

BACKGROUND INFORMATION TO GENETICALLY MODIFIED ORGANISAM ISSUE

At a Special Meeting of Council on 14 November 2001, a presentation on genetic engineering supported by a petition of 140 signatures was received from Dr Peter Maddison. A second presentation, accompanying a report from His Worship the Mayor on the principle of Waitakere being Genetic Engineering-free, was received from Ms Lisa Er who presented a vision for an organics industry cluster in Waitakere City. At this Special Meeting, the Council resolved:

"That Waitakere City Council declares Waitakere City GE-free in field and food."

2635/2001

The City confined its reservations regarding genetic engineering to the use of genetically modified products in food, and the use of genetically modified plants and animals in the environment (agriculture and horticulture). "GE-Free for Waitakere" does not mean that the City opposes the use of genetic modification for medical purposes and for research confined to the laboratory situation. The Council also resolved at the same meeting:

"That there be further investigation to identify the most effective ways of advancing Council's aspirations for Waitakere City to be "GE-free", without compromising medical research or currently permitted activities but discouraging in every way possible any form of field trials."

2636/2001

Subsequently at the meeting of Council, 19 December 2001, it was resolved:

*"2. That a survey (on community opinion on the GE issue) not be undertaken at this point in time.
3. That Council work with local businesses to develop an organics cluster and that this work be reflected in the Economic Development Strategy."*

2954/2001

Waitakere City Council, together with other local authorities under the ambit of Local Government New Zealand, sought an amendment to the Hazardous Substances and New Organisms Act 1996 (HSNO Act). This was done via submission to the New Organisms and Other Matters Bill. The submission sought that the Environmental Risk Management Authority (ERMA) be required to accommodate local authority policy statements on Genetically Modified Organisms land use in its decisions on Genetically Modified Organisms releases. It further sought the incorporation of a link to the Resource Management Act 1991, to enable local authorities to set stricter controls on applications within the local authority boundaries through a tandem process with Environmental Risk Management Authority. The submissions were declined as the Government sought to specifically exclude local government from having a role in the management of Genetically Modified Organisms activities in the environment.

In April 2004, Mr Simon Terry, of Simon Terry Associates, gave a presentation to the then Environmental Management Committee regarding options available for community management of genetically modified organisms under the Resource Management Act 1991. This presentation was based on a report commissioned by local councils of the Northland Region. The Committee resolved:

"That Council hold a workshop to consider options for giving effect to the Council policy on GE-free food and field with a view to:

a) Setting the direction and scope of the approach Council wishes to take;

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b) Establishing processes that are robust and meet statutory requirements including the Resource Management Act, the Local Government Act 2002 and the Hazardous Substances and New Organisms Act;

c) Learning from the experience of the councils in the Northland region;

d) Determining when Council should seek a range of advice on potential options and strategies for community management of genetically modified organisms/events/risks."

605/2004

A workshop was held on 17 May 2004, with staff and Councillors and representatives from the Environmental Risk Management Authority. The Environmental Risk Management Authority confirmed that the Council is registered as an interested party and would be advised, and comments sought, on any Genetically Modified Organisms release applications of interest to Waitakere City. To date, no applications for release have been lodged with Environmental Risk Management Authority.

On consideration of the outcomes from the workshop, the Council at its meeting, 25 August 2004 resolved:

"That Council agrees to contribute \$8,350 to jointly fund with the northern councils a Risk Evaluation and Options Report as outlined in the proposal attached at pages A34 to A35 to the Agenda report of the Environmental Management Committee meeting held on 10 August 2004."

1567/2004

The final report "*Community Management of Genetically Modified Organisms II Risks and Response Options*", together with an independent peer review and a separate legal opinion from R J Somerville QC are now available.

Synopsis of the Reports

The legal opinion of Royden Somerville concludes that there is an avenue to regulate Genetically Modified Organisms-related land uses in a District Plan. There are differing views, however, on whether any regulation under the Resource Management Act 1991 could be successfully supported by a section 32 analysis.

The Risk and Response Options report identifies specific sources of risk for local government from releasing Genetically Modified Organisms into the environment. The Report then examines options to address the risks identified.

The risks identified for the Northland Peninsula are:

- Cultivation of GM crops that could cause economic damage through trace GM contamination appearing in non-GM crops. Such trace contamination could jeopardise export potential for that crop;
- Other unresearched risks include adverse effects on non-target species, for example, harm to pollinators from GM crops containing self-produced insecticide, or GM crops that are herbicide resistant becoming invasive; and
- Cultural risks such as offence to whakapapa.

The report explores some "deficiencies" in the national regulatory regime (Environmental Risk Management Authority regulation under Hazardous Substances and New Organisms Act 1996). For example, the report highlights the reliance that is placed on the common law provision for liability for damage arising as a result of Genetically Modified Organisms activity carried out in accordance with an approval from Environmental Risk Management Authority. A further deficiency is perceived in that precaution is a matter for Environmental Risk Management Authority's discretion.

A2

The report advocates that district councils have jurisdiction under the Resource Management Act 1991 to set rules for Genetically Modified Organisms that act in addition to those that may be set by Environmental Risk Management Authority under Hazardous Substances and New Organisms Act 1996. The report then discusses the classes of Genetically Modified Organisms that may be of concern and explores the district options for intervention; whether specific classes of Genetically Modified Organisms should be considered for discretionary activity or prohibited status.

It is not made clear in the Report whether the basis for intervention is on community preference, i.e. submissions to Long Term Council Community Plans or District Plans, or on an assessment of effects and perceived deficiencies in the Hazardous Substances and New Organisms Act 1996 risk assessment process. It is considered important to define the driver for intervention, for the purpose of adequately preparing a section 32 report to support any District Plan change.

On the matter of liability, the Crown Law Office, in its legal opinion of 3 November 2004, indicates that local authorities would not be financially responsible for any environmental damage arising from Environmental Risk Management Authority approved Genetically Modified Organisms activity, unless that local authority were proven to be negligent or had created the nuisance. This is the case whether or not the local authority also had rules in a District Plan to control Genetically Modified Organisms-related land use.

Waitakere City Council and the Environmental Risk Management Authority

Waitakere City Council has registered with Environmental Risk Management Authority as an interested party to applications for release of genetically modified organisms. This will enable the Council to submit on any applications brought to notice anywhere in the country. It is not only use of genetically modified organisms in Waitakere City that may affect this community and the organics business sector but also their use across the City boundary or anywhere in the country that may have an effect on environmental safety or on trade relations. In particular, the Council will be concerned with the growing of any crops that may have an adverse environmental or economic effect on the organics industry, or on the environmental advantage that Waitakere City currently enjoys.

Working Party Outcome

The Working Party, at its meeting of 9 September 2005 resolved:

- That the outcomes of the meeting be jointly reported to the participating councils at their November 2005 meetings;
- That a consistent covering brief be presented to each council along with the Risks and Response Options Report, legal opinion and independent review.

*Tabled at
Kaipara
Meeting
19/6/2006*

BIG YELLOW TAXI (ANTI GE VERSION)

They paved Mangawhai and put up a parking lot
With a hairdresser, cafe and another real estate shop

CHORUS:

Don't it always seem to go
That you don't know what you've got till it's gone
They paved paradise and put up a parking lot

Hey all you experts who say that GE is okay
They said that about possums and now they won't go
away – no way!

