; and

(d) The exercise of the resource consents that have effect in its region or district, as the case may be, -

and take appropriate action (having regard to the methods available to it under this Act) where this is shown to be necessary.

[(2A) Every local authority must, at intervals of not more than 5 years, compile and make available to the public a review of the results of its monitoring under subsection (2)(b).]

I note that there is reference in the report to civil liability issues which may face a district council concerning environmental damage resulting from GMO-related land uses.<sup>6</sup> It is not within the scope of my instructions to address this matter. However, public authority liability is a complex subject and in my opinion, one cannot assume that the district council would be immune from liability as a result of the way in which it exercises its statutory duties under the RMA, and particularly if it has made commitments to manage GMO-related land use activities in its long-term council community plan promulgated under the Local Government Act 2002.<sup>7</sup>

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the Court of Appeal in *Taranaki Catchment Commission & Regional Water Board v Roach* [1983] NZLR 641.

<sup>6</sup> At page 51 of the report there is reference to a Crown Law Office opinion of the 3<sup>rd</sup> November 2004: *Advice on potential for civil liability arising from rules controlling GMOs*.

<sup>7</sup> For issues concerning civil liability and public authorities, see Butler and McLay *Liability of public authorities*, NZ Law Society Booklet June 2004. For a discussion of liability issues and GMO-related activities, see S. Todd, *Liability issues involved, or likely to be involved now or in the future, in relation to the use, in New Zealand, of genetically modified organisms and products*; E.J. Currie *Liability for damage from genetic modification*, Biotechnology & Law 2004, 2<sup>nd</sup> Annual Lexis Nexis Conference, March 2004; Simon Terry and others *Who Bears the Risk? Genetic Modification & Liability* (2 ed, Chen Palmer & Partners and Simon Terry Associates Ltd, Wellington, 2001); Charles River Associates *Review of Chen, Palmer & Partners and Simon Terry Associates, Who Bears the Risk* (Charles River Associates (Asia Pacific) Ltd, Wellington, 2001); M. Christensen and P. Horgan "Genetic Modification: The Liability Debate" (unpublished, 2001) [http://www.lifesciencenz.com/Repository/020118\\_liability.pdf](http://www.lifesciencenz.com/Repository/020118_liability.pdf) *Liability for loss resulting from the development, supply, or use of genetically modified organisms*, Study Paper 14, Law Commission May 2002.

The law concerning claims for economic loss resulting from a breach of statutory duty by a public authority is not circumscribed and depends to a large extent on the nature of a relevant statutory duty.<sup>8</sup> The High Court has confirmed that it would expect to try and link common law obligations to the statutory obligations contained in the RMA.<sup>9</sup>

The RMA does not preclude civil actions. Section 23 of the RMA states:

**23. Other legal requirements not affected** - (1) Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law.

(2) The duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act.

(3) Nothing in subsection (2) limits or affects any right of action which any person may have independently of the provisions of this Act.  
[emphasis added]

## Conclusion

I am satisfied that the report provides sufficient information to allow consultation with the community in order to make the necessary judgements about what level of control over GMO-related land uses will promote sustainable management of the natural and physical resources of the district pursuant to the RMA.

I am also satisfied that if the council, after consultation with the community, were to develop objectives and policies for managing the risk of adverse environmental effects from GMO-related land uses, that there is sufficient information in the report to carry out a section 32 evaluation of them. However, methods (including rules

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<sup>8</sup> Currently in England and Wales the general test as to whether or not there could be a claim in negligence against a public authority involves questions such as:

- Does the statute in question exclude a private law remedy?
- Can a common law remedy co-exist with the statutory duty or power?
- Has there been an omission? Is there a duty of care to do something or refrain from doing something?
- Has the public body undertaken a responsibility which gives rise to a common law duty of care?

See A.R. Keene, *Negligence claims against public bodies*, New Law Journal, 21 January 2005, p86.

<sup>9</sup> See *Ports of Auckland v Auckland City Council* [1999] NZLR 600.

covering financial instruments) would still need to be developed for inclusion in the district plan before a section 32 assessment of a proposed plan change could be completed.

Whether or not the council proceeds to initiate a plan change to address environmental risks associated with GMO-related land uses in its district, it still has statutory and public law obligations pursuant to the RMA.

I have not addressed the issue of risks to the district council of civil proceedings if environmental damage resulted from GMO-related land uses, in the absence of objectives, policies or methods (including controls) for the managing of such a risk, because that is outside the scope of my instructions. However, it should not be assumed that the district council, as a public authority, will automatically be immune from liability.

Yours faithfully

Dr R J Somerville QC