CHORUS

Hey "Man from E.R.M.A." we say its time to stop!
Before the big corporations take total control of our
crops.

CHORUS

So Kaipara Council, don't you allow in GE
Or you'll stuff up our seed lines and wreck our ecology
CHORUS (x2)

Community Management of GMOs: *Risks and Options Analysis*

Presentation to Kaipara District Council Workshop
19 June 2006

Simon Terry Associates

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Presentation Outline

- Why was a Risks and Options report called for?
- What risks do GMOs present?
- Isn't Government already addressing these?
- What are the options for local management?
- What are the costs and benefits?
- What happens if Councils "do nothing"?
- Next Steps

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1. Why a Risks and Options Report was Commissioned

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Rights Sought by Local Govt

- In 2003, LGNZ and a number of Northland Peninsula councils sought to have the national regulations governing GMOs give explicit rights to local government
- This was in recognition of local government statutory responsibilities and public concern
- No local government role in decision-making resulted, and no financial protections offered

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Investigation of Alternatives

- Northland Peninsula Councils subsequently started examining alternatives
- Report in March 2004 and Crown Law opinion showed district councils had jurisdiction to manage outdoor use of GMOs under RMA
- LTCCP submissions evidenced continued high levels of community concern and some councils set GMO policies as a result

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Risks and Options Report

- This report commissioned to provide detailed assessment of RMA options for responding to risks arising from **outdoor use** of GMOs
- Objective to provide the basis for a decision in principle on how to proceed
- Research provided by
 - Dr Royden Somerville QC - Legal
 - John Kyle, Mitchell Partnerships - Planning
 - Simon Terry, STA - Economic, industry analysis

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2. *What Risks do GMOs Present*

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Economic Risks

- Key economic risk is the difficulty in preventing GM production from causing trace contamination in non-GM crops
- Trace GM contamination is sufficient to trigger food product rejection as a matter of course in Japan and northern Europe
- One incident (before any release) cost a Gisborne-based producer nearly \$500,000
- Markets not governments set purity standards

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Environmental Risks

- Key environmental risks include:
 - adverse effects on non-target species
 - GM plants becoming invasive
 - spread of altered genes to other organisms
- Few risks have been researched sufficiently
- For more complex GMOs, past experience provides little basis for predicting effects

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Cultural Concerns

- The concerns of Maori include:
 - preserving the integrity of nature
 - potential ecological effects
 - which parts of the community stand to benefit from the technology
- A view widely held by Maori is that the mixing of genes from unrelated species is a breach of the integrity of species

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3. *Isn't Government Already Addressing these Risks?*

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Inadequate Liability Law

- There is no liability under HSNO for damage resulting from an activity carried out in accordance with an ERMA approval
- Law only bites if ERMA conditions breached
- Common law actions are generally ineffective
- Innocent parties will tend to bear any economic losses arising from unexpected events and ineffective regulation of GMOs

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Crown Law Opinion Inadequate

- Crown Law considered only one of six types of financial risk – a council's legal liability for environmental damage.
- Not considered:
 - the risk of councils facing cleanup costs
 - constituents facing losses from GM contamination

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Precaution Optional

- HSNO makes the exercise of precaution a matter for ERMA's discretion
- Precaution is an option, not a requirement
- At the same time, a number of Northland Peninsula Councils have developed policies requiring precaution with respect to the management of GMO risks

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Lack of Surety of Outcome

- Absence of requirement for precaution means a lack of surety of outcome for councils:
 - Whether ERMA will act at all on specific concerns that may be held by a council and its community
 - Where it does act, whether ERMA will exercise the same degree of caution as would a council and its community

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Government's Dual Role

- Government has a dual role as both the ultimate regulator and the nation's largest investor in outdoor GMO research
- It has elected not to remedy clear deficiencies in the national regulatory framework

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4. What are the Options for Community Management?

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Using the RMA to Manage GMOs

- District councils have jurisdiction under the RMA to set rules for GMO management
- These would act in addition to those that may be set under HSNO, or by ERMA
- No change of national law is required
- Rules would be set through a change of the district plan

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Costs of Acting

- Shared one-off costs involved in designing and implementing any plan change
- Admin costs can be charged to applicant
- Risk that costs arise from a legal challenge
 - *A contingent cost - may never arise*
 - *Risk taken only after detailed legal review*
 - *A shared cost if did arise*

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“Do Nothing” Risk 1 - Cleanup

- Councils exposed to carrying cleanup costs for environmental damage
- MAF only obliged to clean up illegal releases
- Toxic contaminated sites provide clear past example of results of no clear liability law
- Government refused to pick up toxic site costs in general - special cases get part funding
- MFE sees as local government responsibility

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“Do Nothing” Risk 2 - Contamination

- Constituents exposed to economic losses from GM contamination
- A single contamination incident can cost millions (Sunrise Coast in NZ was \$500K - Starlink corn cost Aventis around \$500M)
- When such damage occurs across groups of producers it becomes a community concern
- Councils owe a duty of care to constituents

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“Do Nothing” Risk 3 - Monitoring

- Councils have an RMA duty to monitor effects
- Constituents may seek to enforce that duty, and possibly others
- Monitoring can be expensive
- GMO operator can only be required to pay for monitoring if is a consent condition for activity
- This requires a plan change to regulate GMOs
- Can then specify bond and other conditions

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Investment Targeting GMO Release

- The very considerable sums being invested in GM plants in NZ can only show a return if these plants are allowed outdoors
- The next stage of work for New Zealand GM plant developers involves pre-commercial projects. GMOs from overseas are the other source of release applications
- Regulation needs to be in place before release undertaken, rather than after the fact

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A Choice of Two Paths

- 1. Wait and React:** Wait for a GMO release to occur, pay equal or greater costs to respond to community concerns (legal costs, monitoring, etc), then play catchup
- 2. Proactive Plan Change:** do time consuming work in advance, share costs with other TLAs, have community determined response set in the district plan - amend as new information available

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New Way to Manage Council Risk

- Plan change represents a way to set level playing field for new industry before any commercial activities at stake
- Provides a tool to check trend of increased responsibility/liability for councils without reciprocal extension of authority to manage

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6. Next Steps

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Way Forward

- There are low cost options for protecting against significant risks
- Non-intervention would seem an unlikely conclusion of the required s32 analysis (given framework identified in this report)
- Decision required now is simply whether there is sufficient evidence to justify proceeding with further development of an active response option, beginning with consultation

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Joint Community Consultation

- Community consultation on options is important as analysis can only go so far
- Ultimate risk bearers are community
- Strong argument for joint consultation process
- Common rules across councils would be best outcome and joint consultation facilitates this
- Should include telephone survey to get broad ratepayer response as well as stakeholders

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Design and Testing of Rules

- When a response option has been selected in principle, then need:
 - Precise objectives, policies and rules
 - Preparation of RMA s32 analyses
 - Legal opinion on robustness of rules
 - Individual council and inter-council evaluation of full proposed plan change

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Genetically Modified Organisms Workshop, 12 June 2006, Kaiwaka Hall

Independent Facilitator Dr Glen Lauder

Panel

Dr Royden Somerville QC

Simon Terry (Simon Terry Associates)

Dr Libby Harrison, Environmental Risk Management Authority

Russell Harding, Ministry for the Environment

Kaipara District Council

Mayor Peter King, QSM

Cr Richard Alspach

Cr Brian Burnett

Cr Brian McEwing

Cr Wendy Salter (12.30pm onwards)

Cr Neil Tiller

Cr David Underwood

Cr Tom Smith

Jack McKerchar, Chief Executive

Brendon Neal, Policy and Planning Manager

Mark Vincent, Regulatory Manager

Claire Lichtwark McInnes, Communications and Services Manager

Rodney District Council

Mayor John Laws

Cr Grahame Powell

Maximus Simtheram, Staff

Wairakere City Council

Eryn Shields, Staff

Whangarei District Council

Cr Crichton Christie

Cr Robin Lieffering

Cr Sheryl Mai

Cr John Williamson

Andrew Lucas, Staff

Far North District Council

Cr Dennis Bowman

Northland Regional Council

Chair Mark Farnsworth

Cr Bill Rossiter

Treena Davidson, Staff

Audience (Questions)

Approximately 50 members of the public, including GE Free Northland, GE Free Kaipara.

Apologies from:

Yvonne Sharp (Mayor Far North District Council)

Clive Manley (Chief Executive Far North District Council)

Mark Simpson (Chief Executive Whangarei District Council)

Pamela Peters (Mayor Whangarei District Council)

Kaipara District Councillors Julia Sutherland, Graham Taylor and Ian Tiller

Councillor Penny Hulse (Waitakere City Council)

Wayne Walker (Rodney District Council)

Zelka Grammer (GE Free Northland)

Note:

The views expressed by participants were in the context of understanding the issues surrounding Genetically Modified Organisms, **not** advocating formal policy positions. Participants were encouraged to ask questions from alternate perspectives.

Glen Lauder stated, *I have my laptop recording the dialogue so that we can keep a transcript of what we are saying. Again, I have given a caveat that we are not going to hold people to what they say as a policy position; we are just going to invite them to speak as clearly as they can from what they have to say.*

While it was hoped to have a verbatim record from the day, the voice recorder could not capture all the dialogue that occurred on the day due to background noise and the position of the recorder. It is, however, considered that most of the dialogue is captured in the notes. Some questions are not attributed to individual participants, as people did not always introduce themselves when they spoke. In addition, some of the dialogue did not make sense in written form when transcribed.

Abbreviation List

HSNO	- Hazardous Substances and New Organisms Act
GMOs	- Genetically Modified Organisms
GE	- Genetic Engineering
RMA	- Resource Management Act

ERMA	- Environmental Risk Management Authority
MAF	- Ministry of Agriculture and Forestry
Mfe	- Ministry for the Environment
LGAct	- Local Government Act
LTCCP	- Long Term Council Community Plan

Introduction by Mayor Peter King

When our Council decided to hold this workshop it was with the objective of becoming better informed on the legalities of GMOs and the environment and what we could do if anything to regulate that. There have been many views ranging from councils simply changing their district plans to councils not having any role at all in this issue and that is the reason why we are here today.

As far as the KDC is concerned this is a very appropriate time for us because after 10 years we are in the process of reviewing our district plan so if we were going to do anything now is the time we should be looking at this.

I hope that you enjoy the workshop today. Personally for me I hope that at the end of the day we have a reasonably clear idea of where Councillors might go as far as GMOs are concerned.

You will note today that we have an independent Chairman so that everyone feels that they have a fair hearing with Dr Glen Lauder.

Glen Lauder (Independent facilitator) introduced himself, the panel, councillors and others and welcomed the speakers.

Not a decision-making day, but a participation day, listening for the common good, in all of this.

I originally have a coastal science background and I ended up leading the development of the New Zealand Biodiversity Strategy a few years ago which took me all around the country so I have a fairly intimate connection with local government around the country and I met Jack through that work. I have also facilitated some workshops around long term council community plans have done some work in Wellington to try and get different agencies talking more effectively to one another and I am very privileged to be back in Northland.

So today is the first workshop around GMOs that I have facilitated so I am completely listening for there is so much to learn here. I have read the material and the Crown Law opinions and I will take the lead in question from the technical advisors and prompting questions from the councillors so that we really drill down and what the issues are and I will go over the questions with a highlighter and see if I can find and bundle up groups of questions.

The main thing is that you go home having really made use of the resources that you have here Simon Terry, Royden Somerville, Libby Harrison and Russell Harding, but also recognising that also in the audience we have some really well informed people.

Brendon Neal

This came before Council at the beginning of this year and basically KDC felt like they needed to be better informed around the whole issues surrounding GMOs and essentially Council resolved to hold a workshop and I was tasked to organising it and I got in contact with the Ministry of the Environment, ERMA and also talked with Simon Terry, and this is where we have got to today in terms of getting all these technical experts along including Dr Royden Somerville who provided the initial legal opinion. The purpose of the day is to be better informed about all the issues surrounding GMOs.

Simon Terry

Thank you so much for the invitation up here today it is much appreciated. Every time I have spoken in the Far North I have been really impressed with the extent to which people here have made it their business to look into the issues and get more knowledge and the questions have always been so stimulating and I am really looking forward to that again today. I also sense the extent to which Northland people also take on this issue in the broader context of the national precedent in the way it is setting because other areas are of course watching how Northland responds to this issue and I know Northland people are thinking of it in the broader context as well.

I will go through briefly to try and anticipate some of the basic questions and to bring us all into the same area as to what is the proposition that is on the table and of course a lot more detailed questions will follow but we will just go through the report that has most recently been commissioned that John [Kyle] and I prepared.

So what I'm going to talk about today is:

- ***Why was that report called for in the first place?***
- ***What risk does GMO present?***
- ***Isn't Government addressing those risks already?***
- ***What are the options for local management?***
- ***What are the costs and benefits of doing that?***
- ***And what happens if councils do nothing?***

Why was it called for?

Those of you who were around in 2003 when the legislation was being changed that primarily governs GMOs may remember that Local Government New Zealand and a number of Northland peninsula councils said to government that we would like to be involved as a part of the decision making processes governing GMOs and Government did not bring forward any explicit rights in response to those requests, it left Councils still with duties but not with rights to match that.

As a result of that lead to Northland peninsula councils looking for some investigations into alternatives and this is where myself initially and a colleague were brought on board and an initial opinion by Dr Somerville clarified as to Crown Law that indeed local councils have jurisdiction. They have the ability to use the Resource Management Act to set regulations in respect of GMOs and the

community consultation process has brought forward further submissions from local people and lead to policies being constructed particularly with respect to precaution and liability.

The particular report that has come forward now, it was asked to look at the risks and options in more detail and to find out particular with respect to the outdoor use of GMOs that is not the medical aspect at all, but purely with respect to outdoor uses could a document be brought forward that would provide a basis for a decision in principle not a final decision but a guide as to how to handle this. This research is a combination of Dr Somerville as was noted provided the legal opinion looking out for how did the report match with the legal requirements, John Kyle is a partner with Mitchell Partnerships he can't be here today unfortunately as he is at another hearing over a power station but John is a very experienced planner with some 10 years expert witness work in the Environment Court.

My background is not only a partner in Simon Terry Associates an economic consulting firm but I am also a senior advisor to the Brattle Group of Boston which are leading economic and regulatory consultants in America. I am Executive Director of the Sustainability Council a non profit trust and I sit on the Ministry of Research Science and Technologies Future Watch Group as one of the twelve scanners looking at future scenarios and technologies.

So what risks do GMOs present and why is this an issue at all?

Taking first the economic risks.

This is something which has materialised over about the last five or six years as consumer markets in response to GM food varieties being introduced. Consumer markets have shown quite strong aversions to GM food. Initially that was with respect to the whole food itself and then we were seeing impact trace contamination in conventional foods were showing up as a criteria for effectively non acceptance of those products. This is not universal but in markets particularly in Northern Europe and Japan and in the wealthier parts of Asia it was very pronounced to the point that a trace contamination of 0.05% was sufficient to see a Gisborne based firm lose a half a million dollar sale to Japan and that was resulted from seeds being contaminated, not the actual growing in New Zealand, but it was the first time a kiwi producer had actually suffered a direct loss of such tiny detectable contamination.

Its markets ultimately that determine what is acceptable whether there are so called thresholds in allowable amounts in GM in a conventional product that may be regulated for labelling or some other standard, but it's markets that ultimately determine saleability and those standards.

The environmental risks are perhaps best characterised into three groups:-

Adverse effects on non-target species - that is unintended impacts on insects, wildlife and so forth

GM plants becoming invasive - that is spreading into an environment in a way they weren't intended to - becoming more distributed or further than they were meant to

Spread or bolted genes to other organisms - the idea that a particular gene inserted in modified plant can by mechanisms (which are very technical and we don't need to go into) can potentially arrive in other plants unintended.

At the moment there is an enormous amount of research to be undertaken in this area. We don't have particularly good information either way as to extents or severity of these risk they really are not very adequately characterised. What has been expressed by a number of research institutes is that as we go from rather simple gene contracts that are currently on the market to much more complicated ones involving multiple genes in so call stacked genes, we are going beyond the realm of experience even further and this presents additional risks.

Cultural concerns have been identified as preserving the integrity of nature and potential ecological effects are of concern to Maori. Also concerns about distribution of benefits is an issue Maori brought up, a view widely held also is that simply the mixing of unrelated species is a concern.

So what is Government doing in this respect or more particularly has Government not picked up all of these concerns?

While Russell and Libby will be able to tell you the basic systems by which government considers applications, I am focusing here on cutting to the chase here on what are the areas not being picked up at a the national regulatory level.

A key issue which has stimulated a lot of interest at council level is liability and effectively there is no liability under HSNO as long as an operator carries out a GM activity in accordance with the ERMA approval. If it obeys what ERMA has stipulated in a consent then effectively there is no comeback only if the condition is breached or an activity is carried out without an ERMA approval this liability will bite. Common law actions outside HSNO really are pretty ineffective and you can just about write that off.

The implication of that is that innocent parties will tend to bear economic losses arising from unexpected events or ineffective regulation so whether regulation anticipates it and properly provides for it, are key uncertainties that parties other than the person who is actually growing the GMO or distributing it, stand to be at risk for.

A Crown Law opinion relating to this has provided some interesting points of discussion and the disappointment with that opinion is the narrowness of its breadth because it only really addressed one of about six types of financial risk and that really is the Council's legal liability for environmental damage. Not considered were the risk of Councils having to face the financial cost of clean up if something goes wrong, also the constituents facing costs arising from GMO contamination.

Another issue is with respect to precaution. Within the HSNO Act, ERMA has discretion as to whether to exercise precaution, that doesn't mean ERMA doesn't exercise precaution and in many instances it does and often it will say it will in a particular matter. The importance for local government and constituents is that there is no binding effect for ERMA to take a precautionary approach. It is not something one can expect as of right or obtain satisfaction on through law and this is an issue to the extent that councils have developed policies that seek for a mandatory precautionary approach to be taken.

What that poses is uncertainty of outcome if councils seek a particular level of precaution or that seek particular aspects of a certain GMO to be treated in a particular way. Councils before ERMA have no

special standing they are treated as any other submitter and if ERMA is not required formally legally to address these matters in that way the question arises then that how does Council square the fact that it seeks certain particular outcomes for those councils that have these policies.

I guess overlaying all of this again is the dual role that central government has as both the ultimate regulator, the one that sets the laws at the national level and also the nations largest investor in research into outdoor GMO use. Government has to balance that tension between its investment and its role as regulator and to date it has chosen not to remedy those particular issues in respect of liability and precaution in particular, although numerous proposals have been brought forward to it.

So those are the issues - so in response to that if councils wanted to address these what are the options. As mentioned before there is no dispute that councils have the ability to use the RMA to set rules with respect to GMOs. Now note that doesn't mean that councils all of a sudden take over the whole role and substitute for ERMA, that is not that case at all. Any rules that the council would set would act additionally to what ERMA has been doing so if you like it is topping up the level of national regulation. There is no change to national laws required and it would be by way of a district plan change that such rules would come into being if a community decides that it is the way that it wished to go.

So broadly speaking councils have two options in how they see the world.

If they think the national regulations are basically okay but would like to top it up a bit - tweak.

Councils can set additional controls that act in addition to ERMA for a particular application.

If the community's view is for whatever reasons they don't see regulation by way of adding controls as being the appropriate mechanism, the RMA does also provide for classes of GMOs to be prohibited so that they would not be considered by Council at all.

The RMA has a multitude of options which I am not going to try to go through here which I can pick up in questioning if you want to, but essentially slightly technical - you can have activities which at the one end of the spectrum are so called discretionary, you could make GMOs such that anyone could bring forward a proposal and Council gets an ability to say "yes to it subject to" some minor amendment right through to the idea that all GMOs might be prohibited in the area, not necessarily forever by any stretch of the imagination - but during the time that the plan sits in that particular context. So we can go through some of the options later on, but just so that you are aware that there is a very flexible and broad approach that can be taken depending on where councils want to sit.

Mark Farnsworth : Are you going to address the type of ruling of the Coromandel's blanket use of prohibited and its implications to what you have just said?

Simon Terry: I think Dr. Somerville would be the best person to respond to that Mark. Dr. Somerville will I am sure cover this in more detail but yes prohibit activity is not seen as a concern in terms of getting a robust plan change in our opinion.

Just to give you a little bit of idea of where some other areas around the world sit on this. It is rather interesting the issue is by no means new globally to have a regional response as well as a national

response and some 172 European regions and over 4500 communities have set policies which to varying degrees set opposition to GMO farming.

It is significant that Poland, Greece and Austria has taken such a stance and much of the area of France and Italy as well. There is a map here giving you some idea with the dark green represents areas where the local jurisdiction or local legislators have accepted policy in respect to GM free zones. The European commission it has to be expressed is not recognising these under European Union law. They are not actually legally recognised so that they have moral force rather than legal force.

Could please point out which are the dark green?

Okay any of this patch if you look at France Italy Poland and Austria that is your colour key so you're getting about a half of Western Europe moving that way. Germany in the middle is an interesting anomaly which I think is possibly explained by the very strict GM liability law which they have been constructing for the last few years. Australia is an interesting other comparison, each Australian state does have the legal right to regulate GMOs and particularly for economic reasons - interestingly its in statute that although the Federal government can approve a particular variety of GMOs (similar to the way ERMA would approve it) each state has its own jurisdiction in respect of GMOs and the major food producing states. So far six of them have passed legislation designating GMO crops and so far no state has permitted commercial production of a GM food crop. There is limited GM cotton production in two states but for GM food the effectively moratoria have been rolled over each time they have come up for renewal and really a lot of that has been around the concern about liability. The Western Australia Minister of Agriculture Kim Chance has effectively said that until we have adequate liability law no state is going to remove its moratorium.

Neil Tiller ?

Is it commercial crops they are doing field trials?

Field trials have been conducted in Australia similar to most countries but it hasn't got beyond the field trial stage.

What steps are being taken to ensure that those field trials can't escalate or get out of hand?

It varies state by state - its actually almost trial by trial and I think it is fair to say that they are not as strict as ERMA in terms of the field trial requirements, but by the same token it is still relatively small plots with the intent being to confine those. There have not been any large scale trials in Australia.

What are the costs of doing something and what are the costs not doing something in response?

The costs of action can be broken down in this way - there are a series of shared one off costs involving design and implementing the plan change. That is the councils of Northland, Rodney and Waitakere have to date been pooling costs and expertise to bring together these reforms such that they can be common and minimise the total cost to any one council. At the point something was put in place and it becomes a question of administering any new rule, the RMA provides for those costs to actually be charged to the applicant such that it wouldn't actually be a net charge on ratepayers.

There is a risk that a legal challenge will arise to a plan change and I think that it is important to recognise the context of that risk because it is quite plain that no council would sign off on making that

plan change without having had a detailed legal review - that said yes this is robust it will stand up. That doesn't guarantee that you wouldn't get a challenge even if it was thought very robust but it gives you a pretty clear of the indication of the likely outcome and the degree of risk any counter party would be taking in bring forward a challenge at that point.

So clearly we are at a half way point here where the report has brought options forward - there isn't a particular proposal to evaluate the legal risk but what we have done in very carefully going through things to date, the team that has been working on this has said yes we can see a very clear legal track - we don't believe it would be an issue to bring forward something robust if that is what is required.

The risk of not doing anything that first arises is if something does go untoward that ERMA hasn't foreseen - no one has foreseen clean up as a requirement. Now depending on what goes wrong the costs can vary considerably. MAF is only obliged to come and do a clean up of the form you are seeing with the so called 'corn-gate' type incidents. MAF is only there because those were not authorised. They were an illegal release effectively so MAF does that work then. There is no obligation on Government to come in, Government could of course decide that it is something of national importance and might relieve a local authority. So there is uncertainty as to who would act, but one is conscious of precedence in respect of contaminated sites where there was completely inadequate liability law. The country is littered with thousands literally of contaminated sites which the Ministry for the Environment at its latest estimates said is about \$...million to clean up and that has effectively has been left with local government to administer and to figure out how to pay for - with a rather small contributions from National Government. That is the risk of going in without adequate liability law and it is uncertain as to who gets to 'carry the can'.

So what you are saying is that this risk applies where a crop that has been given approval by ERMA and the applicant has met all of its requirements under that approval but nevertheless there has been/is a mistake of GMOs being released into the environment which is different from an illegal release - is that what you are saying?

Simon Terry

Good point. An illegal release ERMA has not given any sign off on - an approved release where ERMA has granted the applicants request to plant a crop for example, there were certain controls stipulated, all those controls are met but somehow something happens that still results in an adverse environmental effect it might have been not known to anyone, and as I have mentioned earlier the science really is very young on understanding the full potential effects, and as with all industries things emerge down the track that aren't always expected up front. If something does happen of that regard and it is regarded as serious and warranting clean-up... what I am pointing to with the question is who pays. At this point under HSNO the operator would not be liable, The Government does it on a "case by case" and so some things - the gypsy moth it decided to clean up, the varroa mite it said it was too expensive and there are various other trade-offs that Biosecurity New Zealand makes as it goes down the track. The question would be whether you could get some enforcement order under the RMA, but as Royden might explain there are complications as well there. It is not a guarantee certainly if the 'guy' hasn't got a lot of money which has proven to be problem in some other environmental litigation. You can litigate all you want but there is no 'pot at the end of the trail'.

So that is Risk Number One "Who pays for clean up if something goes wrong?"

Risk Number Two is borne primarily by constituents and that is the economic losses arising from GM contamination to a market that is sensitive to that. Not all markets are sensitive to GM contamination about 80% of GM crops worldwide go to animal feed and while some supermarkets in Europe are now labelling whether an animal has been fed on GMO or not on GMO - effectively that is where a lot of the material has gone.

But if you are talking about human food markets currently in premium markets - that resistance is extremely strong and particularly so for kiwi exporters because our contact with industry is that a number of the contracts are let for growers in New Zealand because it is perceived as a more GM free source of production. The kind of things that can go wrong as I mentioned is that a Gisborne firm was out of pocket by half a million dollars in a local incident. The most costly food product recall in US history was startling corn which was in the hundreds of millions and you can get anything in between depending on what is the nature of the product guarantees and the extent of recall required.

Now the question for local communities - is it okay that it may fall on a few individual producers - it may fall on a wider group of producers at some point it becomes perhaps a loss big enough to the community that really it is a community concern, over all or that at least the risk of that is sufficient to be a community concern and councils have a "duty of care" to their constituents and there is some interest as to how that duty of interest can be explored in that circumstance - that is a legal term of course.

Risk number three of doing nothing.

Councils under the RMA have a duty to monitor effects. Now if constituents sought to enforce that duty and possibly other things this would mean - this is the scenario where councils decided not to put any rules in place and then constituents say "Ah well, I'm going to go to the Environment Court and get the Council to undertake monitoring" that is quite possibly a significant expense depending on the number of sites to be monitored and the time over which that is required. So Councils are up for that and then the question would be - could the council get it back from the operator only if they had actually made a plan change to require that under the Act. In other words only if they had set some rules that required monitoring to be paid for and the question that arises at that point is that if you are going to make a plan change to get the cost of monitoring covered wouldn't you at the same time seek a bond from the applicant such that you also cover other costs that may arise and that leads you in to the low end of the type of response that Councils might take if they wanted to do a little but not much - and that was that spectrum of options that I pointed to before. You can do just a little and cover your bases for financial costs or you can go much further but that is Risk Number Three that council gets drawn into expenditure regardless of standing back.

Now what is going to come forward and when? This is a crystal ball exercise.

All one can say is that the considerable sums being invested in GM plants in New Zealand can only show a return if those plants are allowed outdoors at some stage. For the most part, the next stage of work New Zealand plant developers are doing involves bringing forward from field trial to pre-

commercial projects. Overseas varieties of GM one can apply at any time to ERMA at any stage for those that have already been commercialised overseas. What the balance or likelihood of those coming forward we can talk about later on, but it is a bit of a crystal ball exercise. Even ERMA has some difficulty in trying to anticipate what is really going to land on its desk from month to month but the point here is that you are going to want to have any regulation or response to this in place before a release is undertaken or is applied to ERMA. This process has been running two years now and if you find that you are playing catch-up it is much harder. Effectively that poses two strategic response options in reality the so-called "wait and react" option is we'll see if it ever comes - we may have to pay greater equal costs to monitor ...

...To run litigation with respect to any community or court challenge and then play catchup in trying to get the regulation in place after the operator is established, which you know has a number of greater difficulties. The proactive way forward would be to do the time consuming work in advance and share the costs across as many authorities and have a community determined response in place which can then be amended as required, as new information comes forward...

This represents a new way to manage council risk. If you think about existing industries that were on the block when the existing Resource Management Act came into place then the rules overlay an existing pattern of development. This is effectively a new industry and it is about considering whether the grounds rules are set before any commercial activities arrive and so provisioning to cover risk in this way. Effectively local government is being asked to be more responsible - to be accountable for more and more. The question is what tools does it require for it to address those accountabilities.

What do we do - the way forward?

The team believes we have identified low cost options for protecting against significant risk. It would seem unlikely to us that some form of intervention would not come forward as a result of doing a formal weighing-up. It could be just a little it could be a lot and that is where the community comes in the decision about exactly how to respond. The reason the report doesn't say - here's the recommendation... nice straight square box one option go forward, is because people like John [Kyle], Royden and I can give you the information about the how, but at some point analysis doesn't fulfil the bill it is actually about community values, how the community perceives risk, how they wish to respond to that, what they think is important to their community. That is why we can't give a prescription straight off but we can tell you all the options depending on how you want to 'cut that risk'. And so the next stage that is being proposed is community consultation in order to consult the ultimate risk bearers on how they see things and to find out not just from interest groups, but find out from ratepayers across the board through some kind of systematic survey so that ratepayers get to decide, 'yep we're willing to spend that amount of money to get that amount of risk protection or no we don't see this as a big issue its not something we want to take forward'. So effectively the proposal on the table at the moment is simply to say that if you want to proceed with this - we believe you should consult with the community and then come back and we can actually then assist you to design more formal options or a single option as required if that is the way you want to proceed.

Once a response option does come through then that leads to the whole refinement process getting precise objectives policies, getting a Section 32 properly drawn up of course - a lot of the information

has already been assembled would slot straight into that. Obviously you want a legal opinion that says on this particular proposal is it robust, will it stand up you'd go through that hoop and then the councils would sit down either individually or together and decided yes we do have all the information now - we can make a call.

Mark Farnsworth

Isn't there a third part? Isn't there a third option - what we have done is highlighted a number of concerns, the monitoring, the liability, surely the third part would be to take the issue up with ERMA and say look here we have found these problems. What we should do - surely we would test that part before you embark on any of the other parts

I am glad you raised that point Mark. I went over that somewhat lightly but indeed at the point the local government had not succeeded in getting the law changed to their desire back in 2003. Representations were indeed made at that time, following that time and the first report that I was commissioned to produce for Whangarei District Council, a big part of that was on what would be required from central government to fix the problem because indeed a first best solution would in many respects be central to take over and fix the existing deficiencies of course. That requires central government will and acceptance of that and what we have seen over the past three years is a pretty consistent response. I have had many late night conversations with Marion Hobbs Chief Advisor when she was the minister and we went up and down this many times. I am convinced that there was not at that time, and my understanding is not still any will to alter the legislation to actually provide for that. So effectively that option does not exist on the table at the moment so that is what brings us down to the other two.

Mark Farnsworth:

We at the Mayoral Forum never actually in light of this lobby government for the benefit for the whole of New Zealand

Simon Terry: No question my report is very strongly in agreement with that conclusion - it is the do-ability of it. The point John [Kyle] makes is quite critical... I can assure you a whole suite of parties have gone forward with that proposition and no movement. So at very least you would be wanting to pursue your other options to the point that you had an ability to exercise those if you couldn't get relief in the ways sought and I think that is what has lead to this programme of work.

Q: I just have three things for clarification. You mention that you could prohibit classes of GMOs. Can you explain what GMO classes are?

Simon Terry: There are many applications that GMOs have been put to. The one that is obviously produced the greatest focus is food. There are different versions of corn, soya, canola - are the primary ones that have been developed for commercial application. GM trees are under development, GM cattle you are aware of. You can get into enzymes, microbes. The suite of not only technologies but the breadth of applications just seems to accelerate rather than stabilize as you look around the research institutions. It is very broad so the idea is that you can look at certain classes. If it has got particular concerns that relate to forestry then it might have rules relating to forestry. It [the report] gave some flexibility as to how to cut the question.

Q: The other question, is am I right in assuming you are talking about the number of ways to approach the risk in the District Plan with regards to GMOs... Am I right in assuming that that must mean controls over field trials or are you saying field trials go under the same criteria

Simon Terry: release as well as field trials and you could make any activity involving GMOs subject to the same hoops if you wished to. Equally as the report points out you could say field trials are under stricter regulations through ERMA, maybe we don't have quite the same needs for those - we could treat them separately. You really can get down to the level of saying, okay you can treat field trials with one level of conditions and we could treat releases with another level of conditions. We could allow field trials and not allow releases, any mix you like. The report explores that and we can go into it.

Q: And finally, if you are trying to do telephone research, it is very important that the survey is robust, and you ...

Simon Terry: I think you are right and that surveys are only as good as they are designed. As you know all too well. And I know the companies Whangarei District Council has talked with to date are the major league polling companies.

Q. One of my concerns is on the medical side. I am an insulin dependent diabetic. And there is a new vaccine for the new flu virus - the new one comes out in the United States and the health system there are going to get genetically modified vaccloids and produce enough for the world in six weeks. The primary trials have shown it copes with most types of flu. Now if we have a total ban on GE then people like me who depend on would then be at risk. That's where I find I have major conflict.

I'm glad you raised that point because the RMA only governs land use activity. Medical applications therefore are essentially out of the equation. Products such as insulin and so on are not produced by land-based activities, they are produced in the lab and to that extent no RMA rules would ever touch it even if a lab to produce insulin was set up in Dargaville. Similarly if GM food was imported from overseas and landed on a shelf in a Dargaville shop there is nothing this Act has to say about that. It is purely about the growing, the live reproductive GMO that affect the environment.

Q: Don Caves: I would like to suggest your risk evaluation is a little bit tempered and that some of the serious research that is now coming out has been such as the British Ecologist magazine, shows that GMO impacts on reproduction are very profound and serious I congratulate the Council on taking the action that they are, I suggest that an organisation such as ERMA can be massaged by great corporations... you will have very great difficulty in getting effective tools to deal with involvement in the future. I would like to table a report, this research, to each and every one of the people attending the meeting today so that in future not one of you individuals can say that no-one ever raised the serious medical risk that GMOs do set for the future of our community and the reproduction on this planet. This research has been through the Royal Commission and it is notorious how effective the multinationals are to shut up intelligent discussion on this subject. This research will be followed up in years to come.

Q Gail Aitken : and for we gardeners there is a huge risk in cultural heritage if you allow GMOs on our food in our area. massive despondency throughout the general population ... lifted the moratorium anyway, claim to have conflict both political and economic

Glen Lauder: Will only take two more, here, who had their hands up as we have a lot to get through.
Please focus on questions rather than statements.

There is value though and I just want to acknowledge that. Just as Simon brings some factual content that he also brings perspective, so each and every person brings perspective. While there is one discourse of pure veracity. The facts of the matter there's another aspect which is about just getting how different people see it differently. One of the things I want to be responsible for is we have only got a couple of people from central government here, we have had some assertions made about the position of central government and we have to make sure from their perspective, their truth as it were that they wouldn't disagree completely with what has already been said so while people are welcome to make statements from their perspective - I am not taking those statements as being the truth but rather than your perspective - because our job on behalf of the councillors is to weigh those perspectives during the day but I do not want to shut down any perspective from the day - so thank you for your contribution.

Q: My name is Martina Tschirky and concern about overseas image

Simon Terry: Very briefly in response the government undertook a study in 2003 as part of looking at its response to the Royal Commission of Inquiry and that did show sensitivity to one GM product could influence others that were completely unrelated. There was up to 20% of consumers surveyed in England, Australia and the US would reject outright purchasing New Zealand goods if they thought that one GM crop was grown. That is a fairly extreme kind of survey result and would require more testing but it did show that there was indeed sensitivity to a brand New Zealand image and this has been commented on by quite a few commentators as to just how far it might affect New Zealand's image.

Q: Trish Allen: My question is about liability and compensation. We produce organic fruit and vegetables. Am I correct that if for example a GMO crop is grown in our area and the grower has gone through ERMA and has all the right permits and has not broken any of the rules and obeyed the rules correctly and our crops become contaminated that we have nowhere to go in terms of compensation.

Simon Terry: In essence the answer is yes. Just to unpack it slightly, one of the options ERMA has before it and I am sure Libby will comment on this further when she speaks is that ERMA can set controls that might require whoever is growing that crop to limit the area to which pollen might spread or seeds might spread - so ERMA could do that. Your question though at the point that the operator/grower had complied and you still got contaminated - there is no liability for that operator under HSNO the chance of getting any other action through common law are remote.

Mark Farnsworth: Common law action is remote. What are you basing your opinion on?

Simon Terry: Three quite extensive reviews of the law firstly Geoffrey Palmer, then Duncan Currie, and more recently international opinion.

Mark Farnsworth: But it hasn't been tested in New Zealand has it.

Simon Terry: It relies on English common law I think Royden may care to comment as well.

It is quite a good issue to explore

Cr Richard Alspach: It is worth adding to that there is some regional council rulesrelating to spray drift ...there is the rules to base a common law action about. What we're talking about right here but we don't actually have those rules here to base a common law action on.

Simon Terry: Yes that is the difference. If you are relying purely on common law most of its negligence action. I think Duncan Currie was the one that was most persuasive on this - he said that there had not been a single action since World War II in the UK that had succeeded. I think that gives some measure of the probability of success.

Glen Lauder: Simon's specific engagement has been by the councils jointly so in a sense, the guys sitting around the table, the councillors are the ones who engaged Simon to do the thinking with his team that he has. Likewise I have been engaged by the councils to facilitate this workshop. As I see it my role today is to be neutral but not empty. I think that we are engaged in a serious enquiry into what are the facts of the matter and what is the balance of the evidence. We are not going to come to a judgement today but I am going to invite the councillors and myself to be quite rigorous from now on - so being quite rigorous in looking at the questions that Simon put in front of you.

Q: What is the veracity of this, is it absolutely true and of course there may be more than one perspective. How persuasive is this as a councillor, are you persuaded, are you comfortable with it or do you need more facts and how viable would the answer be, is it a workable solution.

All of these things might be debatable. So during the day I invite you to be open to taking more than one perspective on the points without actually coming to a conclusion. So I'll just draw you a picture of what I mean. So if we are going to come to a picture of what the whole picture looks like we might need to take more than one perspective so from now on for example when Roydon speaks or when Libby speaks or Russell speaks or the councillors speak, consider that you can look at the world through their eyes while they are speaking and take on that perhaps what they are saying is a contribution to you understanding the full picture. This is an invitation. To interrupt is a tendency of human beings to judge and assess everything people are saying before they have spoken otherwise you might miss the key point that they are making. So as we have listened to Simon I invite you to listen to the others as if you actually want to hear the world through their eyes you can think about asking questions for clarification, but during this part of the workshop it is really important that we get to the heart of the matter rather than quickly dismiss what they are saying so I really appreciated your contribution Simon. Simon has a series of slides that he has made available which will take us more

deeply into those questions and during lunch we will have an opportunity to weigh up those areas where we have least clarity so that we can follow up after lunch.

Probably our most legally qualified person here is yourself Roydon and you know how to conduct an enquiry beyond anything that we do so in a way you are both guiding us as a member of the team, but you are also giving us a guidance on the law so I really appreciate you being here.

Roydon Somerville: Thanks very much Glen usually people go to sleep when we talk about the law. Basically my role in this was as you know under the Resource Management Act and Local Government Act and so forth every land use in a district is controlled normally by the plan. ... So the plan has the oversight and the council is responsible for putting the plan in place. So the issue that I was asked to look at here was whether there is any reason in law why crops on land should be excluded from the oversight of the district plan and left to the national control rather than local community values having any say at all. So the first thing I looked at was is there any legal reason why a district plan is not able to contain objectives, policies and methods for dealing with that particular land use as the plan can for any other land use. The first thing one looks at is was there another statutory regime or another system of law which addresses it in a better way and that the community values should be subservient to other values, like national values or international values. Now I came to the conclusion and so did Crown Law, which was very reassuring, that the Resource Management Act deals with the effects from land uses for everything and it doesn't exclude the effects of land uses because it involves say a genetically modified crop so that was the first thing.

The second thing is yes there is in tandem a regulatory system, a complete code for dealing with the permitting if you like of the technology. Now that is not unusual as the councillors know the district plans often run in tandem with other numerous other permitted systems - forestry, mining. We have just had some huge cases involving the coastal environment with marine farming where you have got the whole fisheries permits alongside (regional councillors will be aware of this) with the Resource Management Act and coastal planning requirements. The one thing that you then have to decide is, and I am expressing this from a purely legal side without taking any view on this as to the merits of it, when you have got two different codes of procedure what I look at is how do you best manage the risks, is it best to manage the risks at a national level or is it better to manage the risks at a national level and a local level, and when it came to fisheries - we have the issue of where there is uncertainty about what huge marine farms might do when it comes to the ecology and we had the fisheries permitting system which has precautionary elements, the resource management system, how did we address it. Now the difficulty with risk and the environment as you know is that there is uncertainty. It is not possible at this stage for science to assess and to know everything and to be able to assess the risk with sufficient confidence for a decision maker to say yes [so] we can relax. So we are really talking about, not risk assessment, but risk management and risk management is a values thing. It is what amount or risk is acceptable to us as a community nationally locally or whatever.

When it came to aquaculture what we did there and this was accepted by the High Court after a lot of litigation. But what we did there was we said well we know that there is uncertainty, we know that we need to go forward as a society, but we need to have some controls to manage the risk and there we

actually zoned areas within the larger areas, zoned areas where the activity could occur but managed with very strict controls - these are resource management controls which would be very similar to the ERMA controls, as far as crops are concerned and outside those areas the activity was prohibited. So the local authority on behalf of the local community determined where it was prepared to manage the risk and where it thought the risk was too great to be managed even by the Resource Management Act. Now the Minister for, when it comes to the coastal environment, the relevant Minister has now accepted that whole regulatory scheme which is a fisheries one and a resource management one with management areas where you use adaptive reflective management techniques for managing the risk and areas where the activity is prohibited. So there is examples of how you do this. We have the mining situation of course and somebody raised this and one of those cases has been de-railed in the Coromandel where the objectives, the policies and the methods were not robust and the court threw them out so if you do go ahead and you want to put in place management regimesmanage risk on a precautionary basis in your plan then it has to be well thought out. And if you are going to do it, doing it collectively makes a lot of sense.

The first question I looked at was why do you exclude this particular land use from the district plan. There is nothing in law that says you have to.

The second thing is if you do develop some instruments in your plan at a local level, the issue then is do you have the expertise to assess risks and things like that. Of course ERMA has the expertise but you have your community values which are entitled to be reflected in your policies as well as in your plan. So you can have a policy as a community that is sustainable management for your land uses or whatever, and it sounds like it is opportune to do this here at this time with the council. If your policy as a community is that you want to manage a risk in a certain way, the only way you can do that is for your local authority to do it for you under RMA for your input.

There has been some discussion about liability as I understand it. I think we can get a bit overexcited about this liability thing because what we have here is the district plan that manages every other land use at the moment - the responsibilities of the local government to do that are there anyway. So if local government is negligent in the way it exercises its plan in any aspect that's always an issue...

But we are talking here about another activity with a central permitting system running alongside the RMA so whether you are careful with your monitoring arrangements, your bond arrangements and your financial contributions, all are funding mechanisms for keeping an eye on these activities, all is exactly the same as any other thing you do with your district plan, so you don't have to be an expert in a particular science, what you have to do is monitor conditions well.

Now I should say before I sit down - bonds and genetic engineering, there is a lot of research been done on that and Russell has probably had a look at that. This is quite tricky, ... long term bonds ... You know some mining bonds go on for a long time after the mine is finished and restored to the area. There is a real debate nationally under the cautionary approach. You are really putting the onus back on the applicant to show there is a management risk of harm, so under the RMA the ability of working to that approach is that if you had a bond the applicant is very willing to ensure there is no longterm harm because of the financial implications so it is a self policing approach. The question is how long does the bond go for and that is something that needs to be teased out. In some overseas jurisdictions

they are talking about until the crops are taken out. The basis of the precautionary techniques is that the onus is on the applicant to address safety rather than the decision maker to try and work out what is safe or not.

Thank you Roydon

Questions of Roydon

Q: Jack McKerchar: Please comment on the risk that Simon raised about local government liability for cleanup.

To a large extent local government liability in this issue is a political issue, not a legal issue. In Canada there was a gentleman who had an organic crop and some of it became contaminated and he sued, and he went right through to the Supreme Court, and at the end of the day the difficulty that person had was actually proving that the contamination came from next door.

So it became a question of evidence and the issue of liability with these things is one of proof and it is very difficult because once the contaminant gets into the environment, to say that that crop over there was responsible for it was very tricky. ... your insurers, lawyers, everybody would be arguing for 20 years.

If there is a challenge against the local authority because there has been a contamination twenty/thirty years time and there were no controls in the plan, that litigation you would hopefully have insurance for, the local authority would have to face the litigation as it was within its district.

Q: Jack McKerchar: I was more concerned about the clean up. ...

Roydon Somerville: Well if you were to grant a resource consent for something and it had conditions, bonds and everything else then you would try and make sure that the clean up was covered in the bond the same as mine.

John Law: I would just like to follow on with two things. Mark Farnsworth Chairman of the Northland Regional Council raised the issue of approaching, talking, lobbying Government or ERMA and you on the other hand are leaning to being able to zone one area compared to another. Now do you think though that it is possible that given that the reason that we have joined together, in my opinion anyway, is because we are neighbouring councils and we have the ability as fragile as it may be to use the city of Auckland as a natural barrier. So in other words Waitakere and all other councils north, is it possible to come to an arrangement with ERMA to leave that area alone for the next decade or so because we are the sub tropical area of New Zealand and if there is a risk why spread it right across New Zealand.

Is it possible that the Government would rather have a nationwide policy in effect only concentrate on one part of the country because of our narrowness and that the top of New Zealand is the narrowest part and it is the logical area to become if you like a barrier to what is being experimenting on somewhere else.

Royden Somerville: Well I must say that I am not in a position to know how you would get on lobbying ERMA and I could also say that there are lots of other districts who would like to be in the queue. ...but I can say that if you are working as a group under the Resource Management Act. In other words if you develop a policy or objective in concept across the district when it comes to changing the plan or whatever you could use the same enquiry right throughout all the districts. There is an economy of scale with the costs there. I would suspect that the planning costs of doing a plan change or a review at the time is probably much the same as any other significant land use issue, because you have still got your statutory procedures, so many months to make submissions, hearings and all the rest of it but it comes back down to the section 32 analysis and that is where, whether you as a group believe that the perceived risks because you don't know what they are, whether they are better managed this way or the government to manage them for your area.

Marty Robinson: Just in support of that comment there the Royal Commission did say that there should be GE exclusion zones ... The reason they are backtracking it seems is on the issue of liability of those concerned and it sounds like they are damned if they do and damned if they don't. I understand that councils may only be liable if they decide to ... or control an activity. If a certain activity is prohibited then the council is not liable if it is illegally introduced is that the case? I would like to ask the question of all four speakers.

Yes, I really do think we need to sort this liability out because if the Council gives permission for a tannery and there is an escape of stuff into the water, in breach of the conditions then the chance of a council being sued are pretty remote, it's not the council who is responsible for the escape. There is a real concern that people might be sued for something here all we are talking about today is whether there is something in the plan that is administered like everything else in the plan whether its to discharge into the air, to use the land or anything else.

... I don't think that it is that simple because like builders have done they form a company and build a house the minute they finish the house they wipe the company out so who do you sue?

That is a real problem because you get these 'paper' companies coming in and out so you get a bond and they are very expensive.

Cr Neil Tiller: My question is that if Council decided to bring this into its district plan it could be a permitted activity, controlled activity or prohibited activity or discretionary activity or non complying or restricted. What are the implications of prohibiting it?

Royden Somerville: Well prohibiting for a start prohibiting means if that got through then you would need a very good section 32 analysis to prohibit something. But if it got through on prohibition the only time it could happen in the future is if the plan is changed again to get rid of the prohibition and that is something that Simon eluded to that you can get to the situation where the uncertainty about the science of the moment is such that you take a strong precautionary approach that we don't want to know about it until we are more confident. So in ten years time somebody can come along and say no we want to do this now we'll seek a plan change and with a lot of developments as you know people come for private plan changes to do them rather than resource consents.